Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This document contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Reporting and recordkeeping requirements, Transportation, Tuberculosis.

Accordingly, 9 CFR part 77 is amended as follows:

PART 77—TUBERCULOSIS

1. The authority citation for part 77 continues to read as follows:

Authority: 21 U.S.C. 111, 114, 114a, 115–117, 120, 121, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

§ 77.1 [Amended]

2. In § 77.1, in the definition for *Modified accredited states*, paragraph (2) is amended by removing "Louisiana,".

3. In § 77.1, in the definition for *Accredited-free states*, paragraph (2) is amended by adding "Louisiana," immediately after "Kentucky,".

Done in Washington, DC, this 13th day of July 1994.

B. Glen Lee,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–17517 Filed 7–18–94; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Airspace Docket No. 94–AWP–10]

Revocation of Restricted Area R–3104, Island of Kahoolawe, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes Restricted Area R–3104, Island of Kahoolawe, HI. Legislation returning Kahoolawe Island to the State of Hawaii was signed into law by the President on November 11, 1993, as part of the Defense Appropriations Bill. The Department of the Navy subsequently submitted a proposal to disestablish the restricted area.

EFFECTIVE DATE: 0901 UTC, August 18, 1994.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–7666.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations removes Restricted Area R–3104, Island of Kahoolawe, HI. Legislation returning Kahoolawe Island to the State of Hawaii was signed into law by the President on November 11, 1993, as part of the Defense Appropriations Bill. The Department of the Navy has terminated the use of R–3104 as a weapons range and has determined the area to be in excess of naval requirements. The Navy has requested that the FAA disestablish R–3104. This action returns formerly restricted airspace to public use. Because this action is a minor technical amendment in which the public is not particularly interested, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary. Section 73.31 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8B dated March 9, 1994.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This action disestablishes restricted airspace. In accordance with FAA Order 1050.1D, "Policies and Procedures for Considering Environmental Impacts," this action is not subject to environmental assessments and procedures.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510, 1522; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§73.31 [Amended]

2. Section 73.31 is amended as follows:

R–3104 Island of Kahoolawe, HI [Removed]

Issued in Washington, DC, on July 7, 1994.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 94–17393 Filed 7–18–94; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing-Federal Housing Commissioner

24 CFR Part 200

[Docket No. R–94–1623; FR–3028–F–02]

RIN: 2502–AF26

Changes to the Minimum Property Standards: Seismic Standards

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

ACTION: Final rule.

SUMMARY: This final rule would amend the Minimum Property Standards (MPS) in 24 CFR part 200, subpart S, to specify that seismic design is a mandatory standard requirement for applicable housing. In addition, the rule would update a reference to a private sector seismic design standard currently incorporated into the MPS. This change to the MPS is needed to comply with the requirements of Executive Order 12699, the National Earthquake Hazards Reduction Program Reauthorization Act, and the Cranston-Gonzalez National Affordable Housing Act. These revisions

would ensure the structural integrity of applicable housing, and would protect the Department's insurance fund.

EFFECTIVE DATE: August 18, 1994.

FOR FURTHER INFORMATION CONTACT: Donald R. Fairman, Acting Director, Manufactured Housing and Construction Standards Division, Department of Housing and Urban Development, 451 Seventh Street SW, Mail Room B133, Washington, DC 20410–8000, telephone (202) 755–7440, or (202) 708–4594 (voice/TDD). (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION:

Background

On August 4, 1993, the Department published in the **Federal Register** a proposed rule (58 FR 41445) to amend the Minimum Property Standards (MPS) in 24 CFR part 200, subpart S. All housing constructed under the Department of Housing and Urban Development ("Department" or "HUD") mortgage insurance and low-rent public housing programs is required to meet or exceed the HUD-established MPS.

Section 526 of the National Housing Act (12 U.S.C. 1735f–4) authorizes the Secretary of Housing and Urban Development (Secretary) to prescribe standards for determining the acceptability of care-type facilities and one- and two-family and multifamily residential structures. Accordingly, the Secretary prescribed minimum property standards in 24 CFR part 200, subpart S. Provisions governing the health and safety criteria applicable to multifamily housing were simplified in 1984 (49 FR 18690, May 1, 1984), to rely on criteria already established in State or local codes or nationally recognized model codes.

This simplification was extended to care-type housing insured under HUD programs by a final rule published August 11, 1986 (51 FR 28696). The change implemented by that rule consolidated the requirements applicable to multifamily and care-type housing, allowing the Department to rely on established codes that have been determined by HUD to be comparable to one of the national model codes.

By a separate rule (50 FR 39586, September 27, 1985), the minimum property standards applicable to one- and two-family dwellings also were simplified to rely on criteria already established in State or local codes or one of the nationally recognized model codes. This rule was described (50 FR 39586) as being similar in many respects to the 1984 rule amending the minimum property standards for multifamily housing.

Executive and Legislative Mandates

The Department is subject to three separate directives that require it to address seismic safety issues in regulations governing programs operated by the Department. The first of these directives is an Executive Order issued by former President Bush. The other two directives are the National Earthquake Hazards Reduction Program Reauthorization Act, approved November 16, 1990 (Pub. L. 101–614) (NEHRP Reauthorization Act), and section 947 of the Cranston-Gonzalez National Affordable Housing Act, approved November 28, 1990 (Pub. L. 101–625) (NAHA).

On January 5, 1990, former-President Bush signed Executive Order 12699, "Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction" (Executive Order). In part, the purpose of this Executive Order is "to reduce risks to the lives of persons who would be affected by earthquake failures of federally assisted or regulated buildings, and to protect public investments, all in a cost-effective manner." The Executive Order applies only to new buildings being constructed with Federal involvement. Each Federal agency is made responsible for developing and implementing its own cost-effective seismic safety program commensurate with its specific program responsibilities. However, section 4(a) of the Executive Order charges the Interagency Committee on Seismic Safety in Construction (ICSSC) to use consensus procedures in recommending cost-effective seismic design and construction standards that would satisfy the requirements of the Executive Order. The Department has been working with the ICSSC to identify and meet the Department's responsibilities under the Executive Order.

Although the Executive Order does not create rights that make it privately enforceable, its provisions are made mandatory by section 8(a) of the NEHRP Reauthorization Act. Under the NEHRP Reauthorization Act each Federal agency is required to issue final regulations that comply with the Executive Order.

Finally, section 947 of NAHA requires the Secretary to develop seismic safety standards for properties assisted under HUD programs. The Secretary expressly is permitted to defer to local building codes that meet the seismic safety requirements established, and is authorized to utilize the resources of the National Earthquake Hazards Reduction Program (see 42 U.S.C. 7704).

The ICSSC was established as part of this Program in 1978, in response to the Earthquake Hazards Reduction Act of 1977 (42 U.S.C. 7701–7706). Since that time, the ICSSC has been working with Federal agencies and the private sector to develop appropriate, generally recognized, seismic safety standards. This final rule permits the Department to benefit from the efforts of the ICSSC, by referencing private sector seismic design and construction standards, as intended under section 3(a) of the Executive Order. In accordance with ICSSC recommendations, in this final rule the Department is adopting the seismic requirements included in the American Society of Civil Engineers (ASCE) standard ASCE 7–88, Minimum Design Loads for Buildings and Other Structures.

The Department expects to follow the recommendations of the ICSSC in applying the requirements that would be established by this final rule, as long as those recommendations would promote the purposes of the Department's programs. For example, the seismic safety requirements would apply where HUD assistance is provided through loan or mortgage insurance programs, and the requirements will apply to additions and renovations to existing buildings. Further, an addition or renovation should not decrease the seismic resistance of an existing building.

Elements of Final Rule

Since 1984, most of the private standards referenced in the MPS have been changed, often because the sponsoring organization has updated a standard. ASCE 7–88, adopted by the sponsoring organization in 1988, but not published until July 1990, recently was incorporated by reference in 24 CFR part 200, Appendix A (58 FR 60246, November 15, 1993). This standard was formerly listed as ANSI A58.1–1982; with a sponsorship change of the standard from the American National Standards Institute (ANSI) to the American Society of Civil Engineers (ASCE), and the revisions published by ASCE in 1990, the Department revised its reference to this standard to be consistent with section 526 of the National Housing Act, OMB Circular A–119, and the goals of the Department. This final rule will simply mandate compliance with the seismic design requirements of ASCE 7–88.

In addition, the Department is correcting minor typographical errors in current regulatory text. Other changes that had been included in the proposed rule have already been adopted recently by the Department in a separate

rulemaking and, therefore, are not included in this final rule.

This final rule concerns those property standards applicable to multifamily and care-type housing and to one- and two-family dwellings. Because manufactured homes eligible for insurance are subject to different minimum standards, the Department will propose a separate rule to mandate seismic standards appropriate for that category of housing.

Comments

Two public comments were received on the proposed rule published in the **Federal Register** on August 4, 1993. One comment was from the American Society of Civil Engineers (ASCE), and the other was from the National Institute of Standards and Technology (NIST), U.S. Department of Commerce.

The ASCE comment stated that ANSI/ASCE Standard 7–88, Minimum Design Loads for Buildings and Other Structures (November 1990) (ASCE 7–88 in this preamble), was under review for change and should be considered as an interim standard. They also pointed out that ASCE was planning to publish changes to ASCE 7–88 in late 1993 or early 1994 and requested the Department to consider waiting for these changes. Although the Department appreciates the ASCE comment, we must comply with the mandate in Executive Order 12699 and the Cranston-Gonzalez National Affordable Housing Act (Pub. L. 101–625, approved November 28, 1990) (NAHA), which requires HUD to adopt seismic requirements for its programs. Therefore, this rule references the standard that has been reviewed by the Department and approved for incorporation by reference. Newer ASCE requirements can be considered for possible revisions to any HUD standards to which they would apply.

The Department of Commerce, National Institute of Standards and Technology (NIST), point out that the 1982 and 1984 editions of the model codes are not considered acceptable for seismic design. The Department acknowledges this problem and has changed these references to refer to the 1993 editions of the model codes. These changes are in conformity with changes to the MPS that were made in a final rule published November 15, 1993, in the **Federal Register** (58 FR 60246).

NIST also noted that the Interagency Committee on Seismic Safety in Construction (ICSSC) has reviewed the 1991 edition of the ICBO Building Code, the 1992 edition of the BOCA National Building Code, and the 1992 edition of the SBCCI Southern Standard Building Code, and found that all provide a level of safety substantially equivalent to that defined in the NEHRP Recommended Provisions.

Other Matters

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The major portion of the rule is designed to effectuate statutory requirements broadly, so that affected parties are permitted to choose among reasonable alternatives in complying with the statutory requirements. Generally, these requirements are imposed separately through State and local building codes that have been, or are being, updated to include the seismic safety standards. This rule would comply with the statutory requirements by specifically referencing existing standards, which have been reviewed and determined to be adequate.

Environmental Impact

At the time of publication of the proposed rule, a finding of no significant impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The proposed rule is adopted by this final rule without significant change. Accordingly, the initial finding of no significant impact remains applicable, and is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the office of the Rules Docket Clerk at the above address.

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 final rule have federalism implications, and are subject to review under the order. Specifically, the rule provides for additional building design and construction standards to be applied to certain buildings in which federal assistance is provided. Because current building standards are met largely through compliance with existing State and local building codes, the additional requirement imposed by this rule may encourage States and local jurisdictions to adopt more stringent seismic design standards. This approach would allow local contractors to continue to rely upon the State and local codes in building to meet any federal requirements.

However, this rule is intended to implement statutory requirements that are broadly applicable to federal programs government-wide, and are not limited to HUD programs. In an effort for consistency and simplification, and as a result of information provided by the Interagency Committee on Seismic Safety in Construction, a great majority of State and local governments have already adopted acceptable seismic design and construction standards in their State and local codes. In large part, the movement to include seismic standards in building design and construction was led by the national model code organizations, whose model codes are often adopted by State and local governments.

Therefore, while the Department recognizes the potential federalism implications of this rule, the Department believes any federalism impact on State and local governments would be a function of the government-wide Federal requirements, rather than this discrete rule. Therefore, a more comprehensive review under Executive Order 12612 is not required, because the implementation of the statutes and Executive Order 12699 leaves little discretion with the Department to lessen these impacts.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive order 12606, *The Family*, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns.

Regulatory Agenda

This rule was listed as Item No. 1590 in the Department's Semiannual Agenda of Regulations published on April 25, 1994 (59 FR 20424, 20448), in accordance with Executive Order 12866 and the Regulatory Flexibility Act.

List of Subjects

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Incorporation by reference, Lead poisoning, Loan programs—housing and community development, Minimum property standards, Mortgage

insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

For the reasons set out in the preamble, title 24, subpart S of the Code of Federal Regulations, is amended as follows:

PART 200—INTRODUCTION

Subpart S—Minimum Property Standards

1. The authority citation for Part 200 is revised to read as follows:

Authority: 12 U.S.C. 1701–1715z–18; 42 U.S.C. 3535(d).

2. Section 200.925a is amended by revising paragraph (c)(2) and by adding a sentence at the end of paragraph (c)(3), to read as follows:

§ 200.925a Multifamily and care-type minimum property standards.

* * * * *

(c) * * *

(2) A State or local building code will be partially accepted if it regulates most of the areas on the list. However, no code may be partially accepted if it fails to regulate the subarea for seismic design (see § 200.925b(c)(5)), or if it fails to regulate subareas in more than one of the following major areas listed in § 200.925b: fire safety, light and ventilation, structural loads and seismic design, foundation systems, materials standards, construction components, glass, mechanical, plumbing, electrical, and elevators.

(3) * * * However, for earthquake loads (see § 200.925b(c)(5)), ASCE 7–88 is mandatory.

* * * * *

3. Section 200.925b is amended by revising the heading for paragraph (c) and paragraph (c)(5) to read as follows:

§ 200.925b Residential and institutional building code comparison items.

* * * * *

(c) *Structural loads and seismic design.* * * *

(5) Earthquake loads (in localities identified by ASCE 7–88 (formerly ANSI A58.1–82) as being in seismic zones 1, 2, 3, or 4, and Guam).

* * * * *

4. Section 200.925c is amended by revising the introductory text of paragraph (c) to read as follows:

§ 200.925c Model codes.

* * * * *

(c) *Designation of Model Codes.* When a multifamily or care-type property is to comply with a model code, it shall comply with one of the model codes designated in paragraphs (c)(1), (2), or (3) of this section, and with any other code or codes identified in the same paragraph. However, seismic design is a mandatory requirement. In addition, the property shall comply with all of the standards that are incorporated into the code or codes by reference. By the time of application for insurance or other benefits, the developer or other interested party shall notify the Department of the code or group of codes to which the developer intends to comply.

* * * * *

5. Section 200.926 is amended by revising paragraph (c)(2) and adding a sentence at the end of paragraph (c)(3), to read as follows:

§ 200.926 Minimum property standards for one and two family dwellings.

* * * * *

(c) * * *

(2) A State or local building code will be partially accepted if it regulates most of the areas on the list. However, no code may be partially accepted if it fails to regulate the subarea for seismic design (see § 200.926a(c)(5)), or if it fails to regulate subareas in more than one of the following major areas listed in § 200.926a: fire safety, light and ventilation, structural loads and seismic design, foundation systems, materials standards, construction components, glass, mechanical, plumbing, and electrical.

(3) * * * However, for earthquake loads (see § 200.926a(c)(5)), ASCE 7–88 is mandatory.

* * * * *

6. Section 200.926a is amended by revising the heading of paragraph (c) and paragraphs (c)(3) and (c)(5), to read as follows:

§ 200.926a Residential building code comparison items.

