

changes in operations tempo and is consistent with applicable regulations;

(viii) Short term increases in air operations up to 50 percent of the typical operation rate, or increases of 50 operations per day, whichever is less;

(ix) Decommissioning, disposal, or transfer of Navy vessels, aircraft, vehicles, and equipment when conducted in accordance with applicable regulations, including those regulations applying to removal of hazardous materials;

(x) Non-routine repair, renovation, and donation or other transfer of structures, vessels, aircraft, vehicles, landscapes or other contributing elements of facilities listed or eligible for listing on the National Register of Historic Places which will result in no adverse effect;

(xi) Hosting or participating in public events (e.g., air shows, open houses, Earth Day events, and athletic events) where no permanent changes to existing infrastructure (e.g., road systems, parking and sanitation systems) are required to accommodate all aspects of the event;

(xii) Military training conducted on or over nonmilitary land or water areas, where such training is consistent with the type and tempo of existing non-military airspace, land, and water use (e.g., night compass training, forced marches along trails, roads and highways, use of permanently established ranges, use of public waterways, or use of civilian airfields);

(xiii) Transfer of real property from DON to another military department or to another federal agency;

(xiv) Receipt of property from another federal agency when there is no substantial change in land use;

(xv) Minor land acquisitions or disposals where anticipated or proposed land use is consistent with existing land use and zoning, both in type and intensity;

(xvi) Disposal of excess easement interests to the underlying fee owner;

(xvii) Renewals and minor amendments of existing real estate grants for use of government-owned real property where no significant change in land use is anticipated;

(xviii) Land withdrawal continuances or extensions which merely establish time periods and where there is no significant change in land use;

(xix) Renewals and/or initial real estate ingrats and outgrants involving existing facilities and land wherein use does not change significantly (e.g., leasing of federally-owned or privately-owned housing or office space, and agricultural outleases);

(xx) Grants of license, easement, or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles (not to include significant increases in vehicle loading); electrical, telephone, and other transmission and communication lines; water, wastewater, stormwater, and irrigation pipelines, pumping stations, and facilities; and for similar utility and transportation uses;

(xxi) New construction that is consistent with existing land use and, when completed, the use or operation of which complies with existing regulatory requirements (e.g., a building within a cantonment area with associated discharges/runoff within existing handling capacities);

(xxii) Demolition, disposal, or improvements involving buildings or structures not on or eligible for listing on the National Register of Historic Places and when in accordance with applicable regulations including those regulations applying to removal of asbestos, PCBs, and other hazardous materials;

(xxiii) Acquisition, installation, and operation of utility (e.g., water, sewer, electrical) and communication systems, (e.g., data processing cable and similar electronic equipment) which use existing rights of way, easements, distribution systems, and/or facilities;

(xxiv) Decisions to close facilities, decommission equipment, and/or temporarily discontinue use of facilities or equipment, where the facility or equipment is not used to prevent/control environmental impacts);

(xxv) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site;

(xxvi) Relocation of personnel into existing federally owned or commercially-leased space that does not involve a substantial change affecting the supporting infrastructure (e.g., no increase in vehicular traffic beyond the capacity of the supporting road network to accommodate such an increase);

(xxvii) Pre-lease exploration activities for oil, gas or geothermal reserves, (e.g., geophysical surveys);

(xxviii) Natural resources management actions where underlying natural resources management decisions have been analyzed in an EA or EIS;

(xxix) Installation of devices to protect human or animal life, (e.g., raptor electrocution prevention devices, fencing to restrict wildlife movement onto airfields, and fencing and grating to

prevent accidental entry to hazardous areas);

(xxx) Reintroduction of endemic or native species (other than endangered or threatened species) into their historic habitat when no substantial site preparation is involved;

(xxxi) Temporary closure of public access to DON property in order to protect human or animal life;

(xxxii) Actions similar in type, intensity and setting (including physical location and, where pertinent, time of year) to other actions for which it has been determined, in a DON EA or EIS, that there were no significant environmental impacts;

(xxxiii) Actions which require the concurrence or approval of another federal agency where the action is a categorical exclusion of the other federal agency.

7. Section 775.12 is revised to read as follows:

§ 775.12 Delegation of Authority.

