Environmental Review Of Construction Grants Projects Under 205 (g)

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November 1983

EPA
REGION I

Prepared for
U S Environmental Protection Agency Region I
Environmental Evaluation Section
Under Contract No 68-04-1009

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INTRODUCTION

Section 205(g) of the Clean Water Act provides funds to the States for administration of delegated construction grants activities. These delegated activities include many aspects of the environmental review process for approval of proposed projects.

Region I of the U.S. Environmental Protection Agency first published a manual on this subject in July of 1980, entitled "Environmental Review under 205(g)". It was widely regarded as a very useful tool, providing a succinct overview of the Federal environmental statutes, regulations, guidelines and policies which affect the construction grants program of the Clean Water Act. Since 1980, significant amendments have been made to sections of the Clean Water Act and to EPA regulations and policies which govern the construction grants program. These amendments, along with amendments to other related environmental legislation, have prompted the production of this revised manual.

The seventeen chapters presented are intended to aid the states in Region I in meeting the Federal legal and procedural requirements for environmental reviews under the 205(g) delegation process. While EPA recognizes that each state has laws, regulations and policies which also have a bearing on the environmental review process, the emphasis of this manual is necessarily on the Federal perspective.

The major changes which this revised manual address are those resulting from the Clean Water Act Amendments of 1981. These amendments essentially remove EPA from active participation in the facilities planning, and sometimes design, process. Thus, in many cases, compliance with the National Environmental Policy Act (NEPA) is no longer required prior to the initiation of design since there is no Federal involvement until construction.

Chapter 2, the focal point of this manual, describes the revised NEPA review procedures. The subsequent chapters have been coordinated, to the extent permissible, with the framework presented by these procedures. Several chapters in this manual are significantly different from the earlier edition. These deal with two new Federal laws, the Coastal Barrier Resources Act and the Farmland Protection Policy Act; a new EPA initiative, financial capability; and a formerly unwritten Region I "policy", groundwater review procedures. A list of State and Federal offices which may be contacted to answer specific questions regarding these procedures is included at the end of each chapter. Also included in each chapter is a list of references pertaining to the chapter subject.

EPA and each state have learned through experience that comprehensive and open planning is the most certain way to obtain successful wastewater management projects. Such planning can only be achieved when it is supplemented by a high quality environmental review effort which is encouraged and implemented by all levels of government. We hope that the states will find this manual useful and will continue to work with us to achieve this goal.

NEPA/CEQ/EPA

2.0 LEGISLATIVE/REGULATORY FRAMEWORK

The National Environmental Policy Act of 1969 (NEPA) established the basic tenet that "environmental amenities and values... be given appropriate consideration in decision-making, along with economic and technical considerations" and set up the Environmental Impact Statement (EIS) as a means of accomplishing this. The Council on Environmental Quality (CEQ) was established by the Act to oversee its implementation through monitoring and continuing policy development.

CEQ originally issued guidelines in 1970 and in 1973 for preparation of Environmental Impact Statements. In 1978, CEQ replaced the guidelines with formal regulations which were intended to provide more uniform procedures among agencies and to better achieve NEPA's goals. CEQ's "National Environmental Policy Act Implementation of Procedural Provisions; Final Regulations" [40 CFR 1500-1508] were issued November 29, 1978.

These regulations are binding on all Federal agencies. They provide uniform standards for conducting environmental reviews, and they establish formal guidance for use by the courts in interpreting NEPA.

Section 1507.3 requires each Federal agency to adopt procedures to implement NEPA in accordance wtih the CEQ regulations. Accordingly, on November 6, 1979, EPA published "Implementation of Procedures on the National Environmental Policy Act" [40 CFR 6]. On March 8, 1982, EPA published an interim final amendment to these regulations to include procedures for granting categorical exclusions from the substantive environmental review requirements.

Subpart E of the EPA regulations [Sections 6.500 - 6.510] sets forth the environmental review procedures for the Wastewater Treatment Construction Grants Program which was established under the Clean Water Act.

The basic elements include preparation of an Environmental Information Document (EID) by the Grantee, review of the EID by State and Federal officials, and a finding by EPA that the project will have no significant adverse impacts (FNSI) or that an Environmental Impact Statement is required.

Under the 1979/1982 procedures, the majority of the environmental analysis and review prescribed by Subpart E occurred during the Step 1 planning phase, before the award of the Step 2 design grant. Except for the categorical exclusion provisions, these are the procedures that were described in the 1980 edition of this Manual.

On December 29, 1981, the Clean Water Act was amended by PL 97-117. Among other changes, this amendment eliminated Federal grants "for the purpose of providing assistance solely for facility plans, or plans, specifications, and estimates for any proposed project for the construction of treatment works." Exceptions for Step 2 design grants are made for communities where the population is 25,000 or less and the Step 3 building cost is $8 million or less.

On May 12, 1982, EPA published interim final regulations [40 CFR 35] to implement the revisions to the Construction Grants Program. The Step 3 (or 2+3) grant applicant must still meet the environmental requirements of NEPA; however, elimination of Step 1 planning and Step 2 design grants effectively eliminates direct Federal involvement in the facilities planning and design phases of wastewater treatment works projects. This means that EPA's 1979/82 environmental review procedures as set forth in Subpart E are no longer appropriate for projects which did not receive Step 1 grant assistance on or before December 29, 1981.

On January 7, 1983, EPA published a proposed amendment to 40 CFR 6 Subpart E, "National Environmental Policy Act; Environmental Review Procedures for the Wastewater Treatment Construction Grants Program, Proposed Rule" (see Attachment 2-1). This document provides for procedural and minor substantive amendments to the environmental review procedures to accommodate the changes in the construction grants program. It is these procedures which serve as the basis for the environmental review process described in this Manual.

2.1 INCORPORATING OTHER ENVIRONMENTAL REVIEW REQUIREMENTS

While NEPA is very broad and general, and mandates consideration of all the components of overall environmental well-being, there are a number of other laws and policies, both pre- and post-dating NEPA, which promote the protection of specific environmental

resources. These laws affect Federal decision-making under their own independent authority and must be complied with regardless of NEPA. The procedures required under these acts, however, can often be efficiently absorbed into the NEPA process whenever NEPA compliance is required.

For example, if an endangered species is to be affected by a Federally-funded project, the Endangered Species Act requires that funding agency to follow specific procedures, including preparation of a biological assessment, in order to comply with the law. At the same time, under NEPA, the presence of the endangered species is a significant feature of the existing environment, and impacts to that species should be weighed by the agency in its decision-making process. Identifying the presence of the species in the area and predicting the project's impact on it is, therefore, a necessary task under both acts. However, the actual task need only be done once if the agency's staff is aware of all applicable environmental laws and can coordinate all the requirements during the environmental review process.

EPA's and CEQ's regulations recognize an agency's responsibilities to carry out these additional procedures and require that the responsible official integrate the procedures into the NEPA review to greatest extent practical.

EPA's November 1979 Procedures, Subpart C, identify these independent authority provisions and describe their central requirements. Subsequent chapters of this Manual are devoted to discussing these requirements in more detail.

2.2 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The environmental review process for projects that were funded as of December 29, 1981 remains substantially the same as the process which was described in the 1980 edition of this manual. The procedures described in the following paragraphs are the new procedures proposed in the January 7, 1983 regulations to implement the revised construction grants program. They apply only to those projects funded after December 29, 1981.

Although the major elements are similar, the revised NEPA review process for wastewater construction grants has two variations depending on whether the Grantee is eligible for a Step 3 grant or for a Step 2+3 grant. The major steps for both of these variations are shown

on Figures 2.1 and 2.2 respectively and are discussed in detail below. The Step 3 grant review procedure shown in Figure 2.1 is anticipated to be the more common variation.

It should be noted that the flow of activities shown in Figures 2.1 and 2.2 represent the order of actions that will generally work best for producing a smooth environmental review process. Some of the steps, such as determination of project status, are not required to occur in any specific order. These have been indicated by dashed lines.

2.2.1 Determination of Project Status

The proposed EPA procedures [40 CFR 35.2113 and 6.504 (c)] encourage grant applicants to consult with EPA early in the facilities planning process to determine the appropriateness of a categorical exclusion, or of early preparation of a FNSI or an EIS.

This step, while not specifically required by the regulations, is important for several reasons. First, EPA is ultimately responsible for ensuring that environmental issues have been adequately addressed. EPA can require further studies or preparation of an Environmental Impact Statement even after all of the planning and design work has been completed and approved by the State. Second, Environmental Impact Statements can take up to two years to prepare. Substantial time savings can be realized if the need for an EIS can be identified early in the planning process. This in turn can minimize escalation of project costs. Finally, receiving a Categorical Exclusion could relieve the Grantee from having to prepare an EID or a delegated state from having to prepare a preliminary EA. Only EPA can approve the granting of a Categorical Exclusion since this function, like preparation of an EIS and issuance of a final EA and FNSI, cannot be delegated.

Initial consultation should take the form of a request through the State, for a determination of the project's environmental status. The State should then review the request and make a recommendation to EPA for granting of a Categorical Exclusion or requiring preparation of an EIS. If neither of these actions is appropriate, the State should direct the Grantee to prepare an EID.

2.2.1.1 Categorical Exclusions

Section 6.107 of EPA's procedures provides that categories of actions that do not generally have a significant effect on the human environment may be exempt from the substantive environmental review requirements of 40 CFR Part 6. Only EPA can make the final determination that a Categorical Exclusion is appropriate. EPA can later revoke its decision if subsequent evidence indicates that the proposed action has changed, a serious local or environmental issue exists, or that Federal, State or local laws may be violated.

Categories of actions generally eligible for a Categorical Exclusion [6.505(b)] include:

- minor rehabilitation of existing facilities,
- functional replacement of equipment,
- construction of new ancillary facilities,
- minor upgrading and expansion of existing treatment works in sewered communities of less than 10,000 persons (not including extension of new collection systems), and
- actions relating to on-site technologies in unsewered communities of less than 10,000 persons.

Categories of actions which are ineligible for Categorical Exclusions [6.505 (c)] include:

- actions which may involve serious local or environmental issues,
- new surface or groundwater discharge,
- substantial increases in discharge volumes or pollutant loadings,
- capacity increase to support a 30 percent or greater population increase,
- actions expected to have a significant effect on the human environment,
- actions expected to affect sensitive environmental resources or areas, and
- actions expected to be controversial or non-cost effective.

2.2.1.2 Environmental Impact Statements

Section 6.508 of the proposed rule requires that an EIS be prepared whenever the project will result in significant adverse impacts to:

- land use patterns, types or policies,
- wetlands,
- endangered species critical habitat,
- floodplains,
- prime agricultural land,
- lands with recognized scenic, recreational, archaeological, or historic value,
- neighborhood stability,
- local ambient air quality, noise levels, and water quality,
- local wildlife habitat, or
- a water body with a challenged water quality classification.

The section also requires that the Responsible Official consider preparation of an EIS whenever it is determined that the project may result in a violation of Federal, state or local law or requirements imposed for protection of the environment.

2.2.1.3 Environmental Information Documents

If the project does not qualify for a Categorical Exclusion and does not automatically require the preparation of an EIS, then EPA is charged with preparing an Environmental Assessment (EA) for the project. In order to provide sufficient background for preparation of an EA, the EPA procedures require that the Grantee submit an Environmental Information Document (EID) as an integral part of the Facilities Plan [6.506(a)].

2.2.2 Scoping the EID [6.506(a)]

EPA's procedures require that the EID "be of sufficient scope to enable the responsible official to prepare an Environmental Assessment." The State has the initial responsibility for helping the Grantee determine the specific environmental issues to be addressed during preparation of the EID.

The State and the Grantee may consult with EPA during preparation of the project scope. EPA is charged with providing this type of assistance, [6.104(a), 6.504(c)] and for some projects involvement of EPA at this stage could better facilitate subsequent review.

It is important to note that the EID must address indirect as well as direct impacts. It should also address the potential for significant cumulative impacts due to the passage of time or in conjunction with other Federal, state, local or private actions [6.506(b), 6.505(c)(1)(iv-v)].

Also, as indicated in Section 2.1 of this Chapter, the project must comply with other Federal laws. In some instances, such as projects involving historic properties, applicable procedures must be initiated by EPA and in other instances, such as projects affecting endangered species' critical habitats, substantial study requirements and review times may be involved. Considerable time and money may be saved by the Grantee if these needs are identified early in the project planning process and can be coordinated with NEPA review procedures.

2.2.3 Availability for Assistance to Potential Applicants [40 CFR 1501.2(d) and 6.104]

In addition to requesting an initial determination of a project's status and assistance in determining the scope of the EID, the Grantee is encouraged to consult with EPA as well as the State for advice and/or assistance throughout the environmental review process.

CEQ regulations [1501.2(d)] require that staff be made available to advise potential applicants of studies or other information foreseeably required. EPA procedures [6.104] require that such advice be available on a project-to-project basis.

It is anticipated that the states will be establishing their own facilities plan review procedures including specific environmental review points.

EPA review and consultation may be especially helpful to the Grantee at the point where the majority of the EID has been prepared but the preferred alternative has not yet been selected.

2.2.4 State Review of Completed Facility Plan and EID [40 CFR 6.506(a)]

The State has the responsibility for review of the complete Facilities Plan with particular attention to the adequacy of the EID and whether or not it was used properly in the development of alternatives and selection of the preferred alternative. The reviewer may require correction of inadequacies and submission of supplementary information required for proper environmental review before approving the plan and preparing the preliminary EA. Requests for additional information must be made in writing to the Grantee.

Once the State has completed its review of the EID, the Grantee and the State must decide which of several routes the environmental process should take. The choices are best understood by reference to the flow diagrams shown in Figures 2.1 and 2.2.

For a Step 3 grant there are four choices:

1. withhold preparation of a preliminary EA until after preparation and review of plans and specifications,

2. request a Categorical Exclusion,

3. recommend preparation of an EIS,

4. prepare a preliminary EA and request an early EPA decision to issue a FNSI.

For a Step 2+3 grant there are three choices:

1. prepare a preliminary EA,

2. request a Categorical Exclusion

3. recommend preparation of an EIS.

In either case, for any particular project the most appropriate choice will depend on the project's potential to result in negative environmental impacts.

If EPA decides to grant a Categorical Exclusion, then the Grantee does not have to submit the EID as part of the Grant Application. If EPA determines that an EIS

should be prepared, then EPA becomes responsible for further environmental analysis and review in accordance with the EIS process.

If, however, one of these two courses is not followed by the State or is rejected by EPA, then the State must prepare a preliminary EA and continue to follow the process described in the remainder of this chapter.

2.2.5 Preparation of Preliminary Environmental Assessment [40 CFR 6.506(b)]

Based on an adequate Facilities Plan, EID, and other relevant independent data sources, the State should prepare a preliminary EA using the format described in Appendix A of this Manual. Care should be taken to avoid the common weaknesses presented in Appendix B.

2.2.6 Certification of Compliance [40 CFR 35.2042(b)]

Under the delegated construction grants program the State has the primary responsibility for review of grant applications before submittal to EPA to ensure that they are complete as specified in Section 35.2040. For purposes of EPA's environmental review, the application should include the Facilities Plan, an adequate EID, and a preliminary EA or other data deemed necessary by EPA to make an EIS determination. This must be accompanied by a written certification from the State to the Regional Administrator stating that the applicable Federal requirements within the scope of authority delegated to the State have been met.

If the State and Grantee elect to submit the preliminary EA before design and request early issuance of a FNSI, the State must still submit a written certification of compliance with Federal laws when it finally submits the complete grant application.

2.2.7 EPA Review and Decision [40 CFR 6.507, 35.2042(b)(2)]

Once the State has submitted the Facilities Plan, EID, and preliminary EA, EPA must make an independent review of the available information and the preliminary EA and determine whether an EIS should be prepared. This action is the Federal agency's legal responsibility and cannot be delegated. In making its determination, EPA shall apply the criteria in Section 6.508 for initiating EIS's.

If the State has submitted the complete grant application, then the Regional Administrator must approve or disapprove the grant within 45 days. However, if EPA identifies deficiencies in any of the environmental documents, it may request that corrections or additional information be furnished before the application is considered complete and the 45 day review period begins.

Where EPA determines that no EIS is necessary, EPA finalizes the EA and attaches it to a FNSI. The FNSI is in the form of a cover sheet explaining that EPA has found that the project does not warrant an EIS. Then the FNSI/EA are widely distributed. The agency must then wait 30 days and respond to comments received during that time before taking action on the grant. This latter requirement means that EPA actually has only 15 days to make its determination to issue a FNSI.

Because the CEQ regulations require the implementation of mitigation measures, any mitigation measures outlined in the FNSI/EA must be followed up by conditioning Step 2+3 and Step 3 grants as necessary and requiring appropriate specifications in the bid documents.

This requires that the plans and specifications be reviewed by the State and EPA to ensure that they accurately reflect the FNSI. In the case of Step 2+3 grants, this review will come after the grant award as part of EPA's monitoring responsibilities. In the case of Step 3 grants, the review of plans and specifications will take place prior to award of the grant.

If an early FNSI had been issued, any significant changes in the project could cause EPA or the State to request additional environmental evaluations and reviews, and an amended FNSI may have to be issued.

2.2.7 EIS Process [40 CFR 1501-1506, 6.105]

Where EPA determines that an EIS is required, the Environmental Evaluation Section of EPA prepares the EIS. EIS's cover the same topic areas as EID's, but concentrate on the issues identified by the EID and examine them in depth (often involving field and literature research efforts). The EIS process is designed to allow more extensive public and review agency involvement than is possible for routine projects.

The general procedure for preparing EIS's is discussed in the CEQ/NEPA Regulations (Sections 1501-1506). First, a "Notice of Intent," announcing EPA's decision

to prepare an EIS is distributed. Then, a scoping process is undertaken; review agencies at all levels of government, special interest groups, and the general public are all contacted to solicit ideas and input on what the EIS should try to accomplish. The EIS is then prepared, often utilizing a special contractor. Several public workshops are held during its development. After about a year, a draft EIS is printed and distributed. A forty-five day comment period follows, during which a public hearing is held. Then, supplementary material is developed and revisions are made in the draft material to respond to questions and criticisms received during the comment period, and a final EIS, incorporating the comments and responses, is printed and distributed. A 30-day comment period follows. After this comment period, the agency makes its final decision on the project and announces it by distributing a Record of Decision. This must state which alternative was found to be environmentally preferrable and, if the agency did not choose it, the Record of Decision must explain why. It must also discuss what mitigation has been adopted and how it will be carried out. The entire EIS process takes 1 to 2 years.

2.2.8 Monitoring [40 CFR 6.511]

The implementation of the mitigation measures in accordance with the grant conditions identified in the FNSI, the Final EIS or the Record of Decision must be monitored by EPA even after construction begins. The Grantee agrees to the conditions in accepting the grant. Section 6.511 of the EPA Procedures outlines EPA's enforcement options should the Grantee not comply with grant conditions.

2.3 CONTACTS

Rogert F. Duwart 617-223-3992
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2.4 REFERENCES

The National Environmental Policy Act of 1969, 42 U.S.C. 4321 and subsequent additions.

CEQ "Regulations on Implementing National Environmental Policy Act Procedures," Federal Register, 40 CFR 1500, Vol. 43, November 29, 1978, 55990 and subsequent additions.

USEPA. "Implementation of Procedures on the National Environmental Policy Act," Federal Register, 40 CFR 6, Vol. 44, No. 216, November 6, 1979, 64177-64193.

USEPA. "Implementation of Procedures on the National Environmental Policy Act, Federal Register, 40 CFR 6, Vol. 47, No. 45, March 8, 1982, 9829-9832.

USEPA, Office of Water Program Operations (WH-547). Construction Grants 1982 (CG-82), Interim Final, Washington, D.C.: 430/9-81-020, July 1982.

USEPA. "Categorical Exclusion from EPA Procedures Implementing the National Environmental Policy Act," Interim Final Rule, 40 CFR 6, Federal Register, Vol. 48, No. 5, January 7, 1983, 1012-1013.

USEPA. "National Environmental Policy Act; Environmental Review Procedures for the Wastewater Treatment Construction Grants Program," Proposed Rule, 40 CFR 6, Federal Register, Vol. 48, No. 5, January 7, 1983, 1014-1020.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 6

[FA-FRL 2097-8]

National Environmental Policy Act; Environmental Review Procedures for the Wastewater Treatment Construction Grants Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document provides procedural and minor substantive amendments to EPA's Procedures Implementing the National Environmental Policy Act (NEPA) for the Wastewater Treatment Construction Grants Program (40 CFR Part 6 Subpart E). The procedural amendments accommodate recent changes in EPA's regulations for the Construction Grants Progran (40 CFR Part 35) which have been modified to incorporate the Municipal Wastewater Treatment Construction Grants Amendments of 1981 (Pub. L. 97-117). The modifications in the grant program change the process recipients of EPA grants follow in the planning and construction of wastewater treatment facilities. The minor substantive amendments to Subpart E streamline the criteria for preparing an EIS. Further recommendations for additional substantive changes will be proposed in the near future and will comprehensively apply to all of 40 CFR Part 6.

DATE: Comments on this proposed rule must be received by February 7, 1983.

ADDRESSES: Comments may be mailed to the Office of Federal Activities, A-104, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D C. 20460. Attention: Paul Cahill, Director.

FOR FURTHER INFORMATION CONTACT: John Gerba, Office of Federal Activities, (202) 382-5910.

SUPPLEMENTARY INFORMATION:

Classificaton

The Office of Federal Activities has determined that this revision is not a "major" rule within the meaning of Executive Order (E.O.) 12291. This is because the revision will not: (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State, or local government agencies; or (3) have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets.

The purpose and effect of this amendment to the environmental review process for the Construction Grants Program is to accommodate recent changes in the grant program and to make minor substantive changes. No increased paperwork burdens are imposed by the amendments.

This amendment was submitted to the Office of Management and Budget (OMB) for review as required by E.O. 12291. Any OMB comments on its reporting or information collection requirements will be addressed in the Final Rule.

This amendment is being published as a proposed rule to allow for public comment. Comments must be received by the Office of Federal Activities (OFA) before February 7, 1983.

Regulator Analysis

Under E.O. 12291, EPA must determine if a regulation is "major" and therefore subject to a Regulatory Impact Analysis. Since EPA believes that this amendment is not "major", it is not subject to such an analysis.

Background

On December 29, 1981 President Reagan signed the Municipal Wastewater Treatment Construction Grants Amendments of 1981 (Pub. L. 97-117). The amendments reflect Congressional and Administration objectives to: (1) Reduce the Federal cost and involvement in the construction of municipal wastewater treatment facilities; (2) streamline the construction grants process; and (3) to maintain the environmental integrity of the program. They also express the Administration's policy to delegate the operation of Federal programs to the appropriate level of government and to provide both States and municipalities with more flexibility in carrying out this responsibility. Although the amendments do not alter EPA's responsibility to make NEPA determinations, they do substantially affect how NEPA is applied by eliminating Step 1 and Step 2 Federal grant assistance.

Meeting NEPA Requirements

NEPA reviews have been most effective when they addressed environmental issues during the facility planning phase. With the elimination of Step 1 and Step 2 grants, official Federal involvement does not occur until after the completion of facilities planning and design. This effectively postpones the "major Federal action" which would trigger NEPA involvement until much of the planning and design phases are completed. The application of NEPA at this point in the development process could cause unnecessary waste and delay if potential Step 3 grantees propose environmentally unsuitable alternatives for Federal funding. The interim final amendments to 40 CFR Part 35 in the May 12, 1982 Federal Register address this issue by requiring that NEPA requirements (40 CFR Part 6) be met before submission of an application for a Step 3 (construction) grant. More specifically the regulations at Section 35.2113 encourages potential applicants to work with the State and EPA as early as possible in the facility planning process to "ascertain the appropriateness of a categorical exclusion, a finding of no significant impact, or an environmental impact statement." They also allow a potential applicant to request a NEPA review early in the facilities planning or design stages. The amendments proposed here reflect this approach.

Categorical Exclusions

On March 8, 1982, an interim final regulation was printed in the Federal Register establishing the process for granting categorical exclusions from NEPA procedures for certain categories of wastewater treatment construction grant projects. This process will likely exclude 20 percent of the EPA funded projects from substantive environmental review. The interim final regulation (as revised by a document published in this issue of the Federal Register) will be combined with the proposed amendments to Subpart E and together they will be published as a final regulation.

Action Being Taken: Subpart E Amendments

EPA is proposing to amend its procedures for implementing the National Environmental Policy Act (NEPA) to: (1) Be consistent with the Municipal Wastewater Treatment Construction Grant Amendments of 1981 (Pub. L. 97-117); (2) be consistent with changes in the Wastewater Treatment Construction Grants Program's regulations (40 CFR Part 35); (3) reorder the sections of Subpart E to more closely reflect the sequence of the steps undertaken in the environmental review process; and (4) make minor substantive changes to the criteria for deciding whether to prepare an EIS. The proposed amendments also provide that

a decision by the responsible official to issue a finding of no significant impact or to prepare an EIS shall not be subject to administrative appeal before the EPA Board of Assistance Appeals. This provision is intended to reflect a proposed change in the Agency's general grant regulations (40 CFR Part 30) which excludes NEPA determinations under 40 CFR Part 6 from the Board's jurisdiction.

Pre- and Post-December 29, 1981 Grants

There are approximately 5,000 wastewater treatment facility planning projects at various stages of development that received Step 1 grants from EPA on or before December 29, 1981. Except as noted in the revised § 6.504 (b) and (c), the requirements of these proposed amendments apply to those projects and to projects subject to the Municipal Wastewater Treatment Construction Grant Amendments of 1981 (projects that did not receive a Step 1 grant on or before December 29, 1981). Although these proposed amendments include provisions for projects that received Step 1 grants on or before December 29, 1981, they do not substantively change the environmental review process for such projects and thus avoid the imposition of retroactive requirements.

Reordering and Clarifying of Subpart E Sections

The existing order of the sections and subsections of Subpart E does not follow the sequence of the environmental review process In order to make the regulation more understandable, the order of the sections has been revised to follow the process. Tables provided below are a guide to the reordering of the text.

DISTRIBUTION TABLE—SUBPART E

Old Section	New Section
§ 500 Purposes	§ 500
§ 501 Definitions	§ 501
§ 502 Applicability [interim final*]	Obsolete
§ 503 Consultation during the environmental review process [revised interim final*]	§ 512 Segmenting projects
§ 504 Public participation [interim final]	§ 513
§ 505 Limitations. [interim final]	Obsolete
§ 506(c) [interim final] and (b), Criteria for preparing EISs	§ 508 Criteria for initiating EISs
§ 506(c) *Categorical exclusions.* [revised interim final]	§ 505
§ 507(a) *Categorical exclusions.* [revised interim final]	§ 505
§ 507(a) [interim final] and (b) *Award of a facilities grant (Step 1). And Mid-course review*	§ 504 Consultation during the facility planning process.

DISTRIBUTION TABLE—SUBPART E—Continued

Old Section	New Section
§ 507(c) and (d) *Review of completed facilities plan. And Environmental review*	§ 506 Environmental review process.
§ 507(e) *Finding of No Significant Impact*	§ 507 (FNSI) determination.
§ 507(f), (g) and (h) *Notice of intent, Scoping, and IES method*	§ 509 Environmental Impact Statement (EIS)—preparation.
§ 508 Limits on delegation to States. [interim final]	§ 514
§ 509 Identification of mitigation measures.	§ 510 Record of decision and
§ 510 Monitoring	§ 511 Monitoring compliance

* FR, March 8, 1982, pp 9829-32
†FR, of this date, following this action.

DERIVATION TABLE—SUBPART E

New Section	Old Section
§ 500 Purposes	§ 500
§ 501 Definitions. (a)–(f)	§ 501(a)–(f)
§ 501(g)	New
§ 502 Applicability and limitations.	New
§ 503 Overview of the environmental review process.	New
§ 504(a) Consultation during the facility planning process	§ 507 Introductory paragraph.
§ 504(b)(1) and (2)	§ 507(a) [interim final*] and (b), new title
§ 504(c)	New
§ 505(a) Categorical exclusions	§ 506(c) Introductory paragraph [interim final]
§ 505(b)	§ 506(c)(1) [revised interim final]
§ 505(c)	§ 506(c)(2) [revised interim final]
§ 505(d)	§ 506(c)(3) [interim final]
§ 506(a) and (b) Environmental review process.	§ 507(c)
§ 506(c)	§ 507(d)
§ 507 Finding of No Significant Impact (FNSI) determination	§ 507(e)
§ 508 Criteria for initiating EISs	§ 506(a) [interim final] and (b)
§ 509 Environmental Impact Statement (EIS) preparation. (introductory paragraph)	New
§ 509(a)	§ 507(f)
§ 509(b)	§ 507(g)
§ 509(c)	§ 507(h)
§ 510 Record of decision and identification of mitigation measures	§ 509
§ 511 Monitoring compliance	§ 510
§ 512 Segmenting projects	§ 503 [revised interim final]
§ 513 Public participation	§ 504 [interim final]
§ 514 Delegation to States	§ 508 [interim final]

* FR March 8 1982 pp 9829–32
†FR of this date, following this action.

Minor Substantive Changes

EPA's Office of Water suggested a revision to the criteria for preparing an EIS (§ 6.508(a)(1)). The revision removes examples of land use related criteria that are currently recommended as a basis for preparing an EIS. In practice, these criteria have not been used as a basis for preparing EISs and are covered in other paragraphs of the same section. The revised language more succinctly states the land use related circumstances which require the preparation of an EIS.