* * * * *

(c) *Structural loads and seismic design.* * * *

(3) Snow loads (for jurisdictions with snow loading conditions identified in Section 7 of ASCE–7–88 (formerly ANSI A58.1–82); * * *

(5) Earthquake loads (for jurisdictions in seismic zones 3 or 4, as identified in Section 9 of ASCE–7–88 (formerly ANSI A58.1–82)).

* * * * *

§ 200.926c [Amended]

7. The table titled "Schedule for Model Code Supplements to Local or State Codes" in § 200.926c is amended by revising the heading, "Deficient major from § 200.926a as determined by field office review", and item (c), "Structural loads * * *", in the first (left-hand) column, to read, respectively, as follows: "Deficient major items from § 200.926a as determined by field office review" and "(c) Structural loads and seismic design * * *".

§ 200.926e [Amended]

8. Section 200.926e is amended by removing each reference to "ANSI A58.1–82" where it occurs in paragraphs (b), (c) introductory text (two occurrences), (c)(2), and (d), and replacing each occurrence with the reference "ASCE 7–88".

§ 200.937 [Amended]

9. Section 200.937(a)(2) is amended by revising the address, "1430 Broadway, New York, NY 10018", listed for the American National Standards Institute, Inc., to read as follows: "11 West 42nd Street, New York, NY 10036".

Dated: June 28, 1994.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 94–17403 Filed 7–18–94; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928

RIN: 1218–AB42

Retention of DOT Markings, Placards, and Labels

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is hereby issuing a final rule that requires employers who receive a package, transport vehicle, freight container, motor vehicle or rail freight car which contains a hazardous material and which is required to be marked, placarded, or labeled in accordance with the U.S. Department of Transportation's (DOT) Hazardous Materials Regulations, to retain the markings, placards, and labels on the package, transport vehicle, freight container, motor vehicle or rail freight car. Such markings, placards and labels generally must be retained on packages until the packaging is sufficiently cleaned of residue and purged of vapors to remove any potential hazards and retained on transport vehicles, freight containers, motor vehicles or rail freight cars until hazardous material which requires the marking or placarding is removed therefrom. This rule is issued pursuant to section 6(b) of the

Occupational Safety and Health Act of 1970 (the Act) and in accordance with section 29 of Public Law 101–615, the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA).

DATES: Effective date: This final rule shall take effect on October 17, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, OSHA Office of Public Affairs, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 219–8151.

SUPPLEMENTARY INFORMATION: Public Law 101–615, the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), 104 Stat. 3244, was enacted by Congress on November 17, 1990. Section 29 of HMTUSA reads as follows:

> Not later than 18 months after the date of enactment of this Act, the Secretary of Labor, in consultation with the Secretary of Transportation and the Secretary of the Treasury, shall issue under section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)) standards requiring any employer who receives a package, container, motor vehicle, rail freight car, aircraft, or vessel which contains a hazardous material and which is required to be marked, placarded, or labeled in accordance with regulations issued under the Hazardous Materials Transportation Act to retain the markings, placards, and labels, and any other information as may be required by such regulations on the package, container, motor vehicle, rail freight car, aircraft, or vessel, until the hazardous materials have been removed therefrom.

The Congressional rationale for this requirement was provided in Senate Report No. 101–449, (p. 16), as follows:

> In November 1988, six Kansas City firemen were killed when the arson-caused fire they were fighting caused the violent explosion of an unmarked truck-trailer parked at a highway construction site. Because the trailer's hazardous materials placards had been removed, the firemen were unaware of the danger it posed. The Secretaries of Labor, Transportation and the Treasury should cooperate in order to ensure that placards and labels required on hazardous materials and explosives, both in transportation and at stationary facilities, be retained until such materials have been removed to the extent that they no longer pose a safety risk.

In response to the Congressional mandate, OSHA issued a proposed rule on September 10, 1993 to address the requirements of HMTUSA (58 FR 47690). A 30-day period was provided during which interested parties were invited to submit comments and information relative to the proposed rule. All comments submitted were collected in Docket No. H–022I, Exhibit No. 5, and prefixed with "Ex. 5" or "Ex. L5" (the latter denotes comments received after the close of the comment period). All comments received were reviewed and considered in developing this final rule. Most commenters supported OSHA's proposal; however, certain issues were raised that persuaded OSHA to modify the final standard in some respects or otherwise provide further clarification.

As with the proposed rule, OSHA believes that this final rule will impose no significant compliance burdens on industry. This was also substantiated in comments to the record.

Congress was specific in its mandate to OSHA for this rule, and the rule itself is limited to implementing the Congressional mandate. In this final rule, OSHA has slightly elaborated on the statutory language to the extent necessary to ensure that its requirements are clear and do not impose undue burdens on affected employers vis-a-vis other federal regulations. This regulation is essentially a continuation of the DOT's Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180). Employers may wish to consult those regulations in regard to complying with this section.

Discussion of Comments to NPRM and Summary and Explanation of the Final Rule

OSHA received 45 comments in response to its Notice of Proposed Rulemaking on the Retention of Markings and Placards. The NPRM requested specific information on costs, current practices with respect to the retention of DOT markings, placards and labels and any foreseeable problems in achieving the requirements of the proposed rule.

Most commenters supported the Agency's approach in responding to the congressional mandate for this action. However, some commenters pointed out potential sources of confusion for affected employers if appropriate modifications were not made to the final rule. Other commenters expressed a need for clarification of certain aspects of the proposal, particularly those relating to the scope of the standard and the relationship between DOT-required labeling and that required by OSHA's Hazard Communication Standard (HCS) at 29 CFR 1910.1200.

Only minimal information was submitted regarding costs. However, of those commenters who responded to this question, the majority agreed with OSHA's assessment that the rule would have only minimal economic impact. The commenters who stated that the costs would not be insignificant appeared to base their findings on what OSHA believes was a misunderstanding of the intent of the proposed rule.

Major Issues Raised

A. Scope

The NPRM did not make a distinction as to the size of packagings of hazardous materials for which employers would be required to retain the necessary DOT marking, label or placard. A significant number of commenters, however, (see, e.g., Exs. 5–3, 5–21, 5–23, 5–24, 5–25, 5–30, 5–32, 5–34, 5–35 and 5–36) pointed out that without restricting the regulation to bulk packaging, employers would be faced with confusing, redundant, and sometimes, inconsistent labeling requirements between DOT and OSHA's HCS. (There was no criticism about the retention provisions for transport vehicles, freight containers, motor vehicles or rail freight cars.)

The HCS requires, in 29 CFR 1910.1200 (f), that manufacturers, importers, and distributors label, tag, or mark any containers of hazardous materials leaving the workplace with the identity of the hazardous material, appropriate hazard warnings and the name and address of the chemical manufacturer, importer or other responsible party. The HCS further requires that such labels, tags and markings be affixed in a manner that does not conflict with the HMR. Consequently, the HCS warning labels, tags or markings do not appear on the outer packagings of combination packagings (e.g., bottles in a box). The inner packagings are required to be labeled in accordance with the HCS, while the outside packaging is marked or labeled in accordance with the HMR. However, in some cases the DOT label and marking may appear on the same non-bulk packages as those required to be labeled under the HCS. This situation caused concern among commenters who questioned the need to retain DOT labels and marking where labeling was already required under HCS.

The Amoco Corporation (Ex. 5–21) summarized its concerns as follows:

> Amoco supports OSHA's proposal requiring employers who receive bulk packages of materials defined as hazardous * * * to maintain the markings, labels, or placards in accordance with the requirements set forth in 49 CFR Part 171 to 180. However, we feel that retention and maintenance of the markings and labels for non-bulk packages would be significantly burdensome to both large and small businesses alike.
>
> * * * We approve of OSHA limiting their rulemaking to the intent expressed by Congress, and from the rationale excerpted from the report, we believe that intent focused solely on hazardous materials transported in bulk packages.

Similar concerns were expressed by the Organization Resources Counselors (Ex. 5–23):

* * * [T]he proposed rule raises concerns over the broad range of containers proposed to be covered. In achieving the congressional mandate, we believe the rule should be limited to requirements for retention and maintenance of placards on bulk containers, such as truck trailers and rail tank cars, only. * * * ORC believes the congressional mandate does not extend to labeling of non-bulk containers for which labeling requirements already exist under other regulations.

If the final rule were to apply to non-bulk packagings, according to at least one commenter, potential liability issues could arise. With respect to replacing labels that may be lost or deteriorated, Oxychem (Ex. 5–35) cautioned:

* * * Sending a replacement placard for bulk shipping containers does not pose a liability issue for a company because the product is easy to trace through the transportation equipment number. * * * [S]ending a replacement label to be affixed by nonvendor employees to a nonbulk package raises several liability issues. The nonbulk package could be mislabeled resulting in improper handling or misuse of the product.

OSHA has crafted language which it concludes fulfills the intent of the statute, is protective of employees and meets the concerns of the commenters. All bulk packages must at all times retain their DOT marking until they are cleaned or purged. Such packages are often reshipped and the large size of the DOT marking is a safety advantage. DOT markings must be retained on non-bulk packages which will be reshipped. Clearly, the DOT marking is needed for reshipment.

However, OSHA concludes that the OSHA HCS label is fully protective for all employees and emergency responders for non-bulk packages which will not be reshipped. That label was designed to protect against all types of hazards. OSHA concludes therefore that it will be sufficient if an HCS label is on a non-bulk package when it is out of transportation, will not be reshipped and is at its final location at a factory or other worksite. This should respond to the commenters who feared that retaining both HCS and DOT labels at that stage might confuse their employees.

Additional concerns were expressed regarding the labeling of inner packagings of combination packagings. For example, Penske Truck Leasing Co. (Ex.5–20) stated:

* * * Manufacturers and distributors pack hazardous materials for transportation in various packaging, i.e., cans, plastic cases, cylinders, etc. These receptacles generally require an outer packaging for various reasons such as ease of handling, palletization, and storage. The packaging may contain one or more receptacles (containers) of the same hazardous material. The packaging is properly labeled with the DOT hazard warning. Upon entering the workplace, the employer * * * removes the packaging to find that the receptacle is not marked with the corresponding DOT hazard label and markings. * * * Under the proposed rule, it is implied that the employer would have to label and mark each container in this situation.

The above commenter was also concerned that the rule would require the labeling of packages that, when in transportation, are excepted from the labeling requirement of the DOT's HMR. It was not OSHA's intention to require labeling of containers that were not originally required to be labeled in accordance with the DOT's HMR. As previously stated, this final rule requires employers to retain labels on packages, this rulemaking does not require employers to label the packages. Inner packagings removed from an outer packaging that is required to be marked or labeled under DOT's HMR are not required to have the DOT marking or label affixed. However, those inner packages are required to have the OSHA HCS label. If the inner packages are to be reshipped, they would, of course, need the appropriate DOT label. In addition, packages which are excepted from the DOT's marking, labeling or placarding requirements, are not required under the DOT's HMR to be marked, labeled or placarded when stored at the workplace, but they would be required to be labeled under the OSHA HCS.

One commenter pointed out that sometimes employers receive hazardous materials which have the DOT-required labels affixed and subsequently store them at remote sites in trailers that are not intended for transportation and therefore are not required to be placarded (Ex. 5–2). The situation that the commenter raises is a small part of a much broader problem. OSHA believes that the communication of hazards at all storage locations (e.g. trailers, warehouses and storage tanks) is an important area for consideration. However, this issue is not within the scope of the statute directing this rulemaking.

In another matter related to the scope of this rule, the American Trucking Association requested a clarification as to whether the rule placed an obligation on operators of transport vehicles (5–22). Similarly, the Agricultural Retailers Association (Ex. L5–37) wanted assurance that the responsibility for retaining DOT placards, markings and labels transfers to the receiving employer. In response to both concerns, the final rule applies to the employer who receives the containers of hazardous materials and not the person responsible for transporting such material unless the material is still under the control of the transporter at its final destination when it is out of transportation.

B. Discrepancy Between DOT and OSHA Definitions of Flammable and Combustible

A number of commenters (Exs. 5–9, 5–25, 5–29, 5–34 and L5–41) raised the issue of the discrepancy between DOT and OSHA with respect to the definitions of flammable and combustible liquids. Commenters correctly stated that OSHA defines a flammable liquid as one with a flashpoint less than 100° F. and a combustible liquid as one with a flashpoint between 100° F and 200° F. Commenters stated that DOT defines a flammable liquid as a material with a flashpoint of below 141° F. and a combustible liquid as a material with a flash point greater than 141° F but below 200° F. OSHA has conferred with the DOT on this issue and was informed that while these statements are correct, DOT does allow in 49 CFR 173.150 (f), for domestic transportation, flammable liquids with a flash point greater than 100° F to be reclassed as a combustible liquid. A combustible liquid is not required to be labeled under DOT's HMR and, therefore, the provisions of this rule regarding the retention of required DOT labels would not apply. OSHA believes that this clarification should satisfy the concerns of commenters who raised the issue of combustible and flammable liquids being defined differently by OSHA and DOT. However, the broader issue of different definitions presents other technical, policy and legal issues and involves many institutions nationally and internationally. These issues cannot be properly addressed nor be solved in this rulemaking.

C. Duration Required for Retention of Hazard Warnings

Paragraph (a)(1) of the proposed standard required that markings, placards and labels remain on the package, freight container, etc. of hazardous material until the hazardous materials are removed therefrom so that they no longer pose a health or safety risk. A number of comments (see, e.g. Exs. 5–10, 5–13, 5–17, 5–23, 5–25, 5–27, 5–29, 5–34, 5–36, L5–40, L5–41 and L5–42) suggested that the language in this

provision was ambiguous and employers would be uncertain as to when DOT labels, placards and markings could be removed without being in violation of the rule. Various suggestions were offered regarding how to clarify this issue, ranging from deleting paragraph (a)(1) (Exs. 5–25, 5–29, L5–40) to allowing removal of the markings and placards as long as no more than a *de minimis* amount of the hazardous material remains in a container (Ex 5–10).

In the final standard OSHA has amended the language in paragraphs (a) and (b) so that it is now clear. Employers need only retain the DOT label, marking or placard until such time as the packaging which contained the hazardous material is sufficiently cleaned of residue and purged of vapor to remove any potential hazard. Paragraph (b), which requires the retention of markings and placards on transport vehicles, etc., states that markings and placards may be removed from transport vehicles if the transport vehicle no longer contains hazardous material subject to the marking or placarding requirements of the DOT's HMR. In the alternative, employers will be in compliance if they choose to retain the appropriate DOT hazard warning on packaging containing only the residue of the hazardous chemical in the same manner as when it contained a greater quantity of the hazardous material.

In the case where an outside package, (including transport vehicles), contains smaller packages of hazardous materials, DOT hazard warnings need be retained on the outside packaging only until the inner packages are removed. However, if a contained package leaks into the outer packaging, the cleaning and purging requirement applies.

D. Other Issues

The Edison Electric Institute (Ex 5–26) requested an exemption from this standard for Nuclear Regulatory Commission licensees whose radioactive material handling practices are already regulated by the NRC. This request was made on the basis of a Memorandum of Understanding (MOU) between the NRC and OSHA which gives the NRC jurisdiction in regulating most situations involving hazards that may be associated with NRC-licensed nuclear facilities, including worksite conditions which affect the safety of radioactive materials and thus the health and safety of workers.

The MOU, however, is not relevant in this case since OSHA is not regulating radioactive materials themselves but is only requiring an extension of DOT requirements. Since the DOT requirements already apply to employers handling radioactive materials, this standard does not represent any change. Therefore, including an exemption in the standard is not appropriate.