(a) The ASN(I&E) may delegate his/her responsibilities under this instruction for review, approval and/or signature of EISs and RODs to appropriate Executive Schedule/Senior Executive Service civilians or flag/general officers. ASN (I&E), CNO and CMC may delegate all other responsibilities assigned in this instruction as deemed appropriate.

(b) The ASN(RD&A) delegation of authority for approval and signature of documents under NEPA is contained in SECNAV Instruction 5000.2 series which sets out policies and procedures for acquisition programs.

(c) Previously authorized delegations of authority are continued until revised or withdrawn.

Dated: June 29, 1999.

Ralph W. Corey,

Commander, U.S. Navy, Judge Advocate General's Corps, Alternate Federal Register Liaison Officer.

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BILLING CODE 3810-FF-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL-6373-7]

RIN 2040-AD33

EPA Review and Approval of State and Tribal Water Quality Standards

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: EPA is proposing to change the regulation that specifies when new and revised State and Tribal water quality standards become effective for Clean Water Act purposes. Under the proposal, new and revised standards adopted after the effective date of the final rule will not be used for Clean Water Act purposes until approved by EPA, unless such new and revised standards are more stringent than the standards previously in effect. The proposal also provides that standards already in effect at the effective date of the new rule may be used for Clean Water Act purposes, whether or not approved by EPA, unless EPA subsequently disapproves them and replaces them with Federal water quality standards.

DATES: EPA must receive comments on this proposed rule on or before August 23, 1999.

ADDRESSES: Send written comments to W-99-05, WQS-Approvals Comment Clerk, Water Docket, MC 4101, U.S. EPA, 401 M Street, SW, Washington, DC 20460. Written comments should include an original and three copies. Electronic comments are encouraged and should be submitted to OW-Docket@epa.gov. Electronic comments must be submitted as an ASCII file or a WordPerfect file, and must be identified by the docket number, W-99-05. The

record for this rulemaking is available for inspection from 9:00 to 4:00 p.m., Monday through Friday, excluding legal holidays, at the Water Docket, East Tower Basement, Room EB57, U.S. EPA, 401 M Street, SW, Washington, DC. For access to docket materials, please call (202) 260-3027 to schedule an appointment.

The draft Clean Water Act Water Quality Standards dockets discussed in section III.E. of the **SUPPLEMENTARY INFORMATION** below are available for viewing in the Regional Offices. Regional contacts, addresses, and phone numbers are included in the supplementary section of this preamble.

FOR FURTHER INFORMATION CONTACT: William Morrow, Office of Science and Technology, Standards and Applied Sciences Division, (202) 260-3657.

SUPPLEMENTARY INFORMATION:

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- XI. National Technology Transfer and Advancement Act

I. Potentially Regulated Entities

Citizens concerned with water quality may be interested in this rulemaking. Entities discharging pollutants to waters of the United States could be indirectly affected by this rulemaking since water quality standards are used in determining National Pollutant Discharge Elimination System (NPDES) permit limits. Potentially regulated entities include:

Category	Examples of potentially affected entities
States, Tribes, and Territories	States, Territories, and Tribes authorized to administer water quality standards.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action once finalized. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the proceeding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Statutory

1. The Role of Water Quality Standards Under the CWA

When the Clean Water Act (CWA or Act) was enacted in 1972, its focus was on the establishment of a system for controlling pollution at the source through imposition of categorical technology-based permit effluent limitations on point sources. However, Congress recognized that such controls would not always be sufficient to meet the goals of the Act, and therefore

complemented that technology-based program with the water quality standards program under section 303 of the Act. Under the CWA, water quality standards consist of designated uses for waterbodies, water quality criteria to protect those uses, an antidegradation policy to maintain water quality, and any policies affecting the application and implementation of such standards. Such standards serve both as a description of the desired water quality for particular waterbodies and as a means of ensuring that such quality is attained and maintained.