Public and Agency participation

These amendments were developed by a work group with representatives from EPA headquarters and regional offices. Their efforts followed the extensive public and regional comment process carried out by the Construction Grant program in developing amendments to 40 CFR Part 35 during which NEPA implementation was considered

List of Subjects on 40 CFR Part 6

Environmental Impact Statements, Foreign relations.

Dated: October 27, 1982.

John W. Hernandez,

Acting Administrator

For the reasons set out in the preamble, 40 CFR Part 6 is proposed to be amended as follows:

1. The authority citation for Part 6 reads as follows:

Authority: Sections 101, 102, and 103 of the National Environmental Policy Act of 1969 (42 U.S C. 4321 et seq), also, the Council on Environmental Quality Regulations dated November 29, 1978 (40 CFR Part 1500)

2. The title to 40 CFR Part 6 is revised to read as follows:

PART 6—PROCEDURES FOR IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

3. Subpart E is revised to read as follows:

Subpart E—Environmental Review Procedures for the Wastewater Treatment Construction Grants Program.

Sec

Note.—To facilitate the identification of proposed changes for the reader, the text of both proposed Revised and New sections or paragraphs are enclosed by arrows (►) ◄

Subpart E—Environmental Review Procedures for the Wastewater Treatment Construction Grants Program

§ 6.500 Purpose.

This subpart amplifies the procedures described in Subparts A through D with detailed environmental review procedures for the wastewater treatment works construction grants program under Title II of the Clean Water Act.

§ 6.501 Definitions.

►(a) "Step 1 facilities planning" means preparation of a plan for facilities as described in 40 CFR Part 35, Subpart E or I.

(b) "Step 2" means preparation of design drawings and specifications as described in 40 CFR Part 35, Subpart E or I.

(c) "Step 3" means building of a publicly owned treatment works as described in 40 CFR Part 35, Subpart E or I

(d) "Step 2 + 3" means a project which combines preparation of design drawings and specifications as described in § 6 501(b), and building as as described in § 6.501(c).◄

(e) "Applicant"►means any individual, agency, or entity which has filed an application for grant assistance under 40 CFR Part 35, Subpart E or I.◄

(f) "Grantee"►means any individual, agency, or entity which has been awarded wastewater treatment construction grant assistance under 40 CFR Part 35, Subpart E or I.◄

►(g) "Responsible official" means the Federal or State decision maker authorized to fulfill the requirements of this subpart. The responsible Federal official is the EPA Regional Administrator and the responsible State official is as defined in a delegation agreement under § 205(g) of the Clean Water Act subject to the limitations in § 6.514 of this subpart.◄

►§ 6.502 Applicability and limitations.

(a) *Applicability.* This Subpart applies to the following actions:

(1) Projects that received Step 1 grant assistance on or before December 29, 1981;

(2) Approval of grant assistance for a project involving Step 3 or Step 2 + 3; and

(3) Award of grant assistance for a project where significant change has occurred in the project or its impact since compliance with this Part.

(b) *Limitations.* Recipients of Step 1 grant assistance must comply with the requirements, steps, and procedures described in this Subpart. As specified in 40 CFR 35.2113, projects that have not received Step 1 grant assistance must comply with the requirements of this subpart prior to submission of an application for Step 3 or Step 2 + 3 grant assistance.◄

►§ 6.503 Overview of the environmental review process.

The process for conducting an environmental review of wastewater treatment construction grant projects includes several steps whose procedures are described in subsequent sections of this subpart. The steps are:

(a) *Consultation.* The Step 1 grantee or the potential Step 3 or Step 2 + 3 applicant is encouraged to consult with EPA early in project formulation or facilities planning stage to determine whether a project is eligible for a categorical exclusion from the remaining substantive environmental review requirements of this part (§ 6.505) and to identify potential environmental issues.

(b) *Determining categorical exclusion eligibility.* At the request of a potential Step 3 or Step 2 + 3 grant applicant or a Step 1 facilities planning grantee, EPA determines the eligibility of the project for a categorical exclusion. A Step 1 facilities planning grantee awarded a Step 1 grant on or before December 29, 1981 may request a categorical exclusion at any time during Step 1 facilities planning or Step 2 design work. A potential Step 3 or Step 2 + 3 grant applicant may request a categorical exclusion at any time before the submission of a Step 3 or Step 2 + 3 grant application.

(c) *Documenting environmental information.* If the project is determined to be ineligible for a categorical exclusion, the potential Step 3 or Step 2 + 3 applicant or the Step 1 grantee subsequently prepares an Environmental Information Document (EID) (§ 6.506) for the project.

(d) *Preparing environmental assessments.* Except as provided in § 6.506(c)(3) and following a review of the EID by EPA or by a State with delegated authority, EPA prepares an environmental assessment (§ 6.506), or a State with delegated authority (§ 6.514) prepares a preliminary environmental assessment. EPA reviews and finalizes any preliminary assessments. EPA subsequently:

(1) prepares and issues a Finding of No Significant Impact (FNSI); or

(2) prepares and issues an Environmental Impact Statement (EIS) (§ 6.509) and record of decision (§ 6.510).

(e) *Monitoring.* The construction and post-construction operation and maintenance of the facilities is monitored (§ 6.511) to ensure the implementation of mitigation measures (§ 6.510) identified in the FNSI, final EIS or record of decision.

►§ 6.504 Consultation during the facility planning process.

(a) *General.* Consistent with 40 CFR 1501.2, EPA shall initiate the environmental review process as early as possible in order to identify environmental effects, avoid delays, and resolve conflicts. The environmental review process should be integrated throughout the facilities planning process (Step 1). Two processes for consultation are described in this section to meet this directive. The first addresses projects which were awarded Step 1 grant assistance on or before December 29, 1981. The second applies to projects which did not receive grant assistance for facilities planning on or before December 29, 1981 and are, therefore, subject to the regulations implementing the Municipal Wastewater Treatment Construction Grant Amendments of 1981 (40 CFR Part 35 Subpart I).

(b) *Projects that received Step 1 grant assistance on or before December 29, 1981.* (1) Early in facilities planning, the grantee should evaluate the likely project alternatives and the existence of environmentally sensitive areas in the facilities planning area, including those identified in § 6.508 of this Subpart. This evaluation is intended to be brief and concise and should draw on existing information from EPA, State agencies, regional planning agencies, areawide water quality management agencies, and the Step 1 grantee. The evaluation and any additional analysis deemed necessary may be used by EPA to determine whether the action is eligible for a categorical exclusion from the substantive environmental review requirements of this Part. It is recommended that the Step 1 grantee submit the information to EPA or a delegated State at the earliest possible time to allow EPA to determine if the action is eligible for a categorical exclusion. If a categorical exclusion is granted, the grantee will not be required to prepare a formal EID nor will EPA need to prepare an environmental assessment. If an action has not been granted a categorical exclusion this evaluation may be used to determine the scope of the EID required of the grantee. It also should be used to make an early determination of the need for an EIS. Whenever possible, the Step 1 grantee should discuss this initial evaluation with EPA or a delegated State, whichever is appropriate.

(2) A review of environmental information developed by the grantee should be conducted to the extent practicable whenever meetings are held to assess the progress of facilities plan development. These meetings should be held after completion of the majority of the EID document and before a preferred alternative is selected. Since any required EIS must be completed before the approval of a facility plan for a project which received a Step 1 grant on or before December 29, 1981, a decision whether to prepare an EIS is encouraged early during the facilities planning process. These meetings may assist in this early determination. EPA should inform interested parties of the following:

(i) The preliminary nature of the Agency's position on preparing an EIS;

(ii) The relationship between the facilities planning and environmental review processes;

(iii) The desirability of public input; and

(iv) A contact person for further information.

(c) *Projects that did not receive grant assistance for Step 1 facility planning on or before December 29, 1981.* Potential Step 3 or Step 2+3 grant applicants are encouraged to consult with EPA or the State during the facilities planning process. In accordance with § 35.2030(c), the potential applicant should work with the State and EPA as early as possible in the facilities planning process to determine the appropriateness of a categorical exclusion, the scope of an EID, or the appropriateness of the early preparation of a FNSI or an EIS. The consultation wuld be most useful if initiated during the evaluation of project alternatives and prior to the selection of a preferred alternative. This consultation may also assist the potential applicant in resolving any identified environmental problems.◄

►§ 6.505 Categorical exclusions.

(a) *General.* At the request of an existing Step 1 facilities planning grantee or of a potential Step 3 or Step 2+3 grant applicant, the responsible official, as provided for in § 6.107(b) and § 6.504(a), shall determine from existing information whether an action is consistent with the categories eligible for exclusion identified in § 6.505(b). The responsible official shall document this determination as provided for in § 6.107(b).◄

(b) *Categories of actions eligible for exclusion.* For this subpart, actions consistent with the following categories are eligible for a categorical exclusion:

►(1) Actions for which the facilities planning is solely directed toward minor rehabilitation of existing facilities, functional replacement of equipment, or towards the construction of new ancillary facilities adjacent or appurtenant to existing facilities which do not affect the degree of treatment or capacity of the existing facility. Such actions include but are not limited to infiltration and inflow corrections, grant eligible replacement of existing mechanical equipment or structures, and the construction of new small on-site structures.◄

►(2)◄ Actions in sewered communities of less than 10,000 persons which are for minor upgrading and minor expansion of existing treatment works. This category does not include actions that directly or indirectly involve the extension of new collection systems funded with Federal or other sources of funds.

►(3)◄ Actions in unsewered communities of less than 10,000 persons where onsite technologies are proposed.

►(4) Other actions developed in accordance with paragraph (d) of this section.

(c) *Criteria for not granting a categorical exclusion.* (1) The full environmental review procedures of this part must be followed if undertaking an action consistent with the categories described in § 6.505(b) may involve serious local or environmental issues, or meets any of the criteria listed below:◄

(i) The facilities to be provided will create a new discharge to surface or ground waters;

(ii) The facilities will result in substantial increases in the volume of discharge or the loading of pollutants from an existing source or from new facilities to receiving waters;

(iii) The facilities would provide capacity to serve a population 30% greater than the existing population;

(iv) The action is known or expected to have a significant effect on the quality of the human environment, either individually, cumulatively over time, or in conjunction with other Federal, State, local, or private actions;

(v) The action is known or expected to directly or indirectly affect sensitive environmental resources or areas, such as floodplains, wetlands, prime or unique agricultural lands, aquifer recharge zones, archaeological and historic sites, endangered or threatened species, or other areas identified in guidance issued by the OFA; or

(vi) The action is known or expected not to be cost-effective or to cause significant public controversy.

►(2) Notwithstanding the provisions of § 6.505(b), if any of the above conditions exist, the responsible official shall ensure:

(i) That a categorical exclusion is not granted;

(ii) That an adequate EID and environmental assessment are prepared

(iii) That either a FNSI or an EIS and record of decision is prepared and issued.◄

►(d)◄ *Developing new categories of excluded actions.* The responsible official or other interested parties may request that a new category of excluded actions be created, or that an existing category be amended or deleted The request shall be made in writing to the Director, OFA and shall contain adequate information to support the request. Under the direction of OFA, proposed new categories shall be developed through EPA's "non-major" rule-making process (E.O. 12291), including publication as an interim final rule in the Federal Register and a subsequent thirty (30) day public comment period. The following shall be considered in evaluating proposals for new categories:

►(1) Actions in the proposed category should seldom result in the effects identified in § 6.505(c);

(2) Based upon previous environmental reviews, actions consistent with the proposed category have not required the preparation of an EIS; and◄

►(3)◄ Whether information adequate to determine if a potential action is consistent with the proposed category will normally be available when needed

►§ 6.506 Environmental review process.

(a) *Review of completed facilities plans.* EPA, or the State where the program is delegated, shall review the completed facilities plan with particular attention to the EID and its utilization in the development of alternatives and the selection of a preferred alternative An adequate EID shall be an integral part of any facilities plan submitted to EPA or to a State. The EID shall be of sufficient scope to enable the responsible official to prepare an environmental assessment.

(b) *Environmental assessment.* The environmental assessment shall cover all potentially significant environmental impacts. For those State where the review of facilities plans has been delegated, State personnel shall prepare a preliminary environmental assessment which serves as an adequate basis for EPA's decision to issue a FNSI or an EIS. Each of the following subjects shall be critically reviewed to identify potentially significant environmental

concerns and shall be addressed in the environmental assessment.

(1) *Description of the existing environment.* For the delineated facilities planning area, the existing environmental conditions relevant to the analysis of alternatives or to determinating the environmental impacts of the proposed action shall be considered.

(2) *Description of the future environment without the project.* The relevant future environmental conditions shall be described. The no action alternative should be discussed.◄

(3) *Purpose and need.* This should include a summary discussion and demonstration of the need for wastewater treatment in the facilities planning area, with particular emphasis on existing public health or water quality problems and their severity and extent.

►(4) *Documentation.* Sources of information used to describe the existing environment and to assess future environmental impacts should be clearly referenced. These sources should include regional, State, and Federal agencies with responsibility or interest in the types of conditions listed in § 6.508 and in Subpart C.

(5) *Evaluation of Alternatives.* This discussion shall include a comparative analysis of feasible alternatives, including the no action alternative, throughout the study area. The alternatives shall be screened with respect to capital and operating costs; significant direct and indirect environmental effects; physical, legal, or institutional constraints; and compliance with regulatory requirements. Special attention should be given to long term, irreversible, and induced impacts. The reasons for rejecting any alternatives shall be presented in addition to any significant environmental benefits precluded by rejection of an alternative. The analysis should consider when relevant to the project:◄

(i) Flow and waste reduction measures, including infiltration/inflow reduction;

(ii) Appropriate water conservation measures;

(iii) Alternative locations, capacities, and construction phasing of facilities;

(iv) Alternative waste management techniques, including treatment and discharge, wastewater reuse, land application, and individual systems;

(v) Alternative methods for management of sludge, other residual materials, including utilization options such as land application, composting, and conversion of sludge for marketing as a soil conditioner or fertilizer;

(vi) Improving effluent quality through more efficient operation and maintenance;

(vii) Appropriate energy reduction measures; and

(viii) Multiple use, including recreation and education.

(6) *Environmental consequences.* Relevant impacts of the proposed action shall be considered, steps to mitigate significant adverse impacts, any irreversible or irretrievable commitments of resources to the project and the relationship between local short term uses of the environment and the maintenance and enhancement of long term productivity. Any specific requirements, including grant conditions and areawide waste treatment management plan requirements, should be identified and referenced. In addition to these items, the responsible official may require that other analyses and data which are needed to satisfy environmental review requirements, be included with the facilities plan. Such requirements should be discussed whenever meetings are held with Step 1 grantees or potential Step 3 or Step 2 + 3 applicants. The responsible official also may require submission of supplementary information before the award of grant assistance if needed for compliance with environmental review requirements. Requests for supplementary information shall be made in writings.◄

(7) *Steps to minimize significant adverse effects.* (i) This section shall describe structural and nonstructural measures, if any, in the facilities plan, or additional measures identified during the review, to mitigate or eliminate significant adverse effects on the human and natural environments. Structural provisions include changes in facility design, size, and location; non-structural provisions include staging facilities as well as developing and enforcing land use regulations and environmental protection regulations.

►(ii) The responsible official shall not award grant assistance if the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a FNSI or EIS. The responsible official shall condition a grant to seek other ways of compliance, to ensure that the grantee will comply with such environmental review determinations.

(c) *FNSI/EIS determination.* The responsible official shall apply the criteria under § 6.508 to any of the following:◄

(1) A complete facilities plan and the EID, whenever review of facilities plan has not been delegated;

(2) A complete facilities plan, the applicant's EID, information document and the preliminary environmental assessment prepared by the State, for a State which has been delegated authority for facilities plan review; or

(3) Other documentation, deemed necessary by the responsible official or submitted by a State with delegated review authority, adequate to make an EIS determination by EPA. Where EPA determines that an EIS is to be prepared, there is no need to prepare a formal environmental assessment.

►If EPA or the State identifies deficiencies in the EID, preliminary environmental assessment, or other supporting documentation, necessary corrections shall be made before the conditions of the Step 1 grant are considered satisfied or before the Step 3 or Step 2+3 application is considered complete. The responsible official's determination to issue a FNSI or to prepare an EIS shall constitute final Agency action and shall not be subject to administrative appeal to the EPA Board of Assistance Appeals under 40 CFR Part 30.◄

►§ 6.507 Findings of No Significant Impact (FNSI) determination.

If, after completion of the environmental review, EPA determines that an EIS will not be required, the responsible official shall prepare and distribute a FNSI in accordance with § 6.104 and Subpart D of this Chapter. The FNSI will be based on EPA's independent review and the environmental assessment which will either be incorporated into or attached to the FNSI. In accordance with 40 CFR 1508.2, the FNSI shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable. Once an environmental assessment and a FNSI have been prepared for the facilities plan for a certain area, grant awards may proceed without preparation of additional FNSIs, unless the responsible official determines that the project has changed significantly from that which underwent environmental assessment.◄

►§ 6.508 Criteria for Initiating Environmental Impact Statements (EIS).

(a) *Conditions requiring EISs.* The responsible official shall assure that an EIS will be prepared and issued when he determines that any of the following conditions exist:

(1) The treatment works in and of itself will significantly affect the pattern and type of land use (industrial, commercial, agricultural, residential) or the potential effects resulting from the

construction or operation of the treatment works will conflict with established land use plans or policies;◄

(2) The treatment works or collector system will have significant adverse effects on wetlands, including indirect effects, or any major part of the treatment works will be located on wetlands;

(3) The treatment works or collector system will significantly affect a habitat identified on the Department of the Interior's or a State's threatened and endangered species lists, or the treatment works will be located on the habitat;

(4) Implementation of the treatment works or plan may directly cause or induce changes that significantly:

(i) Displace population;

(ii) Alter the character of an existing residential area;

(iii) Adversely affect a floodplain; or

(iv) Adversely affect significant amounts of prime or unique agricultural land, or agricultural operations on this land as defined in EPA's Policy to Protect Environmentally Significant Agricultural Land.

(5) The treatment works will have significant adverse direct or indirect effects on parklands, other public lands or areas of recognized scenic, recreational, archeological, or historic value; or

(6) The treatment works may directly or through induced development have a significant adverse effect upon local ambient air quality, local ambient noise levels, surface or groundwater quality or quantity, fish, wildlife, and their natural habitats.

(7) The treated effluent is being discharged into a body of water where the present classification is too lenient or is being challenged as too low to protect present or recent uses, and the effluent will not be of sufficient quality or quantity to meet the requirements of these uses.

►(b) *Other conditions.* The responsible official shall consider preparing an EIS if it is determined that the treatment works may threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment.◄

►§ 6.509 Environmental Impact Statement (EIS) Preparation.

In addition to the requirements specified in subpart B, C, and D of this part, EPA will conduct the following activities:

(a) *Notice of intent.* If a determination is made that an EIS will be required, the responsible official shall prepare and distribute a notice of intent as required in Subpart D in accordance with § 6.104

(b) *Scoping.* As soon as possible, after the publication of the notice of intent, the responsible official will convene a meeting of affected Federal, State and local agencies, the grantee and other interested parties to determine the scope of the EIS. A notice of this scoping meeting will meet the requirements of Subpart D. As part of the scoping meeting EPA will as a minimum:◄

(1) Determine the scope and the significant issues to be analyzed in depth in the EIS;

(2) Identify those issues which are not significant;

(3) Determine what information is needed from cooperating agencies or other parties;

(4) Discuss the method for EIS preparation and the public participation strategy;

(5) Identify consultation requirements of other environmental laws, in accordance with subpart C; and

(6) Determine the relationship between the EIS and the completion of the facilities plan and any necessary coordination arrangements between the preparers of both documents.

►(c) *Methods for preparing EISs.* EPA shall prepare this EIS by any one of the following means:◄

(1) Directly by its own staff;

(2) By contracting directly with a qualified consulting firm; or

(3) By utilizing a joint EIS process, whereby the grantee contracts directly with a qualified consulting firm. In this case the draft EIS serves the purpose of and satisfies the requirement for an EID. In this instance, the following selection requirements shall be fulfilled:

(i) A Memorandum of Understanding shall be developed between EPA, the grantee, and where possible, the State, outlining the responsibilities of each party and their relationship to the EIS consultant;

(ii) EPA shall approve evaluation criteria to be used in the consultant selection process;

(iii) EPA shall review and approve the selection process; and

(iv) EPA shall approve the consultant selected for EIS preparation.

►§ 6.510 Record of decision and identification of mitigation measures.

(a) *Record of decision.* When a final EIS has been issued, the responsible official shall prepare a record of decision in accordance with 40 CFR 1505.2 prior to the submission of an application for grant assistance (40 CFR Part 35.2113). The record of decision shall include identification of mitigation measures derived from the EIS process which are necessary to make the recommended alternative environmentally acceptable.

(b) *Specific mitigation measures.* Prior to the approval of grant assistance, the responsible official must ensure that effective mitigation measures identified in the FNSI, final EIS, or record of decision are implemented by the grantee. This should be done by revising the facilities plan, initiating other steps to mitigate adverse effects, or agreeing to conditions in grants requiring actions to minimize effects. Care should be exercised if a condition is to be imposed in a grant document to assure that the applicant possesses the authority to fulfill the conditions.◄

►§ 6.511 Monitoring for compliance.

(a) *General.* The responsible official shall ensure there is adequate monitoring of mitigation measures and other grant conditions identified in the FNSI, final EIS, and record of decision.

(b) *Enforcement.* The responsible official may consider taking the following actions consistent with 40 CFR 35.965 and 30.430 if the grantee fails to comply with grant conditions:◄

(1) Terminating or annulling the grant,

(2) Disallowing project costs related to noncompliance;

(3) Withholding project payments,

►(4) Finding the grantee to be nonresponsible or ineligible for future Federal assistance or for approval for future contract awards under EPA grants;

(5) Seeking an injunction against the grantee; or

(6) Instituting such other administrative or judicial action as may be legally available and appropriate.◄

►§ 6.512 Segmenting projects.

(a) *Criteria for segmenting* When there are overiding considerations of costs or impaired program effectiveness, a Step 3 grant for the building of a discrete segment of the treatment works may be awarded before the environmental review is completed if the segmented portion of the treatment works:

(1) is noncontroversial,

(2) is necesary to correct water quality or other immediate environmental problems; and

(3) will not, by its completion, foreclose any reasonable options being considered in the environmental review

(b) *EIS determination* If a treatment works is to be segmented, the entire treatment works shall be evaluated to determine if an EIS is required In applying the criteria to determine if an EIS is required, the regional EIS preparation staff shall be consulted

(c) *Steps in segmenting.* In no case may grant assistance for a segmented Step 3 project be awarded unless:

(1) the OFA has been consulted;

(2) a FNSI on the segment permitted to proceed has been issued at least 30 days prior to grant award; and

(3) the grant award contains a specific agreement prohibiting the building of additional or different segments of the treatment works for which the environmental review is not complete.◄

►§ 6.513 Public participation.

(a) *General.* It is EPA policy that optimum public participation be achieved during the environmental review process as deemed appropriate by the responsible official. Compliance with public participation activities require under this part, Part 25, and Part 35 Subpart E or I constitutes compliance with the requirements for public participation under this subpart.

(b) *Coordination.* NEPA related public participation activities undertaken in connection with the environmental review process should be coordinated with any applicable public participation program wherever possible.

(c) *Scope.* Consistent with 40 CFR 1506.6, the responsible official may institute such additional NEPA-related public participation procedures as is deemed necessary during the environmental review process.◄

►§ 6.514 Delegation to States.

(a) *General.* In cases where the authority for facilities plan review has been delegated to the State under section 205(g) of the Clean Water Act, the State may be delegated the responsibility for carrying out all EPA activities under this part except for the following responsibilities:◄

(1) The determination of whether or not to prepare an EIS shall be solely that of EPA. EPA shall consider a State's recommendations, but the ultimate decision under NEPA cannot be delegated;

(2) Categorical exclusions, Findings of No Significant Impact and the environmental assessment shall be approved, finalized and issued by EPA; and

(3) Notices of intent shall be prepared and issued by EPA.

(b) *Elimination of duplication.* ►The responsible official shall assure that maximum efforts are undertaken to minimize duplication within the limits described under § 6.508 and under paragraph (a) of this section. In carrying out requirements under this subpart, maximum consideration shall be given to eliminating duplication in accordance with 40 CFR 1506.2. Where there are State or local procedures comparable to NEPA, EPA should enter into memoranda of understanding with a State concerning workload distribution and responsibilities for implementing the environmental review and facilities planning process.◄

[FR Doc. 83-193 Filed 1-6-83; 8:45 am]
BILLING CODE 6560-50-M

Clean Air Act

CLEAN AIR ACT - CONFORMANCE WITH STATE IMPLEMENTATION PLANS

3.0 LEGISLATIVE/REGULATORY FRAMEWORK

3.0.1 Clean Air Act

The Clean Air Act as amended through 1981 directs EPA to set ambient air quality standards and to establish limitations for new pollutant sources. Each state has been given the responsibility of developing strategies for attaining ambient air quality standards within its own geographic area. Sections of the Act which affect construction grants projects are discussed below.

Section 110 requires that each state outline a process and provide for legally enforceable mechanisms to sufficiently reduce air pollution to comply with national standards by 1987.

Areas of a state which meet the standard for any of the five categories of pollutants for which national standards have been established are identified as "attainment" areas. Those not meeting the standards are "non-attainment" areas. A major portion of the Clean Air Act (Part D) is devoted to correcting such non-attainment areas.

The State's total air quality control strategy is known as the State Implementation Plan (SIP). The SIP must include specific measures for correcting non-attainment areas.

Section 176(c) states that Federal agencies cannot approve or fund projects which are not in conformance with the SIP.

Section 316 authorizes the Administrator of EPA to condition, restrict or withhold grants for wastewater treatment facilities:

- if the facilities involve an incinerator that cannot meet the new source performance standards (NSPS) or the national emission standards for hazardous air pollutant sources (NESHAPS);

- if the proposed new treatment capacity will lead, directly or indirectly, to an increase in emissions in excess of those provided for in the SIP or will otherwise not conform to the SIP;

- where the project is in a non-attainment area or an area subject to prevention of significant deterioration and the State is not carrying out or does not have an approved SIP which provides for the project's anticipated emissions; or

- if the increased emissions associated with the new capacity will interfere with or be inconsistent with the SIP of any of the surrounding states.

3.0.2 EPA NEPA Regulations [40 CFR 6.303]

Section 6.303 of EPA's NEPA regulations sets forth procedures for incorporating the requirement for conformance with the SIP's under Section 176(c) of the Clean Air Act. These procedures include:

- assessing direct or indirect increases in emissions and their subsequent effect on air quality;

- consulting with state and local agencies to determine whether or not the proposed action conforms with the SIP; and

- assuring in the FNSI or draft EIS that the proposed action conforms with the SIP.

3.0.3 Proposed Rulemaking

On April 1, 1980, EPA issued an advanced notice of proposed rulemaking [45 FR 21590] to implement Section 176(c) of the Clean Air Act. The proposed rulemaking requires states to adopt procedures and criteria to help ensure that Federal actions are in conformance with the SIP and requires Federal agency procedures for determining conformance of their action with the SIP. To date, the only follow-up has been a Memorandum of Understanding regarding transportation-related air quality issues.

Pending adoption of the proposed rules and the subsequent development of more specific procedures by individual states and Federal agencies, the advanced notice of proposed rulemaking recommended that the NEPA review be used to enable assurance of conformance.

3.0.4 EPA Policy and Procedures Memorandum [45 FR 53382]

On August 11, 1980 EPA issued a policy and procedures memorandum to implement the construction grant limitations in Section 316 of the Clean Air Act (see Attachment 3-1). The purpose of this policy is to

ensure that wastewater construction grants projects do not contribute to air quality deterioration and to invoke sanctions on states which have not fully complied with SIP adoption requirements. The 316 policy specifies the conditions under which grants must be withheld, discusses extenuating circumstances where exceptions are allowed, and discusses how SIP's can be revised or mitigation programs can be adopted to allow certain projects to proceed.

The basic policy elements include:

- assuring compliance of new sewage treatment works with the new source performance standards (NSPS) and the national emission standards for hazardous air pollutants (NESHAPS),

- withholding construction grants in areas where states have not made good faith efforts to submit or carry out an SIP revision,

- reconciling population projections used for air and water quality planning to ensure that SIP's provide an accurate accounting of the increased indirect emissions associated with new sewage treatment capacity,

- withholding portions of construction grants for major growth-related projects in attainment areas:

    a. where the emissions associated with the project will contribute to the violation of any national ambient air quality standard (NAAQS).

    b. where the SIP and water quality planning population projections are inconsistent by more than 5 percent,

- consulting with adjacent states to prevent the increased emissions associated with new sewage treatment capacity from interfering or being inconsistent with any other SIP.

It is anticipated that the 316 policy memorandum will be revised to reflect the 1982 Construction Grant amendments. However, the basic policy for sanctions will not change.

3.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The major steps for complying with the Clean Air Act during a 205(g) review are shown in Figure 3.1 and discussed below.

3.1.1 Procedures During Facilities Planning

The State should explain the requirements for incorporating control technology for direct emissions and for quantifying and mitigating indirect emissions to the Grantee and his consultant during the initial stages of the facilities planning process.

During evaluation of the alternatives, the Grantee must develop the analyses required by 40 CFR 6.303(d) and include these in the EID. The Grantee may wish to contact the state agency with primary responsibility for the SIP to obtain air quality data and advice during the development of the analyses.

Indirect air quality impacts due to population growth will usually be the primary issue unless a sludge incinerator is proposed. Direct impacts due to point source or vehicle emissions need only be considered when State air quality permits are required or the increase in vehicle traffic for project construction or operation is greater than 10 percent.