There was some confusion regarding paragraph (a)(2) of the proposed rule which required that markings, placards and labels be maintained in a manner that ensures the legend is visible. In effect, all that was intended by this provision was to assure that the label, placard, or marking be kept sufficiently clean (unobscured by dust, dirt, mud, etc.) that it would be easily seen in the event of an emergency or as necessary to prevent a hazardous situation. The provision was never intended to place restrictions on how or where DOT-labeled materials should be stored. However, since one commenter (Ex. L5–42) objected to the use of the term "legend," the provision has been revised as paragraph (c) in the final rule to read: "Such markings, placards and labels shall be maintained in a manner that assures they are readily visible." This does not mean that non-bulk packages with DOT labels that are stored in a warehouse (e.g. cartons containing 4-gallon cans of a hazardous material) have to be arranged in a manner which allows every label to be in view at all times. Rather it requires that where DOT hazard warnings are required to be retained, that such warnings are maintained in a manner that ensures that the message which the hazard warning is intended to convey is not compromised. In other words, at least some labeling should be visible for each type of hazardous material.

Additional minor changes were also suggested (Exs. 5–33 and L5–42) that OSHA agrees are appropriate for completeness and has incorporated in the final rule. Specifically, the title of the final rule has been amended to include the term "label." The terms "aircraft" and "vessel" have been deleted from the regulatory text as there are no specific DOT requirements to affix warning labels to an aircraft or vessel. The term "container" was also changed to "freight container" as Ex. 5–33 suggested. The section has been editorially revised in order to be more consistent with the DOT's HMR and in order that the section is more readily understandable. For example, the requirements for packages versus transport vehicles have been separated into two separate paragraphs.

Suggestions also were made (Exs. 5–19 and 5–25) to delete the phrase "* * * and other information as may be required by such regulations * * *" from paragraph (a). The commenters were concerned that the phrase might be interpreted as requiring materials not designed for display (e.g. manifests) to be kept on the container, package, etc. by the receiving employer. While this language was consistent with Section 29 of HMTUSA, OSHA did not intend it to place an additional burden on employers. OSHA is therefore removing this language from the final rule to eliminate any misconceptions about the requirements of the final rule.

Several commenters suggested that OSHA should go beyond the Congressional mandate in developing this rule. For example, the Laborers' Health & Safety Fund of North America recommended that the rule be expanded to cover hazardous materials being loaded or stored prior to shipment (Ex. 5–8). DOT's regulations generally do not apply until a material is offered for transportation. To require marking, labeling or placarding in accordance with the HMR prior to a material being offered for transportation is beyond the scope of this rulemaking.

The New York Department of State pointed out that mixed loads of hazardous materials are identified with the all purpose "dangerous" placard. While the vehicle may be parked, the shipping papers may have been taken away by the driver, thus removing a vital asset to the identification of hazards of the contents (Ex. 5–14). OSHA interprets the Congressional mandate to be limited to the retention of DOT hazards warnings which are designed for display. Consequently, shipping papers are not included.

Finally, Growmark suggested that this rulemaking presents OSHA with an opportunity to consider making all hazard warnings on vehicles, warehouses, storage tanks, etc. more uniform so that emergency responders could recognize and respond to one type of marking instead of having to learn dual systems (Ex. 5–11).

OSHA is aware that employers and others have expressed a need for consistency in labeling practices. However, this issue is beyond the scope of the specific authorizing statute and would require a major and lengthy interagency approach to complete. Moreover, the Agency published a Request for Information in the context of the Hazard Communication Standard on May 17, 1990 (see 55 FR 20580). The issue is still being considered with respect to what action the Agency should take in the context of that standard.

In a similar matter concerning the authority granted the Agency by the HMTUSA legislation, at least one commenter (Ex. 5–4) suggested that

since the real issue addressed in the legislation was hazard communication, the requirement to retain DOT hazard warnings should have been integrated in the Hazard Communication Standard in lieu of issuing a separate regulation. OSHA, however, believes that Congress was quite specific in its instructions to the Secretary of Labor that this requirement apply to DOT regulations and that it be addressed as a separate rule. Paragraph (d) does, however, make this final rule better integrated with the Hazard Communication Standard.

Finally, Amoco (Ex. 5–21) raised the issue of whether the rule would apply to an employer's current inventory of DOT-labeled materials and whether changes to the existing markings and labels would be required. In response to this comment, the Agency is allowing 90 days following publication of the final rule in the **Federal Register** for employers to come into compliance. The rule requires no changes in the content of the label. However, OSHA is providing what it believes is sufficient time for employers to replace labels, markings or placards that may have been removed, or to empty containers of hazardous materials. Once the effective date of the rule has passed, employers will be subject to OSHA citations if packages, transport vehicles, freight containers, etc. of hazardous materials covered by DOT's HMR are present in the workplace, do not have the appropriate DOT hazard warning and violate the standard. It is not possible for OSHA compliance officers to readily know the date transport vehicles or packages were received and DOT warnings were removed. The 90-day period is a realistic time in which to replace removed placards, markings or labels or to empty containers.

Because Congress has directed that OSHA issue this regulation for all employers covered by the OSH Act, this notice includes separate but identical standards for general industry (§ 1910.1201), construction (§ 1926.60), shipyards (§ 1915.100), marine terminals (§ 1917.29) and longshoring (§ 1918.100). The general industry standard will also be added to the list of Part 1910 standards which apply to agricultural operations, as a new paragraph (a)(7) of § 1928.21.

As with the proposed rule, OSHA has consulted with delegated officials of the Secretary of Transportation and the Secretary of the Treasury, as required by HMTUSA, in preparing this final rule.

Regulatory Flexibility Act

OSHA has not performed a Regulatory Impact Analysis for this standard since adoption of the proposed requirements would add no new regulatory burden on employers with respect to either cost or information collection.

Executive Orders 12866, 12612, and 12778

This rule is not a significant regulatory action for the purposes of Executive Order 12866. It also does not have federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order 12612. This rule has been certified in accordance with Executive Order 12778 regarding Civil Justice Reform.

Paperwork Reduction Act

This rulemaking action imposes no paperwork burdens under the Paperwork Reduction Act.

List of Subjects in 29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928

Occupational safety and health, hazardous materials transportation, hazardous substances, explosives, chemicals, health, safety.

Authority and Signature

This document was prepared under the direction of Joseph A. Dear, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

Accordingly, pursuant to section 29 of the Hazardous Materials Transportation Uniform Safety Act of 1990 (Pub. L. 101–615, 104 Stat. 3244), sections 4 and 6(b) of the Occupational Safety and Health Act (29 U.S.C. 653, 655), Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), Sec. 107, Contract Work Hours and Safety Standards Act (40 U.S.C. 333), Secretary of Labor's Order No. 1–90 (55 FR 9033) and 29 CFR Part 1911, Parts 1910, 1915, 1917, 1918, 1926 and 1928 of 29 CFR are amended as set forth below.

Signed this 14th day of July 1994.

Joseph A. Dear,

Assistant Secretary of Labor.

OSHA is amending Parts 1910, 1915, 1917, 1918, 1926, and 1928 of Title 29 of the Code of Federal Regulations as follows:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

PART 1915—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT

PART 1917—MARINE TERMINALS

PART 1918—SAFETY AND HEALTH REGULATIONS FOR LONGSHORING

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

1. The authority citation for subpart Z of Part 1910 is revised to read as follows:

Authority: Secs. 6, 8 Occupational Safety and Health Act, 29 U.S.C. 655, 657; Secretary of Labor's Order 12–71 (36 FR 8754), 9–76 (41 FR 25059), 9–83 (48 FR 35736) or 1–90 (55 FR 9033), as applicable; and 29 CFR Part 1911.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act, except those substances which have exposure limits listed in Tables Z–1, Z–2 and Z–3 of 29 CFR 1910.1000. The latter were issued under Section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z–1, Z–2 and Z–3 also issued under 5 U.S.C. 533. Section 1910.1000, Tables Z–1, Z–2 and Z–3 not issued under 29 CFR Part 1911 except for the arsenic (organic compounds), benzene and cotton dust listings.

Section 1910.1001 also issued under Sec. 107 of Contract Work Hours and Safety Standards Act, 40 U.S.C. 333.

Section 1910.1002 not issued under 29 U.S.C. 655 or 29 CFR Part 1911; also issued under 5 U.S.C. 553.

Section 1910.1025 also issued under 5 U.S.C. 553.

Section 1910.1043 also issued under 5 U.S.C. 551 et seq.

Section 1910.1201 also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3244 (49 U.S.C. 1801–1819 and 5 U.S.C. 553).

Sections 1910.1200, 1910.1499 and 1910.1500 also issued under 5 U.S.C. 553.

2. The authority citation for part 1915 is revised to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736) or 1–90 (55 FR 9033) as applicable; and 29 CFR part 1911.

Section 1915.99 also issued under 5 U.S.C. 553.

Section 1915.100 also issued under Section 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3244 (49 U.S.C. 1801–1819 and 5 U.S.C. 553).

3. The authority citation for part 1917 is revised to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736) or 1–90 (55 FR 9033) as applicable; 29 CFR Part 1911.

Section 1917.28 also issued under 5 U.S.C. 553.

Section 1917.129 also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3244) and 5 U.S.C. 553.

4. The authority citation for part 1918 is revised to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736) or 1–90 (55 FR 9033) as applicable.

Section 1918.90 also issued under 5 U.S.C. 553 and 29 CFR Part 1911.

Section 1918.100 also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3244 (49 U.S.C. 1801–1819, 5 U.S.C. 553, and 29 U.S.C. Part 1911).

5. The authority citation for subpart D of part 1926 is revised to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736) or 1–90 (55 FR 9033) as applicable.

Section 1926.59 also issued under 5 U.S.C. 553 and 29 CFR Part 1911.

Section 1926.60 also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3244), 5 U.S.C. 553, and 29 U.S.C. Part 1911.

PARTS 1910, 1915, 1917, 1918, AND 1926—[AMENDED]

6. Parts 1910, 1915, subpart F; 1917, subpart B; 1918, subpart I and 1926, subpart D of Title 29 of the Code of Federal Regulations are amended by adding identical sections as §§ 1910.1201, 1915.100, 1917.29, 1918.100 and 1926.61 to read as follows:

§ *.*** Retention of DOT markings, placards and labels.**

(a) Any employer who receives a package of hazardous material which is required to be marked, labeled or placarded in accordance with the U. S. Department of Transportation's Hazardous Materials Regulations (49 CFR Parts 171 through 180) shall retain those markings, labels and placards on the package until the packaging is sufficiently cleaned of residue and purged of vapors to remove any potential hazards.

(b) Any employer who receives a freight container, rail freight car, motor vehicle, or transport vehicle that is required to be marked or placarded in accordance with the Hazardous Materials Regulations shall retain those markings and placards on the freight container, rail freight car, motor vehicle or transport vehicle until the hazardous materials which require the marking or placarding are sufficiently removed to prevent any potential hazards.

(c) Markings, placards and labels shall be maintained in a manner that ensures that they are readily visible.

(d) For non-bulk packages which will not be reshipped, the provisions of this section are met if a label or other acceptable marking is affixed in accordance with the Hazard Communication Standard (29 CFR 1910.1200).

(e) For the purposes of this section, the term "hazardous material" and any other terms not defined in this section have the same definition as in the Hazardous Materials Regulations (49 CFR Parts 171 through 180).

PART 1928—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR AGRICULTURE

7. The authority citation for Part 1928 is revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), or 1–90 (55 FR 9033), as applicable; 29 CFR Part 1911.

Section 1928.21 also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3244 (49 U.S.C. 1801–1819 and 5 U.S.C. 553).

PART 1928—[AMENDED]

8. Section 1928.21 is amended by adding and reserving paragraph (a)(6) and adding a new paragraph (a)(7) reading as follows:

§ 1928.21 Applicable standards in 29 CFR Part 1910.

(a) * * *

(6) [Reserved]

(7) Retention of DOT markings, placards and labels —§ 1910.1201.

* * * * *

[FR Doc. 94–17534 Filed 7–18–94; 8:45 am]

BILLING CODE 4510–26–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IN43–1–6393A; FRL–5014–1]

Approval and Promulgation of Implementation Plan; Indiana

AGENCY: United States Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The United States Environmental Protection Agency (USEPA) approves Indiana's 1990 base year ozone precursor emissions inventory for Lake and Porter Counties as a revision to the Indiana ozone State Implementation Plan (SIP). The emissions inventory was submitted by the State of Indiana to satisfy a Federal requirement that States containing ozone nonattainment areas submit inventories of actual ozone precursor emissions. In the proposed rules section of this **Federal Register**, USEPA is proposing approval of and soliciting public comment on this requested SIP revision. If adverse comments are received on this direct final rule, USEPA will withdraw this final rule and address the comments received in response to this final rule in a final rule on the related proposed rule which is being published in the proposed rules section of this **Federal Register**.

EFFECTIVE DATE: This action will be effective September 19, 1994, unless notice is received by August 18, 1994, that someone wishes to submit adverse comments. If the effective date of this action is delayed due to adverse comments, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments should be sent to J. Elmer Bortzer, Chief, Regulation Development Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois. 60604. Copies of Indiana's emission inventory submittals and USEPA's technical support documents are available for public review during normal business hours, between 8:00 a.m. and 4:30 p.m., at the above address.

FOR FURTHER INFORMATION CONTACT: Edward Doty, Regulation Development Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois, 60604 Telephone: (312) 886–6057.

SUPPLEMENTARY INFORMATION:

I. Emission Inventory Policy and Guidelines

Under the Clean Air Act (Act), as amended in 1990, States have the responsibility to inventory emissions contributing to the violation of a National Ambient Air Quality Standard (NAAQS), to track these emissions over time, and to ensure that control strategies are being implemented that reduce emissions and move areas towards attainment of the NAAQS. States containing ozone nonattainment areas are required, under section 182(a)(1) of the Act, to submit by November 15, 1992, a comprehensive, accurate, and current inventory of actual ozone precursor emissions (emissions of Volatile Organic Compounds [VOC], Oxides of Nitrogen [NO_X], and Carbon Monoxide [CO]) for each ozone nonattainment area. This inventory must include base year (1990) emissions from point, area, on-road mobile, and non-road mobile anthropogenic (man-made) sources and biogenic (natural or plant generated) sources in the ozone nonattainment area(s) and the ozone precursor emissions from major stationary sources (with VOC, CO, or NO_X emissions equal to or exceeding 100 tons per year) located within 25 miles of the nonattainment area(s). The emissions inventory must be established for the peak ozone season (those months when peak hourly ozone concentrations occur in excess of the primary ozone National Ambient Air Quality Standard [NAAQS], generally June through August in Indiana) and must represent typical weekday emissions. Available guidance for preparing and reviewing the emission inventories is provided in the General Preamble to Title I of the Act. See 57 FR 13498 (April 16, 1992). Additional guidance is identified in the Technical Support Document (TSD) for this rulemaking.

The Act also requires States with ozone nonattainment areas designated as moderate, serious, severe, or extreme to submit a plan by November 15, 1993, to reduce VOC emissions by 15 percent by November 15, 1996. The baseline level of emissions, from which the 15 percent reduction is calculated, is determined by adjusting the base year emissions inventory to exclude biogenic emissions and certain emission reductions not creditable toward the 15 percent Reasonable Further Progress (RFP) requirement. The 1990 base year emissions inventory is the primary emissions inventory from which the RFP projection inventory, future periodic inventories, and attainment demonstration modeling inventories are derived. Further information on these inventories and their purposes can be found in the "Emission Inventory Requirements for Ozone State Implementation Plans," U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1991.