The CWA prescribes various uses for water quality standards. For example, they are used as benchmarks for evaluating proposals such as basin grants under section 102(c), plans for the Chesapeake Bay under section 117(b)(2), water quality management planning under section 205(j), and contained disposal facilities for dredged spoil under 33 U.S.C. 1293(a). Water quality standards are also the basis for identifying impaired waters under

sections 303(d)(1)(A) and 304(1) and developing total maximum daily loads (TMDLs) and waste load allocations under section 303(d)(1)(C). Water quality standards are the foundation for water quality-based effluent limitations for NPDES permits under section 301(b)(1)(C), serve to limit variances under section 301(h) and (m), and are a floor when permit limitations are relaxed under section 402(o)(3). Under section 401, they also serve as a basis for granting or denying State or Tribal certifications for federal licenses or permits for activities that may result in a discharge.

2. Adoption, Revision, and Review and Approval of State and Tribal Water Quality Standards

CWA section 303 describes the requirements for adoption, revision, review and approval of water quality standards. Sections 303(a) and (b) provided a transition from the predecessor statute and were designed to ensure that States have water quality

standards for both interstate and intrastate waters of the United States. Section 303(c) establishes procedures for the periodic review of, and as needed, revisions to States and Tribes' initial standards. Section 303(c) requires States (and hence Tribes which have authorized to be treated in the same manner as States) from time to time but at least once every three years to hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting new or revised standards. The results of such reviews are to be made available to EPA.

Under section 303(c)(2)(A), whenever a State or authorized Tribe adopts a new or revised standard, the State or Tribe must submit it to EPA. Section 303(c)(3) requires EPA to review such submissions. If the Administrator, within 60 days of such submission, determines that a standard meets the requirements of the Act, "such standard shall thereafter be the water quality standard for the applicable waters of that State." Today's proposed rule addresses the meaning and implementation of the phrase: "such standard shall thereafter be the water quality standard for the applicable waters of that State."

If the Administrator determines that a new or revised standard is not consistent with the requirements of the Act, she shall notify the State or authorized Tribe no later than 90 days after the date of the submission and shall specify the changes needed to meet such requirements. If the State or authorized Tribe does not adopt the necessary changes within 90 days of notification, the Administrator is to promptly propose a federal replacement water quality standard pursuant to section 303(c)(4)(A). In addition, section 303(c)(4)(B) authorizes the Administrator to propose a water quality standard whenever she determines one is necessary, for example, if a State or authorized Tribe fails to update an existing standard or adopt a standard where necessary. Whether proceeding under section 303(c)(4)(A) or (B), the Administrator is to promulgate a final water quality standard not later than 90 days after proposal, unless the State or authorized Tribe has in the meantime taken action that addresses EPA's concern.

3. CWA Section 510

As discussed above, the CWA sets out a detailed process to ensure that there will be a complete set of applicable water quality standards available for CWA purposes which meet the minimum requirements of the Act.

However, section 510 of the Act also makes it clear that this process was not intended to preempt the right of States to adopt and enforce more stringent standards if they so choose. Thus, if a new or revised standard is more stringent than the otherwise applicable water quality standard, the proposed rule would continue to allow the promulgating State or Tribe to enforce within its boundaries such standards without prior EPA review and approval. Accordingly, the practical consequences of the proposed rule requiring EPA approval before a state water quality standard is considered the "applicable water quality standard" are largely confined to new or revised standards which are less stringent than the preceding standards. The interplay between CWA sections 510 and 303 is discussed in more detail in section III.D. below.

B. Regulations

EPA first promulgated a water quality standard regulation in 1975. That regulation specified the minimum requirements for State review and revision of water quality standards, but did not identify the procedures for submitting standards to EPA for review or address whether such standards were effective under the CWA prior to EPA's approval (promulgated Nov. 28, 1975, as 40 CFR 130.17(c), recodified as 40 CFR 35.1550).

In 1983, EPA substantially revised and expanded the water quality standards regulation. This regulation, codified at 40 CFR part 131, specified in more detail the requirements for water quality standards. These revisions included the specific elements that must be in a State's water quality standards, procedures for triennial reviews, and procedures for submitting new or revised standards to EPA. The regulation also for the first time addressed the question of when State standards were effective for purposes of the CWA. Specifically, it provided that "A State water quality standard remains in effect, even though disapproved by EPA, until the State revises it or EPA promulgates a rule that supersedes the State water quality standard." See 40 CFR 131.21(c). As explained in the preamble to the 1983 rule, this provision was based on the view that State water quality standards should be effective under the CWA as soon as they were adopted and effective under State law. In 1991, EPA amended the water quality standards regulation to add procedures by which an Indian Tribe may qualify for the water quality standards and CWA section 401 certification programs.