Population projections for the facilities planning analysis must meet the provisions of Section 5.5.1 of Construction Grants 1982 (CG-82). This document requires use of current State projections from the Needs Survey. It also requires that the projected State figures be consistent with the projections used for air planning. The population projections in the SIP's are being or will be revised to conform to the projections in the Needs Survey.

3.1.2 Review of EID and Preparation of Preliminary EA by State

Based on the information being developed in the facilities planning process, if the project appears to have significant adverse impacts, the State should consult with the state agency with primary responsibility for the SIP, with the non-attainment enforcement agency designated under Section 174 of the Act, and, where appropriate, with the metropolitan planning organization to find out whether the project complies with the SIP. If no adverse impacts are anticipated, the State can assume conformance without consultation.

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In either case, the preliminary EA should contain a statement assuring conformance based on the determinations contained in 40 CFR 6.303(d). Documentation of consultation, where it was carried out, should be submitted to EPA by the State along with the preliminary EA.

Where an assurance of conformance cannot be made, the State will notify EPA, and EPA will recommend additional planning to find a way to assure conformance or will determine that an EIS is necessary under the criteria of 40 CFR 6.508(a)(6) or 6.508(b).

3.1.3 EPA Review

Based on the review of the submitted information, EPA will, in the case of a conforming project, issue a FNSI. Where no consulation was undertaken, the review period of the FNSI will allow the state agency with primary responsibility for the SIP an opportunity to concur or object to the assurance of conformance in the EA.

In the case of a Step 2+3 grant request, EPA must condition the grant to require that the design incorporate appropriate technology to control direct emissions.

3.2 CONTACTS

3.2.1 Federal Agencies

Air Management Division — 617-223-5633
U.S. Environmental Protection Agency
Region I
J. F. K. Federal Building
Boston, MA 02203

3.2.2 State Agencies

CONNECTICUT
Department of Environmental Protection — 203-566-4030, 203-566-3160
Division of Environmental Quality
Air Compliance Unit
Air Quality Enforcement
165 Capitol Avenue, Room 144
Hartford, CT 06106

MAINE
Department of Environmental Protection — 207-289-2437
Bureau of Air Quality Control
Ray Building AMHI
Hospital Street, Station #17
Augusta, ME 04333

MASSACHUSETTS
Department of Environmental Quality Engineering — 617-727-2658
Air Quality Control Division
1 Winter Street
Boston, MA 02108

NEW HAMPSHIRE
Air Resources Agency — 603-271-4572
Health and Welfare Building
Hazen Drive
Concord, NH 03301

RHODE ISLAND
Department of Environmental Management — 401-277-2808
Division of Air and Hazardous Materials
75 Davis Street, Room 204
Providence, RI 02908

VERMONT
Agency of Environmental Conservation — 802-828-3395
Environmental Protection Division
Air and Hazardous Materials
Montpelier, VT 05602

3.3 REFERENCES

The Clean Air Act 42 U.S.C. 7478 as amended August 1977.

Transmittal of Advance Notice of Proposed Rulemaking to Implement Section 176(c) of the Clean Air Act, April 8, 1980, EPA Memorandum from John O. Hidinger to Directors, Air and Hazardous Materials Divisions.

USEPA. "Municipal Wastewater Treatment Works," Federal Register, 40 CFR 35, Vol. 44, No. 156, August 11, 1980, 53382-53389.

USEPA, Office of Water Program Operations (WH-547). Construction Grants 1982 (CG-1982), Interim Final. Washington, D.C.: 430/9-81-020, July 1982.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[FRL 1524-7]

Municipal Wastewater Treatment Works; Construction Grants Limitations Provided by Section 316 of the Clean Air Act; Policy and Procedures

AGENCY: Environmental Protection Agency.

ACTION: Notice of policy and procedures memorandum.

SUMMARY: The purpose of the following memorandum is to set forth policy and procedures for implementing the municipal wastewater treatment works construction grants limitations provided in section 316 of the Clean Air Act, as amended (Pub. L. No. 95-95). Section 316 of the Clean Air Act allows the Administrator of the Environmental Protection Agency (EPA) to withhold, condition or restrict municipal wastewater treatment works construction grants funded under section 201 of the Clean Water Act (Pub. L. No. 95-217) in areas where the state implementation plan (SIP) has not been approved or conditionally approved, is not being implemented, or does not provide for the increased air pollution emissions resulting directly or indirectly from the proposed treatment works.

DATE: The section 316 policy is effective August 11, 1980.

FOR FURTHER INFORMATION CONTACT:

Cary B Hinton, Office of Transportation and Land Use Policy (ANR-445) Environmental Protection Agency, 401 M Street, S W., Washington, D.C. 20460, (202) 755-0570, or

Roger Rihm, Office of Water Program Operations (WH-595), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 755-8056.

SUPPLEMENTARY INFORMATION:

Background

This notice announces final EPA policy and procedures for determining whether any limitations on federal assistance for the construction of sewage treatment works under the Clean Water Act [33 U S C et seq] are necessary to implement section 316 of the Clean Air Act [42 U.S C. 7616].

EPA published its intent to develop policy and procedures under section 316 in the Federal Register on July 2, 1979 (44 FR 38575) Public comments were requested within 30 days of this notice. All comments that were received, including those received after this deadline, have been reviewed and considered in the development of the final policy and procedures.

The basic elements of the section 316 policy include:

- Assuring compliance of new sewage treatment works with the new source performance standards (NSPS) and the national emission standards for hazardous air pollutants (NESHAPS).
- Withholding construction grants in areas where states have not made good faith efforts to submit or carry out a SIP revision.
- Reconciling population projections used for air and water quality planning to ensure that SIPs provide an accurate accounting of the increased indirect emissions associated with new sewage treatment capacity.
- Withholding portions of construction grants for major growth-related projects in attainment areas, based upon case-by-case determinations by the EPA Regional Administrators in the following situations:

—Where the emissions associated with the project will contribute to the violation of any national ambient air quality standard (NAAQS).

—Where the SIP and water quality planning population projections are inconsistent.

Portions of the grants that fund increased capacity will be withheld until the governor is notified of the need to accommodate any unaccounted emissions in a SIP revision or the grant applicant adopts a mitigation program.

- Consulting with adjacent states to prevent the increased emissions associated with new sewage treatment capacity from interfering or being inconsistent with any other SIP.

The policy and procedures will provide EPA and the states with a mechanism for insuring that the provisions of section 316 are applied consistently nationwide in areas that are not attaining all NAAQSs or that are subject to the requirements for the prevention of significant deterioration (PSD) of air quality. EPA announces elsewhere in this Federal Register that it is considering revising the municipal wastewater treatment works construction grants regulations and/or the regulations to implement the National Environmental Policy Act (NEPA) to include provision for the requirements of section 316.

Response to Comments on Proposed Policy

On July 2, 1979 EPA published in the Federal Register and advance notice of interim policy and procedures to implement section 316. The notice included a copy of the June 8, 1979 memorandum to the Regional Administrators from David G. Hawkins, EPA Assistant Administrator for Air, Noise, and Radiation and Thomas C. Jorling, former Assistant Administrator for Water and Waste Management. The memorandum announced EPA's intent to implement section 316 by developing policy and procedures and initiating revisions to the construction grants regulations. The notice requested public comment on a recommended approach that would serve as a basis for both of these actions. EPA received 23 comment letters and 30 comments from the toll free telephone "hotline" in response to this notice. As a result of the comments, numerous changes were made to improve the section 316 policy and procedures. The following is the response to the substantive comments made on the recommended approach for implementing section 316:

1. Request for expanded comment procedures.

Several commenters requested an extension of the comment period beyond the August 1, 1979 (or 30-day) limit. No formal extension of the comment period was made, but because the final policy did take several additional months to complete, comments that were received as late as May 7, 1980 were considered. One commenter recommended that EPA establish a national advisory task force to assist in the development of the section 316 policy. Although EPA did not establish such a task force, at the request of several private and public interest groups EPA did provide briefing meetings during the course of the development of this policy.

2. Revised regulations needed before issuance of section 316 policy.

The advance notice indicated that EPA was considering the development of both regulatory revisions and policy and procedures to implement section 316. One commenter questioned why EPA would issue policy and procedures before it had promulgated regulations. EPA believes that it has already promulgated the necessary regulatory framework for the review of the air quality impact of sewage treatment works. Existing requirements in both EPA's municipal wastewater treatment works construction grants regulations (40 CFR 35.925-14) and EPA's regulations to implement NEPA (40 CFR 6.506)require a review of the air quality impact of proposed sewage treatment works. This policy provides guidance to implement these existing regulatory requirements. In addition, as indicated elsewhere in this Federal Register, EPA is initiating rulemaking to revise its

construction grants regulations and/or its regulations implementing NEPA. Such revisions would both better inform grant applicants of their responsibilities and facilitate EPA's implementation of this policy.

3. Allow state policy to supersede EPA section 316 policy.

One respondent requested EPA to allow a functionally equivalent (but different) state policy on section 316 to supersede EPA's policy. Although EPA believes that the cooperation of the states is essential to the effective long-term implementation of section 316, it finds that the delegation of its authority to individual states is inadvisable. Implementation of section 316 is a part of the Administrator's responsibilities to approve, conditionally approve, disapprove and promulgate SIPs. The revised policy notes that there are significant state responsibilities to ensure the effective implementation of section 316 requirements.

4. Provide general exemptions to the policy and procedures.

A few commenters requested that EPA provide more general exemptions for construction grant applicants to the section 316 policy and procedures. Two commenters suggested that applicants for facility design (step 2) and facility construction (step 3) grants should be exempted to avoid seriously impeding the water pollution clean-up efforts of the construction grants program. Although some construction grants in a limited number of areas may be delayed, EPA believes that the efforts to clean the nation's waters will not be imperiled. The clear intent of Congress through the enactment of section 316 is that EPA should not fund the construction of sewage treatment works that will induce increased air pollution until the new emissions are provided for in an adequate SIP or are otherwise mitigated. One commenter requested that since facility planning (step 1) grants were for planning purposes and would not contribute to increased air pollution they should be exempted from the provisions of this policy. EPA believes that it is most appropriate for grantees to consider the provisions of the section 316 policy during the facility planning phase, rather than increasing the potential for step 2 or step 3 grant approval delays. In addition, EPA finds that the section 316 compliance requirements for step 1 grantees are consistent with the existing air pollution assessment and mitigation requirements of the construction grants program. (The basic elements of these requirements are outlined in Attachment A to the section 316 policy.)

To avoid conflict with the purposes of the construction grants program, some commenters suggested that EPA exempt proposed sewage treatment works from the provisions of the section 316 policy in areas where water pollution problems are more serious than air pollution problems. Although it is unnecessary to provide this exemption in all areas, EPA does believe that a case-by-case exemption should be allowed in certain nonattainment areas even if the 1979 SIP revisions required by Part D of the Clean Air Act have not been approved or conditionally approved and the state is not making reasonable efforts to submit the SIP. Therefore, the section 316 policy has been revised to allow the Regional Administrator to exempt municipal wastewater treatment works construction grants from the grant withholding provisions of this policy when the project is needed for immediate public health needs and would not expand capacity by more than one million gallons per day (mgd). Another revision to the section 316 policy provides that construction grants will not be withheld for those projects which are designed to improve treatment capability without expanding treatment capacity to provide for future growth.

5. Section 316 policy and procedures should not apply to attainment areas.

One commenter believed that in attainment areas section 316 only requires the control of increased emissions resulting directly from sewage treatment works which are classified as major pollution sources. According to the commenter, the policy should not require the control of increased indirect emissions in attainment areas. EPA finds that this is an incorrect reading and interpretation of section 316(b). States are explicitly required by section 316(b)(2) to have and carry out an EPA approved SIP that provides for the increased emissions of each air pollutant from stationary and mobile sources which may be reasonably anticipated to increase because of new sewage treatment capacity in both attainment or nonattainment areas.

6. Demonstration of facility compliance with NSPS and NESHAPS requirements.

One commenter noted that it is not possible for a construction grant applicant to demonstrate compliance with all federal (NSPS and NESHAPS) and state emissions standards prior to the award of a step 2 grant. The demonstration of standards compliance requires facility design work which must be done in the step 2 design phase. EPA has modified this requirement in the revised policy to clarify that EPA's intent is that the step 2 grantee will include appropriate design criteria to comply with NESHAPS, PSD and state emission requirements before the step 3 grant award and the NSPS requirements prior to facility operation. Another commenter suggested that EPA should require the states to define an allowable amount of direct emissions from new sewage treatment works as a percentage of the SIP's total areawide stationary source emissions projection. EPA currently requires all SIPs for nonattainment areas to either accommodate or offset the increased emissions from all new or modified major and nonmajor stationary sources. However, EPA believes that the allocation of the growth of emissions within a nonattainment areas is clearly a state responsibility and is not a matter to be prescribed by EPA.

It was suggested by one respondent that EPA should mention in the policy that sludge incinerators which are designed to recover energy are exempted from the nonattainment requirements under EPA's emission offset interpretive ruling (44 FR 3276). EPA has not highlighted this exemption in the section 316 policy because the offset ruling applies in only limited circumstances after July 1, 1979. Some states have adopted that provision of EPA's offset ruling in their SIPs and in these instances there is a narrow exemption provided for resource recovery facilities which burn municipal sludge. New resource recovery facilities that burn sludge are exempted from EPA's offset policy only under the following conditions: (1) the applicant makes the best efforts to obtain sufficient offsets to comply with the conditions of the policy and is unsuccessful, (2) the applicant has secured all available emissions offsets, and (3) the applicant will continue to seek the necessary emission offsets and apply them when they become available. This exemption does not affect the requirements for compliance with NSPS or NESHAPS.

7. Revise threshold criteria for determining section 316 policy compliance of construction grant applications.

Several commenters found that the total flow capacity threshold of one mgd was too low. Others said it was too high. Several claimed that the use of an interceptor diameter threshold was irrelevant. Other commenters found the population growth ratio to be either too low or too high. To provide greater administrative flexibility EPA has modified these threshold criteria for the section 316 policy to allow for greater

discretion by the Regional Administrators in the review of new construction grant applications. In areas with approved, conditionally approved or promulgated SIPs the Regional Administrator will conduct a mandatory review of all grant applications for the construction of sewage treatment works which will increase capacity in excess of ten mgd. At the discretion of the Regional Administrator, any grant application for a facility that will increase capacity in excess of one mgd may also be reviewed, if there is a possibility that the increased indirect emissions associated with the facility may not conform to the SIP's provision for demonstrating reasonable further progress (RFP) towards attainment of all NAAOSs by the required date.

8. Oppose withholding construction grants under any circumstances.

There were six comments that opposed the withholding of construction grants under any circumstances. A few commenters believed that the withholding of construction grants would unfairly emphasize air pollution considerations over water pollution problems. Others simply believed that the withholding of grants would seriously imperil the national housing industry. As previously noted, EPA has revised the section 316 policy to allow some exemptions to the provisions for withholding grants when the sewage treatment works are needed to take care of an existing water pollution problem which endangers public health and would not expand capacity by more than one mgd. In addition, the policy would exempt from the grant withholding provisions those projects which improve treatment capability but would not expand treatment capacity for future growth. EPA recognizes that, as a by-product of this policy, in a limited number of nonattainment areas there may be a delay of some new housing construction due to the lack of sufficient excess sewage treatment capacity. Based upon the progress that the States are making to submit and implement approvable SIPs, EPA does not believe that the grant withholding provisions of this policy will seriously impact the national housing industry.

A few commenters believed that EPA misinterpreted the basic intent of Congress in section 316. They believed that section 316 created a mechanism to impose a sanction against states to assure the submittal and implementation of adequate SIPs. Because it is the responsibility of the states to develop, submit and implement the SIPs, these commenters believed that Congress did not intend that individual construction grant applicants should be penalized by the withholding of funds or the imposition of new review and mitigation requirements. The simple construction of section 316 only allows the Administrator to withhold, condition or restrict construction grants for sewage treatment works "which the Administrator is authorized to make to any applicant." Section 316 specifically refers to "any applicant" and "any grant." Therefore, the provisions apply to all eligible grant applicants under the construction grants program including municipal, intermunicipal, state, and interstate agencies (40 CFR 35.920-1). EPA does not believe that the intent of Congress was to limit the application of the section 316 provisions only to those construction grant applications submitted by state agencies. To the contrary, EPA believes Congress intended that the increased emissions resulting directly or indirectly from all EPA funded sewage treatment works would be mitigated and provided for in an EPA approved, conditionally approved or promulgated SIP.

EPA also believes that the provisions of section 316 apply to all steps of the construction grants program, established pursuant to section 201 of the Clean Water Act. Section 212(1) of the Clean Water Act defines the construction process, as used in Title II of the Clean Water Act, Grants for Construction of Treatment Works, in a manner which clearly includes activities which are funded by step 1, and step 2, as well as step 3 grants. EPA's construction grants regulations (40 CFR 35.900 et. seq.) also refer to construction as all three steps of the sewage treatment works development process.

9. Request for public hearings when construction grants withheld.

One commenter requested that EPA hold public hearings whenever it decides to withhold a construction grant award pursuant to the provisions of the section 316 policy. Although public comments on construction grant withholding actions may be useful, EPA believes that individual public hearings would be an excessive administrative requirement. EPA has decided that the best opportunity for public comment would be provided in conjunction with the public notification and review procedures, established pursuant to section 176(a) of the Clean Air Act, for limiting federal assistance for air quality and transportation related activities. The section 176(a) procedures (45 FR 24692) provide a 30-day public comment period after EPA has published in the Federal Register its finding that a state has failed to submit, or is not making reasonable efforts toward submitting, a revised SIP as required by Part D of the Clean Air Act. After considering the public comments, EPA will publish the final section 176(a) finding in the Federal Register. In accordance with the provisions of the Section 316 policy, EPA will begin withholding the approval of construction grant applications for those areas included in the proposed notice when the final section 176(a) finding is published. Removal of this limitation from an area will be after EPA proposes the action in a Federal Register notice, provides a 30-day public comment period and publishes final action. Normally, this can be done at the same time EPA proposes and finalizes approval of the SIP revision. Although it can also be done when reasonable efforts have been demonstrated, absent an approvable SIP, removal of funding limitations on this basis will be done only in rare cases.

10. Construction grant reviews to determine if increased indirect emissions provided for in the SIP are unreasonable.

Three commenters believed that assessment of the amount of increased emissions that are indirectly induced by new sewage treatment capacity is not technically feasible. The air pollution impact of new growth has routinely been assessed by state, regional and local air quality management agencies for several years. The assessments of increased indirect emissions from new sewage treatment works which have occurred in recent years demonstrate that there are existing techniques that are feasible for undertaking this task. In 1978, EPA's Office of Air Quality Planning and Standards published two reports: *Growth Effects of Major Land Use Projects (Wastewater Facilities) Volume I: Model Specification and Causal Analysis* (EPA Report No. 450/3-78-014a, March 1978) and *Volume II: Summary, Predictive Equations and Worksheets* (EPA Report No. 450/3-78-014b, May 1978) which document a modeling technique for conducting this assessment. In addition, EPA's Office of Transportation and Land Use Policy will soon publish "Air Quality Reviews for Wastewater Management Facilities: A Guidebook on Procedures and Methods." This publication will present a review of alternative modeling and impact assessment techniques and alternative mitigation measures.

Another respondent believed that the air pollution impact review at each step of the construction grant process would duplicate the step 1 environmental assessment requirements included in EPA's regulations to implement NEPA.

The policy has been revised to emphasize that the assessment of increased indirect emissions should occur during the step 1 facility planning phase. EPA believes that a step 1 grantee should be able to complete this assessment as a part of the environmental information document, prepared pursuant to EPA's NEPA regulations, which must be submitted along with the facility plan.

One commenter felt that it is not the responsibility of a grant applicant to assure that the increased indirect emissions associated with a facility are included in a SIP. Four others believed that the grantee does not have the responsibility to offset or mitigate the increased indirect emissions associated with a sewage treatment works. Section 316 is clear in its requirement that the increased indirect emissions from a new sewage treatment works must not be greater than those provided for in the SIP. EPA concurs with the commenters that believe it would be unreasonable to delay the approval of a construction grant until a SIP revision has been approved which accommodates the increased emissions. Therefore, EPA has revised the policy to provide an opportunity to approve construction grants when either the governor is notified by EPA to revise the SIP to accommodate the increased emissions, or the grantee commits to implement an adequate emissions mitigation program.

EPA believes that the increased indirect emissions will usually be accommodated in a SIP revision. The notification to the governor that a SIP revision is necessary to accommodate the increased indirect emissions should generally ensure that corrective actions will be taken. EPA may invoke the funding limitations pursuant to section 176(a) and section 316 if the SIP revision is not submitted or is found inadequate. In a limited number of cases, however, it may be preferable to require the grant applicant to submit an emissions mitigation program. The use of a mitigation program will effectively mean that the increased indirect emissions should be reduced to the point where they will not endanger the SIP's provisions for demonstrating RFP towards attainment of all NAAQSs by the required date.

Another commenter suggested that EPA should require the states to include project lists in the SIP to indicate that the increased indirect emissions have been provided for in the SIP. Although the states may include lists of planned sewage treatment works, which have increased indirect emissions that are provided for in the SIP, there are no provisions in section 316, or anywhere else in the Clean Air Act, which authorize EPA to make this a mandatory SIP requirement. In those cases when a state includes a project list in the SIP, EPA will still have to verify that the projected increased indirect emissions associated with the facility at the time of grant application are consistent with the amount of emissions that were assumed to be provided for in the SIP.

11. Use of consistent population projections places an unfair burden on the grantee.

One commenter questioned the significance of the relationship between population projections and increased air pollution induced by new sewage treatment capacity. EPA believes that there is an implicit accommodation of new growth, and mitigation of increased emissions, when the population projections on which the SIP, 208 state and areawide water quality management plans and 201 facility plans are based can be determined to be consistent. This consistency implies that the air pollution associated with the residential, commercial and minor industrial growth resulting from the new treatment capacity will not exceed the SIP's projection of areawide stationary and mobile source emissions which must be reduced to attain the NAAQS.

Several commenters found that if the population projections are inconsistent then it would be in appropriate for the grant applicant to seek their reconciliation. EPA has concurred with this viewpoint, and on January 15, 1980 directed the Regional Administrators to carry out this responsibility. Several commenters also believed that when the population projections are inconsistent EPA should not place a hook-up restriction in the grant award and the national pollutant discharge elimination system permit. One commenter suggested that use of a mitigation program would be fairer and more effective. The section 316 policy has been revised to provide the opportunity for this recommended approach. Three commenters recommended that when EPA finds the population projections to be consistent grantees should not have to commit to support the implementation of all SIP measures because this may exceed their authority. EPA concurs with this recommendation and has deleted this requirement from the section 316 policy. However, EPA cautions those grantees that also have specific SIP implementation responsibilities to carry them out in order to avoid any future withholding or delays in the award of construction grants in their area.

12. Emissions mitigation program requirements are excessive.

Four commenters believed that the emissions mitigation program requirements outlined in the recommended approach were excessive because many grant applicants lack the authority to implement the mitigation measures. EPA has modified the mitigation program requirements in the section 316 policy to respond to these concerns. The mitigation measures may now be adopted through an intra-municipal or inter-municipal agreement. This allows single purpose wastewater management agencies to work with multi-purpose units of government that service the same areas to develop and implement the mitigation program.

EPA also modified the emissions mitigation program requirement that the appropriate mitigation measures would have to be incorporated within the SIP. The program requirements now provide that the grantee will request a SIP revision to incorporate the adopted mitigation program. And, as previously noted, EPA has deleted the requirement for a commitment to implement the SIP measures over which the grant applicant has no control.

One commenter requested that EPA delete the required commitment to monitor and report on the implementation of all mitigation measures because this is actually the reponsibility of the state and EPA, and not the grantee. EPA has not deleted this requirement because we believe it to be consistent with a provision of our NEPA regulations (40 CFR 6.509(a)) and necessary to judge the eligibility of the grantee for future construction grant awards.

13. Provide guidance on cost-eligible items.

Two commenters requested that EPA provide guidance in the policy on whether the correction of SIP deficiencies or the development and implementation of the emissions mitigation program are cost-eligible items. Section IV of the policy provides a description of the allowable project costs associated with the implementation of the section 316 policy This description is consistent with the existing construction grants program regulations (40 CFR 35.940)

The Administrator has determined that the section 316 policy is nationally applicable and is based on determinations of nationwide scope an effect. EPA intends that, for purposes o judicial review, the interpretations made by this notice be treated as severable

Issued on July 23, 1980.

Douglas M. Costle,

Administrator, Environmental Protection Agency

On July 23, 1980, the EPA Administrator sent the following memorandum:

Memorandum

To Regional Administrators, Regions I–X.
Subject Policy and Procedures to Implement Section 316 of the Clean Air Act, as Amended.

I. Purpose

This memorandum establishes policy and procedures for the implementation of the sewage treatment works construction grants limitations provided under section 316 of the Clean Air Act, as amended (Pub. L. No. 95–95).[1] To further ensure the consistent nationwide implementation of the section 316 provisions, EPA has also initiated the development of revisions to the construction grants regulations. Section 316 allows the Administrator of the Environmental Protection Agency (EPA) to withhold, condition or restrict grants for the construction of sewage treatment works under the following situations.

- Where the treatment works will not comply with new source performance standards (NSPS) established under section 111 of the Clean Air Act or with national emission standards for hazardous air pollutants (NESHAPS) established under section 112 of the Act [316(b)(1)].
- Where, in a nonattainment area or an area subject to the requirements for the prevention of significant deterioration (PSD) of air quality, the state is not carrying out the state implementation plan (SIP) or there is not an EPA approved SIP that provides for the increase of each air pollutant that is reasonably anticipated to result either directly or indirectly from proposed new sewage treatment capacity [316(b)(2)].
- Where construction of the proposed treatment works will create new sewage treatment capacity that may reasonably be anticipated to cause or contribute to, directly or indirectly, an increase in emissions of any pollutant in excess of the increase provided for under the SIP [316(b)(3)(A)].
- Where the proposed new sewage treatment capacity will otherwise not be in conformity with the SIP [316(b)(3)(B)].
- Where the increased emissions associated with the proposed new sewage treatment capacity will interfere with, or be inconsistent with, the applicable implementation plan for any other state [316(b)(4)]

The implementation of this policy continues many existing efforts to reduce the direct and indirect air quality impacts of new sewage treatment works. The policy supplements existing guidance and provides procedures for the implementation of new EPA regulations. It provides guidance in fulfilling EPA's sewage treatment works construction grants regulatory requirement (40 CFR 35.925–14) that "the treatment works will comply with all pertinent requirements of the Clean Air Act." Background on other existing requirements of the construction grants program related to air quality impacts is included in Attachment A.

On November 6, 1979 EPA published in the **Federal Register** (44 FR 64174), the final rule to implement the procedural provisions of the National Environmental Policy Act (NEPA). Section 6.303 of these regulations establishes new procedures by which the Agency will incorporate into the environmental review process the determination of conformity of certain types of EPA actions with a SIP. This policy is designed to ensure that the emissions quantification, control and mitigation requirements for step 1 construction grants are implemented in consonance with EPA's procedures to implement NEPA.

II. General Provisions

Each Regional Administrator shall administer the construction grants program to ensure that the emissions that result directly or indirectly from the construction of new sewage treatment capacity conform to the requirements of the applicable SIP.[2] These requirements include the attainment and maintenance of the national primary and secondary ambient air quality standards (NAAQS) established for each air pollutant pursuant to section 109 of the Clean Air Act. The requirements also include those for the protection of air quality cleaner than the NAAQS. In addition, sewage treatment works must meet the emission limitations established under section 111 and section 112 of the Act.

The increased emissions associated with the location of a sewage treatment works or the expansion of treatment service in an attainment area must be provided for in the SIP as a component of the areawide and minor source growth rates that are applied to the annual increment for the pollutants (sulfur dioxide and particulates) regulated under current PSD regulations, pursuant to Part C of the Clean Air Act. The increased emissions associated with the expanded treatment capacity for an attainment area will also be subject to any future limitations established for PSD Set II pollutants (hydrocarbons, carbon monoxide, nitrogen oxides and lead). Development of regulations dealing with these pollutants has been initiated by EPA.

When the administration of the construction grants program has been delegated to the state, it will continue to be the responsibility of the Regional Administrator to ensure compliance with the provisions of this policy prior to the final EPA approval of any grant award.[3] To the greatest extent practicable, the Regional Administrator shall utilize EPA's environmental review procedures for the construction grants program to carry out the provisions of this policy. Nothing in these procedures amends or alters EPA's regulations (40 CFR 6.500) to implement the procedural requirements of NEPA as they apply to the sewage treatment works construction grants program. Any additional joint review procedures should be included as a component of the annual State-EPA Agreement. The responsibilities of EPA regional offices, states and construction grants applicants are summarized in Attachment B.

III. Construction Grants Award Limitations

A. Control of Direct Emissions

The Regional Administrator shall condition step 1 and step 2 grants for the construction of sewage treatment works that will have direct emissions (e.g., sludge incineration) to incorporate into the facility plan and design sufficient control techniques to meet the federal NSPS, NESHAPS and PSD requirements and other state emission standards contained in the SIP. Failure to comply with this condition will result in the grantee being ineligible for subsequent construction grant awards for these sewage treatment works.

The applicant for a step 3 grant for the construction of a sewage treatment works that will be a direct source of emissions shall obtain, prior to grant approval, all air pollution control permits from the EPA and state or local air pollution control agencies with regulatory jurisdiction over NESHAPS, PSD and the SIP. Failure to obtain permits will result in the withholding of the award of grant funds until the applicant can demonstrate or assure compliance.