As a primary tool for the review of the quality of emission inventory submittals, the USEPA has developed three levels (I, II, and III) of emission inventory quality assurance review checklists. The Level I and II reviews are used to determine that all required components of the base year emission inventory and its associated documentation are present. These reviews also evaluate the level of quality of the supporting documentation and data provided by the State and assess whether the emission estimates were developed according to current USEPA guidance. The Level III review evaluates 10 crucial aspects and the overall acceptability of the emission inventory submittal. Failure to meet one of these crucial aspects would lead to disapproval of the emission inventory submittal. The 10 crucial requirements of the emission inventory submittal are:

1. An Inventory Preparation Plan (IPP) must be submitted by the State and approved by the USEPA. In addition, a Quality Assurance (QA) plan contained within the IPP must have been implemented and documented.
2. The emission inventory submittal must contain adequate documentation showing the procedures and input data used and the input data sources.
3. The point source portion of the inventory must be complete.
4. The point source emissions must have been prepared or calculated in accordance with current USEPA guidance.
5. The area source portion of the inventory must be complete.
6. The area source emissions must have been calculated in accordance with current USEPA policy.
7. The biogenic emissions must have been calculated using USEPA's PC-Biogenic Emissions Inventory System (PC–BEIS) or other equivalent techniques in accordance with current USEPA guidance.
8. The Vehicle Miles Travelled (VMT) estimates used in the calculation of on-road mobile source emissions must have been developed in accordance with USEPA guidance and must have been adequately documented in the inventory submittal.
9. The MOBILE emission factor model must have been correctly applied to produce emission factors for each of the vehicle classes.
10. Non-road mobile source emissions must have been prepared in accordance with current USEPA guidance for all of the non-road source categories.

The base year emission inventory may be approved if it passes the Level I, II, and III reviews. Detailed Level I and II review procedures and questions can be found in the "Quality Review Guidelines for 1990 Base Year Emission Inventories," U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, July 27, 1992. Level III review procedures and criteria are specified in a memorandum from David Mobley, Emission Inventory Branch, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, to the Chief of the Regulation Development Branch, Region V, et al., titled "Final Emission Inventory Level III Acceptance Criteria," October 7, 1992.

The Act requires States to observe certain procedural requirements in developing and submitting SIP revisions, including the base year emissions inventory submittal. Section 110(a)(2) of the Act provides that each SIP revision submitted by a State must be adopted after reasonable notice and public hearing. Final approval of the emissions inventory will not occur until the State revises the emissions inventory to address public comments. Future changes to the base year inventory (due to previously missed sources or to corrected source emission factors or activity levels) that impact the 15 percent RFP calculations or demonstration of attainment and that require a revised emission control strategy will be required to be addressed in a SIP revision.

II. Indiana's Emission Inventory Submittals

On January 15, 1994, the Indiana Department of Environmental Management (IDEM) submitted the final, adopted base year ozone precursor emissions inventory for Lake and Porter Counties. The emissions inventory submittal covers the emissions of VOC, NO_X, and CO for this ozone nonattainment area. In addition to emissions from the ozone nonattainment area, the submittals also cover VOC, NO_X, and CO emissions from major stationary sources (with actual emissions for any of the covered pollutants equal to or in excess of 100 tons per year) in all counties located within 25 miles of the ozone nonattainment area.

Prior to developing the base year emission inventories, the State of Indiana developed an IPP as required by the USEPA. This IPP was approved by the USEPA in March 1992.

Emissions contained in the emissions inventory cover the general source categories of point sources, area sources, on-road mobile sources, off-road mobile sources, and biogenic sources. Emission inventory summary tables in the submittal include a more detailed source category breakdown as requested by the USEPA. All emission summaries were accompanied by documentation covering the sources and values of input data and by sample calculations.

To determine up-to-date point source emissions, the State sent emission inventory questionnaires to all facilities contained in the State's Aerometric Information Retrieval System (AIRS) and to all sources in the subject area which hold an air emissions permit issued by the State. The questionnaires contained all key data fields necessary to calculate typical summer weekday emissions. To assure full coverage of emitting point sources, the State also consulted other data sources, such as manufacturer's listings, newly issued construction permits, and other databases, including Superfund Amendments and Reauthorization Act (SARA) Title III, section 313 summaries, and the Toxic Release Inventory.

The point source portion of the emissions inventory includes detailed facility-specific emission listings with emissions determined at the segment level and at the facility total level. Point source emissions at these source levels were listed for all facilities in the ozone nonattainment area with emissions of VOC or NO_X equal to or greater than 10 tons per year or with emissions of CO equal to or greater than 100 tons per year (facilities with less emissions were also included in the point source portion of the emissions inventory). Exceedance of the emission cutoff for VOC, NO_X, or CO resulted in the reporting of all VOC, NO_X, and CO emissions for a given facility. Point source emissions were calculated using emission factors contained in AIRS or using techniques outlined in the approved IPP. Emission factors used were generally obtained from the AIRS Facility Subsystem (AFS), AP–42 Compilation of Air Pollution Emission Factors, National Acid Precipitation Assessment Program emission inventory, direct stack test data, or other USEPA guidelines. The point source listings included with emission inventory submittals (on file at the Region 5 office) identify the emission factors, source activity levels or throughputs, operating schedules, control equipment efficiencies, and rule effectiveness estimates used for each facility and facility segment.

Area source emissions were calculated using a variety of information sources and guidance from the USEPA. Where appropriate, point source emissions have been subtracted from the calculated area source emissions to account for source coverage overlap and to avoid double counting of emissions in the emission totals. For all appropriate source categories, the State assumed a rule effectiveness level of 80 percent.

In preparing the area source emissions, the State used the following USEPA guidance documents: *Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone, Volumes I and II*, EPA–450/4–91–016 and EPA–450/4–91–014, May 1991; and *Procedures for Emission Inventory Preparation, Volume IV: Mobile Sources*, EPA–450/4–81–026d, revised in July 1989. The new Volume IV guidance, issued in the Spring of 1992, was used to estimate railroad and aircraft emissions. Estimates of other off-road mobile source emissions were based on USEPA's 1991 off-road mobile source emission study. In making other area source estimates, the State followed the approved IPP.

The State has entered the calculated area source emission estimates into USEPA's AIRS Area and Mobile Source System (AIRS/AMS). The data are well documented in both hardcopy and in computer data files submitted with the emission inventory submittals as additional documentation.

On-road mobile source emissions were calculated using USEPA's *Procedures for Emission Inventory Preparation, Volume IV: Mobile Sources* (as revised in 1989) and USEPA's MOBILE5A model. Daily Vehicle Miles Travelled (VMT) and speed data by county and roadway type were obtained from the Indiana Department of Transportation (InDOT), who used the Highway Performance Monitoring System (HPMS) to determine VMT by roadway functional class. The VMT provided by InDOT were annual average daily traffic levels. Insufficient data existed to allow the VMT to be adjusted to the summer months and the day of week levels. To QA the VMT estimates, the local Metropolitan Planning Organization (MPO) was requested to confirm the VMT estimates or to correct them if needed based on more representative data. The VMT were quality assured through comparison with current roadway traffic counts.

The MPO recommended vehicle speeds based on the use of local transportation models. The estimated speeds were used in conjunction with USEPA-recommended defaults for vehicle mixtures to determine emission rates for each roadway type. Fuel volatility was assumed to comply with USEPA requirements for the area. The ambient temperature used in the mobile source emissions modeling was derived from the average maximum and minimum temperatures on the ten highest ozone days for the period of 1988 through 1990 using an approach recommended by the USEPA. The emission factors determined using MOBILE5A were combined with the total VMT for each functional roadway class to determine the total mobile source emissions for each county. All parameters used in the mobile source emissions modeling, including the parameters used by the MOBILE5A model, were well documented.

The biogenic emissions for each of the counties were determined using USEPA's PC–BEIS model. Included in the documentation of the application of this model was a description of the methodology used to determine temperature inputs for the model. The temperature inputs were determined using the technique recommended by the USEPA. The applications of PC–BEIS also included the use of land use data supplied by the USEPA.

The State of Indiana held public hearings on the emissions inventory on June 28, 1993, and July 6, 1993. Comments received during these public hearings were used to make appropriate corrections in the emissions inventory.

The emissions in units of tons/day for an average day are summarized below:

LAKE AND PORTER COUNTIES

Source type	VOC	CO	NO_X
Point Sources ..	79.23	709.32	302.94
Area Sources ..	41.91	5.14	5.60
On-Road Mobile Sources .	134.54	771.28	83.10
Off-Road Mobile Sources .	11.68	78.16	27.94
Biogenic Sources	21.44	.....	.....
Totals	288.80	1,563.90	419.58

III. Final Rulemaking Action

The USEPA has conducted Level I, II, and III quality assurance reviews of the emission inventory submittals and has concluded that the State of Indiana has met the requirements of section 182(a)(1) of the Act by submitting an ozone precursor emissions inventory that include comprehensive, accurate,

and current actual emissions from all identified sources in the subject ozone nonattainment area. In particular, the Indiana submittals meet the 10 crucial criteria contained in the Level III quality assurance review. The emissions inventory is, therefore, approved for incorporation in the SIP as satisfying the requirements of section 182(a)(1) of the Act.

Because USEPA considers this action noncontroversial and routine, we are approving it without prior proposal. The action will become effective on September 19, 1994. However, if the USEPA receives adverse comments by August 18, 1994, then the USEPA will publish a notice that withdraws the action, and will address the comments received in response to this final rule in the final rule on the requested SIP revision which has been proposed for approval in the proposed rules section of this **Federal Register**. The comment period will not be extended or reopened.

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future notice will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for 2 years. The USEPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on USEPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993. The OMB has exempted this regulatory action from Executive Order 12866 review.

Nothing in this section should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to any SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, USEPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

The SIP approvals under section 110 and subchapter I, part D, of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, I certify that it does not have a significant impact on small entities. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids the USEPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (1976).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Nitrogen dioxide, Ozone, and Volatile organic compounds.

Dated: June 30, 1994.

Valdas V. Adamkus,

Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

Subpart P—Indiana

2. Section 52.777 is amended by adding paragraph (g) to read as follows:

§ 52.777 Control strategy: Photochemical oxidants (hydrocarbons).

* * * * *

(g) The base year ozone precursor emission inventory requirement of section 182(a)(1) of the Clean Air Act, as amended in 1990, has been satisfied for Lake and Porter Counties, Indiana.

* * * * *

[FR Doc. 94–17431 Filed 7–18–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Health Resources and Services Administration

42 CFR Part 51a

RIN 0905–AD88

Maternal and Child Health (MCH) Project Grants

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Final rule.

SUMMARY: This final rule amends existing regulations governing the Maternal and Child Health (MCH) Federal Set-Aside programs under sections 502(a) and 502(b) of Title V of the Social Security Act (42 U.S.C. 702(a) and 702(b)). This rule revises the regulations to: increase flexibility to fit changing policy concerns; implement requirements established under the Omnibus Budget Reconciliation Act of 1989 (OBRA '89) addressing collection of data from funded projects, and make other changes that are technical or clarifying in nature. The rule updates the existing regulations in accord with current Department policy and statutory amendments made to sections 501(a), 502(a), 502(b), and 506(a)(3).

EFFECTIVE DATE: This regulation is effective August 18, 1994.

FOR FURTHER INFORMATION CONTACT: Lynn Squire, Legislative Officer, Maternal and Child Health Bureau, HRSA, HHS, Office of Program Development, Parklawn Building, room 18–20, 5600 Fishers Lane, Rockville, MD 20857; telephone number: 301–443–2778.

SUPPLEMENTARY INFORMATION: On July 21, 1993, the Secretary published in the **Federal Register** (58 FR 38995) a Notice of Proposed Rulemaking (NPRM) proposing to revise existing regulations governing the MCH Federal Set-Aside programs to bring them into conformity with current Department policy and statutory amendments to these programs. The Maternal and Child Health (MCH) Services Block Grant is the only federally authorized program devoted exclusively to maternal and child health. First authorized under Title V of the Social Security Act (the Act) in 1935 and reorganized as a block grant under the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35), the program provides funds primarily to States to develop the maternal and child health infrastructure and public health system which supports the establishment of

community-based, family-centered systems of preventive, primary and specialized care that coordinate and integrate public and private sector resources for women of childbearing age, infants, children, adolescents, and families, particularly those who are low income, have limited access to care, or have a child with special health care needs.

Sections 502(a) and 502(b) of Title V, as amended by the Omnibus Budget Reconciliation Act (OBRA) of 1989 (Pub. L. 101–239), govern the MCH Federal Set-Aside programs. These sections require that specified portions of the annual appropriation for the MCH Block Grant be set aside and retained by the Secretary to support projects in designated categories. Section 502(a) established the federal set-aside for Special Projects of Regional and National Significance (SPRANS), which supports grants, contracts, and cooperative agreements for: training; research; genetic disease and newborn screening; hemophilia treatment centers; and special Maternal and Child Health Improvement Projects (MCHIP). Section 502(b) was authorized under section 6502(a)(3)(b) of OBRA '89. It establishes a set-aside, consisting of 12.75 percent of annual appropriated amounts above $600 million, for special projects termed "Community Integrated Service Systems (CISS)" projects. The purposes of these special projects are identified under section 501(a)(3) of the Act. They include the development and expansion of: maternal and infant home visiting programs; programs to increase the numbers of obstetricians and gynecologists participating in Titles V and XIX; integrated MCH service delivery systems; MCH centers operating under not-for-profit hospitals; rural MCH projects; and outpatient and community based services for children with special health care needs. Regulations published at 51 FR 7726, March 5, 1986 (and codified at 42 CFR 51a), focus only on the SPRANS federal set-aside under 502(a). The regulations have not been revised since their initial publication.

The NPRM proposed to: (1) Replace references to "crippled children" with "children with special health care needs" in all sections of the regulations, as mandated under section 9527 of COBRA; (2) change the heading and revise the wording in § 51a.1 to reflect the intent of the section, which is to expand the regulation's applicability to the CISS program under section authorized under section 502(b)(1)(A) of the Act by OBRA '89; (3) In § 51a.3, change the language to clarify and more clearly distinguish between eligibility requirements for applicants for research, training, and other grant categories under the Federal Maternal and Child Health Set-Aside program; (4) make minor wording changes in § 51a.4, to better describe the application process and to more clearly distinguish between requirements for research applications and those for other grant categories; (5) amend § 51a.5 to incorporate into the Secretary's funding decisions consideration of MCH-related Healthy People 2000 objectives, as required by OBRA '89 under section 501(a) of the Act. The amended § 51a.5 would also incorporate a statutory funding preference for certain CISS project strategies in areas of high infant mortality, as required by OBRA '89 under section 502(b)(2) of the Act. In addition, to better reflect the diversity of project categories for which applications are currently solicited and their responsiveness to changing needs, the NPRM proposed to replace obsolete and inflexible evaluation criteria in the section. The new criteria would be consistent with Part 116 of the PHS Grants Administration Manual, applicable to decisions on funding awards, while increasing opportunities for the Secretary to develop criteria as needed for specific project categories. Category-specific evaluation criteria would be published in program announcements and/or application guidances; (6) In § 51a.7, make technical changes to eliminate obsolete references as a result of changes in Department regulations, and to correct other errors in references; and (7) add a new § 51a.8 to set out conditions which grantees must meet. Requirements in paragraph (a) would implement amendments to section 506(a)(3) of the Act made by OBRA '89, which address collection of data from funded SPRANS projects concerning the number of individuals served or trained, as appropriate.

In addition, the NPRM proposed information collections which have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 and assigned control number 0915–0169. It also proposed to add a provision giving the Secretary discretion to impose such additional conditions on grantees as the Secretary views as necessary, using language identical to that in many other PHS grant program regulations. Additionally, technical and ministerial revisions were proposed to bring existing regulations into compliance with current major departmental policy initiatives and grants policy language.

The public comment period on the proposed regulations closed on September 20, 1993. The Department received 4 letters of public comment on this NPRM. All significant comments have been considered and discussed. Comments relating to the information collection requirements in § 51a.8 highlight the Department's responsibility to provide grantees with clear and explicit instructions for completing prescribed forms. There are no substantive differences between the proposed rule and the final rule as a result of our review of public comments.

The comments received on the proposed rule and the Department's responses to the comments are discussed below under the section numbers of the regulations affected.