C. The Alaska Litigation

In 1996, a coalition of environmental groups sued EPA, alleging that EPA was violating the CWA by applying new and revised standards adopted by Alaska before EPA had approved the standards (*Alaska Clean Water Alliance v. Clark*, No. C96-1762R (W.D.Wash.)). On July 8, 1997, the United States District Court for the District of Washington (the Court) issued an opinion in this case holding that, notwithstanding § 131.21(c) of EPA's regulation, the plain meaning of CWA section 303(c)(3) was that new or revised State water quality standards did not become effective for CWA purposes until approved by EPA. The parties to the lawsuit have entered into a settlement agreement under which EPA agreed to propose revisions to 40 CFR 131.21(c) consistent with the Court's opinion no later than July 1, 1999. EPA also agreed to take final action within nine months of this proposal. If EPA promulgates a final regulation that substantially conforms to the proposal, plaintiffs have agreed to dismiss their litigation. If the final rule does not substantially conform to the proposal, the plaintiffs retain the right to reactivate the litigation and seek a remedy from the court. Today's proposed rule is issued in accordance with this settlement agreement. EPA seeks comment on both the basic approach and the specific provisions in today's proposal.

III. What Is EPA Proposing and How Will it Work?

A. Summary

This proposed rule makes three principal points. First, today's proposed regulation at § 131.21(c) addresses the issue of when a new or revised State or Tribal water quality standard becomes the "applicable water quality standard for purposes of the CWA" in accordance with section 303(c)(3) of the CWA. The proposed rule does not affect the process by which State or Tribal water quality standards are adopted under State or Tribal law, but simply specifies when State or Tribal standards will be recognized as the "applicable water quality standard" under the CWA. In accordance with the language of CWA section 303(c)(3) as interpreted by the District Court in the Alaska case, proposed § 131.21(c) provides that new and revised water quality standards adopted after the effective date of the final rule will not become the "applicable water quality standards for CWA purposes" until approved by EPA. See proposed § 131.21(c). As discussed above, such "CWA purposes" include, but are not limited to, section 303(d)

listings of impaired waters, development of TMDLs, and establishment of water quality-based effluent limitation in NPDES permits.

As discussed in more detail below, today's proposed regulation would affect standards adopted after the effective date of EPA's final rule. (In the context of this proposal, the word "adopted" refers to completion of the process under which standards are developed and made effective under State and Tribal law.) EPA is proposing the State and Tribal standards adopted prior to that date, which are considered applicable standards under the current federal water quality standards regulation, will remain the applicable standards. This will include those standards that EPA has approved and continue in effect under State and Tribal law as well as those standards in effect under State and Tribal law that EPA has not yet approved or that EPA has disapproved. This "grandfathering" of State and Tribal standards adopted and in effect before EPA's new rule becomes effective merely allows such standards to continue in effect; it does not alter EPA's responsibility to complete its review of any standards it has not yet approved or disapproved or to promulgate replacement standards for any disapproved standards.

Second, today's proposed regulation at § 131.21(c) and (3) state that, after the effect date of the final rule, any changes (i.e., repeals, amendments or additions) to the applicable State and Tribal standards must be approved by EPA to be effective for CWA purposes. (This requirement will apply to future changes to "grandfathered" standards which automatically become applicable standards under the current rule as well as to changes to future standards which, under the new rule, become applicable standards when approved by EPA.)

Third, the proposed rule makes it clear that, in accordance with CWA section 510, it does not preempt the right of State or Tribes to adopt and enforce within their boundaries water quality standards which are "not less stringent" than the applicable water quality standards. What this means, in practical terms, is that if a State or authorized Tribe adopts a standard which is at least stringent as the applicable standard (either a grandfathered standard or a standard adopted and approved after the effective date of the rule), the State or Tribe may immediately use such a standard for CWA purposes, pursuant to § 510, without waiting for EPA to complete its section 303(c)(3) review. The State may also use standards adopted pursuant to § 510 as a basis for conditions in section

401 certifications for federal permits such as EPA-issued NPDES permits.