B. Control of Indirect Emissions

1. In Areas Without Approved or Conditionally Approved SIPs

The Regional Administrator shall withhold all sewage treatment works construction grants in nonattainment areas where the 1979 SIP revision is not approved or conditionally approved *and* the state is not making reasonable efforts to submit the SIP.

In addition, if the Regional Administrator finds in the annual determination of reasonable further progress (RFP) that implementation of the SIP in a nonattainment area where the sewage treatment works would be located is not proceeding towards the attainment of all NAAQS, then all step 2 and step 3 construction grant awards in that nonattainment area will be withheld.[4]

The public notification and review for the withholding of any construction grants will be done using the procedures for making determinations pursuant to section 176(a) of the Clean Air Act, for withholding transportation and air quality funding.[5] Any determination made pursuant to these procedures is binding in EPA Board of Assistance Appeals dispute proceedings under 40 CFR Part 30, Subpart J.

Those grants for sewage treatment works which the Regional Administrator finds are needed for immediate public health needs and will not expand usable capacity by more than one million gallons per day (mgd) will not be withheld. In addition, construction grants will not be withheld for those projects which improve treatment capability, but would not expand treatment capacity for future growth.

2. In Areas With Approved, Conditionally Approved or Promulgated SIP's

The Regional Administrator shall condition step 1 construction grants in nonattainment, attainment, or unclassified areas to quantify the increase of indirect emissions associated with the proposed facility in the environmental information document and

include provisions for the control and mitigation of impacts in conformity with the requirements of the SIP. Failure of the grantee to comply with this condition will result in the grantee being ineligible for subsequent grant awards for that sewage treatment works.

The population projections for nonattainment areas on which the 1979 SIP revision is based are required to be consistent with those submitted by the state and approved by EPA in accordance with EPA's cost-effectiveness guidelines.[6] When the population projections from the 201/208 plan exceed the state or areawide projections in the SIP by more than five percent, the Regional Administrator shall choose one of the following actions when considering step 2 and step 3 construction grant awards for increased capacity where the increases will exceed ten mgd:

a. Notify the governor to revise the SIP to include reconciled population projections and adequate control measures to attain the NAAQS by the projected deadline and define the specific steps needed to be accomplished and the time by which they shall be completed; or

b. Withhold those portions of step 2 and step 3 construction grant awards for increased capacity until the grant applicant has adopted an adequate emissions mitigation program, as outlined in section 3.

When the state or areawide population projections are inconsistent by more than five percent and it is determined that the increased indirect emissions associated with the facility will not conform to the SIP's provisions for demonstrating RFP towards attainment of all NAAQS by the required date, the Regional Administrator may withhold step 2 and step 3 construction grant awards for increased capacity in excess of one mgd until the governor is notified to revise the SIP or the grant applicant adopts an adequate mitigation program.[7]

Prior to the award of the aforementioned step 2 and step 3 construction awards, the Regional Administrator shall verify through consultation with the appropriate state air pollution control or designated local lead agency or agencies for nonattainment planning that the increased indirect emissions will not interfere with, or be inconsistent with, the applicable SIP for any other state. When the Regional Administrator finds that the increased indirect emissions associated with the construction of a sewage treatment works will interfere with, or be inconsistent with, the applicable SIP for any other state, those portions of the grant award for increased capacity will be withheld until the governor of the state in which the facility will be located is notified to revise the SIP or the applicant adopts an adequate mitigation program.

Using data from the environmental information document, environmental impact statement or supplementary information provided by the grant applicant, the Regional Administrator shall determine whether the increased emissions associated with a sewage treatment works that will increase capacity in excess of ten mgd in an attainment or unclassified area will cause a violation of any NAAQS. When the Regional Administrator finds that the increased emissions will cause a standard violation, those portions of the grant award for increased capacity shall be withheld until:

a. The area that will be adversely impacted by the increased indirect emissions has been redesignated as a nonattainment area, pursuant to section 107(d)(1) of the Clean Air Act, and the Regional Administrator has notified the governor to revise the SIP for that area, in accordance with the requirements of Part D of the Clean Air Act; or

b. The grant applicant has adopted an adequate emissions mitigation program, as outlined in section 3.

3. Emissions Mitigation Program Requirements

As provided by this policy, the award of step 2 and step 3 construction grants may be conditioned on the implementation of an adequate emissions mitigation program. The demonstration by the grant applicant that it has adopted an adequate emissions mitigation program shall be based upon the following requirements:

a. Grantee commits to locally adopted measures for emissions reduction through an intra-municipal or inter-municipal agreement. These emissions mitigation measures may previously have been included in the facility plan's environmental assessment or environmental impact statement.

b. Agreement identifies agencies responsible for implementation of the emissions mitigation program.

c. Agreement provides performance time schedule for adopted mitigation measures.

d. Agreement provides for continued reporting by the grantee to EPA or the state on the implementation of the adopted mitigation measures.

e. Grantee has submitted the adopted mitigation program to the state air pollution control agency or designated local lead agency and has requested revisions to the SIP to incorporate the mitigation program.[8]

IV. Allowable Construction Grants Program Costs

Costs incurred by the grantee to perform air quality analyses, facility planning and design changes, and the planning for mitigation measures, as required by the provisions of this policy, are allowable project costs and are reimbursable pursuant to the regulations of the EPA construction grants program. The control of direct emissions from a sewage treatment works will be an allowable cost provided it is within the scope of the project. Implementation costs for a program to mitigate the increased indirect emissions associated with the facility will not be allowable costs.

V. Effective Date

In areas without approved or conditionally approved SIPs all step 1, step 2 and step 3 construction grant awards issued after the date of publication of this memorandum in the Federal Register shall be subject to the provisions of this policy.

In areas with approved, conditionally approved or promulgated SIPs all step 1 construction grant awards issued after the date of publication of this memorandum in the Federal Register shall be subject to the provisions of this policy. All step 2 and step 3 construction grant awards that are issued for those areas shall be subject to the provisions of this policy September 10, 1980.

Douglas M Costle,

Administrator, Environmental Protection Agency.

Memorandum Footnotes

[1] Sewage treatment works include treatment plants, interceptor sewers, collection systems and other devices and systems as defined in section 212 of the Clean Water Act, as amended (Pub L. 95-217).

[2] Indirect emissions result from areawide mobile and minor stationary source growth that will potentially be induced by the expanded sewage treatment capacity.

[3] Grants for the construction of sewage treatment works are authorized in section 201 of the Clean Water Act. Under section 205(g) of the Clean Water Act the EPA Administrator may delegate to each state the administration of the sewage treatment works construction grants program.

[4] The requirements for the annual demonstration of RFP are pursuant to section 171 of the Clean Air Act. The February 24, 1978 policy memorandum on the criteria for approval of the 1979 SIP revisions (43 FR 21675) provides guidance on the RFP requirement. In addition, the general preamble for proposed rulemaking on approval of SIP revisions for nonattainment areas (44 FR 20375) provides further guidance on the use of schedules for the demonstration of RFP.

[5] The policy and procedures for applying federal assistance limitations in section 176(a) of the Clean Air Act appear in a March 19, 1980 memorandum from the EPA Assistant Administrator for Air, Noise, and Radiation and the Deputy Federal Highway Administrator to the EPA Regional Administrators and the Federal Highway Regional Administrators (45 FR 24692). The imposition of any funding limitations, pursuant to the provisions of this policy, will not require coordination with the Federal Highway Administration.

[6] Earlier guidance on the use of uniform population projections was provided in the February 24, 1978 policy memorandum on the criteria for approval of the 1979 SIP revisions (43 FR 21674), the October 18, 1978 and January 10, 1980 memorandums from the Assistant Administrators for Air, Noise, and Radiation and for Water and Waste Management and the January 15, 1980 memorandum from the Assistant Administrator for Air, Noise, and Radiation.

[7] Modeling studies indicate that treatment and/or collection capacity greater than one mgd is the approximate minimum for creation of significantly increased direct and indirect emissions of critical air pollutants associated with induced growth. This criteria is equivalent to the preconstruction review threshold for any facility which emits or has the potential to emit 100 tons per year or more of any pollutant (44 FR 51924).

[8] Local lead agencies are certified by the governor pursuant to section 174 of the Clean Air Act and are reponsible for air quality planning in areas where ozone and carbon monoxide standards have not been attained.

Attachment A

Section 316 Policy Background

On June 6, 1975 former EPA Administrator Russell E. Train issued a policy statement requiring the consideration of secondary environmental effects in the construction grants process.[1] This policy requires that the environmental review process for sewage treatment works include analyses of secondary as well as primary environmental effects and indicate whether such effects may contravene any federal, state, or local environmental laws, regulations, plans, or standards. Where contravention can reasonably be anticipated, the policy provides that the Regional Administrator shall withhold approval of a step 2 or step 3 construction grant until the applicant revises the facility plan, initiates steps to mitigate the adverse effects or agrees to conditions in the grant document requiring actions to minimize the effects.

EPA policy established in 1978 provides that new sewage collection systems are eligible for federal financial assistance only in a community with substantial human habitation on October 18, 1972.[2] The bulk of the flow design capacity (generally two-thirds) through the collection system is to be for wastewaters originating from that eligible community. This policy places further restriction on funding the construction of collection systems that would induce new population growth and indirect growth of emissions by requiring that the grant should only be approved when the systems currently in use for disposal of wastes from the existing population are creating a public health problem, contaminating groundwater, or violating the point source discharge standards.

In September 1978 EPA established guidelines (43 FR 44087) for determining the most cost-effective waste treatment management systems or component parts. The cost-effectiveness analysis guidelines require each state, working with 208 water quality planning agencies, local lead air quality planning agencies, and other regional planning agencies to disaggregate the state-Bureau of Economic Analysis (BEA) population projections among its designated 208 areas. Standard Metropolitan Statistical Areas (SMSAs) not included in the 208 area, and non-SMSA counties. Each state was required to submit its projection total and disaggregations for the Regional Administrator's approval before October 1, 1979. After the state disaggregations are approved, 208 areawide agencies, in consultation with the state, are required to disaggregate the 208 area projections among the SMSA and non SMSA areas. The 208 areawide agencies must then disaggregate these SMSA and non SMSA projections among facility areas and remaining areas. These disaggregations must be used in the individual facility plans.

The cost-effectiveness guidelines discourage the over-sizing of treatment facilities by lowering the planning estimate for per capita flow by 20–30 percent. A grantee with a high flow growth factor in excess of 1.8:1 for the 20-year planning period must stage the construction for 10 years.[3] Future industrial flows are to be accommodated only if the industry is included in the land use element of the 208 plan and may not exceed five percent of the total design flow or 25 percent of the total industrial flow. Grant applicants that propose to include additional treatment capacity beyond that amount determined to be cost-effective in accordance with these guidelines may receive federal financial assistance if, among other requirements, the project can ensure that air quality standards will not be violated.

Interceptors are now limited by the cost-effectiveness guidelines to a construction staging period of 20 years. A larger pipe size corresponding to a longer staging period, not to exceed 40 years, may be allowed if the grantee can demonstrate compliance with all pertinent requirements of the Clean Air Act. The grantee must also demonstrate that the larger pipe size will reduce overall environmental impacts, including the secondary effects on air quality. Interceptors may not be extended into undeveloped areas unless there are exceptional circumstances.

The EPA regulations implementing the NEPA procedures require that the environmental information document prepared during the facility planning phase (step 1), and any subsequent environmental impact statement (EIS), will document the treatment works' effect upon local ambient air quality caused by direct emissions or induced development.[4] These regulations also provide that the environmental information document and the EIS will describe the steps that have been taken to mitigate or eliminate any significant adverse air quality effects from the construction and operation of the treatment works. Section 6.509(a) of the revised regulations provides that a facility design (step 2) or a facility construction (step 3) grant shall not be awarded if the grantee has not made, or agreed to make, pertinent changes in the project to mitigate or eliminate the significant adverse air quality effects. Moreover, this regulation provides that step 2 or 3 grants will be conditioned to ensure that the grantee will comply, or seek to obtain compliance with the mitigation requirements.

Attachment A Foonotes

[1] EPA Construction Grants Program Requirements Memorandum 75–26.

[2] EPA Construction Grants Program Requirements Memorandum 78–9.

[3] The growth factor is defined as the ratio of wastewater flow expected at the end of the 20-year planning period to the initial flow at the time the treatment works is expected to become operational.

[4] Originally promulgated as 40 CFR 6.510(f) on April 14, 1975, revised as 40 CFR 6.506(a)(6) on November 6, 1979.

Attachment B

Section 316 Policy Implementation Responsibilities

I. EPA Regional Administrators' Responsibilities.

A. Condition step 1 and step 2 grant awards to ensure the use of sufficient air pollution emissions control techniques.

B. Withhold step 3 grants for facilities with incinerators until NESHAPS, PSD and state air pollution permits are obtained.

C. Withhold all construction grants in nonattainment areas where:

1. The SIP is not approved or conditionally approved *and* the state is not making a good faith effort to submit the SIP, or

2. The state is not making reasonable further progress (RFP) towards attainment of all NAAQS.

The withholding of any construction grants would be done consistent with the Clean Air Act (CAA) § 176(a) procedures for withholding transportation and air quality funding. Those grants for projects which the Regional Administrator (RA) finds are needed for immediate public health needs and would not expand capacity by more than one mgd will not be withheld. Grants will not be withheld for projects which improve treatment capability without expanding capacity for future growth.

D. Condition the step 1 grant award to include provisions in the facility plan that quantify the increase of indirect emissions associated with the proposed facility and approaches to control and mitigate their impacts. Withhold approval of the step 2 grant award until this condition has been met.

E. Review SIPs and 201/208 plans to determine the consistency of population projections.

F. Notify states that the 1982 SIP revision is to be based upon population projections consistent with those prepared for 201/208 plans, in accordance with the cost-effectiveness guidelines.

G. Use CAA § 105 and § 175 grants and state-EPA agreements to assure revised SIP and 201/208 population projections are consistent within five percent by January 15, 1981.

H. Notify the governor to revise the SIP when the RA finds that the emissions control measures in the 1979 SIP revision are inadequate to attain the NAAQS in 1982, due to SIP population projections which have been reconciled upward.

I. In nonattainment areas, when SIP and 201/208 population projections are inconsistent, withhold portions of step 2 and step 3 grant awards for increased capacity where the increase would exceed 10 mgd, or 1 mgd when the RA also finds that the increased emissions may endanger RFP, until

1. The governor is notified to revise the SIP; or

2. The grant applicant adopts an adequate mitigation program.

J. Prior to the approval of step 2 and step 3 grant awards identified pursuant to the preceding requirement, consult with appropriate state and local air pollution control agencies to verify that the increased emissions associated with the facility will not interfere with, or be inconsistent with, the applicable SIP for any other state. Where the increased emissions will violate the SIP of another state withhold portions of the grant award for increased capacity until.

1. The governor is notified to revise the SIP, or

2. The applicant adopts an adequate mitigation program.

K In attainment or unclassified areas, determine whether the increased indirect emissions associated with a facility that would expand capacity in excess of 10 mgd will cause a violation of the NAAQS. Where the increased emissions will cause a violation of the NAAQS, withhold portions of the grant award for increased capacity until:

1 EPA completes rulemaking to redesignate the area as nonattainment and notifies the governor to submit a Part D SIP revision, or

2. The applicant adopts an adequate mitigation program.

II. States' Responsibilities:

A. Submit approval SIP and 208 plans.

B Submit disaggregated population projections in accordance with the cost-effectiveness guidelines.

C. Reconcile SIP and 201/208 population projections by January 15, 1981.

D Use population projections approved in accordance with the cost-effectiveness guidelines as the basis for 1982 SIP revision.

E. When reconciliation of SIP and 201/208 population projections invalidates projected attainment of a NAAQS in 1982, revise SIP to provide additional emissions control measures.

F Within nine months of a request by the RA to accommodate the increased indirect emissions associated with new sewage treatment capacity, submit a SIP revision to the Administrator.

G. When grantee submits adopted project mitigation program, revise the SIP to incorporate additional emissions control measures.

H. Administer EPA delegated construction grant program, consistent with the requirements of the policy.

III Grant Applicants' Responsibilities:

A During step 1, quantify the increase of direct and indirect emissions associated with the proposed facility and include approaches to control their impacts in the environmental information document and facility plan.

B When the 208 plan's population projections have been revised downward to reconcile with lower SIP population projections, make subsequent changes to the facility plan's population projections and to the facility design.

C During step 2, incorporate in the design of a facility with an incinerator sufficient control techniques to meet the federal NSPS, NESHAPS, and PSD requirements, and state emission standards contained in the SIP.

D. Prior to step 2 and step 3, if required by the RA or the state, adopt a program to mitigate the increased emissions from the proposed facility.

E Submit the project mitigation program to the state air pollution control agency or the designated local lead agency for inclusion in a SIP revision.

F Prior to step 3, obtain NESHAPS, PSD and state air pollution permits, for facilities with incinerators

G Provide continued reporting to EPA or the state on the implementation of the adopted project mitigation program.

[FR Doc. 80-24005 Filed 8-8-80; 8:45 am]

BILLING CODE 6560-01-M

Coastal Zone Management Act

CZM

COASTAL ZONE MANAGEMENT ACT

4.0 LEGISLATIVE/REGULATORY FRAMEWORK

4.0.1 Coastal Zone Management Act

The Federal Coastal Zone Management Act (CZMA) of 1972 encourages states to develop comprehensive resource management programs that balance the wise use and protection of the coast. All of the states in Region I, except for Vermont, are eligible to participate and all have Federally-approved programs. All projects within the coastal zone requiring Federal assistance or permits must be consistent with the state's coastal zone management (CZM) program policies.

4.0.2 NOAA Regulations on Federal Consistency [15 CFR 930]

State coastal management agencies ensure Federal compliance with state coastal policies through "consistency procedures" established by the National Oceanic and Atmospheric Administration. Essentially, before a Federal agency can fund a project or grant a permit in a state's coastal zone, it must receive a consistency determination from the state Office of Coastal Zone Management (CZM agency).

Projects are reviewed for their consistency in two different ways. Applicants seeking Federal assistance follow a state's intergovernmental review (formerly A-95 review)* procedure to alert the State CZM agency and to obtain a consistency determination from them. Applicants seeking Federal permits, however, must correspond directly with the State CZM agency to secure a consistency determination [15 CFR 930.57].

On July 14, 1982, the President issued Executive Order 12372 rescinding A-95 and replacing it with new rules for State and Federal Consultation [40 CFR 29]. These new rules, which were effective October 1, 1983, encourage states to develop their own clearinghouse procedures. EPA is in the process of developing guidance for implementation of 40 CFR 29 for the construction grants program. For the present, projects which were in the A-95 review process as of October 1, 1983 should continue through that process. New projects should follow the state-adopted procedures. The EPA guidance document is expected to address the case where no state program is adopted.

Although a consistency determination is not required until an application is submitted for Federal assistance or a permit, applicants and the State construction grants agency are encouraged to consult with the State CZM agency throughout facilities planning and design to avoid conflict that may arise during the consistency review process.

4.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The major steps for complying with the CZM consistency requirements during 205(g) reviews are shown in Figure 4.1 and discussed below. As in previous chapters, optional steps are shown by dashed lines.

4.1.1 Determination of Applicability [15 CFR 930 Subpart F]

The Federal CZM Act requires that all Federal assistance applications for coastal projects receive a consistency determination prior to any approval of funding; consequently, the application must receive a consistency determination or resolve any CZM agency objections before EPA can grant Step 3 or a Step 2+3 funding.

As part of their Coastal Zone Management Plans, state CZM agencies have listed Federal activities which are likely to directly affect the coastal zone regardless of whether they are actually in the coastal zone. The Grantee is encouraged to seek advice from the State construction grants coordinator early in the planning process to find out if his project is in the coastal zone or is included on the list of activities likely to directly affect the coastal zone and thus require a consistency determination.

4.1.2 Basis for Consistency Determination [15 CFR 930.39]

If it is determined that the facilities planning area is in or is likely to affect the coastal zone, then the Grantee must notify the state intergovernmental review clearinghouse of the proposed plan. The Grantee is responsible for providing sufficient information in this notice for the CZM agency to make its determination. It is therefore important that the Grantee include a thorough coastal impact analysis as part of the EID.

At a minimum, the coastal analysis should include the following:

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- a list and map of sensitive coastal resources within the planning area (refer to the State Coastal Program for a definition of sensitive coastal areas), and

- a review of impacts to these sensitive coastal areas including proposed mitigation measures.

This information will serve as the basis for preparation of the notice to the clearinghouse. The notice is to be prepared by the Grantee.

It is strongly recommended that the Grantee and the State 201 agency consult with the State CZM agency during both the planning and design phases. Prior consultation with the State CZM office will often streamline the Grantee's literature reviews, coastal impact analysis and, ultimately, the consistency review.

The 201 agency is responsible for reviewing the EID to be sure sufficient information is present to allow the CZM agency to determine consistency. If it is evident that Federal permits (Section 404, Clean Water Act; Section 10, River and Harbors Act) will be required to construct the facility, the 201 agency should remind the Grantee to apply during design for its permits and for the consistency determination necessary for the permits.

The preliminary EA should summarize the information presented in the EID on this subject and reference any permit consistency determinations already obtained and those still required.* The preliminary EA should also discuss any comments received from the CZM agency. It should be written, keeping in mind that this document may be used by the CZM agency as a supplement to the clearinghouse notice in making the Step 3 or Step 2+3 consistency determination.

Common examples of Federal permits required during the 201 process are a 404 Army Corps permit for sewer-related construction affecting wetlands, or a National Pollution Discharge Elimination System (NPDES) permit, required for effluent disposal. It is the applicant's responsibility to notify the State CZM agency of the proposed action. In turn, the State CZM agency responds directly to the applicant concerning the consistency certification and resolution of minor conflicts. Major conflicts are mediated as described below. Procedures for reviewing permits vary considerably from state to state.

4 1.3 Notification of CZM [15 CFR 930.95]

For purposes of obtaining the consistency determination, the State CZM agency should be officially notified of the project through the State's interagency review process approximately 3 months prior to submittal of the Step 3 or Step 2+3 grant application.

The State construction grants agency is responsible for making certain that the clearinghouse notice clearly states that the proposed project is within the coastal zone, and is believed to be consistent with the state's CZM plan.

The notice should list any sensitive coastal areas (e.g. wetlands, finfish migratorial pathways) that are known to exist within the project planning area. It should also make note of any impact analyses that have been done in support of the Grantee's and State's statement of consistency.

4.1.4 CZM Agency Review [15 CFR 930.96]

When a State CZM agency receives notification of a project requesting Federal assistance, the agency evaluates the consistency of the proposal with state CZM policies and may respond in one of the following four ways:

- no comment (presumed to mean no objection),
- support the project (project is consistent),
- object to the project because of inconsistency, or
- object to the project due to insufficient information.

When a CZM office chooses to comment, the response is generally in the form of a letter or memo, citing applicable coastal policies. This response is then transmitted back to the applicant through the clearinghouse. In the event of an objection, the CZM agency's statement must describe how the project is inconsistent with elements of the CZM program and recommended modifications that would eliminate the inconsistencies [15 CFR 930.96]. Objections based on insufficient information must include a description of the information necessary to complete the review. Applicants may choose to accept suggestions of the State CZM agency and revise the project or, if so direct, supplement the previously deficient information. If there is serious disagreement, between CZM and other State, Federal and municipal agencies, Grantees may request mediation by the Secretary of Commerce [15 CFR 930, Subpart G].

4.1.5 EPA Responsibility [15 CFR 930.97]

If the CZM agency determines that the project is consistent with the state CZM policies and all Federal permits are approved, then EPA may award the Step 3 grant. If, however, the CZM agency objects to the project and EPA concurs with CZM's objections, EPA will not award a Step 3 grant. In the event that the CZM agency objects to the project but EPA does not agree, then EPA can request mediation through the Secretary of Commerce or through judicial means.

4.2 CONTACTS

4.2.1 Federal Agencies

Kathryn Cousins or 202-634-4126
Doris Grimm
The United States Department of Commerce
Office of Coastal Zone Management
3300 Whitehaven Street, NW
Washington, DC 20235

4.2.2 State Agencies

The following state agencies are responsible for managing their state coastal program:

CONNECTICUT (approved)
Arthur Rocque, Director 203-566-7404
Coastal Area Management Program
Department of Environmental Protection
71 Capitol Avenue
Hartford, CT 06115

MAINE (approved)
David Keeley 207-289-3154
Coastal Program Manager
State Planning Office
State House Station 38
Augusta, ME 04333

MASSACHUSETTS (approved)
Richard F. Delaney 617-727-9530
Coastal Zone Management
100 Cambridge Street
Boston, MA 02202

NEW HAMPSHIRE (Ocean segment approved)
Peter Piattoni, Program Manager 603-271-2155
Coastal Management Program
Office of State Planning
2 1/2 Beacon Street
Concord, NH 03301

RHODE ISLAND (approved)
Malcom J. Grant, Assistant Director 401-277-2771
Dept. of Environmental Management
83 Park Street
Providence, RI 02908

4.3 REFERENCES

The Coastal Zone Management Act of 1972, 16 U.S.C. 1451 and subsequent additions.

USEPA. "Intergovernmental Review of Environmental Protection Agency Programs and Activities," 40 CFR 29, Federal Register, Vol. 48, No. 123, June 24, 1983, 29300-29303.

USEPA, Office of Water. Memorandum from Henry L. Longest to Water Management Division Directors, Regions I-X on Supplemental Guidance to Implement Intergovernmental Review Under Executive Order 12372 and 40 CFR Part 29 for the Construction Grants Program, October 5, 1983.

NOAA. "Regulations on Federal Consistency with Approved Coastal Management Programs," Code of Federal Regulations, Title 15, Part 930.

Coastal Barrier Resources Act

CBRA

COASTAL BARRIER RESOURCES ACT

5.0 LEGISLATIVE/REGULATORY FRAMEWORK

5.0.1 Coastal Barrier Resources Act

The Coastal Barrier Resources Act of 1982 (CBRA) [P.L. 97-348] establishes the Coastal Barrier Resources System (CBRS) and restricts future Federal expenditures and financial assistance which have the effect of encouraging development on undeveloped coastal barriers. The Act potentially applies to Federal projects in all states in EPA Region I except Vermont.

Section 3(1) of the Act defines an "undeveloped coastal barrier" as a depositional geologic feature such as a barrier island plus all related aquatic habitats, provided that they contain few manmade structures and are not already protected by another Federal, State or local law.

The CBRS is estabished under Section 4(a) of the Act. The system is defined as the undeveloped coastal barriers of the Atlantic and Gulf coasts (known as units of the system) which are depicted in a series of maps entitled Coastal Barrier Resources System, prepared by the U.S. Fish and Wildlife Service (see Attachment 5-1). At present, CBRS units have been designated in Connecticut, Maine, Massachusetts and Rhode Island.

Section 4(c) of the Act provides for periodic review and modification of the maps. These completely supersede and replace the draft or proposed maps previously circulated by the Department of Interior under provisions of the Omnibus Budget Relocation Act of 1981.

Section 5 of CBRA prohibits expenditures of most new Federal financial assistance within the CBRS units. Section 6 provides for a number of exceptions which may be funded after consultation with the Secretary of the Interior. The exceptions are for projects which involve conservation, public recreation, scientific research, air and water navigation, national security, energy development, general revenue sharing grants to the states, and maintenance of existing public facilities.

5.0.2 U.S. Department of the Interior Advisory Guidelines [48 FR 45664]

Advisory Guidelines for the Coastal Barrier Resources Act were issued by the Department of the Interior (DOI) on October 6, 1983. The guidelines identify the Environmental Protection Agency's 201 and 208 grants programs as included under the Act. The guidelines indicate that "publicly owned utilities", which includes sewers and related wastewater management systems, fall within the definition of "publicly owned or operated ... structures and facilities" which are eligible to be considered for an exception to the Act.

The guidelines encourage Federal agencies to contact the DOI consultation officer for clarification on the applicability of specific projects to the allowed exceptions and to establish consultation procedures. If formal consultation is required, the Secretary of Interior's responsibility is to provide technical information and comments on the question of consistency with CBRA. These should be provided through direct consultation with the Regional Director of the Fish and Wildlife Service. The guidelines also provide that the results of any consultation be included in the appropriate environmental document.

5.0.3 U.S. Environmental Protection Agency Memorandum on Coastal Barrier Resources Act - Restriction on Grant Awards

The Environmental Protection Agency's policy regarding the administration of projects to which CBRA applies is a March 18, 1983 Memorandum from the Office of Water to the Regional Administrators (see Attachment 5-2).

This memorandum, which was issued prior to the DOI guidelines, assumes that certain construction grants projects would be eligible for exceptions to the CBRA restrictions. The memo summarizes the general purposes, requirements, and conditions of the Act and interprets them for the administrators of the Construction Grants program.

The memorandum specifically interprets the restriction on funding programs which would have secondary impacts on the CBRS. "...The Act prohibits the award of a grant for capacity in a treatment plant or conveyance outside of the delineated areas which would have the effect of encouraging development in the delineated areas."

5.0.4 State Programs

In addition to the Federal Coastal Barrier Resources Act, Rhode Island, Maine and Massachusetts have State requirements which govern development on barrier beaches and other coastal resources and which must be addressed in the EID. These State requirements may be more stringent or may apply to a greater number of coastal areas than CBRA.

5.1 ENVIRONMENTAL REVIEW UNDER 205(g)

The recommended steps for complying with the Coastal Barrier Resources Act during a 205(g) review are shown in Figure 5.1. The initial reviews and determinations would be carried out most practically at the beginning of the project planning or throughout the early stages of the formal Facilities Planning effort.