Part 51a—Project Grants for Maternal and Child Health

One respondent expressed support for the proposed replacement of all references to "crippled" children in all sections of the regulation to "children with special health care needs." The Department is making this change to conform with Section 9527 of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA) [Pub. L. 99–272], which substitutes the term 'Children with Special Health Care Needs' for 'Crippled Children' throughout Title V

Section 51a.5 What criteria will DHHS use to decide which projects to fund?

One respondent was concerned that some potential SPRANS and CISS applicants do not work closely enough or early enough with the State Title V agency in developing their grant proposals. This respondent suggested adding "the quality of coordination with the state Title V program" to the criteria used by the Department to review projects for funding.

The Department wishes to stress that it considers a key objective of these new rules to be the elimination of obsolete and overly-rigid evaluation criteria in order to better accommodate the broad diversity of project categories in which grants are awarded; in recent years, the number of separate categories and subcategories has exceeded 35. Limiting regulatory review criteria to the minimum required by Part 116 of the Public Health Service (PHS) Grants Administration Manual does not affect the Department's ability to publish in annual program announcements and/or application guidelines additional criteria for any grant category. This limitation is also consistent with Executive Order 12875 of October 26, 1993, which discourages executive departments from promulgating any regulation "that is not required by

statute and that creates a mandate upon a State, local, or tribal government".

The Department will include category-appropriate review criteria in the application guidelines it distributes for each grant category. Most demonstration grant categories can be expected to contain review criteria relating to meaningful and timely consultation and collaboration by applicants with the State Title V agency, as well as with other State, local, and tribal governments regarding matters that uniquely affect their communities. The Department notes, however, that the statute does not condition awards under the MCH Federal Set-Aside programs on coordination with the State Title V agency and that such coordination may not be relevant for every grant category. The statutory emphasis on "regional and national significance" reflects Congressional intent that some categories should properly serve interests beyond those of the host State. Because both categorical diversity and changing priorities over time are fully accommodated by customizing annual announcements and/or guidelines, the Department is making no changes to the review criteria in this section.

This respondent also suggested that priorities for funding within the SPRANS and CISS programs be determined in consultation with State Title V programs. Agency discretion in selection of priorities for funding in both the SPRANS and CISS programs is actually extremely limited. The major SPRANS categories are identified in section 502(a) and CISS project categories are specified in some detail in sections and 502(b) of Title V. Subcategories and priorities under SPRANS can change from year to year; typically, however, they are designed to fulfill specific Congressional or Administration program directives. The Department has an established mechanism for soliciting comments from the public on proposed priorities for Title V grant programs. Annual announcements of the availability of funding for SPRANS and CISS invite public comment on the published program priorities. When application deadlines prevent consideration of public comments in developing priorities for the current fiscal year, they are considered for the following fiscal year. In addition, numerous formal and informal opportunities currently exist for consultation and exchanges of views on grant priorities between the Department's central and regional office officials and State Title V programs and their chosen representatives.

One respondent pointed out a misprint in the NPRM listing of CISS funding preferences, which is corrected in the final regulation. The misprint resulted in incorrectly combining two separate statutory categories—integrated maternal and child health service systems and maternal and child health centers operating under the direction of not-for-profit hospitals—and in omitting the category of outpatient and community based services for children with special health care needs.

Section 51a.8 What other conditions apply to these grants?

OBRA '89 added a requirement (under sec. 506(a)(3) of the Act) for annual collection of data from SPRANS and CISS project grants, including: (1) Information on the number of individuals served or trained; (2) a copy of any evaluation conducted by the recipient; and (3) a list of Healthy Children 2000 objectives addressed by the project and data on how the project met the objectives.

Two respondents raised concerns regarding the applicability of individual-oriented reporting requirements to projects whose objectives or activities are primarily population-based, such as infrastructure building, needs assessment, quality control, or policy development. The Department appreciates these concerns. To accommodate variations in the targeting of the major types of SPRANS/CISS grants, the Department has developed and OMB has approved for a one-year period, through November 1994, a "SPRANS/CISS Uniform Data Collection Instrument" for use in this annual data collection, which will usually take place in the spring of each fiscal year. Following the submission by SPRANS/CISS grantees of their completed data forms, the Maternal and Child Health Bureau (MCHB) will compile the data in compliance with the legislative mandate for information on the number of persons served or trained. Four separate SPRANS/CISS Uniform Data Collection Instrument forms have been designed for use in FY 1994, customized for projects focusing on: (1) Training; (2) research; (3) data analysis; and (4) other discretionary grants. The development of the forms to be used in this information collection was guided by an active data development committee within the MCHB. The forms were sent to all Public Health Service Regional Offices for review. In addition, draft data collection instruments were disseminated in FY 1993 for field testing to nine institutions representing each major type of SPRANS/CISS grantee, i.e. training, research, genetics, hemophilia, and MCH improvement projects.

Smoke Free Workplace

Public Law 103–227, enacted on March 31, 1994, prohibits smoking in certain facilities in which minors will be present. The Department of Health and Human Services is now preparing to implement the provision of that law. Until those implementation plans are in place, PHS continues to strongly encourage all grant recipients to provide a smoke free workplace and promote the nonuse of all tobacco products.

Regulatory Flexibility Act and Executive Order 12866

These regulations govern a financial assistance program in which participation is voluntary. The Department believes that the resources required to implement the new requirements in this final rule are minimal. In accordance with the requirements of the Regulatory Flexibility Act of 1980, the Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

The Department also has determined that this rule is not a major rule under Executive Order 12866; therefore, a regulatory impact analysis is not required. The rule will not exceed the threshold level of $100 million established in section (b) of Executive Order 12866.

Paperwork Reduction Act

This rule contains information collections which have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 and assigned control number 0915–0169. The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting, notification and recordkeeping burdens. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: SPRANS/CISS Uniform Data Collection Instrument.

Description: Information will be collected from funded projects to enable the Secretary to respond to congressional reporting mandates required by OBRA '89 concerning individuals served or trained by projects, their responsiveness to Healthy Children 2000 objectives, and their evaluation status.

Description of Respondents: Recipients of SPRANS and CISS project awards.

Estimated Annual Reporting and Recordkeeping Burden:

Section	No. of respondents	Responses per respondent	Hours per response	Total hours
Reporting:				
§51a.8	580	1	4	2,320
Total Burden				2,320

We received one comment on the estimated annual reporting burden published in the NPRM. The estimate of four hours per response was based on initial information provided to MCHB by a sampling of grantees' data specialists. Feedback from the field test has confirmed the general accuracy of the estimated burden. Prior to expiration of OMB approval for this data collection, in November 1994, the utility of the data instrument will be reviewed and an analysis of grantee experience in complying with the requirements will be done. The estimated reporting burden remains the same as in the proposed rule.

List of Subjects in 42 CFR Part 51a

Grand programs—health, Health care, Health professions, Handicapped, Maternal and child health.

Dated: April 12, 1994.

Philip R. Lee,

Assistant Secretary for Health.

Approved: July 7, 1994.

Donna E. Shalala,

Secretary.

(*Catalog of Federal Domestic Assistance*, No. 93.110, Maternal and Child Health Consolidated Federal Programs).

Accordingly, 42 CFR Part 51a is amended as set forth below:

PART 51a—PROJECT GRANTS FOR MATERNAL AND CHILD HEALTH

1–2. The authority citation for Part 51a is revised to read as follows:

Authority: Sec. 1102 of the Social Security Act, 49 Stat. 647 (42 U.S.C. 1302); sec. 502(a), 502(b)(1)(A), and 506(a)(3) of the Social Security Act, 95 Stat. 819–20 (42 U.S.C. 702(a), 702(b)(1)(A) and 706(a)(3)).

3. Section 51a.1 is revised to read as follows:

§ 51a.1 To which programs does this regulation apply?

The regulation in this part applies to grants, contracts, and other arrangements under section 502(a) and 502(b)(1)(A) of the Social Security Act, as amended (42 U.S.C. 702(a) and 702(b)(1)(A)), the Maternal and Child Health (MCH) Federal Set-Aside project grant programs. Section 502(a) authorizes funding for special projects of regional and national significance (SPRANS), research and training projects with respect to maternal and child health and children with special health care needs (including early intervention training and services development); genetic disease testing, counseling and information programs; comprehensive hemophilia diagnostic and treatment centers; projects for screening and follow-up of newborns for sickle cell anemia and other genetic disorders; and special maternal and child health improvement projects. Section 502(b)(1)(A) authorizes funding for projects termed community integrated service system (CISS) projects for the development and expansion of: maternal and infant health home visiting; projects to increase the participation of obstetricians and pediatricians in title V and title XIX programs; integrated maternal and child health service systems; maternal and child health centers operating under the direction of not-for-profit hospitals; rural maternal and child health programs; and outpatient and community-based services programs for children with special health care needs.

4. Section 51a.3 is revised to read as follows:

§ 51a.3 Who is eligible to apply for Federal funding?

(a) With the exception of training and research, as described in paragraph (b) of this section, any public or private entity, including an Indian tribe or tribal organization (as those terms are defined at 25 U.S.C. 450b) is eligible to apply for federal funding under this Part.

(b) Only public or nonprofit private institutions of higher learning may apply for training grants. Only public or nonprofit institutions of higher learning and public or private nonprofit agencies engaged in research or in programs relating to maternal and child health and/or services for children with special health care needs may apply for grants contracts or cooperative agreements for research in maternal and child health services or in services for children with special health care needs.

5. Section 51a.4 is revised to read as follows:

§ 51a.4 How is application made for Federal funding?

An application for funding under the MCH Federal Set-Aside project grant programs must be submitted to the Secretary at such time and in such manner as the Secretary may prescribe. It must include a budget and narrative plan of the manner in which the project will meet each of the requirements prescribed by the Secretary. The plan must describe the project in sufficient detail to identify clearly the nature, need, and specific objectives of, and methodology for carrying out, the project. (Approved by the Office of Management and Budget under control number 0915–0050)

6. Section 51a.5 is revised to read as follows:

§ 51a.5 What criteria will DHHS use to decide which projects to fund?

(a) The Secretary will determine the allocation of funds available under sections 502(a) and 502(b)(1)(A) of the Act for each of the activities described in § 51a.1.

(b) Within the limit of funds determined by the Secretary to be available for each of the activities described in § 51a.1, the Secretary may award Federal funding for projects under this part to applicants which will, in his or her judgment, best promote the purpose of title V of the Social Security Act and address achievement of Healthy Children 2000 objectives,[1] taking, the following factors into account:

[1] Healthy Children 2000: National Health Promotion and Disease Prevention Objectives Related to Mothers, Infants, Children, Adolescents, and Youth is a special compendium of health status goals and national health objectives affecting mothers, infants, children, adolescents, and youth originally published in Healthy People 2000 in September 1990. Potential applicants may obtain a copy of Healthy People 2000 (Full Report: Stock No. 017–001–00474–0 or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office Washington, DC 20402–9325, (telephone: 202 783–3238).

(1) The extent to which the project will contribute to the advancement of maternal and child health and/or improvement of the health of children with special health care needs;

(2) The extent to which the project is responsive to policy concerns applicable to MCH grants and to program objectives, requirements, priorities and/or review criteria for specific project categories, as published in program announcements or guidance materials.

(3) The extent to which the estimated cost to the Government of the project is reasonable, considering the anticipated results;

(4) The extent to which the project personnel are well qualified by training and/or experience for their roles in the project and the applicant organization has adequate facilities and personnel; and

(5) The extent to which, insofar as practicable, the proposed activities, if well executed, are capable of attaining project objectives.

(c) For the following types of CISS projects, preference for funding will be given to qualified applicants in areas with a high infant mortality rate (relative to the latest average infant mortality rate in the United States or in the State in which the area is located):

(1) Projects for the development and expansion of maternal and infant health home visiting;

(2) Projects to increase the participation of obstetricians and pediatricians in title V and title XIX programs;

(3) Integrated maternal and child health service systems;

(4) Maternal and child health centers operating under the direction of not-for-profit hospitals;

(5) Rural maternal and child health programs; and

(6) Outpatient and community based services for children with special health care needs.

7. Section 51a.7(a) is revised to read as follows:

§ 51a.7 What other DHHS regulations apply?

(a) Several other DHHS regulations apply to awards under this part. These include, but are not limited to:

42 CFR Part 50—Policies of general applicability:

Subpart B—Sterilization of persons in federally assisted family planning projects.

Subpart C—Abortions and related medical services in federally assisted programs of the Public Health Service.

Subpart E—Maximum allowable cost for drugs.

45 CFR Part 76—Governmentwide debarment and suspension (nonprocurement) and governmentwide requirements for drug-free workplace (grants).

45 CFR Part 80—Nondiscrimination under programs receiving Federal assistance through the Department of Health and Human Service—Effectuation of title VI of the Civil Rights Act of 1964.

45 CFR Part 81—Practice and procedure for hearings under Part 80 of this title.

45 CFR Part 84—Nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from Federal financial assistance.

45 CFR Part 86—Nondiscrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance.

45 CFR Part 91—Nondiscrimination on the basis of age in HHS programs or activities receiving Federal financial assistance.

45 CFR Part 93—New restrictions on lobbying.

(b) In addition to the above regulations, the following apply to projects funded through grants:

42 CFR Part 50—Policies of general applicability:

Subpart D—Public Health Service grant appeals procedure.

45 CFR Part 16—Procedures of the Departmental Grant Appeals Board.

45 CFR Part 74—Administration of grants to nonprofit organizations.

45 CFR Part 75—Informal grant appeals procedures.

45 CFR Part 92—Administration of grants to State and local governments.

* * * * *

8. Section 51a.8 is added to read as follows:

§ 51a.8 What other conditions apply to these grants?

(a) Recipients of project grants will be required to submit such additional information to the Secretary on an annual basis as the Secretary determines, including:

(1) the number of individuals served or trained, as appropriate under the project;

(2) a copy of any evaluation conducted by the recipient; and

(3) a list of Healthy Children 2000 objectives addressed by the project and data on how the project contributed toward meeting the objectives.

(b) The Secretary may at the time of award of project grants under this Part impose additional conditions, including conditions governing the use of information or consent forms, when, in the Secretary's judgment, they are necessary to advance the approved program, the interest of public health, or the conservation of grant funds.

[FR Doc. 94-17218 Filed 7-18-94; 8:45 am]
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Health Care Financing Administration

42 CFR Parts 412, 413, and 418

[BPD-436-F]

RIN 0938-AD71

Medicare Program; Periodic Interim Payments for Hospitals and Other Providers

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

ACTION: Final rule.

SUMMARY: This final rule responds to public comments on the January 21, 1988 final rule with comment period that implemented section 9311 of the Omnibus Budget Reconciliation Act of 1986. The January 21, 1988 rule described the circumstances under which the periodic interim payment (PIP) method is available for services furnished by hospitals and other providers.

EFFECTIVE DATE: This final regulation is effective on August 18, 1994.

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SUPPLEMENTARY INFORMATION:

I. Background

Section 1861(v)(1)(A) of the Social Security Act (the Act) defines reasonable cost under Medicare as the cost actually incurred, excluding any cost unnecessary in the efficient delivery of needed health services. That section of the Act also provides that reasonable costs must be determined in accordance with regulations that establish the methods to be used and the items to be included for purposes of determining which costs are allowable for various types or classes of institutions, agencies, and services.

Under Medicare, providers are paid for inpatient and outpatient services that they furnish to beneficiaries under Part A (Hospital Insurance) or Part B (Supplementary Medical Insurance). Currently, most hospitals are paid for their hospital inpatient operating costs and capital-related costs under the prospective payment systems in accordance with sections 1886(d) and (g) of the Act and regulations at 42 CFR part 412. Under these systems, Medicare payment is made at a predetermined,

specific rate for inpatient operating costs and inpatient capital-related costs for each hospital discharge based on the information contained in actual bills submitted.