While EPA review of standards adopted pursuant to § 510 is underway, the State or Tribe can repeal or modify them and such changes would go into effect immediately. However, when EPA completes its review and approves such standards, they become the new applicable CWA water quality standards, and subsequent revisions to them will not be applicable for CWA purposes until approved by EPA (subject again to the State's and Tribe's preserved right under section 510 to adopt and enforce an even more stringent standard).

B. Rationale for Changing § 131.21(c)

As mentioned in the background section above, EPA's current regulations at 40 CFR part 131 provide that new and revised State and Tribal standards are effective for CWA purposes as soon as they are effective under State or Tribal law and that they remain in effect, even if subsequently disapproved by EPA, until superseded by a federal promulgation or changed or withdrawn by the State or Tribe. EPA believed such an approach was necessary to avoid an absence of standards prior to EPA approval. See response to comments for 1983 regulation, 48 FR 51400, 51412 (Nov. 8, 1983): "This interpretation is necessary because otherwise there would be no standard at all until federal action was completed." Over time, however, it became apparent that this approach did not always serve the purposes of the Act, particularly if a revised standard did not meet the requirements of the Act. The Alaska litigation in which EPA's reliance on existing § 131.21(c) was challenged (see II.C. above) caused EPA to re-examine its position.

EPA believes that the approach set forth in today's proposal not only is consistent with the language of section 303(c)(3) but also addresses the practical concern driving the approach in the 1983 regulation. As the Court held, the import of the phrase in section 303(c)(3) "shall thereafter be the water quality standards" (emphasis added) is that, until the new or revised standards are approved, they are not considered the applicable standards as a matter of federal law. In addition, EPA has re-examined its earlier concern that the 1983 approach was necessary to avoid a gap in standards until federal review was complete, because states would repeal their old standard when adopting new or revised one. The fact of the matter is that the repeal of the earlier water quality standard would itself be considered a revision to standards. If, as

the words of section 303(c)(3) indicate, revisions need to be approved to be effective for CWA purposes, the repeal of the old standard could not be effective until approved by EPA, and hence there would in fact be no gap in standards.

Another concern underlying the 1983 regulation was that requiring EPA approval might delay the use of improved water quality standards. However, as a practical matter, only the implementation of less stringent standards would be delayed under today's proposal, since section 510 provides that nothing in the CWA affects the right of States or Tribes to enforce standards within their boundaries that are equally or more stringent than the federally approved water quality standards. Of course, the mere fact that a standard is less stringent than the previous standard does not mean that it is not justified (e.g., new scientific information may show that a less stringent criterion is in fact protective of the designated uses or the previous criterion may have been based on incomplete or inaccurate information). Having EPA review a new or revised standard before it replaces a more stringent standard simply allows EPA to confirm that the new standard is justified and that it meets the requirements of the CWA.

EPA recognizes that the approach of the proposed rule may change in some respects the relationship between EPA and the States and authorized Tribes. For example, States and authorized Tribes will not be able to base CWA permits on new or revised standards which are less stringent than the predecessor applicable standards unless EPA approves the less stringent standard. On the other hand, there may be less need for federal promulgations to correct deficiencies in State and Tribal standards under the new approach.

C. Options EPA Considered

1. Prospective Effect of the Rule

Because the Court concluded that the CWA on its face required that new and revised State or Tribal water quality standards be approved by EPA before being used for CWA purposes, EPA considered whether the new rule should govern all standards adopted since 1972, or whether it should apply only to standards adopted after this rulemaking takes effect. For the reasons below, EPA proposes that only new and revised State or Tribal water quality standards adopted after the effective date of this rule must be approved to be the applicable water quality standards for purposes of the CWA. Previously

adopted standards that are in effect under State and Tribal law on the effective date of this rule will remain applicable standards. If the State or authorized Tribe repeals or revises such standards after the effective date of the rule, any such revisions or repeal would be subject to the new rule, that is, they would need EPA approval to be effective for CWA purposes.