5.1.1 Applicability of the Act

For any project in or near a coastal area, it is recommended that the Grantee contact the State Coastal Zone Management agency to determine the presence of a CBRS unit in the study area. If none exists, then the Act does not apply. If part or all of the project is located in a unit of the system, or has the capacity to serve development within a CBRS unit, the Act is applicable.

The Grantee should include the results of any preliminary State consultation in the Environmental Information Document.

5.1.2 Applicability of Exception to the Act

Based on the Final Guidelines issued by DOI, it would be possible for certain wastewater management projects to qualify for an exemption to the Act. Once it is determined that the project falls within an area protected by CBRA, the State and Grantee are advised to consult the EPA regional office if they believe that the project will qualify as an exception under Section 6 of the Act.

Two of the six exceptions identified in the Act may apply to certain wastewater Construction Grants projects. Section 6(a)(3) allows for the "maintenance, replacement, reconstruction or repair but not expansion, of publicly-owned...facilities that are essential links in a larger network...". Section 6(a)(6)(F) allows for the "maintenance, replacement, reconstruction or repair

but not expansion,of publicly-owned...facilities" provided that the action is consistent with the purposes of the Act.

It is anticipated that one or both of these provisions would allow funding for a project to repair old or damaged wastewater collection facilities located in or near a unit of the CBRS if the existing facilities were the cause of water quality degradation. Deteriorated wastewater treatment facilities may qualify also, but it is unlikely that there are any existing wastewater treatment plants located within the CBRS.

No project which would expand the size or capacity of a wastewater collection system or treatment plant, and no project which would encourage development on a CBRS unit(s) would be eligible for an exception under the Act. This latter restriction applies even to projects located outside a CBRS unit.

5.1.3 Consultation Process

If the EPA determines that the project is not eligible for an exception to the Act, then the Grantee has an opportunity to modify the project to meet the requirements of the Act.

If EPA concurs on the eligibility for exception to the Act, EPA must consult with the Regional Director of the U.S. Fish and Wildlife Service (FWS) before awarding a grant. According to the guidelines issued on October 6, 1983, FWS will provide technical information and issue an opinion on whether or not the project is one which is allowed by Section 6. Under the guidelines, the FWS opinion is advisory only and EPA will have final responsibility for the decision on funding the project.

Also in accordance with the October 6 guidelines, the results of the FWS consultation should be included in the Environmental Assessment on the project.

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5.2 CONTACTS

5.2.1 Federal Agencies

For consultations and inspection of CBRS maps and aerial photographs:

Assistant Regional Director-
Habitat Resources
U.S. Fish and Wildlife Service
One Gateway Center
Newton Corner, MA 02158
617-965-5100
x9217

Frank McGilvrey,
Consultation Officer
U.S. Fish and Wildlife Service
U.S. Department of the Interior
Washington, DC 20240
202-343-5000

For purchase of maps ($3.25 each, 36" x 42"), and information regarding purchase of 1:24,000 aerial photography:

Eastern - National Cartographic
Information Center
U.S. Geological Survey
536 National Center
Reston, VA 22092
703-860-8336

For inspection of CBRS maps, Regional Fish and Wildlife offices:

ALL UNITS
U.S. Fish and Wildlife Service
One Gateway Center, Suite 700
Newton Corner, MA 02158
617-965-5100

CONNECTICUT, MAINE, MASSACHUSETTS,
RHODE ISLAND
U.S. Fish and Wildlife Service
P.O. Box 1518
Concord, NH 03301
603-224-2585

CONNECTICUT, RHODE ISLAND
Don Tiller, Refuge Manager
Trustom Pond National Wildlife Refuge
Box 307
Charlestown, RI 02813
401-364-3106

MAINE
Douglas M. Mullen, Refuge Manager 207-454-3521
Moosehorn National Wildlife Refuge
Box X
Calais, ME 04619

MAINE
Maurice Mills, Jr., Refuge Manager 207-646-2996
Rachael Carson National Wildlife Refuge
Route 2, Box 98
Wells, ME 04090

MASSACHUSETTS
George W. Gavutis, Refuge Manager 617-465-5753
Parker River National Wildlife Refuge
Northern Boulevard
Plum Island
Newburyport, MA 01950

5.2.2 State Agencies

CBRS maps may also be available for review at offices of Coastal Zone Management Agencies listed in Chapter 4 on the CZM Act.

5.3 REFERENCES

The Coastal Barrier Resources Act, 16 U.S.C. 3501.

USEPA, Office of Water. Memorandum from Frederick A. Eidsness, Jr. to Regional Administrators, Regions I-IV, VI, IX and X on the subject of Coastal Barrier Resources Act - Restriction on Grant Awards, March 18, 1983.

USDOI, Fish and Wildlife Service. "Coastal Barrier Resources Act; Advisory Guidelines," 43 CFR Subtitle A, Federal Register, Vol. 48, No. 195, October 6, 1983, 45664-45668.

ATTACHMENT 5-1 - LISTING OF CBRS UNITS, EPA REGION I

Map Number(s) and Unit Names(s)

MAINE (12 maps)
A01 Lubec Barriers
A01A Baileys Mistake
A03 Jasper
A03B Starboard
A03C Popplestone Beach/Roque Island
A05A Seven Hundred Acre Island
A05B Head Beach
A05C Jenks Landing/Waldo Point
A06 Cape Elizabeth
A07 Scarborough Beach
A08 Crescent Surf
A09 Seapoint

MASSACHUSETTS (39 maps)
C00 Clark Pond
C01 Wingaersheek
C01A/C01B Good Harbor Beach and Brace Cove
C01C West Head Beach
C02 North Scituate
C03 Rivermoor
C03A Rexhame
C04 Plymouth Bay
C06 Center Hill Complex
C08 Scorton
C09 Sandy Neck
C10 Freemans Pond
C11 Namskaket Spits
C11A Boat Meadow
C12 Chatham Roads
C13 Lewis Bay
C14 Squaw Island
C15/C16 Centerville and Dead Neck
C17 Popponessett Spit
C18/C18A Waquoit Bay and Falmouth Ponds
C19 Black Beach
C19A Buzzards Bay Complex Sheet 1 of 2
C19A Buzzards Bay Complex Sheets 2 of 2
C20 Coatue
C21 Sesachacha Pond
C22 Cisco Beach
C23/C24 Esther Island Complex and Tuckernuck Island
C25 Muskeget Island
C26 Eel Pond Beach
C27 Cape Poge
C28 South Beach
C29 Squibnocket Complex

C29/C29B James Pond and Mink Meadows
C31 Elizabeth Islands
C31A West Sconticut Neck
C31B Harbor View
C32 Mishaum Point
C33/C34 Little Beach and Horseneck Beach
C34A Cedar Cove

RHODE ISLAND (9 maps)
D01 Little Compton Ponds
D02 Fogland Marsh
D02B Prudence Island Complex
D02C West Narragansett Bay Complex
D03/D04/D05 Card Ponds, Green Hill Beach and East Beach
D06 Quonochontaug Beach
D07 Maschaug Ponds
D08 Napatree
C09 Block Island

CONNECTICUT (8 maps)
E01/ E01A Wilcox Beach and Ram Island
E02, E03, E03A Goshen Cove, Jordon Cove and Niantic Bay
E03B Lynde Point
E04 Menunketesuck Island
E05 Hammonassett Point
E07 Milford Point
E08A Fayerweather Island
E09 Norwalk Islands

Source: Federal Register, November 19, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 1 8 1983

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Coastal Barrier Resources Act - Restriction on Grant Awards

FROM: Rebecca Hanmer for Frederic A. Eidsness, Jr., Assistant Administrator for Water (WH-556)

TO: Regional Administrators
Regions I-IV, VI, IX and X

ATTN: Water Management Division Directors

President Reagan signed the Coastal Barrier Resources Act (P.L. 97-348) into law on October 18, 1982.

This Act (copy attached) restricts new federal expenditures and financial assistance which have the effect of encouraging development on undeveloped coastal barriers within the Coastal Barrier Resources System. The term financial assistance includes grants for the construction of any wastewater treatment facility or related infrastructure. The Coastal Barrier Resources System consists of undeveloped coastal barriers located in the Atlantic and Gulf coasts of the United States. The system includes depositional geologic features, such as barrier islands and related areas containing few man-made structures. The areas included in the system are shown on maps discussed below.

The Act generally prohibits new federal expenditures or new federal financial assistance for construction within the Coastal Barrier Resources System on or after October 18, 1982. Specified exceptions to this prohibition are available after consultation with the Secretary of the Interior. The exception relevant to the construction grants program allows funding for projects for the maintenance, replacement, reconstruction, or repair, but not expansion, of publicly owned or publicly operated structures or facilities, provided they meet one of two conditions. Specifically, the projects must either be an essential link in a larger network or system or be consistent with the purposes of the Act.

For the construction grants program, an expenditure is not a new expenditure if a grant award was made before October 18, 1982, the date of enactment.

In addition to restricting grant awards for funding construction of facilities within the Barrier Resources System, the Act prohibits the award of a grant for capacity in a treatment plant or conveyance outside of the delineated areas which would have the effect of encouraging development in the delineated areas.

Maps delineating the locations where grants for facilities may not be awarded are available from Department of Interior. Advance copies of the maps were sent to you in December. A description of the method initially used to develop the maps, and a listing of the maps were published in the Federal Registers of August 16, 1982 (47 FR 35696-35715), and November 19, 1982 (47 FR 52388-52393).

Copies of maps have been sent to the Regional Environmental Impact Statement (EIS) coordinators. Comments on the maps will be transmitted to the Department of Interior for their use in determining whether minor and technical changes to system boundaries are warranted. Additionally, an EIS, being prepared on the development of the maps, is expected to be circulated to each coastal Region for review. Each Atlantic and Gulf coast Region or delegated State should use the maps and EIS to identify and review pending applications for Step 3 or Step 2+3 grants and all grant awards made on or after October 18, 1982 to insure consistency with the provisions of this Act.

If you have questions on how this Act affects a particular project you should first contact your Regional Counsel's Office. Headquarter's points of contact are William Kramer of the Facility Requirements Division, FTS 382-7277 and Howard Corcoran, Office of General Counsel, FTS 382-5320.

Attachment

cc: R. Perry
P. Cahill

Endangered Species Act

ENDANGERED SPECIES ACT

6.0 LEGISLATIVE/REGULATORY FRAMEWORK

6.0.1 Endangered Species Act

The Endangered Species Act of 1973, amended to October 1982, provides a means of conserving species of fish, wildlife and plants which are threatened with extinction and the ecosystems upon which these species depend.

The Act requires the Secretary of the Interior to research the status of various species and designate a species as endangered or threatened where such designation is warranted. Designated species are put on a formal list, which also identifies the range where the species is endangered or threatened and any critical habitat within such range.

The Fish and Wildlife Service (FWS) has jurisdiction and responsibility for terrestrial and freshwater species on the list. The National Marine Fisheries Service (NMFS) has jurisdiction and responsibility for the marine species on the list. Species may be removed from the list when the Secretary of Interior and the Secretary of Commerce determine that the species is no longer endangered. The list of species is published periodically in the Federal Register. The current publication is dated July 27, 1983.

Species included on the list which may be found in Region I include:

- Terrestrial Wildlife

Gray Wolf	*Canis lupus*
Eastern Cougar	*Felis concolor cougar*
Indiana Bat	*Myotis sodalis*
Plymouth Red-bellied Turtle	*Chrysemys rubriventris bangsi* (Massachusetts)

- Birds

Bald Eagle	*Halioeetus leucocephalus*
Peregrine Falcon	*Falco peregrinus anatum* and *Falco peregrinus tundrius*

- Marine Species

Short Nose Sturgeon	*Acipenser brevirostrum*
Whales	(8 species)
Sea Turtles	(4 species)

- Plants

Furbish Lousewort	*Pedicularis furbishiae* (Maine)
Small Whorled Pogonia	*Isotria medeoloides*
Robbins Cinquefoil	*Potentilla robbinsiana* (New Hampshire, Vermont)

Section 7(a) of the Act requires Federal agencies such as EPA to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify or destroy the critical habitats of such species. Actions which might jeopardize listed species have been interpreted to include direct and indirect effects, together with the cumulative effects of other actions which are interrelated with, or interdependent on, the proposed action.

If listed species or their habitat are believed to be present within the area of the proposed action, informal consultation between the Federal agency acting on the project and the appropriate wildlife agency must be undertaken. The purpose of this consultation is to find out whether or not the project will be "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat."

Section 7 of the Act was amended in November 1978 to require specific consultation procedures as follows:

- request for information from the Secretary of Commerce and/or Interior,
- preparation of a Biological Assessment by the Federal agency advocating the proposed action,
- formal consultation between the Federal agency and the Secretary of Commerce and/or Interior,
- issuance of an opinion by the appropriate Secretary as to the likelihood of jeopardy by the proposed action to the continued existence of the species or its critical habitat.

A description of the elements of each of these procedures is included in Attachment 6-1.

Section 7(c) of the Act provides that the Biological Assessment may be undertaken as part of the Federal agency's compliance with NEPA.

Section 7(d) of the Act provides that, after initiation of the consultation process, the Federal agency and the applicant shall make no irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would not violate Section 7(a).

Section 7(h) of the Act provides for exemptions from the Act only if an appointed Endangered Species Committee finds that:

- there are no reasonable and prudent alternatives to the agency action,
- the benefits clearly outweigh the benefits of alternative actions consistent with the Act, and
- the action is of regional or national significance.

6.0.2 FWS/NMFS Interagency Cooperation Regulations

Prior to the November 1978 amendments, Section 7 consisted of one brief paragraph requiring consultation between the Secretary of Commerce and/or Interior and other Federal agencies. In order to implement the consultation requirements, NMFS and FWS published regulations on January 4, 1978 outlining consultation procedures (40 CFR 402). While these regulations are technically still in effect, they are no longer completely appropriate because of the more specific procedural requirements of the Novmber 1978 amendments. In addition, the January 1978 regulations set forth a definition for "critical habitat" which was substantially modified by the November 1978 amendments to the Act.

In response to the 1978 amendments, NMFS and FWS have been drafting new regulations and have recently published a Proposed Rule in the Federal Register (June 29, 1983) for interagency cooperation procedures to implement Section 7 as amended.

The Proposed Rule does not change the basic elements of the consultation procedure identified in 50 CFR 402, but provides more detail on the specific nature of each element and on the time frame in which it must be carried out.

The major departure of the proposed regulations from the procedures set forth in the amended Act itself is that the regulations try to set a threshold before requiring the formal consultation in the form of Request for Information and the Biological Assessment (thus, this procedure would only be required for major projects which may have an adverse effect. For other projects, the burden of decisions/compliance would be placed on the individual agency but FWS/NMFS would still have an opportunity to step in on any project at any time if they felt the agency did not properly consider endangered species).

Until such time as these pending regulations are promulgated, EPA will follow the procedures set forth in the amended Act itself.

6.0.3 State Programs

In addition to the Federal endangered species program, many states have endangered species programs of their own and maintain lists of those species endangered or threatened within the state.

Actions affecting these species and their habitat are not subject to the Federal Endangered Species Act unless the species are proposed for inclusion on the Federal list. They are, however, subject to NEPA and to the Fish and Wildlife Coordination Act and to any applicable state laws or regulations.

6.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The major steps for complying with the Endangered Species Act during a 205(g) review are shown in Figure 6.1. The flow of activities shown in the figure represent the order of activities, based on the requirements of the Act and 50 CFR 402, that are currently in general use. Some of the initial steps are optional and are shown by dashed lines.

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6.1.1 Determining the Need for a Biological Assessment

Section 7(c) of the Act requires EPA to request information from the Secretaries of Interior and Commerce on whether any species which is listed or proposed to be listed may be present in the area of the proposed action. Since the required studies and consultation procedures may take in excess of 12 months, if such species are found to be present, the Grantee is advised to discuss the potential applicability of the Endangered Species Act with the State project coordinator during the initial stages of the facilities planning process.

The State project coordinator may consult with the State Fish and Wildlife staff who should be able to advise the project coordinator and the Grantee as to the designation of any state or Federal endangered or threatened species or critical habitat within the study area.

While the Grantee may have access to a current list himself, it is important that the state Fish and Wildlife agency be contacted, as the list published in the Federal Register may not contain sufficient detail about the species or its critical habitat for site specific analysis.

If a species on the state list is present in the area, the State should advise the Grantee as to the procedures to follow to meet state requirements. The presence of state listed species and project impacts on those species should be addressed in the EID.

If the State Fish and Wildlife staff advise that Federal endangered species or their critical habitat are listed within the study area, then the State and/or the Grantee are advised to contact EPA during preparation of the Facilities Plan. They should ask that EPA request information on the presence of species from the Secretaries of Commerce and Interior through the NMFS and the FWS, respectively.

EPA must write all letters to FWS or NMFS because, under the present regulations, EPA cannot delegate the responsibility for compliance with this Act. The FWS and/or NMFS must respond within 30 days.

If the FWS and NMFS respond that there are no endangered species present, then neither the EPA nor the Grantee need take further action on the issue. The results of

their communication with NMFS and/or FWS should be included in the EID.

If FWS and/or NMFS respond that an endangered species may be present, then a Biological Assessment will be required.

The appropriate Federal wildlife service will, to the extent their manpower permits, assist the Grantee, State and EPA in the scoping of the assessment.

6.1.2 Biological Assessment

The purpose of the Biological Assessment is to determine if listed species or critical habitat actually are present and, if so, to what degree, they are likely to be affected by the proposed project (see Attachment 6-1).

When a Biological Assessment is necessary, it must be completed within 180 days of EPA's receipt of notification from NMFS or FWS unless the agencies agree to an extension. The Biological Assessment would usually be prepared by the Grantee and reviewed by the State initially. It should be submitted to EPA for review within the 180 day period. EPA will then submit the Biological Assessment to FWS or NMFS for review.

The FWS or NMFS may find the document inadequate and request additional information. Once the FWS or NMFS find the Biological Assessment to be adequate, the State should include it with the preliminary EA.

If the Biological Assessment indicates that either the listed species or their critical habitat may be affected, then EPA must request formal consultation with NMFS and/or FWS. Again, this request must come from EPA in writing and cannot be delegated.

6.1.3 Formal Consultation

The formal consultation process consists of an examination by NMFS and FWS of the Biological Assessment and any other available scientific information related to the species in question. It may also include on-site inspection.

The examination must be concluded within 90 days except, in the case of approval of a permit or license during design, the agencies and the Grantee may agree on a longer period.

At the end of the examination the Director(s) or Regional Director(s) of NMFS and/or FWS must submit to EPA a Biological Opinion detailing how the agency action affects the species or its critical habitat. The opinion must include a summary of the information upon which it is based and any recommended mitigating measures. If the opinion is that the action would jeopardize the continued existence of the species, then the opinion must suggest reasonable and prudent alternatives which the Director believes would not violate the Endangered Species Act.

After receipt of the Biological Opinion it is EPA's responsibility to determine whether to proceed with the action in light of its obligations under the Act.

A finding that endangered species are present and may be affected could also cause EPA to require an EIS at this point, pursuant to the criteria of 40 CFR 6.508(a)(3).

6.1.4 EID Review and Preparation of Preliminary EA by State

The State should be sure that the approved Biological Assessment has been incorporated into the EID and any mitigating measures recommended by it, FWS or NMFS have been or will be incorporated into the project. The preliminary EA should discuss the findings of the assessment and, if consultation was undertaken, the findings of the Biological Opinion.

6.1.5 EPA Review

Where the preliminary EA shows that there are no endangered or threatened species present or that the project will not adversely affect those that are present, EPA can issue a FNSI. Where a Biological Opinion has stated that a project "is likely to jeopardize" a species, EPA will not be able to fund the project unless an exemption to the Act is granted. It is more likely that this situation would result in additional facilities planning (probably with a concurrent EIS) to try to develop a solution which would not harm the species.

6.2 CONTACTS

6.2.1 Federal Agencies

Paul Nickerson — 617-926-9316
U.S. Fish and Wildlife Service
Region 5 - One Gateway Center
Newton, MA 02158

Douglas Beach — 617-281-3600
National Marine Fisheries Service
14 Elm Street
Gloucester, MA 01930

6.2.2 State Agencies

The following state agencies should be able to provide assistance in assessing impacts on endangered species and information on whether the state has an endangered species program and list of its own.

CONNECTICUT
Fauna and Flora:
Leslie Mehroff — 203-486-3266
Division of Natural Resources
Department of Environmental Protection
U-42 University of Connecticut
Storrs, Connecticut 06268

MAINE
Fauna:
Robert W. Boettger, Chief or — 207-289-3651
Lee Perry, Assistant Chief
Wildlife Division
Inland Fisheries Wildlife Department
284 State Street
Augusta, Maine 04333

MASSACHUSETTS
Fauna:
Chet McCord, Chief — 617-366-4470
Wildlife Research, Division of
Fisheries and Wildlife
Field Headquarters
Westboro, MA 01581

Brad Blodget, Chief of Non-Game — 617-727-3151
Massachusetts Division of Fisheries
and Wildlife
100 Cambridge Street
Boston, MA 02202

NEW HAMPSHIRE
Fauna:
Howard C. Nowell, Jr 603-271-3551
Chief, Game Management and Research
or
Harold P. Nevers 603-271-2774
Federal Aid and Endangered Species
Project Coordinator
Fish and Game Department
34 Bridge Street
Concord, NH 03301

Flora:
Howard Townsend 603-271-3551
Commissioner
New Hampshire Department of Agriculture
Park Plaza
85 Manchester Street
Concord, NH 03301

RHODE ISLAND
Fauna:
John M. Croanan, Chief 401-789-3094
Division of Fish and Wildlife
Department of Environmental Management
Washington County Government Center
Tower Hill Road
Wakefield, RI 02879

Flora:
James Chadwick 401-789-3094
Deputy Chief of Wildlife
Division of Fish and Wildlife
Department of Environmental Management
Washington County Government Center
Tower Hill Road
Wakefield, RI 02879

VERMONT
Fauna:
James D. Steward 802-828-3371
Fish and Game Coordinator
Fish and Game Department
State Office Building
Montpelier, Vermont 05602

Flora:
Charles Johnson 802-828-3375
State Naturalist
Agency of Environmental Conservation
Department of Forests, Parks and Recreation
79 River Street
Montpelier, Vermont 05602

6.3 REFERENCES

The Endangered Species Act of 1973, 16 U.S.C. 1531.

USDOI, Fish and Wildlife Service and USDOC, National Marine Fisheries Service. "Interagency Cooperation - Endangered Species Act of 1973," Code of Federal Regulations, Title 40, Part 402, 377-380. (Source: 43 FR 874, January 4, 1978).

USDOI, Fish and Wildlife Service and USDOC, National Marine Fisheries Service. "Interagency Cooperation; Endangered Species Act of 1973", Proposed Rule, Federal Register, Vol. 48, No. 146, June 29, 1983, 29990-30004.

USDOI, Fish and Wildlife Service. "Republication of the Lists of Endangered and Threatened Species," 50 CFR 17, Federal Register, Vol. 48, No. 145, July 27, 1983, 34182-34196.

ATTACHMENT 6-1

Biological Assessment (as described in the proposed rule published June 29, 1979)

purpose to assist agency in determining whether formal consultation necessary

180 days to complete

informal assistance from FWS and NMFS in scoping

study shall include:

determination of which species or habitat are present in the action area

evaluation of potential impacts on species or habitat

evaluation of cumulative effects on species or habitat

report shall be forwarded to director of applicable FWS or NMFS office for review (review comments within 30 days if director disagrees with findings).

Consultation

initiated by letter to FWS or NMFS formally requesting consultation

after request, no irreversible or irretrievable commitments to the project are allowed until process complete

amendment to Act requires biological opinion to be issued by FWS or NMFS within 90 days after initiation

under January 4, 1978 regulation and proposed rule, the biological opinion document could express one of following three opinions about the effect of the project:

not likely to jeopardize or adversely affect habitat accompanied by conservation measures

likely to jeopardize or adversely affect accompanied by suggested alternatives

insufficient information - FWS or NMFS could require information to be gathered before they would reconsider and issue a final opinion - this situation should not occur if care is taken during scoping of the Biological Assessment.

Reinitiation of Formal Consultation

if new information revealing adverse impacts

if modification of project

if new species is listed that project may affect

Fish And Wildlife Coordination Act

FISH AND WILDLIFE COORDINATION ACT

7.0 LEGISLATIVE/REGULATORY FRAMEWORK

7.0.1 Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) of 1958 requires that wildlife conservation be given equal consideration and be coordinated with other features of water-resource development projects.

Section 662(a) of the Act requires the proponent agency to consult with the U.S. Fish and Wildlife Service and the State wildlife agency "...whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever...".

Section 662(b) provides that reports and recommendation of the wildlife agencies be given full consideration. It further requires that the proponent agency include in the project plans such justifiable means and measures for wildlife purposes that the wildlife agencies find should be adopted to obtain maximum overall project benefits. The Act authorizes agencies such as EPA to provide grant funds for measures necessary to accomplish wildlife conservation activities.

7.0.2 "Memorandum of Understanding Between the Environmental Protection Agency and the U.S. Department of Interior", November 1978

Between 1979 and 1982, the Department of Interior and the Department of Commerce proposed rules defining procedures for implementation of the Fish and Wildlife Coordination Act. In 1982 these proposals were withdrawn in favor of administrative actions preparing memoranda of agreement and other Executive instructions.

In the absence of formal regulations or more specific memoranda of agreement, the Fish and Wildlife Service has been relying on the Authority of a "Memorandum of Understanding Between the Environmental Protection Agency and the U.S. Department of Interior", November 1978 for elevating resolution of FWCA-related issues above staff level when necessary. This very general memorandum was developed by direction of Section 304(j)(1) of the Clean Water Act to enhance coordination of clean water programs.

7.0.3 Current Practice

Regardless of the status of proposed regulations and agreements, EPA has found it beneficial to involve the FWS in reviewing the Facilities Plans and EID's for a variety of reasons. Most importantly, EPA has an overall responsibility under its own mission and under NEPA to protect fish and wildlife habitat (especially wetlands). In addition, FWS, because of its expertise in this area, can offer valuable comments and assistance.

Secondly, for projects requiring permits, EPA or the Corps of Engineers would eventually have to consult with FWS on the project under the FWCA. FWS regularly reviews all Section 404/10 permits under a general agreement with the Corps (see Chapter 9, Section 404/10). Since problems at the end of the design stage may require completed work to be changed and can seriously delay a project, it is much better to consult early in the planning process so as to avoid these problems.

Because of these considerations, Region I EPA arranged to have the FWS staff at their area office in Concord, N.H. review all completed Facilities Plans and EIS's. In addition, it has been standard practice to involve the FWS in early field trips and review meetings for those projects which can be predicted to involve impacts to wetlands and require Section 404/10 permits.

Since EPA will no longer necessarily be involved in the planning stage and the states have assumed the responsibility for initial compliance with Federal requirements, it is strongly recommended that the states make provision in their facilities planning procedures to continue these practices.

7.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The recommended steps for complying with the Fish and Wildlife Coordination Act during a 205(g) review are shown in Figure 7.1. The flow of activities shown represents those which are generally in current practice.

7.1.1 Procedures During Facilities Planning

The State should ensure at the start of the project that the Grantee is aware of the provisions of the FWCA itself and the general concerns of the FWS (as expressed in the 5/9/80 letter from Beckett to Murray, see

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Attachment 7-1). The State should make sure that wetlands, Section 404/10, and fish and wildlife habitat issues will be adequately addressed in the EID.

During preparation of the Facilities Plan, the State should closely monitor those projects which may involve wetlands or riverine construction. Whenever the State deems it appropriate, EPA, FWS, and the State's fish and wildlife agency should be kept informed of progress on specific projects and invited to review meetings and field trips to view the wetland in question. Any FWS or State fish and wildlife comments received should be addressed in the development of the Facilities Plan.

If it becomes evident that a preferred alternative will require stream or water body alterations (crossings, diversions, construction in wetlands, etc), it is recommended that the State notify EPA as soon as possible so that consultation under the FWCA may proceed.

7.1.2 EID Review and Preparation of Preliminary EA by State

Regardless of whether or not the FWS was involved during Facilities Planning, the State should arrange for FWS to receive a copy of the completed Facilities Plan as soon as it is available. The FWS will try to comment within 30 days. The State may wish to include FWS comments with the other comments to the Grantee requesting further information or corrections before Facilities Plan approval. The State may need to require that mitigating measures be developed.

The preliminary EA should describe any wetlands/riverine impacts, discuss the permits involved, briefly describe any coordination that was undertaken, discuss mitigating measures and how they are to be accomplished, and discuss any unresolved issues.

7.1.3 Coordination Activities During Design

Where Corps permits are required, the Corps will initiate consultation with FWS under its own agreements with FWS. If the Corps is satisfied that FWS concerns have been adequately met, it will issue the permits necessary for construction. If not, the permits will be withheld until the necessary resolution is reached.

7.1.4 EPA Review

If EPA is satisfied that fish and wildlife coordination concerns have been adequately incorporated into the project, it will issue a FNSI.

If unresolved issues remain, EPA will determine whether or not an EIS is necessary under the criteria of 40 CFR 6.508(a)(6), and/or whether further coordination with FWS is required.