Hospital outpatient services, hospitals and hospital units that are excluded from the prospective payment systems, as well as most other providers, are paid, in part, an amount based on the reasonable cost of items and services furnished to beneficiaries, in accordance with the regulations at 42 CFR part 413.

Since actual reasonable cost cannot be determined until the end of a provider's cost reporting period, an interim rate of payment, approximating actual cost as closely as possible, is determined by the intermediaries for each provider, and interim payments are made on that basis during the year. These interim payments are required by section 1815(a) of the Act, which states that we must pay providers at least monthly during the cost reporting period, pending a final determination of cost on the basis of a submitted cost report and any necessary adjustments. After receipt of the provider's cost report, the intermediary determines what the actual payment for the period should have been and a retroactive adjustment is made. The regulations that implement these policies are located at § 413.64.

There are two methods of interim payment for inpatient hospital services for hospitals not receiving payment under the prospective payment systems. One method is based on actual bills submitted by the hospital. Under this method, interim payments are calculated by applying a predetermined per diem amount to the number of Medicare patient days reflected on actual bills or by applying a predetermined percentage to the charges reflected on the actual bills submitted. The predetermined per diem amount or percentage factor applied to billed patient days or charges represents an estimate of the hospital's previous year's costs, adjusted to ensure that the current year's rate of payment is as close as possible to the current year's costs.

Under the second method, referred to as the periodic interim payment (PIP) method, interim payments are not based on individual bills. Instead, payment is based on the estimated annual costs attributable to estimated Medicare utilization of a hospital, and equal biweekly payments are made to hospitals without regard to the submission of individual bills. PIP has been available for inpatient hospital services since 1968. It was offered to qualified hospitals as an alternative to regular interim reimbursement, which requires submission of a bill to receive payment.

With either of these interim payment methods, any overestimation or underestimation of the hospital's actual costs, to the extent not adjusted during the year, is adjusted at the time of cost report settlement.

Under the prospective payment system, hospitals are paid, for most of the Part A inpatient services they furnish, a prospectively determined amount for each discharge based on actual bills submitted. This amount constitutes final payment for each discharge claimed. Although no form of interim payment is necessary for hospitals operating under the prospective payment system, we extended the option to these hospitals to elect to receive PIP when the prospective payment system was implemented in order to avoid cash flow problems in the early stages of the system. Thus, prospective payment hospitals that met the qualifications for receiving PIP could elect to receive this type of interim payment, which would be based on their estimated annual prospective payment amounts. The PIP payment is made 2 weeks after the end of a biweekly period of services. In these circumstances, year-end reconciliation is required.

Although the PIP method of interim payment is not based on actual bills submitted, a PIP hospital must continue to submit bills for subsequent intermediary verification of the accuracy of the rate. The rate is reviewed at least twice per year for hospitals paid under the prospective payment system and at least quarterly for hospitals and other providers paid on a reasonable cost basis. If necessary, as determined by the reviews, the rate is adjusted. Interim payments may be further adjusted based on cumulative payment data for the year.

On August 15, 1986, we published a final rule in the **Federal Register** (51 FR 29386) concerning interim payments. In that rule, we took the following actions, which were to be effective on July 1, 1987:

- We eliminated PIP as an optional method of payment for inpatient hospital services furnished to Medicare beneficiaries, except for services furnished by a rural hospital with fewer than 100 beds.
- In order to alleviate the cash flow problems that certain hospitals encounter, we provided for one interim payment to hospitals subject to the prospective payment system for each case in which a patient remains in the hospital more than 30 covered days. Under this provision any interim payment made was to be applied against the final payment made for the discharge.
- We also eliminated PIP for hospitals receiving payment under a demonstration project authorized by section 402(a) of the Social Security Amendments of 1967 (Public Law 90-248) or section 222(a) of the Social Security Amendments of 1972 (Public Law 92–603), and for those hospitals paid under State reimbursement control systems authorized by section 1886(c) of the Act and approved by HCFA. However, under this provision, these hospitals were to be permitted to use a form of interim payment similar to PIP if that type of payment is specifically approved by HCFA as a part of the demonstration or control system.
- We provided that payment for direct medical education and other inpatient hospital costs excluded from the prospective payment system was to continue to be made biweekly on an interim payment basis.

We issued the August 15, 1986 final rule because evidence indicated that the PIP method had increasingly become a burden for the intermediaries and that it resulted in the expenditures of considerable resources in attempting to identify and correct overpayments and underpayments. We stated that eliminating PIP for all hospitals (that is, those paid on the basis of reasonable costs and those subject to prospective payment) would allow intermediaries to utilize their resources more effectively to better control payments to hospitals and all other providers. Furthermore, we stated that the elimination of PIP would encourage hospitals to submit their bills on a more timely basis since hospitals receiving PIP have less incentive to bill timely than hospitals not receiving PIP.

On October 21, 1986, the Omnibus Budget Reconciliation Act of 1986 (Public Law 99–509) was enacted. In effect, except for the provision dealing with a special interim payment to prospective payment hospitals experiencing unusually long lengths of stay (discussed below), section 9311 of Public Law 99–509 overrode the August 15, 1986, final rule. Specifically, section 9311(a) of Public Law 99–509 added a new paragraph (e) to section 1815 of the Act that provides for the following——

- Payment must be made available for inpatient hospital services furnished by a prospective payment hospital, including distinct part psychiatric or rehabilitation units, on a PIP basis (rather than on the basis of bills actually submitted) in the following cases:

—The hospital's fiscal intermediary fails to meet the requirements of section

1816(c)(2) of the Act concerning the prompt payment of claims for 3 consecutive months, the hospital requests payment on a PIP basis, and the hospital meets the requirements applicable to payment on a PIP basis that were in effect as of October 1, 1986. The hospital can continue to receive PIP payments until its fiscal intermediary meets the prompt payment of claims requirements for 3 consecutive calendar months.

—The hospital has a disproportionate share adjustment percentage (as established in section 1886(d)(5)(F)(iv) of the Act) of at least 5.1 percent as computed for purposes of establishing the average standardized amounts for discharges occurring during Federal fiscal year (FY) 1987 and the hospital requests payment on a PIP basis. Hospitals meeting this criterion can receive PIP only if they were being paid on a PIP basis as of June 30, 1987 and the hospital continues to meet the requirements applicable to payment on a PIP basis that were in effect as of October 1, 1986.

—The hospital is located in a rural area, has 100 or fewer beds, and the hospital requests payment on a PIP basis. Again, hospitals meeting this criterion can receive PIP only if they were being paid on a PIP basis as of June 30, 1987, and the hospital continues to meet the requirements applicable to payment on a PIP basis that were in effect as of October 1, 1986.

• Payment on a PIP basis must be made available under the standards established in § 405.454(j) (redesignated as § 413.64(h)), as in effect on October 1, 1986, for the following services if the provider qualifies for and elects to receive PIP payment:

—Inpatient hospital services of a hospital excluded from the prospective payment system.

—Inpatient hospital services of a hospital receiving payment under a State hospital reimbursement system under section 1814(b)(3) or 1886(c) of the Act, if payment on a PIP basis is an integral part of that reimbursement system.

—Skilled nursing facility services.

—Home health services.

—Hospice care.

• The Secretary may make appropriate accelerated payments to hospitals subject to the prospective payment system that have significant cash flow problems resulting from operations of its intermediary or from unusual circumstances of the hospital's operation.

On January 21, 1988, we published a final rule with comment period (53 FR 1621) that implemented section 9311(a) of the Omnibus Budget Reconciliation Act of 1986 (Public Law 99–509, enacted October 21, 1986). In that final rule, in addition to implementing section 9311(a) of Public Law 99–509, we deleted the provision at § 413.64(k)(5) permitting a special interim payment for long lengths of stay cases.

This provision had been set forth in our August 15, 1986, final rule (51 FR 29386), before the enactment of Public Law 99–509. As explained in detail in our January 21, 1988, final rule (53 FR 1625), the amendments made by section 9311(a) of Public Law 99–509 did not include any provision for interim payments to prospective payment hospitals that are not on PIP, and we believed that, in light of the changes it was making to PIP, Congress did not believe such a provision was necessary. Therefore, we deleted this provision from the regulations. However, as a result of comments received objecting to the elimination of this provision, we reconsidered our position and subsequently revised our policy in regulations at § 412.116(d) in the final rule published on September 1, 1989 (54 FR 36495). (This issue is also discussed below in response to public comments.)

II. Discussion of Comments

In response to the January 21, 1988 final rule with comment period (53 FR 1621), we received 31 comments from or on behalf of hospitals and their associations. The following is a summary of the comments and our responses to them.

A. Capital-Related Costs of Inpatient Hospital Services

As part of the January 21, 1988 final rule, which dealt primarily with PIP, we made an unrelated change to the regulations. Section 413.64(k)(6), dealing with reductions in capital payments under section 1886(g)(3) of the Act, was revised and redesignated as a new § 412.113(a)(2). As part of that change, we made a technical change in § 412.113(a)(1) by removing the language, "For cost reporting periods beginning before October 1, 1986," to reflect the fact that hospitals subject to the prospective payment system continued to be paid in part on a hospital-specific basis during the transition period to fully prospective payment, which was in effect for cost reporting periods beginning on or after October 1, 1983, and before October 1, 1987.

Comment: One commenter requested that the date be changed to October 1, 1987 and that the language be reinserted in § 412.113(a)(1). The request was made to reflect the fact that for cost reporting periods beginning on or after October 1, 1987, with the exception of sole community hospitals (see § 412.92), prospectively determined payments based on national and regional standardized rates do not depend upon an individual hospital's cost experience. Therefore, according to the commenter, the capital consistency rule (discussed fully in the final prospective payment system rule published September 30, 1988 (53 FR 38517)) addressed in § 412.113(a)(1) would not be applicable for periods beginning on or after October 1, 1987. The commenter also believed that the capital consistency rule should not be applicable to sole community hospitals after that date, notwithstanding that those hospitals continue to receive a prospective payment, part of which is based on their own cost experience.

Response: As we explained in our September 30, 1988, final rule (53 FR 38517), the consistency rule required that the classification of capital-related and direct medical education costs remain constant for each hospital during the prospective payment transition period. This rule was necessary since a portion of the prospectively determined payment during the transition to fully Federal standardized rates was based upon a hospital's own cost experience (that is, the hospital-specific rate).

In that final rule, we noted that the consistency rule, for capital-related costs and for direct medical education costs, was no longer necessary due to the expiration of the prospective payment transition period. Accordingly, we removed the language from the regulations text concerning the consistency rule. With regard to the commenter's concern regarding sole community hospitals, we agree that the capital consistency rule is no longer applicable for these hospitals.

Comment: A commenter noted that the capital reduction percentages in § 412.113(a)(2) have been superseded by section 4006 of the Omnibus Budget Reconciliation Act of 1987 (Public Law 100–203).

Response: Section 4006 of OBRA 1987 amended section 1886(g)(3)(A) of the Act and provided that the inpatient capital reduction be increased to 12 percent for FY 1988, effective for discharges or portions of cost reporting periods occurring on or after January 1, 1988. For discharges or portions of cost reporting periods occurring in FY 1989, the reduction was 15 percent. Section

6002 of OBRA 1989 amended section 1886(g)(3)(A) of the Act and mandated a reduction of 15 percent of payments for capital-related costs of hospital inpatient services identified under section 1886(d) attributable to portions of cost reporting periods or discharges occurring during the period beginning January 1, 1990 and ending September 30, 1990. Section 4001(a) of OBRA 1990 extended the 15 percent reduction applicable to prospective payment hospitals to September 30, 1991. These provisions were incorporated into regulations at § 412.113 on August 30, 1991 (56 FR 43448).

In addition to those changes, additional changes to § 412.113 were necessary to conform the regulations with the statute. Specifically, we revised § 412.113(a)(2) (B), (C), and (D) to conform the dates and the percentages specified in these sections to the law.

B. Special Interim Payment for Unusually Long Lengths of Stay

Comment: Twenty-nine commenters objected to our elimination of the provision for special interim payments for unusually long lengths of stay. The commenters generally stated that the fact that the legislation did not address this provision indicated Congressional intent that it be retained. They noted that the legislation included a specific provision permitting the Secretary to make appropriate accelerated payments to a hospital subject to the prospective payment system that has significant cash-flow problems resulting from the operation of its intermediary or from unusual circumstances of the hospital's operation. They asserted that this provision was intended to address a variety of unusual circumstances that cause cash-flow problems, including situations in which a hospital experiences cash-flow problems due to long-stay patients.

Many commenters said that we had originally provided for the special interim payments in order to alleviate the cash-flow problems that certain hospitals might encounter after they no longer received PIP. The commenters indicated that a cash-flow shortage continues to be a problem for a hospital that cannot receive any Medicare payment for a patient who has been in the hospital for an unusually long stay. Some commenters stated that the problem was more acute for small hospitals or for rural hospitals, but all believed that not receiving an interim payment for a long-stay patient represented a hardship to a hospital.

Some pointed out that an interim payment is particularly important for long-stay patients because, generally, the most intensive resource consumption occurs early in a patient's stay. Others commented that the problem is exacerbated in areas where there is a shortage of Medicare-participating skilled nursing facility (SNF) beds, since such shortages tend to increase the number of long-stay patients remaining in the hospitals awaiting SNF placement.

One commenter recommended that the threshold for interim billing be based on the outlier threshold for the DRG assigned to the case and that the hospital should be given an opportunity to submit an interim bill for long-stay patients every 30 days after the original interim bill.

Response: Due to the importance of this issue to the hospital industry, we have already responded to these comments and addressed these issues in a final rule published on September 1, 1989 (54 FR 36495). As we explained in detail in that document, based on our review of these comments, we reconsidered our position on this issue and revised § 412.116(d) accordingly.

Prospective payment system hospitals that do not receive PIP may request special interim payments after a patient has been in the hospital at least 60 covered days and thereafter at intervals of at least 60 days. The initial special interim payment will be made at the rate for the appropriate DRG based on the diagnosis, procedures and other pertinent information reported on the initial interim bill.

The payment for the initial interim bill will be determined as if the bill were the final bill. That is, the intermediary will pay the hospital based on the DRG determined for the bill plus any outlier payments as of the date of the last day for which services have been billed. Subsequent interim bills, including the final bill, will be processed as adjustment bills, with payment determined as if the bill were the final bill. Generally, the adjusted payment from subsequent bills will result from outlier payments accruing since the previous bill. These special interim payments were effective September 1, 1989 for all qualifying current and subsequent inpatient admissions.

C. Method of Payment

Comment: One commenter asked that we reconsider our position and revoke the regulation that eliminates PIP for many hospitals. The commenter pointed out that as hospitals deplete their working capital, operating cash becomes very critical, and the new regulation will create additional cash-flow problems for the hospital industry.

Response: We believe that the regulation properly implements the statutory provisions, and, therefore, should continue in effect. However, as discussed above, we have reconsidered our elimination of the provision for an interim payment after a Medicare beneficiary's length of stay exceeds 60 days. The special interim payment provision at § 412.116(d) should assist prospective payment hospitals in maintaining cash flow in cases of long-stay Medicare patients.

D. Periodic Interim Payments

Comment: One commenter stated that certain disproportionate share hospitals and small rural hospitals that could elect PIP under the provisions in § 412.116 (b)(1)(ii) or (b)(1)(iii) may not have been given clear instructions in sufficient time to make a proper request for PIP prior to July 1, 1987, as required in §§ 412.116 (b)(1)(ii) and (b)(1)(iii). Accordingly, the commenter requested that HCFA provide a 60-day window of opportunity to eligible disproportionate share and small rural hospitals to request PIP.