If EPA were to apply the new interpretation to standards adopted before EPA's final rule, EPA would need to do so consistently. EPA's experience indicates in some cases this would be exceedingly difficult, if not impossible, to do. There are a number of reasons for this. Under the current rule, the approval status of a standard did not affect whether it was the applicable standard for CWA purposes; standards changes have not always been promptly submitted to EPA; and some EPA reviews of standards have not resulted in timely and clear-cut approvals or disapprovals. Confirming in every case that standards currently in effect under State law have been approved by EPA, or, if not, tracking down in each case the last approved predecessor standard, could be a very burdensome task with minimal environmental benefits. For example, if a State or authorized Tribe had reorganized and recodified its water quality standards after approval, it might be difficult today to reconcile the current citations with the citations of the provisions in question when approved. In addition, in the case of standards approved in the 1970's and still in effect, the record of approval could in some instances be difficult to locate, especially in EPA Regional offices where there have been organizational changes and physical relocations of office records over the years. Furthermore, if the last standard which could be clearly demonstrated as approved had later been superseded by other standards a long time ago, it might no longer mesh with the structure of other, approved parts of the State or Tribe's current standards or reflect current science or improved stream conditions. To resurrect such a standard as the applicable standard CWA purposes could in many cases be very artificial, and have uncertain environmental benefits. Finally, the time and effort involved in confirming the status of standards adopted since 1972 would also significantly detract from EPA's ability to make future approval/disapproval decisions in a timely manner. For these reasons, EPA believes that there would be extreme practical problems to applying today's

proposed approach to all standards adopted since 1972.

Additionally, changing the status of standards currently on the books could result in confusion, for example, in situations where States or authorized Tribes had in the past relied on the current federal water quality standards regulation to take actions using State or Tribal standards that were not yet approved by EPA. Questions would arise about the need to revisit such State or Tribal actions. While the use of a grandfathering provision excepting such actions from the rule might partially address this problem, EPA believes that it would be difficult to craft, and would not fully eliminate confusion. EPA solicits comment on the approach outlined in today's proposed rule.

2. Disapproved Water Quality Standards

As described above, the proposed rule provides that standards adopted by a State or authorized Tribe before the effective date of the rule (and still in effect under State or Tribal law) will remain the applicable water quality standards for CWA purposes regardless of whether they have been approved, disapproved, or simply not yet acted on by EPA. One option EPA considered was to propose that where such a standard was disapproved by EPA, it would cease to be the applicable standard for CWA purposes as of the effective date of the rule or disapproval date, whichever was later. An advantage of such an option would be to limit circumstances under which inadequate standards could be used. A disadvantage is that there would be no standard to replace the disapproved standard until EPA promulgated a superseding federal standard or the State or authorized Tribe revised the disapproved standard and obtain EPA's approval. This gap could theoretically be filled if the proposed rule also provided that the last previously approved standard could be "resurrected" until a new standard was approved or promulgated. However, for the reasons given above, tracking down the predecessor standard in each case would be problematic in these instances as well.

EPA seeks comments on whether the final rule should provide that standards disapproved by EPA prior to the effective date of the final rule should cease to be applicable water quality standards under the CWA. EPA also seeks comments on whether, if it adopts such a provision, the provision should specify that previously approved standards be resurrected and serve as the applicable CWA standard until a replacement for the disapproved

standard is adopted by the State or authorized Tribe and approved by EPA, or until EPA promulgates a federal standard.

D. Integration With CWA Section 510

Section 510 of the Act provides that nothing in the Act restricts the right of any State or authorized Tribe (or political subdivision thereof, or interstate agency) to adopt or enforce any standard, as long as it is not less stringent than a standard in effect under the Act. The proposed rule acknowledges this reserved State and Tribal authority by stating explicitly that a State or authorized Tribe may adopt and enforce a water quality standard which is not less stringent than the "applicable water quality standard" under the rule. (As explained above, the "applicable standard" would be either the standard in effect as of the effective date of the rule, or a superseding approved standard, or a federally promulgated standard.)