7.2 CONTACTS

7.2.1 Federal Agencies

Douglas Thompson — 617-223-3910
U.S. Environmental Protection Agency
Region I
J.F.K. Federal Building
Boston, MA 02203

Gordon Beckett, Supervisor — 603-834-4726
Ecological Services
Fish and Wildlife Service, Region 5
U. S. Department of the Interior
P. O. Box 1518
Concord, NH 03301

Allen E. Peterson, Jr., Director — 617-281-6700
National Marine Fisheries Service
14 Elm Street
Gloucester, MA 01930

7.2.2 State Agencies

See listing of wildlife agencies in section covering Endangered Species Act.

7.3 REFERENCES

The Fish and Wildlife Coordination Act, 16 U.S.C. 661-661c and subsequent additions.

ISDOI and USEPA. Memorandum of Understanding Between the Environmental Protection Agency and U.S. Department of the Interior, November 1978.

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
ECOLOGICAL SERVICES
P.O. Box 1518
Concord, New Hampshire 03301

Mr. Charles W. Murray, Jr.
Director, Water Division
U.S. Environmental Protection Agency
Region I
JFK Federal Building
Boston, Massachusetts 02203

MAY 09 1980

Dear Mr. Murray:

Following our April 8, 1980, meeting with you and members of your staff, we have the following general concerns and recommendations regarding various aspects of 201 wastewater treatment facilities projects. We recommend that, in addition to your staff and the state DEP staffs becoming familiar with our concerns and recommendations, consulting engineers also be given a copy of this listing so that they may incorporate our recommendations in the early planning stages of proposed 201 projects. If these generalized guidelines are followed during project planning, the review and comment process for our respective agencies should be facilitated for most projects.

Wetlands: Avoid siting the facilities in wetlands, whenever possible. If wetlands cannot be avoided, take all reasonable measures to minimize the size of the area disturbed. For interceptor lines, do not place fill above the original contours of the wetland area. Clay saddles should be placed at intervals on any pipe passing through a wetland to prevent drainage along the pipe. Avoid using wetlands as equipment storage areas. Any use of wetlands should be reviewed for compliance with the requirements of Executive Order 11990.

Floodplains: Avoid siting facilities within the 100-year floodplain, whenever possible. If floodplain areas cannot be avoided, attempt to site facilities at the highest elevation possible (e.g., the 50-year floodplain boundary would be generally preferable to the 10-year floodplain boundary) giving full consideration to wildlife habitat values. Any use of floodplain areas should be reviewed for compliance with Executive Order 11988.

Streams: Avoid siting facilities to encroach upon riparian (stream bank) vegetation. A minimum buffer strip of 100-feet of undisturbed vegetation should be maintained between the stream and the interceptor line, whenever possible. These concerns are related closely to the floodplain issues. The number of stream crossings should be minimized

and precautions taken to control erosion. The streambed should be returned to its original grade. Crossings should be made adjacent to rights-of-way (ROW's) such as existing bridges or road culverts, whenever possible, to avoid disturbing previously undisturbed areas. Stream crossings should be made during low flow periods of the year, such as July-September. Crossings should be made at right angles to the stream to minimize the length and width of stream bottom disturbance. Stream channelization should be avoided.

Vegetation: Facilities should be sited to avoid having an impact on forested areas, especially riparian, wetland, and floodplain types. Interceptor lines should be routed through existing streets, roads, or other ROW's. Overland routes should be avoided, whenever possible. When route alignment cannot be accomplished within existing streets, then our preference would be an alignment through fields, pastures, golf courses, or other areas containing herbaceous vegetation. In all cases, the amount of vegetative clearing should be minimized; disturbed areas should be seeded and mulched until native vegetation becomes established. Topsoil should be striped and stockpiled separately from parent material. After the construction is completed, the topsoil should be placed back on top of the disturbed area. Care should be taken to replace upland topsoils in upland areas and wetland topsoils in wetland areas. Maintenance roads should be eliminated on ROW's passing through wooded overland routes whenever possible. If vegetation maintenance is required, we prefer to have the ROW maintained with a cover of native shrubs and small trees instead of herbaceous ground cover.

Outfall impacts: Our concerns generally relate to the disinfection system, the relationship between normal stream low-flow and effluent flow, and whether the outfall is new or an existing one. Chlorine is the most commonly used disinfectant (biocide) for municipal wastewater because it is efficient, effective, and relatively inexpensive. However, chlorine is also toxic to aquatic life in the receiving stream. This toxicity problem is cause for great concern when the receiving waters support cold-water or salmonid fisheries. Receiving waters containing a low BOD load or low organic carbon load generally have less capacity to absorb the chlorine impact than streams with a high organic load. In the former instance, fish and other aquatic life may form a large part of the organic carbon reaction base resulting in a loss of fish and invertebrates. Alternative disinfection techniques, such as ozonation, are encouraged. Declorination may also be an acceptable method of eliminating the chlorine toxicity problems. As a general rule, we recommend residual chlorine concentrations in the effluent not to exceed .002 mg/l and 0.01 mg/l for receiving waters containing cold- and warm-water fish populations, respectively.

The relationship between stream flow and effluent flow is an important consideration for fish and invertebrate communities. Our concerns become pronounced when a large discharge is proposed for a small receiving stream. In these instances, a high percentage of the flow might consist of treated effluent with subsequent undesirable impacts on stream aquatic life. Alternative methods should be sought to avoid this type of situation. This might include land application with percolation back into the receiving stream, relocation of the outfall to a larger stream, or implementation of certain advanced waste treatment systems. A proposed outfall on a stream that does not presently have an existing wastewater discharge will generally be cause for concern. Streams supporting anadromous fish runs should not be further downgraded to accept a new or additional wastewater discharge.

Secondary development: Our concerns relate to induced development in floodplain, wetland, and other areas containing valuable wildlife habitat. Local zoning ordinances normally are not sufficient deterrents to protect wetlands that are not covered by Section 404 regulations (e.g., a lake less than 10 acres in surface area or a stream less than 5 cfs and their adjacent or contiguous wetlands) nor to protect floodplains. Zoning ordinances generally only require first floor elevation one foot above the 100-year flood, outside of the floodway. Development in these areas generally could not occur without a sewer system. The action of routing a sewer line through an area containing undeveloped floodplain, wetland, or various wooded uplands on poorly drained soils can be the single action that opens these lands up for development. Development is thus promoted in areas that would otherwise be secure for wildlife uses. Mechanisms to limit this development should be incorporated in the Facility Plan. This could entail sizing the project (interceptors and treatment works) to service the existing structures only. Grant conditions or stipulations could also be made to preclude hookup rights to any future development involving wetlands, floodplains, or unique ecosystems. This approach could ultimately prove the most successful, since the municipalities would have to abide by the conditions set forth in the 201 grant.

If you have any questions regarding these concerns and recommendations, please feel free to contact our office.

Sincerely yours,

Gordon E. Beckett

Gordon E. Beckett
Supervisor

Wetlands And Floodplain Protection Procedures

8.0 LEGISLATIVE/REGULATORY FRAMEWORK

8.0.1 Administrator's Decision Statement No. 4, February 21, 1973

EPA has had a strong policy to protect wetlands since early 1973. The Administrator's decision statement, entitled "EPA Policy to Protect the Nation's Wetlands," outlines the values of wetlands and states that it is the agency's general policy to give special attention to any proposal with the potential to damage wetlands and to protect wetlands to the maximum extent possible from adverse dredging and filling practices and non-point source pollution.

The decision statement specifically addresses the 201 grant program as follows: ". . .it shall be the policy of this Agency not to grant Federal funds for the construction of municipal wastewater treatment facilities or other waste-treatment-associated appurtenances which may interfere with the existing wetland ecosystem except where no other alternative of lesser environmental damage is found to be feasible."

8.0.2 Executive Order 11990, Protection of Wetlands, May 24, 1977 and Executive Order 11988, Floodplain Management, May 24, 1977

Due to increasing public awareness of the values of wetlands and floodplains and to increasing concern for protecting these areas, President Carter issued two orders instructing agencies to ensure that their own actions do not diminish, but rather restore, preserve and enhance the natural and beneficial values of wetlands and floodplains. Each order directs every agency to avoid new construction in wetlands or floodplains except where no practicable alternative exists and then only after adopting strong mitigating measures and giving special public notification. Both orders require that each agency amend existing procedures or issue new procedures in order to implement these requirements.

8.0.3 Water Resources Council, "Floodplain Management Guidelines for Implementing Executive Order 11988", February 10, 1978

Because the Executive Order directed that agencies prepare their procedures in consultation with the Water Resources Council, that organization issued these detailed guidelines to aid the agencies. While the EPA procedures developed from these guidelines are complete in and of themselves, the guidelines are still useful as a reference. They give a detailed interpretation of the Executive Order and provide a great deal of information on the methods of identifying, evaluating, and minimizing floodplain impacts.

8.0.4 EPA "Statement of Procedures on Floodplain Management and Wetlands Protection" January 5, 1979 [Appendix A, 40 CFR 6]

These procedures emphasize that, to the extent possible, the requirements of the Executive Orders will be carried out through the agency's NEPA procedures. They also point out that the 1973 EPA Wetlands Protection Policy remains in effect, and they define "practicable" as capable of being done within existing constraints, including cost and technological constraints. The specific procedures they recommend to carry out the executive orders have been incorporated into the following discussion.

8.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The recommended steps for complying with EPA's procedures on floodplain management and wetlands protection during a 205(g) review are shown in Figure 8.1 and discussed below.

8.1.1 Procedures During Facilities Planning

Before developing project alternatives, the Grantee should make a preliminary review of the proposed project area to determine if there are any wetlands or floodplains located there so that they may be avoided wherever possible. The State should also review the extent of the wetlands and floodplains located in an area so that they will be able to judge how closely the project should be monitored. Since the preliminary EA must be quite detailed in this subject area, it is important to fully develop in the EID all of the information that will be necessary for the EA.

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The EID should contain detailed information on the location, extent, type and value of wetlands and floodplains in the area. During planning, alternatives which avoid any impacts to the areas should be formulated, and where an alternative will affect a wetland or floodplain, the impacts should be quantified, and mitigating measures should be developed.

The State should monitor closely any projects with the potential for significant direct or indirect impacts on wetlands or floodplains. Interim review meetings and field trips are strongly recommended, and EPA and FWS should be invited to attend. (See the Fish and Wildlife Coordination Act chapter for a discussion on their involvement). The 1973 EPA wetlands policy supports this involvement by stating, "The Department of Interior will be consulted to aid in the determination of the probable impact of the pollution abatement program on the pertinent fish and wildlife resources of wetlands". The Facilities Plan and EID should incorporate any comments received from EPA and FWS during this time.

EPA may also decide early in the process that an EIS is necessary under the criteria of 40 CFR 6.508(a)(2).

In any case, when it is apparent that the proposed action is likely to affect a floodplain or wetland, the public should be informed through appropriate public notice procedures in accordance with Section 6 a(2) of Appendix A to 40 CFR 6.

8.1.2 EID Review and Preparation of Preliminary EA by State

The State should forward the completed Facilities Plan and EID to FWS for review as soon as they are available. Comments from FWS should be incorporated into the State's general comments to the Grantee. The State should review the Facilities Plan and EID to be sure that the treatment of floodplain/wetland information and issues is comprehensive and that the selected alternative is the least harmful "practicable" one.

EPA Floodplain/Wetland Procedures require the preparation of a "Floodplain/Wetland Assessment" and a "Statement of Findings," along with special public notice, if the proposed action will be in or will affect a floodplain or wetland. However, for projects subject to NEPA, these discussions on floodplain and wetland matters can be incorporated into the normal environmental assessment and FNSI, and notice can be

provided through the normal EA/FNSI distribution procedures.

In accordance with 40 CFR 6a(3) and 6a(6), the preliminary EA must cover all of the areas which would be covered in a "Floodplain/Wetlands Assessment" and a "Statement of Findings". These are:

- a description of the proposed action,
- a discussion of its effects on the floodplain/wetlands,
- a description of the alternatives considered,
- a discussion of the reason that the action must be located in, or affect, the floodplain or wetland including a description of the decision factors,
- a statement regarding the conformance of the action to applicable State or local floodplain protection standards, and
- a description of how the proposed action has been modified to minimize potential harm.

8.1.3 EPA Review

EPA will review the preliminary EA as well as the correspondence from FWS and any other pertinent information. If the project will not affect the resources or will present the least impact of any practicable alternative, EPA will issue a FNSI and will take special care to be sure it is distributed to all parties and agencies with special interest in floodplains and wetlands. If there are unresolved floodplain/wetland issues, EPA will consult with the Grantee, State and FWS and try to resolve them, and will again consider whether or not an EIS is warranted.

8.2 CONTACTS

8.2.1 Federal Agencies

Julius Mikolaities 603-224-2585
U.S. Fish and Wildlife Service
Ecological Services
P.O. Box 1518
Concord, NH 03301

8.2.2 State Agencies

CONNECTICUT 203-566-2110
Department of Environmental Protection
State Office Building
165 Capitol Avenue
Hartford, CT 06106

MAINE 207-289-2801
Department of Conservation
Maine Geological Survey
State House Station #22
Augusta, ME 04333

MASSACHUSETTS 617-292-5519
Department of Environmental
Quality Engineering
One Winter Street
Boston, MA 02202

NEW HAMPSHIRE 603-271-2147
Water Resources Board
37 Pleasant Street
Concord, NH 03301

RHODE ISLAND 401-277-6820
Department of Environmental
Management
Division of Land Resources,
Wetlands Section
38 State Street
Providence, RI 02908

VERMONT 802-828-3365
Agency of Environmental Conservation
State Office Building
79 River Street
Montpelier, Vermont 05602

Information for Locating Floodplains and Wetlands
National Flood Insurance Program community floodplain maps:

Federal Emergency Management 617-223-2616
Agency (FEMA)
John W. McCormack Post Office and
Courthouse Building, Room 462
Boston, MA 02109

Fish and Wildlife Service 617-965-5100
wetland inventory maps
Regional Office
U.S. Fish and Wildlife Service
One Gateway Center, Suite 700
Newton, MA 02158

County Soil Survey Maps; Soil Conservation Service, USDA District Offices

Storrs, CT	203-429-9361
Orono, ME	207-866-2132
Amherst, MA	413-549-0650/256-0441
Durham, NH	603-868-7581
West Warwick, RI	401-884-9499
Burlington, VT	802-862-6261

Corps of Engineers floodway maps

U.S. Army Corps of Engineers 617-894-2400 x551
424 Trapelo Road
Waltham, MA 02254

USGS Quadrangle or Orthophoto Quadrangle Maps

Municipal Wetland Protection Bylaws

8.3 REFERENCES

Office of the President. "Protection of Wetlands," Executive Order 11990, Federal Register, Vol. 42, No. 101, May 25, 1977.

Water Resources Council Floodplain Management Guidelines for Implementing Executive Order 11988, February 10, 1978 (Includes Executive Orders 11988 and 11990).

USEPA. Statement of Procedures on Floodplain Management and Wetlands Protection, January 5, 1979 (in Appendix A, EPA Implementation Procedures on NEPA, 40 CFR Part 6, November 6, 1979).

Section 404 Of Clean Water Act And Section 10 Of Rivers And Harbors Act

SECTION 404 OF CLEAN WATER ACT AND SECTION 10 OF RIVERS AND HARBORS ACT

9.0 LEGISLATIVE/REGULATORY FRAMEWORK

9.0.1 Clean Water Act - Section 404

Section 404 of the Clean Water Act established a national program to control the discharge of dredged or fill material into the "waters of the United States". "Waters of the United States" are defined as all tributaries of navigable water up to their headwaters and landward to their ordinary high water mark, thus including wetlands. Key requirements of Section 404 are: that there must be a clear need to place fill or dredged material in the water resource, that alternatives must be thoroughly examined, and that the least damaging practicable alternative must be adopted.

Under Section 404(a) a permit system was established for administration by the Corps of Engineers. Section 404(b) required EPA, in consultation with the Corps, to develop environmental criteria to guide the permitting decisions. These criteria are discussed below.

Under Section 404(c) EPA may overrule a Corps decision to allow a discharge if EPA determines such discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds, fishery areas, wildlife or recreational areas. EPA 404 staff regularly review Corps permit applications by examining the projects for conformance with the 404(b) guidelines.

In 1977, the provisions of Section 404 were expanded under Sections 404(g) and (h) to allow state permit programs in lieu of the Corps program in non-tidal waters and where the Corps has not historically maintained navigation channels. There are no delegated or Federally approved state dredge and fill permit programs currently in Region I.

9.0.2 Rivers and Harbors Act - Section 10

Section 10 of the Rivers and Harbors Act of 1899 established a permit program administered by the Corps which regulates the placement of structures into navigable waters and is concerned with their effect on navigation.

A major distinction between Section 404 and Section 10 is the difference between "waters of the United States" and "navigable waters." As noted above, "waters of the United States" under Section 404 extends the jurisdiction beyond the limits of traditional navigability.

In most situations applying to "navigable waters," the Corps will consolidate permit applications for both Section 404 and Section 10. For areas not defined as "navigable waters", only Section 404 permits apply. Section 10 permits, however, will be required for the placement of any structure, such as an outfall pipe, in navigable waters even without any discharge of dredged or fill material.

Section 404 and/or 10 permits are required for any wastewater treatment plants or sewer lines located in or crossing water bodies or wetlands.

9.0.3 EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material [40 CFR 230]

On December 24, 1980 EPA issued a Final Rule establishing substantive criteria for use in evaluating discharges of dredged or fill material under Section 404 of the Clean Water Act [45 FR 85336]. These guidelines replace the September 5, 1975 Interim Final Guidelines developed pursuant to Section 404(b)(1) and apply to all 404 permit decisions made after March 23, 1981. They reflect the 1977 amendments to the Clean Water Act, were developed in conjunction with the Corps, and, although entitled "Guidelines", have the force of regulations. The 1980 guidelines stress the overall 404 program's goal of preventing any discharges that would have an unacceptable adverse impact on the aquatic ecosystem, including wetlands, either individually or cumulatively.

Section 230.10, Restrictions on Discharge, defines the four independent requirements which must be met to comply with the guidelines. They are:

- there must be no less environmentally damaging, practical alternative available;
- the discharge must not violate applicable water quality standards or jeopardize an endangered species;
- the discharge must not result in a significant degradation of the aquatic environment;

- all reasonable measures must be taken to minimize impacts to the aquatic environment.

Section 230.5 of the guidelines establishes a general procedure for evaluating whether a particular discharge site may be approved. Section 230.11 establishes "factual determinations" which are to be used in determining whether or not a proposed discharge satisfies the conditions for compliance with the guidelines.

The guidelines point out that the level of documentation in the factual determinations and findings of compliance should reflect the significance and complexity of the discharge activity.

9.0.4 Interim Final Rule for Regulatory Programs of the Corps of Engineers [33 CFR 320-330]

On July 22, 1982 the Corps published Interim Final Regulations [47 FR 31794] to update previous regulations governing the Corps' regulatory programs in order to reflect changes to the Clean Water Act, judicial decisions, Executive Orders and policy changes since 1977. These regulations establish policies, procedures and criteria for evaluation and issuance of 404/Section 10 permits.

A key policy of the Corps' permitting program is that a project must be in the public interest. The preamble to the Corps' 1982 regulations indicates that the Corps' public interest review goes hand-in-hand with EPA's Guidelines [40 CFR 230] and that, at the end of the public interest review, a permit would be denied if it did not conform to the EPA guidelines.

9.0.5 Applicability of Other Federal Legislation to the 404/Section 10 Permit Process

The Corps of Engineers must comply with several other Federal statutes during its 404/Section 10 permit evaluation process.

A State Water Quality Certification is required under Section 401 of the Clean Water Act before a 404/Section 10 permit can be issued. Permit applications are routinely reviewed by U.S. Fish and Wildlife Service pursuant to the Fish and Wildlife Coordination Act (FWCA) as discussed in Chapter 7 and by National Marine Fisheries Service. A "consistency determination" is required from the State Coastal Zone Management Agency

pursuant to the Coastal Zone Management Act (CZMA) as discussed in Chapter 4.

The Corps also must comply with NEPA and could require the preparation of an EIS if significant environmental issues remain unanswered at the time the permit application is submitted.

9.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

In actual practice, the Corps cannot issue a permit during the facilities planning process because they need the detailed plans and specifications developed during design in order to make a permit decision. Secondly, it is not necessary to have an approved 404/Section 10 permit to apply for a Step 2+3 or a Step 3 Construction Grant. However, the permit process normally takes from two to six months and can incur substantial delays and costly redesign if alternatives and mitigating measures have not been adequately addressed. It is therefore strongly recommended that the Grantee and State take the 404/Section 10 requirements into consideration during the development of the Facilities Plan and the EID and that the Grantee initiate the 404/Section 10 application process with the Corps during the project design phase.

Construction Grants 1982 indicates that the facilities plan and EID should evaluate alternatives identified by the Corps if a 404/Section 10 permit is needed. The recommended steps for complying with Section 404 during 205(g) review are shown in Figure 9.1. The process shown in Figure 9.1 and described below is aimed at ensuring that there will be no permit denials at the end of the design phase when extensive engineering design changes would be costly and time-consuming.

9.1.1 Procedures During Facilities Planning

At the beginning of the facilities planning process, the State should discuss 404/Section 10 requirements with the Grantee and should give the Grantee the latest EPA/Corps guidelines and criteria under Section 404.

During plan development, alternatives which would avoid any river crossings or other dredging activities should be formulated. If, however, it is determined that such situations cannot be avoided and a 404/Section 10 permit will be required, alternative methods of accomplishing the work in an environmentally sound manner should be formulated along with further mitigation measures. The Grantee should then review the guidelines and develop

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information for inclusion in the EID which allows a determination of the environmental effects of placing dredged and fill materials into water or wetland areas.

In order to expedite later reviews, the EID should contain a separate Section 404 discussion following the criteria of Section 230.10, and including sufficient information for a preliminary determination that Section 404 approvals from the Corps can be anticipated.

9.1.2 EID Review and Preparation of Preliminary EA by State

Since the states do not have an agency with primary Section 404 responsibility, it is recommended that the State consult with EPA's 404 staff to get an opinion on whether the project would receive a 404/Section 10 permit. The EPA 404 staff is experienced in applying the guidelines and routinely monitors Corps permit decisions. Therefore, it is possible for them to make a reasonable judgment as to whether or not the Corps would issue a 404/Section 10 permit for a specific project alternative based on information provided in the EID.

The State should also review the EID to assure satisfaction of any overall environmental concerns raised by issuance of a 404 permit.

The preliminary EA prepared by the State should refer to the applicability of 404/Section 10 to a project, discuss the environmental issues relating thereto, and give an opinion as to the project's acceptability in consideration of the prevailing guidelines.

9.1.3 EPA Review

After receiving the preliminary EA, EPA should review the discussion for adequacy and accuracy and issue the FNSI if the project is acceptable under the Guidelines. If EPA believes the project does not meet the Guidelines, EPA may decide to prepare an EIS under the criteria of 40 CFR 6.508(a)(2).

9.2 CONTACTS

9.2.1 Federal Agencies

William F. Lawless, Chief — 617-647-8338
Regulatory Branch
U.S. Army Corps of Engineers
New England Division
424 Trapelo Road
Waltham, MA 02154

Douglas Thompson 617-223-3910
404 coordinator
U.S. Environmental Protection Agency
Environmental Evaluation Section
Water Quality Branch
J.F.K. Federal Building
Boston, MA 02203

9.2.2 State Agencies

Agencies noted under the chapters on Wetland/Floodplain or Coastal Zone Management Act may be able to provide assistance with 404 evaluation.

9.3 REFERENCES

The Rivers and Harbors Act of 1899, 33 U.S.C. 403, particularly Section 10.

The Clean Water Act, 33 U.S.C. 1344 and subsequent additions, particularly Section 404, Permits for Dredged or Fill Material.

USEPA. "Guidelines for Specification of Disposal Sites for Dredged or Fill Material," 40 CFR 230, Federal Register, Vol. 45, No. 249, December 24, 1980, 85336-85357.

USCOE. "Interim Final Rule for Regulatory Programs of the Corps of Engineers," 33 CFR 320-330, Federal Register, Vol. 47, No. 141, July 22, 1982, 31794-31834.

USEPA, Office of Water Program Operations (WH-547). Construction Grants 1982 (CG-82), Interim Final. Washington, D.C.: 430/9-81-020, July 1982.

National Historic Preservation Act

10.0 LEGISLATIVE/REGULATORY FRAMEWORK

10.0.1 National Historic Preservation Act

The National Historic Preservation Act (NHPA) of 1966 and its supporting regulations are intended to help ensure that no significant archaeological or historical properties are irretrievably lost as a result of Federally-funded construction projects.

The major provisions of NHPA are the following:

- establishment of the National Register of Historic Places,
- implementation of the Section 106 review process, and
- establishment of the Advisory Council on Historic Preservation.

The National Register of Historic Places is a listing of significant historic buildings, districts and archaeological sites maintained by the Secretary of the Interior under Section 101(a) of NHPA.

Under Section 106, any Federal agency must take into account the effect of a Federally funded, licensed or assisted project upon any historic or archaeological property listed in, or eligible for listing in, the National Register.

In Sections 201-212 of NHPA, the establishment of the Advisory Council on Historic Preservation and its role in the 106 review process are described. The Advisory Council was authorized to develop regulations in order to implement the terms of Section 106 of NHPA.

10.0.2 Advisory Council Regulations

Executive Order 11593, "Protection and Enhancement of the Cultural Environment" of 1971, required Federal agencies to consult with the Advisory Council in the development of procedures to preserve and enhance sites, structures, and objects of historical or architectural significance. The Advisory Council regulations implementing Section 106, "Procedures for the Protection of Historic and Cultural Properties", were published in 1974. In order to improve implementation of the

Advisory Council regulations, the Presidential Memorandum on Environmental Quality and Water Resources Management in 1978 directed that the 1974 regulations be amended and further stated that "Federal agencies with water resource responsibilities... publish procedures implementing the Act (NHPA)." Pursuant to the requirements of the Presidential Memorandum, the Advisory Council issued new regulations in January 1979 (36 CFR Part 800). To date EPA has not published procedures for compliance with Section 106 of the NHPA. It is EPA's policy to apply the Advisory Council's regulations in 36 CFR 800 to all EPA programs which have the potential to affect historic and cultural properties.

The major steps in the Section 106 review process described in 36 CFR 800 are: the identification of properties which are listed on the National Register or eligible for listing; the determination of whether the project will have an effect on the properties and whether the effect will be adverse; and agreement on mitigating or avoidance measures. The principal participants in the process are the Grantee, the State Historic Preservation Officer (SHPO), EPA, and the Advisory Council.

10.0.3 State Historic Preservation Officer

The State Historic Preservation Officer (SHPO), appointed by the governor of each state, is reponsible for the inventory of cultural resources in each state and for implementing programs necessary for the protection of resources on or eligible for the National Register. The SHPO is also responsible for directing a state-wide survey of all cultural properties that are significant in American history, architecture, archaeology and culture at the national, state and local levels. The SHPO has a primary role in the review of historic and archaeological properties that may be affected by Federal programs in compliance with the Advisory Council Procedures (36 CFR 800.5) and should participate in any consultations on mitigating measures and sign any Memorandum of Agreement reached under the Section 106 regulations. The SHPO can also generally provide assistance in designing surveys or choosing qualified consultants.

10.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The NHPA requires that, before EPA can issue a construction grant, the Section 106 review process must be completed. The state coordinator should inform the Grantee of the requirements of the Section 106 review early in the planning process. Generally the Section 106 review period should run concurrently with the NEPA review process. Consultation with the SHPO and EPA about the 106 review process early in the facilities planning process will help identify possible problems, and will reduce delays if an extensive review is required. In addition, identification of National Register or eligible properties early in the planning process will allow for the full development of alternatives which have less or no adverse impact. It is desirable that the Section 106 review be completed before a FNSI is issued. In cases where a Step 2+3 grant is involved, the review process should be substantially completed, or if the project has adverse impacts, be at a point where agreement on necessary mitigating measures seems likely.

The major steps necessary for complying with Section 106 during a 205(g) review are shown in Figure 10.1 and discussed below. Optional steps are shown by dashed lines.

10.1.1 Identification of National Register or Eligible Properties

The first step in the Section 106 review process is the identification of historic and archaeological properties. This initially involves contacting the SHPO and any local historic commission in the community of the project's location. If an adequate survey of archaeological/historic resources has not been previously conducted in the project area, a survey may be necessary to identify resources on or potentially eligible for the National Register. This survey must be conducted by a professional.

The extent of survey activities is determined in consultation with the SHPO and based on the probability with which historic and archaeological properties can be expected to be found within the area of the project's potential environmental impact. The Advisory Council's regulations state that indirect as well as direct impacts be considered. Past practice has often been to limit surveys to direct impacts, such as areas where ground will be disturbed for the project. In practice

the Grantee and the SHPO can usually reach an agreement on the scope of an individual project.

There are different levels of surveys to be conducted at specific stages in the planning process. The first level of survey is the reconnaissance survey, designed to identify any archaeologically and/or historically sensitive areas potentially within the project area. This level of survey involves background research into the available literature and the consultation of local sources (written and oral) for the identification of culturally significant properties. This survey should be done as early in the planning effort as possible, since its results may influence the formulation or choice of alternatives to avoid identified properties or areas suspected to contain resources.

Later in the facilities planning and design process, when the project alternatives have been developed, a second level of survey may be necessary where the project's construction would overlap a sensitive area. This survey involves field testing of previously undisturbed lands. If archaeological properties are discovered, a site examination to evaluate the significance of any identified properties will follow.

When a survey identifies a property that is not on the National Register but has historical, architectural, archaeological, or cultural value, the Grantee, in consultation with the SHPO, will apply the National Register criteria (36 CFR 60.4) to see if the property might be eligible. If the SHPO and the Grantee agree that the identified property does not meet the criteria, the Grantee should document the agreement.