Response: We believe that eligible disproportionate share and small rural hospitals had adequate notice to request PIP prior to July 1, 1987. In May of 1987, we issued Program Memorandum A–87–4 that advised intermediaries to notify the hospitals to request PIP. (Subsequent instructions were included in the Intermediary Manual Part 3, section 3600.1.) Intermediaries, accordingly, notified their providers. Since we received no other comments indicating any problems in this regard, we do not believe that an additional extension was necessary for these hospitals to request PIP.

E. Payment to Providers of Service

Comment: One commenter asked whether a small rural hospital that qualifies for prospective payment as an urban hospital under section 1886(d)(8)(B) of the Act, as added by section 4005(a) of the Omnibus Budget Reconciliation Act of 1987 (Public Law 100–203), would become ineligible to receive PIP when section 4005(a) went into effect.

Response: Section 1886(d)(8)(B) of the Act provides that if certain conditions are met, hospitals located in a rural county adjacent to one or more urban areas are treated, for purposes of determining prospective payment amounts, as being located in the urban metropolitan statistical area to which the greatest number of workers in the county commute. This provision relates solely to the amount of prospective payment a hospital will receive based

on its geographic classification, and does not change the status of small rural hospitals that have qualified to receive PIP under section 1815(e) of the Act.

F. Payment to Hospitals Subject to the Prospective Payment System

Comment: In the January 21, 1988 final rule, we stated that when an intermediary that had not met the prompt payment standard has again met that standard for 3 consecutive calendar months, the hospitals will receive notice (concurrent with their removal from PIP) that they will no longer receive PIP, effective with discharges occurring the first day of the month following the third consecutive month in which the requirements were met (53 FR 1624). One commenter asserted that this policy did not provide sufficient time for intermediaries to change the payment method from PIP to claim-by-claim. The commenter also pointed out that providers would have no advance notice of PIP removal. Another commenter suggested that removal should be no sooner than 2 weeks after notification.

Response: We agree that providers need advance notification of removal from PIP, and intermediaries need additional time to make changes in their payment method. Accordingly, intermediaries now will notify hospitals as follows:

If an intermediary that has consistently failed (that is, for 3 consecutive months) to meet the prompt payment requirements subsequently meets the requirements for 2 consecutive calendar months, it must so notify its hospitals within 7 working days after the end of the 2nd month. Within 7 working days after the end of the following month, the intermediary must notify the hospitals whether it met or failed the prompt payment requirements for that month.

- If the intermediary failed to meet the requirements, its hospitals may continue to receive PIP, and the intermediary is not required to further notify the hospitals until the intermediary again meets the prompt payment requirements for 2 consecutive calendar months.
- If the intermediary met the requirements (that is, complied with the prompt payment requirements for 3 consecutive calendar months), the intermediary will notify its hospitals that they will no longer receive PIP effective with discharges occurring on the first day of the following month, that is, 30 days after the intermediary meets the requirements. The intermediary is not required to further notify the hospitals regarding its timeliness in paying claims until it again fails to meet the prompt payment requirements for 2 consecutive calendar months.

If an intermediary has consistently met the requirements but subsequently fails to meet them for 2 consecutive calendar months, it must so notify the hospitals within 7 working days after the end of the 2nd month. Within 7 working days after the end of the following month, the intermediary must notify the hospitals whether it met or failed to meet the requirements for that month.

- If the intermediary met the requirements, the hospitals continue not to receive PIP, and the intermediary is not required to further notify the hospitals until the intermediary again fails to meet the requirements for 2 consecutive calendar months.
- If the intermediary failed to meet the requirements (that is, did not comply with prompt payment requirements for 3 consecutive calendar months), the intermediary will notify the hospitals that they may request to receive PIP.

If a hospital's request is received by the intermediary by the 15th day of the month (or the first regular business day after the 15th day of the month), the intermediary will initiate PIP for a qualifying hospital effective with discharges occurring on or after the first day of the following month, that is, 30 days after the intermediary failed to meet the requirements for 3 consecutive calendar months. If the hospital's request is not received by the intermediary by the 15th day of the month (or the first regular business day after the 15th day of the month), the intermediary will process the request for PIP under its usual procedures for PIP requests. The intermediary is not required to further notify its hospitals regarding its timeliness in paying claims until it meets the prompt payment requirements for 2 consecutive calendar months.

G. Limitation on Reelection

In addition to the changes discussed above, we are making an additional revision to the PIP regulations at § 412.116(b)(4)(iii) concerning the limitation on the reelection of PIP. Although we received no public comments on this issue, we believe that the change is necessary to remedy a flaw in the regulations set forth in our January 21, 1988, final rule, and that it is clearly beneficial to hospitals. Section 412.116(b)(4)(iii) provides that if a disproportionate share hospital or a small rural hospital receiving PIP under the criteria set forth in § 412.116 (b)(1)(ii) or (b)(1)(iii), respectively, is removed from PIP, either by its own request or by the intermediary, it may reelect to receive PIP only under the criteria set forth in § 412.116(b)(1)(i). (That is, the availability of PIP to the hospital would be subject to the intermediary's prompt payment of claims.) We believe that if a hospital requests to be removed from PIP, § 412.116(b)(4)(iii) should continue to apply. However, § 412.116(b)(4)(iii) may, in some cases, discourage intermediaries from properly removing hospitals that no longer qualify since such hospitals could no longer receive PIP except under the provisions of § 412.116(b)(1)(i).

Accordingly, we are revising § 412.116(b)(4)(iii) to provide that if an intermediary removes a qualifying disproportionate share hospital or a small rural hospital from PIP because the hospital no longer meets the requirements for PIP under § 413.64(h), a hospital qualifying under § 412.116 (b)(1)(ii) or (b)(1)(iii) may subsequently reelect to receive PIP, subject to the requirements of § 413.64(h). This reelection also applies in situations, with regard to a hospital that has changed ownership or undergone a change in management, in which the intermediary removes the hospital from PIP temporarily to evaluate whether or not the hospital, under its new ownership or new management, meets the requirements of § 413.64(h).

H. Editorial Comment

Comment: One commenter pointed out two errors in the preamble of the January 21, 1988 final rule. Specifically, the commenter noted that on page 1621, column 3, paragraph 3, in the sentence reading "These interim payments are determined by estimating the reimbursable amount for the year based on the previous year's experience and on information for the current year and dividing that amount in to 29 equal payments made biweekly.", "29" should be changed to "26". Also, in the same paragraph, the last sentence reading "These payments will continue to be made on a biweekly basis" should have read "These payments will continue to be made 2 weeks after the end of a biweekly period of service."

Response: The commenter correctly suggested that the preamble read incorrectly. However, the regulations at § 412.116(c) do read correctly, and thus we did not believe it was necessary to publish a correction notice. We note that payment for the indirect teaching adjustment and capital-related costs are no longer made on a biweekly basis. As discussed in the September 30, 1988 **Federal Register** (53 FR 38517), payment for the indirect teaching

adjustment is now made on a bill-by-bill basis. In addition, the payment methodology for hospital inpatient capital-related costs for hospitals paid under the prospective payment system has been revised. Under the current methodology, in effect since October 1, 1991, a predetermined amount per discharge is made for Medicare inpatient capital-related costs. However, payments on an interim basis are still made for direct medical education.

III. Changes to the Regulations

This final rule responds to the comments concerning the changes we made in the January 21, 1988, final rule with comment period (53 FR 1621). As discussed in section II above, we are making, or have made, the following changes to the regulations.

- As a result of comments received objecting to the elimination of the provision for special interim payments for unusually long lengths of stay, we reconsidered our position and revised our policy. Due to the importance of this issue to the hospital industry, we have already published this policy in regulations at § 412.116(d) in the final rule published on September 1, 1989 (54 FR 36495).
- As discussed above, we are revising § 412.116(b)(4)(iii) to provide that if a hospital that is receiving periodic interim payments under the criterion set forth in §§ 412.116 (b)(1)(ii) or (b)(1)(iii) is removed from that method of payment at its own request, it may reelect to receive periodic interim payments only under the criterion set forth in paragraph § 412.116(b)(1)(i). However, if the hospital is removed from that method of payment by its intermediary because it no longer meets the requirements for PIP under § 413.64(h), a hospital qualifying under the provisions of §§ 412.116 (b)(1)(ii) or (b)(1)(iii) may later reelect to receive periodic interim payments subject to the requirements in § 413.64(h).
- As a result of section 9311(a) of Public Law 99–509, PIP was made available for prospective payment hospitals, including distinct part psychiatric or rehabilitation units, if—(1) The intermediary fails to meet the prompt payment requirements for three consecutive months, (2) the hospital has a disproportionate share adjustment percentage of at least 5.1 percent, or (3) the hospital is a rural hospital that has 100 or fewer beds. These provisions were discussed extensively in the January 21, 1988, final rule with comment period (53 FR 1623), and were at that time incorporated in regulations at § 412.116(b). Section 9311(a) of Public Law 99–509 also allowed hospices to receive PIP. This provision was also addressed in the preamble to the January 21, 1988, final rule with comment period (53 FR 1625), and was at that time incorporated in regulations at § 418.307. However, when we added § 412.116(b) in the January 21, 1988 rule, we did not also specify in § 413.64(h) that PIP was available to distinct part psychiatric and rehabilitation units, and to hospices. To remedy that inadvertent omission, we are now adding § 413.64(h)(2) (v) and (vi) to specify that PIP is available to distinct part psychiatric units and rehabilitation units, and to hospices, respectively. In addition, we are revising § 418.307 by adding the explanation of how payments are made under the PIP method, now located only in § 413.64(h).

IV. Impact Statement

Unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612). For purposes of the RFA, we consider all hospitals to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any final rule that may have significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. With the exception of hospitals located in certain rural counties adjacent to urban areas, for purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds.

This final rule confirms and responds to comments on our January 21, 1988 interim final rule. We received no comments on our statement in that rule that the PIP provisions would not have a substantial economic impact, and we are making no significant changes in this final rule.

We have determined, and the Secretary certifies, that this final rule will not have a significant effect on either a substantial number of small entities or on small rural hospitals. Therefore, we have not prepared a regulatory flexibility analysis or an analysis of the effects of this rule on small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was not reviewed by the Office of Management and Budget.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

List of Subjects

42 CFR Part 412

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

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

42 CFR Chapter IV, is amended as follows:

A. Part 412 is amended as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

1. The authority citation for Part 412 continues to read as follows:

Authority: Secs. 1102, 1815(e), 1820, 1871 and 1886 of the Social Security Act (42 U.S.C. 1302, 1395g(e), 1395i–4, 1395hh and 1395ww).

2. In § 412.116, paragraph(b)(4)(iii) is revised to read as follows:

§ 412.116 Method of Payment.

* * * * *

(b) *Periodic interim payments* * * *

* * * * *

(4) *Termination of periodic interim payments.* * * *

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(iii) *Limitation on reelection.* If a hospital that is receiving periodic interim payments under the criterion set forth in paragraph (b)(1)(ii) or (b)(1)(iii) of this section is removed from that method of payment at its own request, it may reelect to receive periodic interim payments only under the criterion set forth in paragraph (b)(1)(i) of this section. However, if the hospital is removed from that method of payment by its intermediary because it no longer meets the requirements of § 413.64(h) of this chapter, that hospital may subsequently reelect to receive periodic interim payments if it qualifies

under the provisions of paragraph (b)(1)(ii) or (b)(1)(iii) of this section, subject to the requirements in § 413.64(h) of this chapter.

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B. Part 413 is amended as follows:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES

1. The authority citation for Part 413 continues to read as follows:

Authority: Secs. 1102, 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); sec. 104(c) of Pub. L. 100–360 as amended by sec. 608(d)(3) of Pub. L. 100–485 (42 U.S.C. 1395ww (note)); and sec. 101(c) of Pub. L. 101–234 (42 U.S.C. 1395ww (note)).

2. In § 413.64, paragraphs (h) (2), (3), (4), (5), and (6), are redesignated as paragraphs (h) (3), (4), (5), (6), and (7), respectively; a new paragraph (h)(2) is added; paragraphs (h)(1) (i), (ii), (iii), and (iv) are redesignated as paragraphs (h)(2) (i), (ii), (iii), and (iv) respectively; paragraph (h)(1) is revised; and new paragraphs (h)(2) (v) and (vi) are added to read as follows:

§ 413.64 Payments to providers: Specific rules.

* * * * *

(h) *Periodic interim payment method of reimbursement*—(1) *Covered services furnished before July 1, 1987.* In addition to the regular methods of interim payment on individual provider billings for covered services, the periodic interim payment (PIP) method is available for Part A hospital and SNF inpatient services and for both Part A and Part B HHA services.

(2) *Covered services furnished on or after July 1, 1987.* Effective with claims received on or after July 1, 1987, the periodic interim payment (PIP) method is available for the following:

* * * * *

(v) Part A services furnished in hospitals paid under the prospective payment system, including distinct part psychiatric or rehabilitation units, as described in § 412.116(b) of this chapter.

(vi) Services furnished in a hospice as specified in part 418 of this chapter. Payment on a PIP basis is described in § 418.307 of this chapter.

* * * * *

C. Part 418 is amended as follows:

PART 418—HOSPICE CARE

1. The authority citation for Part 418 continues to read as follows:

Authority: Secs. 1102, 1812(a)(4), 1812(d), 1813(a)(4), 1814(a)(7), 1814(i), 1816(e)(5), 1861(dd), and 1871 of the Social Security Act (42 U.S.C. 1302, 1395d(a)(4), 1395d(d), 1395e(a)(4), 1395f(a)(7), 1395f(i), 1395h(e)(5), 1395x(dd), and 1395hh); and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

2. Section 418.307 is revised to read as follows:

§ 418.307 Periodic interim payments.

Subject to the provisions of § 413.64(h) of this chapter, a hospice may elect to receive periodic interim payments (PIP) effective with claims received on or after July 1, 1987. Payment is made biweekly under the PIP method unless the hospice requests a longer fixed interval (not to exceed one month) between payments. The biweekly interim payment amount is based on the total estimated Medicare payments for the reporting period (as described in §§ 418.302–418.306). Each payment is made 2 weeks after the end of a biweekly period of service as described in § 413.64(h)(5) of this chapter. Under certain circumstances that are described in § 413.64(g) of this chapter, a hospice that is not receiving PIP may request an accelerated payment.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: March 24, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: May 16, 1994.

Donna E. Shalala,

Secretary.

[FR Doc. 94–17309 Filed 7–18–94; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 12

RIN 1090–AA41

Administrative and Audit Requirements and Cost Principles for Assistance Programs

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This final rule is in response to section 310 of Public Law 103–138 and sections 502 and 503 of Public Law 103–126. Public Law 103–138, the "Department of the Interior and Related Agencies Appropriations Act, 1994," and Public Law 103–126, the "Energy and Water Development Appropriations Act, 1994," extend the Buy American requirements which had been included in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, to awards of financial assistance under the Department's general appropriation for Fiscal Year 1994, as well as to similar awards by the Bureau of Reclamation. These provisions require that no funds appropriated or transferred pursuant to the Act can be expended by an entity unless the entity agrees that in expending the assistance they will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a–10c, popularly known as the "Buy American Act").

EFFECTIVE DATE: August 18, 1994.

FOR FURTHER INFORMATION CONTACT: Dean A. Titcomb (Chief, Acquisition and Assistance Division), (202) 208–6431.

SUPPLEMENTARY INFORMATION: On October 5, 1992, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 ("the Act") was signed into law. Section 319 of the Act was entitled "Buy American Requirements." The section applied to funds appropriated or transferred pursuant to the Act for the purchase of any equipment or product that may be authorized to be purchased with financial assistance. The provision expressed the "sense of the Congress" that entities receiving the assistance, purchase only American-made equipment and products.

Section 319(b)(2) required that in providing the financial assistance under the Act, the Secretary shall provide to each recipient of the assistance a notice describing the requirement. No other specific guidance was given regarding the implementation of this requirement.