Section 510 is self-implementing. This means that a standard adopted under authority preserved by section 510 may be used immediately to control pollution originating in the State or Tribe adopting the standard, without first obtaining EPA approval or EPA concurrence that the standard is "not less stringent." (Of course, it would be prudent for a State or authorized Tribe to consult with EPA if there is any question about the comparative stringency of a new or revised standard.) Before it is approved by EPA and becomes the "applicable standard", such a standard can be changed by the State or authorized Tribe. However, until federally approved, the standard does not have any extra territorial effect. Once such a standard is federally approved, it becomes the new "applicable standard" and may serve as the basis for NPDES permit limitations on out-of-state (as well as in-state) sources which could affect the waters covered by the standard. (See CWA sections 402(a)(2), 402(b)(5) and (d)(2); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).)

While the use of standards adopted pursuant to § 510 that have not yet been federally approved and thereby transformed into "applicable standards for purpose of the Act" is generally within the State or Tribe's discretion, there is an exception. CWA section 301(b)(1)(C), in conjunction with section 402(a), requires that NPDES permits contain limits as needed to meet water quality standards established under authority preserved by section 510, as well as applicable standards established under section 303. Therefore, permitting

authorities must include effluent limitations in NPDES permits as stringent as necessary to meet all water quality standards of the State or authorized Tribe within which the permittee is discharging, including standards adopted pursuant to 510 that have not yet been approved by EPA.

E. Tracking CWA Standards

1. EPA's CWA WQS Docket

In today's proposed rule, EPA, is proposing to rely on the adoption date (for existing standards) and the approval status (for future adoptions) to determine whether or not a State or Tribal standard is an "applicable standard" under the CWA. To facilitate identifying whether a given State or Tribal standard is an applicable CWA standard, EPA believes it is important to develop a comprehensive tracking system. Under the current regulation, EPA primarily relies on the standards compilations prepared by States and authorized Tribes to determine the applicable CWA standard. For example, where EPA is the NPDES permitting authority, EPA looks to the State's or authorized Tribe's standards, plus any superseding federal standard that may have been promulgated by EPA, as the basis for developing water quality-based conditions in a permit. Under today's proposed rule, before using a State or tribal standard, EPA would also need to know whether the standard had been in effect under State and Tribal law on the effective date of the final rule, and, if it had not been, whether EPA had approved the State or Tribal standard (see table at § 131.2 (c) in today's proposed regulation). To simplify the process for determining what the CWA standard is at any given time, EPA is proposing to establish a CWA Water Quality Standards (WQS) docket which would contain the applicable CWA standards for every State, authorized Tribe, and Territory. This CWA WQS docket will contain (1) State and Tribal standards adopted prior to, and still in effect under State or Tribal law on, the

effective date of the final rule, (2) State or Tribal standards adopted after the effective date of the final rule and approved by EPA, (3) any applicable federal standards promulgated under subpart D to 40 CFR part 131. This CWA WQS docket will be updated regularly by EPA to reflect future EPA approvals and promulgations. This CWA WQS docket will be available to the public to facilitate the public's ability to determine what the applicable CWA standard is for a particular waterbody.

In conjunction with today's proposed rule, EPA has established a draft CWA WQS docket for each State, authorized Tribe, and Territory. The draft CWA WQS docket for each State, authorized Tribe, and Territory is located in the corresponding EPA Regional Office. EPA believes the draft CWA WQS docket contains all the current CWA standards in effect as of July 9, 1999. EPA assembled the draft CWA WQS docket with assistance from State, authorized Tribes, and Territories. While we collectively believe it contains all of the elements of each State's or Tribe's program that is subject to review and approval under section 303(c) of the CWA, we will be checking its accuracy before finalizing the rule. Although the docket is not itself a rule but rather an administrative aid, comments from the public pointing out any omissions or erroneous inclusions are welcome. EPA will continue to work with States, authorized Tribes, and Territories to ensure that the CWA WQS docket is current and complete by the time this rule goes into effect.

EPA believes that, in order for the CWA WQS docket to be useful, it should be in a form that is readily accessible to anyone interested in water quality standards. Establishing hardcopy CWA WQS subdockets in each EPA Regional office EPA's first step in assuring such accessibility. EPA is evaluating long term plans for maintaining the CWA WQS docket, including the possibility of having the CWA WQS docket accessible over the

Internet. For example, EPA could establish and maintain a web site where the applicable CWA standard for any State, authorized Tribe, or Territory could be accessed quickly. If this approach is taken, having States and authorized Tribes submit their standards revisions electronically would allow EPA to enter the revisions into an electronic database in a more timely manner. EPA solicits comments on the most effective ways (short term and long term) to make the CWA WQS docket accessible to the public.