If a property appears eligible, a request for a determination of eligibility must be made. 36 CFR Part 63 discusses the procedures for this in detail. This request and any other formal correspondence must be sent by EPA, as EPA's responsibilities under Section 106 regulations cannot be delegated. Basically, if the SHPO and the EPA agree that a property is eligible, EPA shall forward to the Keeper of the National Register:
1) a letter stating their agreement and 2) a description of the property with the SHPO's statement that the property is eligible for the National Register. Written notice of the eligibility determination made by the Keeper of the National Register will be received by both EPA and the SHPO within 10 working days. If EPA and the SHPO do not agree about the property's eligibility, the EPA shall submit a letter to the Keeper of the National

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Register requesting a determination of eligibility. The Keeper must respond to this request within 45 days of its receipt.

In July 1982, the Advisory Council temporarily suspended three sections of its regulations. Included was the suspension of Section 800.4(a)(4) which now allows the Grantee to proceed with the rest of the Section 106 process concurrently with the determination of eligibility if it appears likely that the Keeper will determine that the properties are eligible. The determination of eligibility must still be undertaken.

If there are no National Register or eligible properties in the area of potential impact, the project does not need to go through the Section 106 process. The Grantee should include a letter from the SHPO in the EID stating that there are no National Register or eligible properties in the area.

10.1.2. Determination of Effect

Having identified the properties listed in, or eligible for listing in, the National Register, a determination of effect on the properties by the proposed project alternative or alternatives must be made. The Grantee, in consultation with the SHPO, will apply the Advisory Council Criteria of Effect (36 CFR 800.3(a). An effect occurs when a project directly or indirectly changes the integrity of location, design, setting, materials, workmanship, feeling or association of the property that contributes to its significance in accordance with the National Register criteria.

If there is no effect, the project can proceed with the Grantee retaining the documentation of no effect. The Grantee should notify EPA that a determination of no effect has been made, so that EPA can notify the Advisory Council. If the Executive Director of the Advisory Council does not object within 15 days, the Section 106 process is complete.

10.1.3 Determination of Adverse Effect

If an effect is found to result from the project, then a determination of either no adverse effect or adverse effect must be made by the Grantee in consultation with the SHPO. The criteria of adverse effect found in 36 CFR 800.3(b) are basically:

- destruction or alteration of all or part of a property;

- isolation from, or alteration of, the property's surrounding environment;

- introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

- neglect of a property resulting in its deterioration or destruction;

- transfer or sale of a property without adequate conditions or restrictions regarding preservation, maintenance, or use.

If it is determined by the Grantee and the SHPO that the effect will not be adverse, documentation of the determination must be submitted to the Advisory Council. The documentation must be sent by EPA and include a cover letter from EPA stating the determination of no adverse effect. As required by 36 CFR 800.13(a), the documentation must include:

- a description of EPA's involvement in the project;

- a description of the proposed project, including photographs, maps, drawings and specifications;

- a list of the National Register or eligible properties that will be effected, including description of physical appearance and significance;

- a brief statement explaining why each of the criteria was found inapplicable;

- a written statement from the SHPO; and

- cost estimates including Federal and non-Federal shares.

Once submitted to the Advisory Council, there is a 30-day review period for the Advisory Council to concur with or reject the finding of no adverse effect. If the Executive Director concurs with the determination of no adverse effect, the Section 106 review process is completed. The State's EA should include the letters from the SHPO and the Executive Director. If the Executive Director does not agree with the determination, he may suggest conditions which would mitigate the adverse effect. If EPA and the Grantee agree with these conditions, the conditions should be documented in the EA and will be included as part of the grant conditions. If EPA and the Grantee do not accept

the conditions, or if the Executive Director disagrees without suggesting conditions, the project is considered to have an adverse effect.

10.1.4 Preliminary Case Report

If the proposed project is determined to have an adverse effect on National Register or eligible properties, the Grantee must prepare a Preliminary Case Report, and develop proposed mitigating measures. The contents of the report are described in 36 CFR 800.13(b) and include, in addition to the material in the section above: the status of the project in the NEPA and State and EPA review processes, views of other governmental agencies or groups, and description and analysis of alternatives which would avoid or mitigate the adverse effect.

The Preliminary Case Report must be sent by EPA to the Advisory Council. With the suspension of 36 CFR 800.6(c)(1) by the Advisory Council on June 4, 1982, there are now two paths to compliance with the remainder of the Section 106 review process. In the case of non-controversial projects that have effects that are customarily mitigated in a standard manner, the EPA can, at this point, prepare a Memorandum of Agreement (MOA), with the proposed mitigating measures. If the EPA, the SHPO and the Grantee sign the MOA, EPA can send it, along with the Preliminary Case Report, to the Advisory Council. If the MOA meets the requirements listed in the Supplemental Guidance [47 FR 29861], the Executive Director will sign it and submit it to the Chairman of the Council for ratification. Normally, an on-site visit and public information meeting will be waived. This expedited process can save substantial time. More information on standard mitigating measures is contained in the Advisory Council Manual of Mitigation Measures. Once the Chairman has ratified the MOA, the Section 106 process is complete. The EA should contain the conditions specified in the MOA, and the grant will require that the project design meet the conditions.

10.1.5 Consultation Process

Projects which cannot use the expedited process must go through the consultation process. The Executive Director, EPA, the SHPO and the Grantee must meet to attempt to produce a MOA with mitigating measures. A visit to the site and a public information meeting are usually required. If the consultation results in agreement, the signed MOA is sent to the Chairman for ratification.

If an agreement cannot be reached, or if under any of the above cases, the Chairman chooses not to ratify the MOA, the project goes to the Advisory Council for discussion at a meeting. The Council will issue comments, and if EPA and the Grantee accept them, the Section 106 process is complete. If EPA or the Grantee do not accept the conditions, EPA must submit a written report to the Advisory Council explaining why the project should proceed. That submission fulfills the Section 106 requirements.

In cases where a significant adverse impact cannot be mitigated, an EIS may be required. It is normally intended that the Section 106 comment period run concurrently with the NEPA review process. The Draft EIS should contain sufficent information on the project and its effect on National Register or eligible properties to be submitted as a Preliminary Case Report. The Section 106 review process must be completed prior to issuance of the Final EIS.

10.1.6 Activities During Construction

If during the construction of the facility previously unsuspected archeological artifacts are discovered, the SHPO should be notified immediately. If the artifacts are determined to be significant, the Grantee, EPA and the SHPO should determine which archeological investigation, documentation or preservation activities are necessary. The Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation should be used.

10.2 CONTACTS

10.2.1 Federal Agencies

Advisory Council on Historic Preservation — 202-786-0505
Thomas King, Director of Cultural Resources Preservation
Donald Klima, Chief of Eastern Division of Project Review
Sharon Conway and Kate Perry, New England Representatives
Ronald Anzelone, Staff Archaeologist
1100 Pennsylvania Ave. N.W., Suite 809
Washington, DC 20004

10.2.2 State Agencies

CONNECTICUT
John Shannahan, Director and SHPO — 203-566-3005
David Poirier, Staff Archaeologist
Connecticut Historical Commission
59 South Prospect Street
Hartford, CT 06106

MAINE
Earle Shettleworth, Jr., Director and SHPO — 207-289-2133
Dr. Arthur Spiess, Staff Archaeologist
Dr. Robert Bradley, Staff Archaeologist
Maine Historic Preservation Commission
55 Capitol Street, Station 65
Augusta, ME 04333

MASSACHUSETTS
Patricia L. Weslowski, SHPO — 617-727-8470
Valerie Talmage, State Archaeologist
Massachusetts Historic Commission
294 Washington Street - 5th Floor
Boston, MA 02180

NEW HAMPSHIRE
George Gilman, SHPO — 603-271-3483 or
Dr. Gary Hume, Staff Archaeologist — 603-271-3558
Linda Ray Wilson, Director
New Hampshire Historic Preservation Office
6 Loudon Road
P.O. Box 856
Concord, NH 03301

RHODE ISLAND
Eric Hertfelder, Deputy SHPO and Director — 401-277-2678
Paul Robinson, State Archaeologist
Rhode Island Historic Preservation Commission
150 Benefit Street
Providence, RI 02903

VERMONT
Eric Gilbertson, Director/Deputy SHPO — 802-828-3227
Giovanna Peebles, State Archaeologist
Division for Historic Preservation
Pavilion Bldg.
Montpelier, VT 05602

10.2.3 Local Historical Society or Historic Commission

10.3 REFERENCES

The National Historic Preservation Act of 1966, 16 USC 470 and subsequent additions.

Executive Order 11593, Protection and Enhancement of the Cultural Environment, 16 U.S.C 470, May 1971

USDOI, "Determination of Eligibility for Inclusion in the National Register of Historic Places," Code of Federal Regulations, Title 36, Part 63, 275-278. (Source: 42 FR 47661, September 21, 1977)

Advisory Council on Historic Preservation. "Protection of Historic and Cultural Properties," Code of Federal Regulations, Title 36, Part 800, 468-484. (Source: 44 FR 6072, January 30, 1979)

USDOI, "Criteria for Evaluation," Code of Federal Regulations, Title 36, Part 60.4, 252-253. (Source: 46 FR 56187, November 16, 1981)

Advisory Council on Historic Preservation, "Supplementary Guidance: Preparation of Memoranda of Agreement," Federal Register, Vol. 47, No. 132, July 9, 1982, 29861.

Advisory Council on Historic Preservation. Memorandum: Information Regarding Suspension of Portions of 36 CFR Part 800, July 16, 1982.

Advisory Council on Historic Preservation. Manual of Mitigation Measures (MOMM), Section 106 Update/3, October 12, 1982.

National Registry Of Natural Landmarks

NATIONAL REGISTRY OF NATURAL LANDMARKS

11.0 LEGISLATIVE/REGULATORY FRAMEWORK

The Historic Sites, Building and Antiquities Act of 1935, a forerunner of the National Historic Preservation Act, declares..."that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."

Under this authority, the Department of the Interior has established a natural areas program and maintains a National Registry of Natural Landmarks. "Federal agencies are responsible for considering the existence and location of natural landmarks when assessing the effects of their actions on the environment under Section 102(2)(C) of the National Environmental Policy Act" [36 CFR 62.6(d)].

Many states have similar programs for listing outstanding or critical natural areas.

11.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

11.1.1 Procedures During Facilities Planning

The State should maintain an up-to-date list of the areas on the National Registry of Natural Landmarks. Updated lists are published periodically in the Federal Register or can be obtained from the National Park Service contact listed below. The State should also keep lists of the properties on their own critical or outstanding natural area programs.

If there is an area on one of these lists within the study area, the State should inform the Grantee and his consultant during the development of the Facilities Plan.

Those developing the Facilities Plan should be aware of the significance of the natural area and try to avoid formulating any alternatives which would adversely affect it. The EID should discuss the area and its significance. Any impacts to the areas should be weighed carefully when choosing a preferred alternative.

11.1.2 EID Review and Preparation of Preliminary EA by State

The State should review the EID to ensure that known landmarks are identified and addressed and that adverse impacts are avoided or mitigated. The preliminary EA should discuss the landmarks and whether or not adverse impacts are anticipated.

11.1.3 EPA Review

EPA will review the preliminary EA. Where no adverse impacts to a landmark are anticipated, EPA will issue a FNSI. Where adverse impacts are expected, EPA will determine whether an EIS is necessary under the criteria of 40 CFR 6.506(a)(5).

11.2 CONTACTS

Herbert S. Cables, Jr. 617-223-3769
Regional Director, North Atlantic Region
National Park Service
15 State Street
Boston, MA 02109

11.3 REFERENCES

USDOI, National Park Service. "Natural Landmarks National Registry," Federal Register, Vol. 48, No. 41, March 1, 1983, 8682.

Wild And Scenic Rivers Act

WILD AND SCENIC RIVERS ACT

12.0 LEGISLATIVE/REGULATORY FRAMEWORK

12.0.1 Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act establishes a procedure for protecting outstanding rivers in their "free flowing" condition. Pursuant to the provisions of the Act, rivers or river segments may be designated for inclusion in the National Wild and Scenic Rivers System in one of three classifications: wild river areas, scenic river areas and recreational river areas.

Designation under any of the classifications may be accomplished by Congressional action or by the Secretary of the Interior, following a submission by a State Governor.

The Act directs that the Secretary of Interior, with the assistance of the National Park Service (formerly the Heritage Conservation and Recreation Service), prepare an inventory of candidate rivers to assist in determining which rivers should be designated. From this list, Congress may choose to instantly designate a river or may choose to authorize further study of a river. In the latter case, the National Park Service or the Forest Service carry out the study to determine the advisability of including the river and to devise a management plan. Based on the report, Congress may then decide to designate the river.

Under Section 7 of the Act, different requirements apply to "designated" rivers, rivers "under study", and rivers identified in the "inventory." These may be summarized as follows:

- For a "designated" river, no Federally-recommended water resource project may be authorized which would have a direct and adverse effect on the values for which the river was established without advising the Secretary of the Interior (or, in the case of a river within a national forest, the Secretary of Agriculture) and Congress. The Department of the Interior has determined that any water resource project construction within one-quarter mile or within the visual field of the river could have a direct and adverse impact.

- For a river "under study", the provisions cited above apply for a three-year period following its designation as a potential addition to the national system unless the Secretary of the Interior or Secretary of Agriculture make the determination that the river under study should not be included in the National Wild and Scenic Rivers System and notice is published in the Federal Register.

- For a river included in the "inventory" there is no specific protection mandated by the Act. The President, however, issued a directive on August 2, 1979, in conjunction with his Environmental Message, that Federal agencies avoid or mitigate any adverse impacts on rivers identified in the inventory.

The Allagash River in Maine is the only designated river in Region I. No rivers are currently under study. A significant number of New England rivers are, however, included on the current Nationwide Rivers Inventory which was published in January 1982.

12.0.2 CEQ Memorandum for Heads of Agencies, August 10, 1980

In response to the 1979 Presidential directive, CEQ distributed a memorandum entitled: Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory [45 FR 59189]. This is a guidance document which establishes a procedure for evaluating the impacts of Federal actions on rivers which are listed on the inventory. Based on the Presidential directive, it also requires Federal agencies to consult with the National Park Service and/or the Forest Service to resolve conflicts and to develop mitigation measures for such impacts.

Appendix I to the memorandum provides a guide for identifying potential adverse effects on wild and scenic rivers.

12.0.3 State Programs

Massachusetts has adopted its own scenic rivers designation program, and Maine has adopted a river conservation policy which governs the development of new hydroelectric and other dam projects and protects river shoreland from improper development. Connecticut, Vermont and New Hampshire are considering adopting some type of river conservation policy.

Maine has designated several rivers for protection under its new policy. Massachusetts has designated only the North River under its State program. Although such designations do not trigger action under the Federal Act, NEPA requires consideration of any State or locally significant resources.

12.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The major steps for complying with the Wild and Scenic Rivers Act under a 205(g) review are shown in Figure 12.1.

12.1.1 Procedures During Facilities Planning

The State should maintain an up-to-date list of the rivers in the national program and in its State program. If there is a river on one of those lists within the study area, the State should inform the Grantee and his consultant at the beginning of the Facilities Plan preparation.

If there is a wild and scenic or recreational river in any status of consideration within the study area, the EID must describe the qualities of the river that are the basis of its being considered and then assess the impacts of the project on those qualities. Good sources of information include the managing agency for a specific river, interested state agencies and river interest groups. The managing agencies include the National Park Service for a designated river or a river listed on the inventory and the Forest Service for a designated river on U.S. Department of Agriculture land.

If the project would result in adverse impacts, the EID must suggest measures for mitigation or avoidance which could be incorporated into the Facilities Plan.

12.1.2 EID Review and Preparation of Preliminary EA by State

The State must review the EID to be sure the information describing a river's status and anticipated impacts is adequate.

If there are no adverse impacts, the preliminary EA can be prepared, briefly mentioning the river's status and explaining why there is no impact.

Where adverse impacts to a designated river cannot be avoided, it is recommended that the State notify EPA immediately so that EPA can consult with the National Park Service or Forest Service to resolve any conflicts.

Where there are adverse impacts to a non-designated river listed on the inventory, the State should send a copy of the preliminary EA to the National Park Service or the Forest Service. The National Park Service or the Forest Service will comment on the preliminary EA within 30 days. If they do not comment within that time frame, the State may submit the preliminary EA to EPA without any further changes.

12.1.3 EPA Review

When EPA is notified that adverse impacts are anticipated on a designated river, EPA has a responsibility to consult with the appropriate agencies and try to resolve the issues. EPA will also determine if an EIS is necessary under the criteria of 40 CFR 6.508(a)(5) for a designated or an inventory river. Once the issues are resolved for either class of river, EPA will issue a FNSI.

12.2 CONTACTS

12.2.1 Federal Agencies

Glen Eugster, or — 215-597-7386
Elizabeth Titus — 215-597-1585
United States Department
of the Interior
National Park Service
143 South Third Street
Philadelphia, PA 19106

12.2.2 State Agencies

CONNECTICUT
Department of Environmental Protection — 203-566-7404
Planning and Coastal Area Management Division
71 Capitol Avenue
Hartford, CT 06106

MAINE
State Planning Office — 207-289-3261
State House, Station #38
Augusta, ME 04333

MASSACHUSETTS
Office of Planning — 617-727-3160
100 Cambridge Street
Boston, MA 02202

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NEW HAMPSHIRE
Office of State Planning — 603-271-2155
State of New Hampshire
2-1/2 Beacon Street
Concord, NH 03301

RHODE ISLAND
Department of Environmental Management — 401-277-2234
State of Rhode Island
Providence, RI 02908

VERMONT
Agency of Environmental Conservation — 802-828-3341
Environmental Protection Division
State Office Building
Montpelier, VT 05602

12.3 REFERENCES

The Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1274 and subsequent additions.

CEQ. "Memorandum for Heads of Agencies on Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory", Federal Register, Vol. 45, No. 175, September 8, 1980, 59190-59192.

USDOI, The National Park Service. The Nationwide Rivers Inventory, Washington, D.C., January 1982.

Farmland Protection Policy Act

FARMLAND PROTECTION POLICY ACT

13.0 LEGISLATIVE/REGULATORY FRAMEWORK

13.0.1 Farmland Protection Policy Act, 1981

The Farmland Protection Policy Act of 1981 [PL 97-98 Subtitle I] requires Federal agencies to evaluate adverse effects of Federal programs on the preservation of farmland and to consider alternative actions that could lessen such adverse effects. This evaluation must be based on criteria to be established by the U.S. Department of Agriculture (USDA). The Act also requires that Federal programs be compatible with State, local and private programs and policies to protect farmland. Farmland as defined by the Act includes four categories as follows.

- Prime farmland - land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides and labor.

- Unique farmland - land other than prime farmland that is used for production of specific high-value food and fiber crops.

- Farmland of statewide or local importance - farmland, other than prime or unique farmland, that is of statewide or local importance for the production of food, feed, fiber, forage, or oilseed crops.

These are generally equivalent to agricultural land types defined in 7 CFR 657 regarding the Important Farmlands Inventory being prepared by USDA Soil Conservation Service (SCS).

Federal agencies are also required to bring their policies into conformance with the Act with the assistance of USDA.

13.0.2 USDA Proposed Rule, Farmland Protection Policy [7 CFR 658]

On July 12, 1983, SCS issued a proposed rule to implement the Farmland Protection Policy Act. This rule establishes criteria for evaluating the value of farmland using a point system. It also provides for technical assistance from SCS and from the Forest

Service in determining the applicability of the Act to a particular site and in evaluating protection issues, developing alternatives and resolving conflicts.

13.0.3 EPA Policy to Protect Environmentally Significant Agricultural Lands, September 8, 1978

This memorandum documents EPA's policy "to protect the nation's environmentally significant agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource."

The policy sets forth specific directives for agency action, as follows:

- Specific 201 project decisions involved in the planning, design and construction of sewer interceptors and treatment facilities shall consider farmland protection.

- Direct and indirect impacts on agricultural land shall be determined and mitigation measures recommended in environmental assessments.

- Interceptors and collection systems should be located in environmentally significant agricultural land only if necessary to eliminate existing discharges and serve existing habitation.

In EPA's policy to protect environmentally significant agricultural lands, seven agricultural land types are defined. Types 1 through 4 are based on definitions set forth by the USDA in [7 CFR 657]. Land types 5, 6, and 7 are classified as significant in relation to their role in an EPA-required program. Environmentally significant agricultural lands include:

- Prime Farmland - land with the best combination of characteristics capable of economically producing sustained high yields of crops when treated or managed. While based on a variety of site characteristics, the key to these lands is "high productivity."

- Unique Farmland - land other than prime farmland that is used for production of specific high value food and fiber crops. Examples of such crops are cranberries, fruits, vegetables, and tree nuts.

- Additional Land of Statewide Importance - land which, with proper treatment or management, may produce crops of high yield. These lands are individually identified by each New England state. Land of this type may produce as high a yield as "prime" lands but may have severe limitations which reduce the choice of plants or which require very careful management, or both.

- Additional Farmland of Local Importance - land not identified as having statewide or national importance but, due to a range of factors, has local significance. These lands are identified by the local agencies concerned. Examples include agricultural lands owned by a town and leased back to farmers as a conservation district.

- Farmlands In or Contiguous to Environmentally Sensitive Areas - such as floodplains, wetlands, aquifer recharge zones or natural scientific study areas; these farmlands play a crucial environmental buffer role to prevent development encroachment on environmentally sensitive areas. The lands, in many cases, are categorically included in land types 1 through 4. Examples of these lands are along the length of the Connecticut River Valley, as well as in many other locations.

- Farmlands of Waste Utilization Importance - which may serve in the land treatment process, be used for composting activities or for controlled beneficial application of sewage sludges or other wastes. This practice occurs in New England, although to a lesser degree than in other regions of the country.

- Farmlands With Significant Capital Investments In Best Management Practices - which serve as elements of an area's (or state's) soil erosion and non-point source pollution control plans. These lands are included so as not to interfere with the investments that other agencies have made in programs, such as Agricultural Stabilization and Conservation Service erosion control or animal waste handling projects or 208 area-wide management programs.

13.0.4 CEQ Memorandum for Heads of Agencies, August 11, 1980

This memorandum was written to alert Federal agencies to the need and opportunities to analyze agricultural land impacts more effectively during planning studies and under NEPA.

The memorandum stated that recent studies by the General Accounting Office and CEQ had indicated that Federal agencies had not adequately accounted for impacts on agricultural land through the environmental assessment process.

Until such time as the SCS regulations to implement the Farmland Protection Policy Act are promulgated, EPA will continue to follow its 1978 policy and comply with the 1980 CEQ memorandum. It should be noted that these procedures are basically consistent with the new regulations.

13.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The major steps for complying with EPA's agricultural lands policy are shown in Figure 13.1 and discussed below.

13.1.1 Procedures During Facilities Planning

The State should assure that the Grantee and its consultant are aware of the requirements to identify agricultural lands at the outset. The Grantee should contact the SCS to determine if prime or unique agricultural lands have been mapped in the project area.

Nationally (through 7 CFR 657), the SCS has been charged with the responsibility of the identification and classification of prime agricultural soils. This assessment work is progressing at varying rates for each state, and complete coverage of New England will not be attained for many years to come. Therefore, the SCS may or may not have surveyed agricultural lands in a specific project area. In cases where SCS has not yet performed studies, EPA can request that SCS undertake one, and SCS will try to fulfill the request.

For maximum efficiency, it is recommended that the State try to coordinate with the State Conservationist of SCS to:

- find out where inventories have been completed or are underway (this will help target areas where prime agricultural lands are already identified as a concern and will assist Grantees in finding out what work has or hasn't been done in their study area); and
- try to influence SCS's sequence of undertaking studies by making SCS aware of the sequence of projects on the 201 priority list.

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If environmentally significant agricultural lands are present in the planning area, the EID should:

- identify them by mapping their location, classify them, and discuss their significance,
- assess and evaluate both direct and indirect effects of the proposed action,
- avoid or mitigate those adverse effects identified to the extent possible, as stated in EPA's policy to protect environmentally significant agricultural land [40 CFR 6.302(c)], and
- suggest alternatives which minimize or avoid direct or indirect effects to these agricultural lands.

13.1.2 Review of EID and Preparation of Preliminary EA by State

The State will review the EID to make sure that agricultural lands have been identified, that impacts to them have been adequately assessed, and that adverse impacts have been avoided or mitigated to the maximum extent possible.

If significant agricultural lands are present, the preliminary EA should discuss the extent of direct or indirect impacts to such lands and propose mitigation measures.

The preliminary EA should also include a determination that any interceptors and collection systems located on environmentally significant agricultural lands are necessary to serve existing habitation or eliminate existing discharges.

13.1.3 EPA Review

EPA will review the preliminary EA and any other related material. If no adverse impacts to prime agricultural lands are anticipated, EPA will finalize the EA and issue a FNSI. If significant adverse impacts are anticipated, EPA will determine whether an EIS is necessary under the criteria of 40 CFR 6.508(a)(4).

13.2 CONTACTS

13.2.1 Federal Agencies

United States Department of Agriculture
Soil Conservation Service Offices, State Conservationists

CONNECTICUT
Philip H. Christensen — 203-429-9361
US Department of Agriculture
Soil Conservation Service
Mansfield Professional Park
Route 44A
Storrs, CT 06268

MAINE
Billy R. Abercrombie — 207-866-2132
US Department of Agriculture
Soil Conservation Service
USDA Building
University of Maine
Orono, ME 04473

MASSACHUSETTS
Rex O. Tracy — 413-256-0441
US Department of Agriculture
Soil Conservation Service
451 West Street
Amherst, MA 01002

NEW HAMPSHIRE
Richard L. Porter — 603-868-7581
US Department of Agriculture
Soil Conservation Service
Federal Building
Durham, NH 03824

RHODE ISLAND
Richard N. Duncan — 401-828-1300
US Department of Agriculture
Soil Conservation Service
46 Quaker Lane
West Warwick, RI 02893

VERMONT
John C. Tichner — 802-951-6795
US Department of Agriculture
Soil Conservation Service
96 College Street
Burlington, VT 05401

13.2.2 State Agencies

Each New England state is serviced by Regional Soil Conservation Districts. Contact the SCS office above for the appropriate state/local contact.

13.3 REFERENCES

The Farmland Protection Policy Act, 7 U.S.C. 4201.

USDA, Soil Conservation Service. "Prime and Unique Farmlands," Code of Federal Regulations, Title 7, Part 657, 548-551. (Source: 43 FR 4031, January 31, 1978).

USEPA. EPA Policy to Protect Environmentally Siginificant Agricultural Lands, Statement from the Administrator to Assistant Administrators, Regional Administrators and Office Directors, September 8, 1978.

CEQ. "Memorandum for Heads of Agencies on the Subject of Analysis of Impacts on Prime Agricultural Lands in Implementing the National Environmental Policy Act," Federal Register, Vol. 45, No. 175, September 8, 1980. 59189-59192.

SCS. "Farmland Protection Policy," Proposed Rule, Federal Register, Vol. 48, No. 134, July 12, 1983, 31863-31866.

Regional Groundwater Review Procedures For Construction Grants

Groundwater

REGIONAL GROUNDWATER REVIEW PROCEDURES FOR CONSTRUCTION GRANTS

14.0 LEGISLATIVE/REGULATORY FRAMEWORK

14.0.1 The Clean Water Act

Section 201 of the Clean Water Act as amended requires the application of Best Practicable Waste Treatment Technology (BPWTT) to wastewater construction grants projects. Section 304(d)(2) of the Act requires the EPA Administrator to publish information from time to time on alternative waste treatment management techniques and systems available to implement Section 201.

Pursuant to these requirements, EPA published a 1976 notice in the Federal Register [41 FR 6190] which set forth criteria for BPWTT for alternatives employing land application techniques and land utilization practices.

These criteria, which are based on resulting groundwater quality, are different depending on the use of the groundwater as follows:

- Case I: the groundwater can potentially be used for drinking water supply.
- Case II: the groundwater is used for drinking water supply.
- Case III: the groundwater will be used only for purposes other than drinking water supply.

In Case I areas the groundwater must meet the standards for chemical quality and pesticides specified in the EPA Manual for Evaluating Public Drinking Water Supplies. In Case II areas groundwater must meet Case I standards as well as bacteriological standards specified in the EPA Manual. Groundwater criteria for a specific Case III area are established by the Regional Administrator based on the present or potential use of the groundwater. Case designations must be made by the Regional Administrator in conjunction with State officials on a site-by-site basis.

14.0.2 Region I Siting Policy

The Water Supply Branch in EPA Region I reviews the land application siting analyses for wastewater construction grants projects. Each project is evaluated on an

individual basis in accordance with the following general policy requirements:

- The choice of potential sites for detailed study must be based upon a reasoned approach.
- Site selection from among alternatives must include consideration of the significance of the affected groundwater resource in terms of local and regional water supply.
- Areas extending downgradient from the disposal site to the hydrologic discharge boundary will be considered Case III unless the level of treatment chosen will result in the maintenance of Case I or II standards.
- A local municipality's conscious decision to forfeit an existing or potential drinking water supply and apply for a Case III determination will generally be supported by EPA if, based on a water resources analysis, the municipality shows that adequate alternative water resources are available to supply existing and future water supply needs on a local, and in some instances a regional, basis.

14.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The recommended steps for complying with Region I's groundwater procedures for site selection are shown in Figure 14.1 and summarized in the following paragraphs.