The Department proposed to revise 43 CFR part 12, by adding subpart E to implement these requirements. No specific guidance was provided by Congress, so the Department decided to base its implementation upon similar rules in the Federal Acquisition Regulation (FAR).

The Department published a notice of proposed rulemaking on August 12, 1993 (58 FR 42918) to implement the requirements included in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993. However, the final rule was not published before the end of Fiscal Year 1993.

Following the inclusion of the Buy American Requirements in the Department of the Interior and Related Agencies Appropriations Act, 1994 and the Energy and Water Development Appropriations Act, 1994, the Department published a notice reopening the comment period on January 14, 1994 (59 FR 2343).

The Department proposed to continue its plans to revise 43 CFR part 12, by adding subpart E to implement the requirements and to issue a final rule based on the proposed rule published on August 12, 1993.

Only one public comment was received in response to the notice of proposed rulemaking. Although the purpose of reopening the comment period was to allow for the receipt of more comments to be considered prior to publication of the final rule, no additional public comments were received.

Comments on the Proposed Rule

The commenter requested an exemption from the provisions of the "Buy American Act" because application of the provisions would entail unreasonable costs unless documentation of the exempted articles or the applicability of exception criteria was done. In addition, the commenter stated that although these criteria are reasonable, maintaining the additional layer of administration to monitor and document such exceptions would be burdensome and self-defeating for using the Department's funding assistance most effectively.

While we are sympathetic with their dilemma, the Department lacks the authority to grant a blanket exemption to the provisions of the Act.

Several internal comments received were considered and changes were made in the final rule to reflect them. A discussion of these changes follows:

Definitions for *concern, labor surplus area, labor surplus area concern* and *small business* have been added to § 12.705 in response to a comment that without definitions, the terms are subject to more than one interpretation.

Language in subparagraph (e) of § 12.710(e) has been revised and reflects a modified version of FAR coverage.

In subparagraph (d)(4) of § 12.710; subparagraphs (a) and (c) of § 12.715; subparagraph (a) of § 12.720; subparagraphs (b) (3) and (4) of § 12.730; subparagraphs (a) (2) and (3) of § 12.810; and subparagraphs (a) and (b) of § 12.815 the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official now makes the nonavailability determination or has approval authority. This change was made in response to a comment that to require recipients to obtain Departmental approval when not specifically required by statute imposed an unnecessary administrative and paperwork burden.

In § 12.720, the list of excepted articles, materials and supplies has been removed from the rule. A reference to the existing list in FAR § 25.108 (48 CFR 25.108) is included instead.

In § 12.820, the language has been changed to state that violation of the Buy American Act is a cause for debarment and information concerning a failure to comply with the requirements shall be promptly reported, investigated, and referred when appropriate to the Department of the Interior employee responsible for administering the assistance agreement. This change was made in response to a comment that the existing language precluded application of any discretion or judgement in applying debarment remedy in the case of a Buy American Act violation. The commenter also stated that the existing language denied the recipient any opportunity for the due process hearings required by the debarment regulations and denied the recipient any opportunity to lessen the punishment by implementing corrective or remedial actions. The new language describes the review process more comprehensively.

In subparagraph (b) of § 12.725, the word, "grantee" has been added to more clearly specify that the awarding official of the organization shall insert the clause at § 12.730, Buy American Act-Supplies and the word, "in" was inserted before solicitations.

In § 12.825, the word, "grantee" has been added to more clearly specify that the awarding official of the grantee organization shall insert the clause at § 12.830, Buy American Act-Construction Materials.

Several typographical errors have now been corrected. These include the following:

Section 12.110 Policy, has been corrected to read § 12.710.

The reference to § 12.120 in subparagraph (a)(3) in § 12.810 has been corrected to read § 12.720.

Because of the applicability of different appropriation acts and a slight change in the language, the wording in the notice in subparagraph (b) of § 12.710 has been changed to account for the reference to language in Public Law 103–138. A separate notice has been added with subparagraph (c) of § 12.710 to account for the reference to language in Public Law 103–126 and its use only for awards made by the Bureau of Reclamation.

Clarification was requested regarding the use of the term "agency" since in the rule it could be read in some places as referring to the Federal granting agency, but in others it looked like it meant some level in the recipient organization. The change made to use the term, "head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official" adds clarity.

Another commenter asked that clarification be added concerning whether the Buy American Act takes precedence over related State laws (thus requiring equal consideration of all domestic products) or whether States may continue to apply their own restriction, as long as the resultant award is for a domestic product. Our interpretation of 43 CFR part 12, Subpart C, is that States are required to ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. On this basis, the requirements of the Act take precedence over related State laws.

Executive Order 12866, Paperwork Reduction Act, and Regulatory Flexibility Act

This rule was not subject to Office of Management and Budget review under Executive Order 12866.

The Department has determined that this rule will not have a significant economic impact on a substantial number of small entities since it is anticipated that no additional costs will be imposed on a substantial number of small entities as a result of the rule. This rule does not contain a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Environmental Effects

The Department has determined that this rule does not constitute a major Federal action having a significant impact on the human environment under the National Environmental Policy Act of 1969.

Executive Order No. 12778

The Department has certified to the Office of Management and Budget that this rule meets the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order No. 12778.

List of Subjects in 43 CFR Part 12

Cooperative agreements, Grants administration, Grant program.

Dated: June 29, 1994.

Ira Michael Heyman,

Acting Assistant Secretary-Policy, Management and Budget.

Title 43, part 12 of the Code of Federal Regulations is amended as set forth below:

PART 12—ADMINISTRATIVE AND AUDIT REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

1. The authority citation for part 12 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 7501; 41 U.S.C. 701 *et seq.*; sec. 310, Pub. L. 103–138, 107 Stat. 1379; sections 502 and 503, Pub. L. 103–126, 107 Stat. 1312; E.O. 12549, 3 CFR, 1986 Comp., p. 189; E.O. 12674, 3 CFR, 1989 Comp., p. 215; E.O. 12731, 3 CFR, 1990 Comp., p. 306; OMB Circular A–102; OMB Circular A–110; OMB Circular A–128; and OMB Circular A–133.

2. Part 12 is amended by adding Subpart E to read as set forth below.

Subpart E—Buy American Requirements for Assistance Programs

Buy American Act—Supplies

Sec.

Buy American Act—Construction Materials

Subpart E—Buy American Requirements for Assistance Programs

Buy American Act—Supplies

§ 12.700 Scope.

This subpart implements section 310 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1994 (Public Law 103–138, 107 Stat. 1312) and section 502 of the Energy and Water Development Appropriations Act, 1994 (Public Law 103–126, 107 Stat. 1379). This subpart requires that no funds appropriated or transferred pursuant to the respective Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a–10c, popularly known as the "Buy American Act"). It applies to procurement contracts under grants and cooperative agreements which provide for the purchase of equipment and products. Section 502 of Public Law 103–126, 107 Stat. 1379, only applies to awards made by the Bureau of Reclamation.

§ 12.705 Definitions.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into the end products.

Concern, as used in this subpart, means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, to an individual, partnership, corporation, joint venture, association, or cooperative.

Domestic end product, as used in this subpart, means (a) an unmanufactured end product mined or produced in the United States; or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with § 12.710(c) (3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic. On acquisitions above $25,000 in value, components of Canadian origin are treated as domestic.

Domestic offer, as used in this subpart, means an offered price for a domestic end product, including transportation to destination.

End product, as used in this subpart, means those articles, materials, and supplies to be acquired for public use under the grant, cooperative agreement, or procurement contract awarded under the grant or cooperative agreement.

Foreign end product, as used in this subpart, means an end product other than a domestic end product.

Foreign offer, as used in this subpart, means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

Instrumentality, as used in this subpart, does not include an agency or division of the government of a country.

Labor surplus area, as used in this subpart, means a geographical area identified by the Department of Labor in accordance with 20 CFR part 654, subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

Labor surplus area concern, as used in this subpart, means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

United States, as used in this subpart, means the states thereof, the District of Columbia, and the territories and possessions of the United States.

§ 12.710 Policy.

(a) In the case of any equipment or product that may be authorized to be purchased with financial assistance provided under Public Law 103–138, it is the sense of Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(b) In awarding financial assistance under Public Law 103–138, bureaus and offices excluding the Bureau of Reclamation shall provide to each recipient of the assistance a notice providing the statement in the following format:

Notice

Pursuant to Sec. 310 of the Department of the Interior and Related Agencies Appropriations Act, 1994, Public Law 103–138, 107 Stat. 1312, please be advised of the following:

In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available in this Act, it is the sense of the Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(c) In awarding financial assistance under Public Law 103–126, the Bureau

of Reclamation shall provide to each recipient of the assistance a notice providing the statement in the following format:

Notice

Pursuant to Sec. 503 of the Energy and Water Development Appropriations Act, 1994, Public Law 103–126, please be advised of the following:

In the case of any equipment or products that may be authorized to be purchased with financial assistance provided under this Act, it is the sense of the Congress that entities receiving such assistance should, in expending the assistance, purchase only American-made equipment and products.

(d) The Buy American Act requires that only domestic end products be acquired for public use, except articles, materials, and supplies—

(1) For use outside the United States;

(2) For which the cost would be unreasonable, as determined in accordance with § 12.715;

(3) For which the agency head determines that domestic preference would be inconsistent with the public interest; or

(4) That are not mined, produced, or manufactured in the United States in sufficient and reasonable available commercial quantities, of a satisfactory quality (see § 12.720).

(e) The grantee's contracting officer may make a nonavailability determination under § 12.710(d)(4) for a procurement contract awarded under the grant or cooperative agreement if—

(1) The procurement action was conducted by full and open competition;

(2) The procurement action was publicly advertised; and

(3) No offer for a domestic end product was received; or

(f) The head of the grantee's contracting activity or designee may make a nonavailability determination under § 12.710(d)(4) for any circumstance other than specified in paragraph (e) of this section.

§ 12.715 Evaluating offers.

(a) Unless the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines otherwise, the offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer (see § 12.705), inclusive of duty, by—

(1) More than 6 percent, if the domestic offer is from a large business that is not a labor surplus area concern; or

(2) More than 12 percent, if the domestic offer is from a small business concern or any labor surplus area concern.

(b) The evaluation in paragraph (a) of this section shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation.

(c) If an award of more than $250,000 would be made to a domestic concern if the 12-percent factor were applied, but not if the 6-percent factor were applied, the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official shall decide whether award to the domestic concern would involve unreasonable cost.

§ 12.720 Excepted articles, materials, and supplies.

(a) As indicated in the Federal Acquisition Regulation (FAR), one or more agencies have determined that the articles, materials, and supplies on the list referred to in paragraph (b) of this section are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. This referenced list in paragraph (b) of this section is furnished for information only; an article, material or supply listed therein may be treated as domestic only when the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official has made a determination that it is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.

(b) Refer to the current list of excepted articles, materials, and supplies in FAR 25.108 (48 CFR 25.108).

§ 12.725 Solicitation provisions and contract clause.

(a) When quotations are obtained orally, vendors shall be informed that only domestic end products, other than end products excepted on a blanket or individual basis (see § 12.720), shall be acceptable, unless the price for an offered domestic end product is unreasonable (see § 12.715).

(b) The grantee awarding officer shall insert the clause at § 12.730, Buy American Act—Supplies, in solicitations for procurement contracts awarded under the grant or cooperative agreement for the purchase of supplies, or for services involving the furnishing of supplies, for use within the United States.

§ 12.730 Buy America Act—Supplies

As prescribed in § 12.725, insert the following clause:

Buy American Act—Supplies

(a) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic end products.

Components, as used in this clause, means those articles, materials, and supplies incorporated directly into the end products.

Domestic end product, as used in this clause, means an unmanufactured end product mined or produced in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in paragraphs (b)(2) or (3) of this clause shall be treated as domestic.

End products, as used in this clause, means those articles, materials, and supplies to be acquired for public use under this contract.

(b) The contractor shall deliver only domestic end products, except those—

(1) For use outside the United States;

(2) That the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;

(3) For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that domestic preference would be inconsistent with the public interest; or

(4) For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the cost to be unreasonable (see § 12.715).

(End of clause)

Buy American Act—Construction Materials

§ 12.800 Scope.

This subpart implements the Buy American Act (41 U.S.C. 10). It applies to procurement contracts awarded under a grant or cooperative agreement for the construction, alteration, or repair of any public building or public work in the United States.

§ 12.805 Definitions.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into construction materials.

Construction, as used in this subpart, means construction, alteration, or repair of any public building or public work in the United States.

Construction materials, as used in this subpart, means an article, material, and supply brought to the construction site for incorporation into the building or work.

Construction material also includes an item brought to the site pre-

assembled from articles, materials, and supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

Domestic construction material, as used in this section, means: (a) An unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the construction material and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with § 12.810(a)(3) are treated as domestic.

Foreign construction material, as used in this section, means as construction material other than a domestic construction material.

United States (see § 12.705).

§ 412.810 Policy.

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when—

(1) The cost would be unreasonable as determined in accordance with § 12.815;

(2) The head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that use of a particular domestic construction material would be impracticable; or

(3) The head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (see § 12.720).

(b) When it is determined for any reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the agreement. Findings justifying the exception shall be available for public inspection.

§ 12.815 Evaluating offers.

(a) The restrictions of the Buy American Act do not apply when the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that using a particular domestic construction material would unreasonably increase the cost or would be impracticable.

(b) When proposed awards are submitted to the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official for approval, each submission shall include a description of the materials, including unit and quantity, estimated costs, location of the construction project, name and address of the proposed contractor, and a detailed justification of the impracticability of using domestic materials.

§ 12.820 Violations.

Violation of the Buy American Act in the performance of a procurement construction contract under a grant or cooperative agreement is a cause for debarment. Information concerning a failure to comply with the clause at § 12.830, Buy American Act—Construction Materials, shall be promptly reported, investigated, and referred, when appropriate to the appropriate U.S. Department of the Interior employee responsible for administering the grant or cooperative agreement. (For debarment procedures, see subpart D of this part).

§ 12.825 Solicitation provision and contract clause.

The grantee awarding official shall insert the clause at § 12.830, Buy American Act—Construction Materials, in solicitations for procurement contracts awarded under a grant or cooperative agreement for construction inside the United States.

§ 12.830 Buy American Act—Construction materials.

As prescribed in § 12.825, insert the following clause in solicitations for procurement contracts awarded under a grant or cooperative agreement for construction inside the United States:

Buy American Act—Construction Materials

(a) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic construction material.

Components, used in this clause, means those articles, materials, and supplies incorporated directly into construction materials.

Construction material, as used in this clause, means an article, material, or supply brought to the construction site for incorporation into the building or work. Construction material also includes an item brought to the site pre-assembled from articles, materials or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

Domestic construction material, as used in this clause, means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the construction materials determined to be unavailable pursuant to § 12.810(a)(3) of 43 CFR part 12, subpart E shall be treated as domestic.

(b) The contractor agrees that only domestic construction material will be used by the contractor, subcontractors, materialmen, and suppliers in the performance of this agreement, except for foreign construction materials, if any, listed in this agreement.

(End of clause)

[FR Doc. 94–17359 Filed 7–18–94; 8:45 am]

BILLING CODE 4310–RF–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 5b

RIN: 0925–AD31

Privacy Act; Exempt System

AGENCY: Office of the Secretary, HHS.

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (HHS) is exempting a proposed system of records, 09–37–0021, "Public Health Service Records Related to Investigations of Scientific Misconduct, HHS/OASH/ORI," from certain requirements of the Privacy Act to protect records compiled during investigations of scientific misconduct and other related decision records leading to the investigation and to protect the identity of confidential sources in such investigations.

EFFECTIVE DATE: August 18, 1994.