14.1.1 Site Selection

When it is determined during the facilities planning process that land application alternatives warrant detailed study, the initial groundwater analysis should be submitted to the State as part of the EID. An adequate groundwater analysis should include:

- a list of all potential sites available to the Town,
- a determination of hydraulic capacity at each potential site,
- a preliminary groundwater flow directional analysis at each viable site,
- a characterization of the groundwater resource downgradient of each viable site in terms of

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drinking water significance, that is, whether the groundwater is either an existing or a potential future supply source, and

- a detailed site alternatives comparison in terms of relative impacts to significant groundwater resources. This may require a quantitative water resources analysis in which drinking water resource availability at both the local and regional levels is evaluated.

State water supply staff responsible for the initial review may wish to consult with EPA when determining the specific testing and modeling requirements of a specific site analysis. These requirements should be based upon the initial site characterization.

14.1.2 Early Case Determination

Once a land application site has been selected and approved by the State, it is recommended that the Grantee and State request from EPA an early determination of which BPWTT Case applies to the site. This will allow EPA to advise the Grantee of the documentation and testing that will be required during design, particularly if a Case III determination by the Regional Administrator is required.

14.1.3 Case Determination

The Grantee, following design, must apply to the Regional Administrator for a Case determination for the proposed site and the area downgradient. The Regional Administrator must make this determination with "the objective of protecting the groundwater for use as a drinking water supply and/or other use as appropriate, and preventing irrevocable damage to groundwater."

In the event that a Case III determination is approved, the Regional Administrator's approval to begin construction will be conditioned on local implementation of adequate legal and institutional safeguards to ensure that the Case III area's groundwater will not be used for drinking water purposes. The determination shall include provisions for monitoring the effect on the native groundwater.

14.2 CONTACTS

14.2.1 Federal Agencies

Steven Koorse — 617-223-6486
Environmental Engineer
Water Supply Branch
Environmental Protection Agency
J.F. Kennedy Federal Building
Boston, MA 02203

14.2.2 State Agencies

CONNECTICUT
Ray Jarema, Acting Chief — 203-566-3110
Water Supplies Section
Connecticut Department of Health Services
79 Elm Street
Hartford, CT 06115

MAINE
Clough Toppan, Manager — 207-289-3826
Drinking Water Program
Division of Health Engineering
Department of Human Services
157 Capital Street
Augusta, ME 04333

MASSACHUSETTS
Ilyas Bhatti, Director — 617-292-5500
Division of Water Supply
Department of Environmental Quality Engineering
One Winter Street
Boston, MA 02108

NEW HAMPSHIRE
Bernard D. Lucey, P.E. — 603-271-3139
Acting Chief
Water Supply Division
New Hampshire Water Supply and Pollution Control Commission
P.O. Box 95, Hazen Drive
Concord, NH 03301

RHODE ISLAND
John Hagopian, Chief — 401-277-6867
Division of Water Supply
Rhode Island Department of Health
75 Davis Street
Providence, RI 02908

VERMONT
David Butterfield, Chief — 802-862-5701 x256
Groundwater Management Section
Department of Water Resources & Environmental Engineering
Vermont Agency of Environmental Conservation
State Office Building
Montpelier, VT 05602

14.3 REFERENCES

The Clean Water Act of 1972 33 U.S.C. 1344 and subsequent additions.

USEPA. Manual for Evaluating Public Drinking Water Supplies - A Manual of Practice. Office of Water and Hazardous Materials, Water Supply Division, reprinted 1975. EPA-430/9-75-011.

USEPA. "Alternative Waste Management Techniques for Best Practicable Waste Treatment". Federal Register, Vol. 41, No. 29, February 11, 1976, 6190-6191.

Direct And Indirect Impacts

DIRECT AND INDIRECT IMPACTS

15.0 LEGISLATIVE/REGULATORY FRAMEWORK

15.0.1 CEQ Regulations [40 CFR 1500-1508]

CEQ's 1978 NEPA regulations require that environmental impact statements address both direct and indirect effects of proposed actions. The regulations include the following definitions of "effects". Effects include:

- direct effects which are caused by the action and occur at the same time and place,
- indirect effects which are caused by the action and occur later in time or are further removed in distance but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."

The regulations go on to note that the terms "effects" and "impacts" are synonymous.

15.0.2 EPA's Rules and Regulations [40 CFR 6]

EPA's 1979 Implementation Procedures on the National Environmental Policy Act [44 FR 64177] adopted CEQ's definitions for direct and indirect effects.

EPA's 1983 Proposed NEPA Review Procedures [48 FR 1014] continue to use the CEQ definitions. These regulations [40 CFR 6.506(b)(5)] stress the need for screening alternatives with respect to significant direct and indirect environmental effects.

15.0.3 EPA Policy

In June 1975 EPA published Program Requirements Memorandum 75-26 (PRM 75-26) on indirect impacts. From 1975 to 1982 this was the essential document covering EPA's policy on indirect impacts and included examples of measures for mitigating indirect effects as well as provisions for the Regional Administrator to withhold grants for wastewater treatment facilities when indirect impacts "can reasonably be anticipated" to contravene an environmental law or regulation, plan or standard.

In 1982 EPA cancelled all Program Requirements Memoranda (includng PRM 75-26) upon publication of a new document entitled Construction Grants 1982 (CG-82).

Chapter 3, Section 3.2.10 of CG-82 on Direct and Indirect Impacts and Section 3.2.11 on Mitigating Adverse Impacts reiterates the basic points made in PRM 75-26. Section 3.2.10 also gives several examples of direct and indirect impacts (See Attachment 15-1). Section 3.2.12 identifies indirect impacts which may result in the need for an EIS.

15.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

15.1.1 EID Preparation

In preparing the EID, the Grantee must develop a knowledge of the existing environment and the direct and indirect effects of the proposed facility on that environment. Impacts may be adverse or beneficial. If the impacts are adverse, a key determination is the severity and significance of the impact.

Direct impacts, such as land disruption for an interceptor sewer or a treatment plant, are easily envisioned. Indirect impacts, which can also be of great importance to the environment, are more difficult to predict. As a rule of thumb, the following types of facilities and/or environmental conditions will have the potential to generate indirect impacts:

- construction of a new or expanded treatment facility to serve (directly or with a potential through expansion) sewering needs in excess of needs generated by present development within the service area,

- construction or replacement of collection facilities to serve, or with a potential to serve, areas where development presently is constrained by topography, soil conditions, sewer moratoria, zoning, or local or state regulations requiring sewers,

- construction of collection or treatment facilities to serve areas adjacent to or including sensitive areas such as wetlands, water bodies, groundwater recharge areas, flood-prone areas, archaeological, historic sites or prime agricultural lands.

The Environmental Assessment Manual prepared by Region I of EPA discusses impact evaluations and can be used as a guide in determining impacts and evaluating their significance.

15.1.2 Review of EID and Preparation of Preliminary EA by State

The State must review the EID for adequacy and prepare a preliminary EA which identifies:

- major direct and indirect impacts,
- the significance of these impacts,
- any contravention of any existing Federal, State, or local environmental law or regulations, or any plan or standard required by such laws or regulation (this has particular application to the areas covered by other chapters of this manual),
- any induced development which may result from the various alternatives evaluated,
- the significance of land use development which can be attributed to the proposed action alternative,
- any measures proposed to mitigate indirect impacts.

15.1.3 EPA Review

EPA is responsible for determining that the preliminary EA submitted by the State covers all important impacts and properly assesses the severity of the impacts and methods for their proposed mitigation. If the impacts are not significant, EPA will issue a FNSI. Where EPA determines the impacts are significant and criteria for preparing an EIS (40 CFR 6.508) are met, EPA will issue a Notice of Intent to prepare an EIS.

15.2 CONTACTS

15.2.1 Federal Agencies

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NEPA and Public Participation
Coordinator
Municipal Facilities Branch
Environmental Protection Agency
Region I
J.F.K. Federal Building
Boston, MA 02203

15.2.2 State Agencies

Responsible state agencies having their own environmental impact review legislation may be sources of assistance in evaluating direct and indirect impacts.

15.3 REFERENCES

CEQ. "Regulations on Implementing National Environmental Policy Act Procedures." Federal Register, 40 CFR 1500, Vol. 43, November 29, 1978, 55990 and subsequent additions.

USEPA. "Implementation of Procedures on the National Environmental Policy Act," Federal Register, 40 CFR 216, Vol. 44, No. 216, November 6, 1979, 64177-64193.

USEPA, Office of Water Program Operations (WH-547), Construction Grants 1982 (CG-82), Interim Final. Washington, D.C.: 430/9-81-020, July 1982.

USEPA. "National Environmental Policy Act; Environmental Review Procedures for the Wastewater Treatment Construction Grants Program, Proposed Rule," Federal Register, 40 CFR 6, Vol. 48, No. 5, January 7, 1983, 1014-1020.

3.2.10 DIRECT AND INDIRECT IMPACTS

Assess in your facilities plan both direct (primary) and indirect (secondary) environmental impacts of the principal and selected alternative. Direct impacts are caused by construction, operation or maintenance of the treatment works and may include for example:

o Disruption of traffic, business or other daily activities during construction;

o Damage to historical, archaeological, cultural or recreational areas during construction;

o Disturbance of sensitive ecosystems such as wetlands and habitats of endangered or threatened species during construction;

o Damage and pollution of surface waters due to erosion during construction;

o Impacts on water quality from effluent discharge during operation;

o Displacement of households, businesses, or services; and

o Discharge of pollutants, noise or visual impacts.

Indirect impacts are caused by development made possible by the project and may include for example:

o Changes in the rate, density, location or type of development, including residential, commercial or industrial; changes in the use of open space or other land;

o Increased air, water, noise pollution, or solid waste from the induced changes in population and land use;

o Damage to sensitive ecosystems (wetlands, habitats of endangered species) and environmentally protected areas (parks, historic sites) that result from changes in population and land uses; and

o Socioeconomic pressures for expansion of existing facilities (housing, schools, highways) and services (police, fire, medical emergency) resulting from induced changes in land use and population.

The environmental analysis should give special attention to indirect impacts to determine whether they will violate Federal, State or local laws.

3.2.11 MITIGATING ADVERSE IMPACTS

Earlier sections have discussed real or potential adverse environmental impacts. Wherever possible, avoid or minimize adverse impacts. Where adverse environmental impacts are unavoidable, discuss methods, both structural and nonstructural, to mitigate them. Such actions may include:

Structural:

o Changes in design, size or location of facilities;

o Rerouting of interceptors to avoid sensitive areas;

o Staging or orderly extension of sewer service;

o Screening for noise or aesthetic purposes;

o Systems for odor or aerosol control;

o Cultural resource recovery including artifacts or important historical data.

Nonstructural:

- Development and enforcement of sewer use regulations;
- Protection of environmentally sensitive areas by local ordinance;
- Modification of zoning ordinances, land use or development plans;
- Stormwater runoff control ordinances; and
- Water conservation programs to reduce wastewater flows.

Costs to mitigate the direct, adverse physical impacts of the building or operation of the treatment works are allowable for grant funding. Mitigative measures should be reasonable in cost and duration and should relate to the resource affected. Mitigation of indirect effects is best accomplished by nonstructural measures. Although you may select structural or nonstructural measures to mitigate indirect impacts, they are not grant eligible.

Grant assistance will not be awarded until your facilities plan provides for mitigation of adverse effects.

Financial Capability Requirements

FINANCIAL CAPABILITY REQUIREMENTS

16.0 LEGISLATIVE/REGULATORY FRAMEWORK

16.0.1 Clean Water Act - Section 204(b)(1)(B)

The Clean Water Act provides that the EPA cannot approve any grant for treatment works unless the applicant "has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction ".

16.0.2 Construction Grants Regulations [40 CFR 35.2104 and 35.2107]

The EPA has implemented the financial capability requirements of the Clean Water Act in the interim final construction grants regulations. These regulations include the above requirements and add the requirement that, if the project will serve two or more municipalities, the Grantee submit an executed intermunicipal service agreement for the financing, building and operation of the project. The requirement for the agreement may be waived if the Grantee can demonstrate:

- that such an agreement is already in place;
- evidence of historic service relationships; or
- that the financial strength of the provider agency is adequate to continue the project without particpation of one of the proposed customer agencies [40 CFR 35.2107].

EPA will publish its financial capability policy with the final construction grants regulations. The policy will require that, at the time of application for a Step 3 or Step 2 + 3 grant award, the Grantee demonstrate that it has the legal, institutional, managerial, and financial capability to construct, operate, and maintain the proposed facility. To do so, the Grantee must answer the following questions:

- What is proposed in the Facilities Plan?

- What roles and responsibilities will local governments have?
- How much will the facilities cost at today's prices?
- How will construction and operation of the facilities be financed?
- What are the annual costs per household?

The information to respond to these questions is generally produced as part of the facilities planning report.

In addition, the Grantee must submit an intermunicipal service agreement and a letter of certification, signed by the responsible municipal official, stating that the Grantee has analyzed costs and impacts, and has the capability to finance and manage the facilities.

16.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

Like the other environmental requirements in this Manual, the financial capability review should occur early in the planning process, should influence the development and evaluation of alternatives, and should be an integral part of the decision making and public participation process.

The EPA has produced a guidebook to assist states and communities in evaluating whether they have the capability to undertake a project. The Financial Capability Guidebook contains a series of worksheets which structure an examination of the financial and institutional factors necessary to answer the five questions EPA requires be answered.

In addition, the worksheets provide a means of assessing the community's financial health so that the responsible municipal official can certify the financial capability of the municipality. The forms in the guidebook are optional; that is, they do not have to be used. They do, however, provide a useful method for assuring that the appropriate factors have been examined. Individual states are able to require additional information or a different format.

16.1.1 Review During Facilities Planning

Prior to initiation of facilities planning, the states are encouraged to screen projects for potential problems. EPA has distributed a "potential problem

projects" list to each state using Needs Survey information and EPA-developed criteria for identifying problem projects. If serious problems are found, the State may ask assistance of EPA in analyzing the financial problems and suggesting potential solutions during the development of the Facilities Plan.

Early in the facilities planning process, when alternatives are being developed and screened, a preliminary financial analysis should be performed by the Grantee. At this stage, the purpose of the analysis should be to determine whether some or all of the alternatives are likely to be too costly. The analysis should not be done in great detail, just enough to evaluate the approximate total and per household costs. This information should be submitted to the State. The State may again use the criteria developed by EPA to help assess the financial capability.

If all of the alternatives appear too costly, it may be necessary to reexamine the alternatives development. Possible actions include reducing the scope of the project, examining additional alternatives, reducing the sophistication ("gold plating") of the project or restructuring the financing. The EPA has informational material on less costly technologies; if a project appears to be too costly at this stage, consultation with EPA can forestall problems at a later stage in the review process.

During the design process, more detailed information on construction, operation, maintenance and replacement costs, and financing and user charge arrangements will be developed. When the Grantee completes the planning and design process and applies for a Step 3 grant, a more detailed financial capability analysis must be prepared and submitted to the State. This will take the form of answering the five questions listed above, providing a signed intermunicipal service agreement if one is necessary, and providing a letter signed by the responsible official stating that the Grantee has analyzed the costs and financial impacts of the project, and that the community has the capability to finance and manage the facilities. Sufficient documentation material must be submitted with the analysis to allow the State to review and certify that the analysis is complete and properly performed. The documentation can be in the form of the worksheets provided in the EPA guidebook, or in a format developed by the State.

If a Step 2+3 grant is involved, the Grantee should submit the same materials, with the exception that a

draft intermunicipal service agreement, with indications that all parties agree, is satisfactory.

Once the State has reviewed and certified the financial capability analysis, it is sent to EPA. EPA does not require the backup documentation at that time, only the answers to the five questions, the service agreement, and the letter of certification.

16.2 CONTACTS

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EPA Region I
JFK Federal Building
Boston, MA 02203

16.3 REFERENCES

USEPA, Office of Water Program Operations. Financial Capability Guidebook (Draft), Washington, D.C.: Prepared by Government Research Finance Center, Municipal Finance Officers Association and Energy and Natural Resources Practice; Peat, Marwick, Mitchell & Co., February, 1983.

USEPA. Potential Problem Projects, unpublished list available at EPA Region I offices.

Public Participation Requirements

PUBLIC PARTICIPATION REQUIREMENTS

17.0 LEGISLATIVE/REGULATORY FRAMEWORK

17.0.1 EPA Overall Public Participation Regulations [40 CFR 25]

On February 16, 1979, the Environmental Protection Agency (EPA) published regulations in the Federal Register [44 FR 10286] expanding the agency's commitment to provide for meaningful public input to programs carried out under the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act. The regulations include general provisions which require open processes of government and efforts to promote public awareness in the course of making decisions in programs and activities under the three acts. Also included are requirements which apply to specific public participation mechanisms, such as public hearings and advisory groups. The regulations do not require the use of any of the specific mechanisms; the mechanisms must be used only if they are required in specific program regulations.

Part 25 sets forth minimum requirements and suggested program elements for public participation in activities under the three applicable acts. The applicability of the requirements of this part is as follows:

- Basic requirements and suggested program elements for public information, public notification and public consultation. These requirements are intended to foster public awareness and open processes of government decision-making.

- Requirements and suggested program elements which govern the structure of particular public participation mechanisms (for example, advisory groups and responsiveness summaries). This part does not mandate the use of these public participation mechanisms. It does, however, set requirements which those responsible for implementing the mechanisms must follow if the mechanisms are required.

- Requirements which apply to Federal financial assistance programs (grants and cooperative agreements) under the three acts.

- Requirements for public involvement which apply to specific activities such as permit enforcement, rulemaking, and assuring compliance with requirements.

17.0.2 Public Participation in the Construction Grants Program [40 CFR 35.917-5] February 16, 1979

To supplement the Part 25 regulations, EPA also published specific requirements which apply to the construction grants program [44 FR 10300]. These regulations applied to all grants made between February 16, 1979 and December 27, 1981. They provided opportunities for public interest groups, private citizens, elected officials and members of the business community to become extensively involved in the decision-making process during the planning stage and, to a lesser extent, at the design and construction stages. They also afforded an opportunity for Grantees to develop an interested and informed public which was able to participate in the whole spectrum of water-related programs.

Prior to the issuance of these regulations, the only public participation requirement in the development of a Facilities Plan was that a public hearing be held on the draft plan. In many cases this was found to be inadequate, as all of the major decisions (needs, proposed alternatives, etc.) had already taken place with little or no public input. Therefore, the new regulations allowed the public to get involved prior to, and all the way through, the development of the Facilities Plan.

17.0.3 Interim Final Construction Grants Regulations [40 CFR 35] May 12, 1982

Under the Interim Final Construction Grants regulations of May 12, 1982, there is only one requirement specifically related to public participation in the facilities planning process. It applies at the time of a grant application and is listed in 40 CFR 35.2040(a)(3) and 40 CFR 35.2040(b)(3). These citations both state that a grant application must contain a "certification from the State that there has been adequate public participation based on State and local statutes." Moreover, in the preamble to the regulations, it is made clear that "because the elimination of Step 1 and 2 grants effectively prohibits Federal involvement in facilities planning and design, neither provisions of this subpart nor of Part 25 apply to activities of a Grantee prior to submission of a Step 3 grant application."

EPA's NEPA regulations [40 CFR 6] do, however, continue to provide an opportunity to ensure appropriate public involvement and the May 12, 1982, regulations require compliance with 40 CFR 6. While Part 6 does not specifically prescribe public participation activities, the "responsible official may institute such additional NEPA-related public participation project procedures as he deems necessary during the environmental review process" [40 CFR 6.513(c)].

Therefore, EPA Region I is requiring that the minimum public participation program for NEPA-related activities leading to the preparation of a FNSI be the following:

- one public meeting when alternatives are largely developed but before an alternative has been selected;
- one public hearing prior to formal adoption of the Facilities Plan.

Exceptions from this minimum will be considered for small non-controversial projects.

In addition, Region I is urging that each State identify those projects likely to need more than this minimum public participation program. This should be done as early as possible in the facilities planning process. For those projects requiring more than the minimum, a proposed program should be sent to Region I in order to formally institute it as such additional NEPA-related public participation procedures deemed necessary during the environmental review process as specified in 40 CFR 6.513(c). This will do away with any question which might arise as to the authority to require certain public participation measures in light of the May 12, 1982 construction grants regulations. The Part 25 regulations still apply to any public participation activities prescribed.

17.1 ENVIRONMENTAL REVIEW PROCEDURES UNDER 205(g)

The major steps for complying with EPA Region I's policy on public participation are shown in Figure 17.1 and discussed below.

These procedures apply to Grantees which began facilities planning after December 27, 1981 without EPA grant assistance. Any facilities planning initiated with EPA grant assistance (and not complete) must still comply with the public participation regulations in

existence at the time of the grant award. The procedures described in the previous Manual, "Environmental Review under 205(g) - July, 1980," would still be applicable to those Grantees.

17.1.1 Procedures Prior to Initiation of Facilities Planning

Prior to the initiation of facilities planning by a Grantee, the State should make the Grantee aware of any public participation requirements. At that time, the State should decide whether there should be more than the minimum public participation program, and if so, require the Grantee to develop the required program as part of its scope of work. The State would approve the program and send it to EPA for concurrence and acceptance as the NEPA-related public participation measures deemed necessary during the environmental review. This process will avoid delays in the FNSI issuance caused by inadequate public involvement in the environmental review process.

If the State determines, however, that an exception would be appropriate, this determination should be forwarded to EPA for approval.

17.1.2 EID Review and Preparation of Preliminary EA by State

The State must certify that adequate public participation in accordance with state and local statutes has occurred. In addition, the State must ensure that the public hearing was properly advertised, must review the transcript of the hearing and any associated correspondence received from the public or any state or Federal agencies, and must include this information in the preliminary EA under Section 6, "Summary of Agency and Public Consultation" (see standard format in this Manual).

17.1.3 EPA Review

EPA will review the preliminary EA and any other pertinent information to determine if the project is controversial. If there is no controversy and all of the public participation requirements have been satisfied, EPA will issue a FNSI.

There is a 30-day comment period, starting from the date of issuance of the FNSI, during which the public and interested state and Federal agencies have additional time to comment on the project. Any comments received by EPA during that time must be addressed prior to the

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award of any Step 3 or 2+3 grant. EPA will call upon the State to assist in the development of responses to any comments that are received.

If significant comments are received, the EA may have to be revised by the State, and EPA will then re-issue the FNSI. Another 30-day comment period must take place prior to EPA taking any further administrative action.

If it is determined that the project is controversial during EPA's review of the preliminary EA or upon the receipt of significant comments during the 30-day comment period, then an EIS may have to be prepared.

17.2 CONTACTS

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17.3 REFERENCES

USEPA. "Public Participation in Programs Under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act," Federal Register, 40 CFR 25, Vol. 44, No. 34, February 16, 1979, 10286-10297.

USEPA. "Grants for Construction of Treatment Works," 40 CFR 35, Federal Register, Vol. 47, No. 92, May 12, 1982, 20450-20469.

Appendix A—
Environmental Assessment Format

ENVIRONMENTAL ASSESSMENT FORMAT
[Use State Letterhead]

A. PROJECT IDENTIFICATION

Project Name:
Address:
Project Location:
EPA Project No.:

B. SUMMARY OF ENVIRONMENTAL REVIEW

The applicant's Facilities Plan, Environmental Information Document, all other supporting documentation (give specific references), and associated comments submitted in regard to this project have been reviewed, and, in accordance with EPA regulations, the findings of our environmental review are summarized below.

1. Project Description

Describe planning area and outline the proposed project (length and diameter of sewers and force mains; number, size and location of pumping stations; location and description of treatment facilities; alternately, areas where on-site septic system rehabilitation and cluster systems will be utilized, etc.). Use maps and figures.

Explain if the project is total or part of a larger scheme.

Include project duration (i.e. 6 months, 1 year etc.) and, for segmented projects, a schedule for construction.

Population Data - Give initial or existing and design year populations for the Planning Area and the Service Area and the basis for the projection. Note conformity with projections used in SIP.

Flow Projections - State existing or initial and design year flows and their basis. Summarize this information in a table.

Roles and Responsibilities of Local Government - Describe which entities will own, operate and manage facilities.

2. Purpose and Need

A summary discussion and demonstration of the need for the proposed facilities in the planning area and how the project will solve the problem, with particular emphasis on existing public health or pollution problems that exist, including air, surface water (note water quality classification) and groundwater, stating their severity and extent. Outline sources of information used to document the need. Note conformity with the 303(e) Basin Plan, the NPDES permit and the 208 Plan.

3. Discussion of Alternatives

This discussion shall include a brief description and a comparative analysis of all the feasible alternatives studied (highlight proposed alternative), as well as including the no-action alternative, for wastewater collection, treatment process, site location, effluent disposal and sludge disposal throughout the study area. Land application alternatives must be fully discussed. The alternatives shall be compared with respect to capital and operating costs (these costs should be summarized in an attached table).

Discuss significant impacts of alternatives to highlight major differences between that alternative and the proposed alternative.

If the proposed alternative is not the most cost-effective one, fully justify the reason(s) for selecting it.

4. Impact of Proposed Project on the Environment

Point out environmental impacts, with mitigation, for the proposed project.

a. Direct Impacts

i. Air Quality - SIP compliance, odors, dust

ii. Water Quality and Quantity

Surface - sedimentation impacts, beneficial quality improvements.

Groundwater - Case I, II, III

Drinking water supplies - impacts, adequacy of existing supplies to serve projected growth.

iii. Environmentally Sensitive Areas

Floodplains and Wetlands - If impacted, prepare "Floodplain and/or Wetland Assessment" and a "Statement of Findings" in accordance with Appendix A of the NEPA Regulations. This need not be a separate, appended document but may be incorporated here. Be sure to include all information required of such an assessment.

Prime Agricultural Land

Wildlife Habitat

Stream Modification

Section '404/10 Evaluation'

iv. Socio-Economic Impacts

Present "today's" costs and state ENR used. Give total project cost, eligible project cost (note ineligible items), estimated Federal and State grants, other funding, local share and cost to homeowner (see Financial Capability Requirements, Chapter 16)

Give impacts of project on employment, multi-use opportunities, uniform relocation and assistance, parks. Also, list legal and institutional constraints and required intermunicipal agreements.

v. Historical/Archaeological Sites and National Landmarks

vi. Endangered Species

vii. Coastal Zone Management and CBRS units

viii. Wild & Scenic Rivers

b. Indirect Impacts - deal with population growth and land-use changes included over the long-run by the project.

Present information on present land use, zoning, etc., and reference population discussion in item B.1.

ii. Re-examine 4a list for induced impacts in those categories.

On a case-by-case basis, each project must be evaluated to determine if there are other pertinent topics or categories that are worthy of discussion in the Environmental Assessment.

5. Mitigation of Environmental Impacts

Summarize mitigation measures discussed in item 4; expand upon them by explaining how these will be achieved and monitored (Special Grant Condition or review of Plans and Specifications). Remember to consider structural and non-structural methods.

6. Summary of Agency & Public Consultation

a. Describe public participation efforts briefly (include dates of major public information meetings and hearings).

b. Describe the public's significant objections to the proposed project, if any. Discuss how the plan was modified to address the objections raised, and, for outstanding objections, explain why no changes were deemed necessary.

c. Discuss significant comments received from interested State and Federal agencies (pro and con). Discuss how the plan was modified to address the objections raised, and, for outstanding objections, explain why no changes were deemed necessary.

7. List of Agencies and Groups Consulted

List agencies and environmental groups consulted in the development of the Facilities Plan and Environmental Information Document.

C. SIGNATURE(S)

Signature(s) of responsible State official(s) and date preliminary EA prepared.

Appendix B—
Common Weaknesses In Environmental Assessments

COMMON WEAKNESSES IN ENVIRONMENTAL ASSESSMENTS

1. Project Description

- Maps not legible or reproducible.
- Maps not appropriate: need figures which have sufficient detail to show project location with respect to state and to show location of pertinent features of project, i.e. sewers, discharge point, etc. Often two maps are required.
- Inadequate break-down of project elements.
- Project schedule often missing.
- Consistency with State Implementation Plan for air quality not addressed.
- Flow projections not listed by residential, commercial, industrial, I/I, institutional sources.

2. Purpose and Need

- Existing situation not adequately described or documented: need information on soils, groundwater, health hazards, water quality problems. Sources should be listed, i.e. surveys, sampling, etc.
- The need to meet legal requirement is too often used as major need for project. Environmental reasons should be stressed since laws and regulations can be changed and, in some cases, are if sufficient justification is given. For example, waivers to certain aspects of on-site system design codes have been granted if the cost of compliance outweighs environmental benefits.

3. Discussion of Alternatives

- Differences among alternatives not made clear.
- Alternatives dropped because "not feasible". The basis of the conclusion must be presented.
- All alternatives not discussed. Some seemingly "far-out" alternatives appear more attractive when costs and benefits of more conventional alternatives are presented to public.

- "No-Action" alternative lightly dismissed. This is often the solution by default for some of the smaller communities which have no problems that can be enforced against. It is important to state the consequences impartially.

- Costs not current. While the consistency of costs is important for comparisons, all alternatives should have up-to-date costs to avoid confusion.

4. Impact of Proposed Project on the Environment

- Actual water quality improvement not addressed. Many projects by themselves will not result in demonstrable water quality use improvements without other actions taking place. This should be acknowledged.

- Impacts on quantity of water supply omitted. Will project serve more people than present supply is capable of serving?

- Alternatives which completely avoid floodplains and wetlands not adequately described.

- Costs not current.

- Costs not all inclusive.

- Archaeological review done after design or construction has begun. This will only result in needless delays.

5. Mitigation of Environmental Impacts

- Specific measures not listed - this hinders monitoring and results in omitting needed grant conditions.

- Monitoring procedures not identified.