Under the existing regulations at 40 CFR 131.21(d), EPA annually publishes in the **Federal Register** a notice of State and Tribal standards that have been approved by EPA since the most previous notice. EPA publishes this notice of approvals to keep the public informed of changes in State and Tribal water quality standards program, and to inform the public that EPA has determined such changes are consistent with the CWA. In today's proposed rule, EPA is proposing to delete this annual reporting requirement in light of our plan to establish a CWA WQS docket. See § 131.21(g) in today's proposed rule. EPA does not see the need to maintain this annual notice of approvals, since the CWA WQS docket will allow anyone to review the applicable CWA standard at anytime. EPA believes the establishment of a CWA WQS docket is an improvement over the existing annual reporting requirement because the full text of the standards themselves will be included, not just a listing of the relevant sections, and because it will be updated whenever there is a change to the applicable standards. EPA solicits comment on replacing the exiting annual reporting requirement of State and Tribal approvals with the establishment of a CWA WQS docket.

As stated above, these draft standards contained in the CWA WQS docket can be viewed in the Regional Offices. Regional contacts, addresses, and phone numbers are listed in the table below.

State	EPA regional office	EPA contact
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	EPA Region 1, 1 Congress Street, Suite 1100, CWWQ, Boston, MA 02114-2023.	Bill Beckwith, 617-918-1544.
New Jersey, New York, Puerto Rico, Virgin Islands ...	EPA Region 2, 290 Broadway, New York, NY 10007	Wayne Jackson, 212-637-3807.
Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia.	EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103-2029.	Ily Davis, 215-814-5453.
Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.	EPA Region 4, Water Division—15th Floor, Atlanta Federal Center, 61 Forsyth Street SW, Atlanta, GA 30303.	Fritz Wagener, 404-562-9267.
Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin.	EPA Region 5, Water Division, 77 West Jackson Boulevard, Chicago, IL 60604-3507.	David Pfeifer, 312-353-9024.
Arkansas, Louisiana, New Mexico, Oklahoma, Texas	EPA Region 6, Water Division, 1445 Ross Avenue, First Interstate Bank Tower, Dallas, TX 75202.	Russell Nelson, 214-665-6646.
Iowa, Kansas, Missouri, Nebraska	EPA Region 7, 726 Minnesota Avenue, Kansas City KS 66101.	Larry Shepard, 913-551-7441.

State	EPA regional office	EPA contact
Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.	EPA Region 8, 999 18th Street, Suite 500, Denver CO 80202-2466.	Bill Wuerthele, 303-312-6943.
Arizona, California, Hawaii, Nevada, American Samoa, Guam.	EPA Region 9, Water Division, 75 Hawthorne Street, San Francisco, CA 94105.	Phil Woods, 415-744-1997.
Alaska, Idaho, Oregon, Washington	EPA Region 10, Water Division, 1200 Sixth Avenue, Seattle, WA 98101.	Lisa Macchio, 206-553-1834.

2. Approving Standards Promptly

Section 303(c)(3) of the CWA provides EPA with 60 days to approve, and 90 days to disapprove, water quality standards submitted by States and Tribes. For a variety of reasons, EPA has not always been able to meet these deadlines. Under the current federal water quality standards regulation, delay on the part of EPA in approving State and Tribal revisions to standards has no immediate practical effect, except for the State of Alaska where EPA is already implementing today's proposed changes as a result of the Court's opinion. While the structure of EPA's proposed rule ensures that States and authorized Tribes will not be penalized by past delays, EPA still views the elimination of this backlog as a high priority. EPA headquarters staff are working with EPA Regional Offices, and with States and Tribes, to streamline our approval process and eliminate the backlog.

EPA is taking several steps to improve the timeliness of its approval/disapproval decisions. For example, EPA is improving coordination among the many EPA offices involved in water quality standards approvals. Although, EPA Regional offices have been delegated the authority to make approval/disapproval decisions, the approval/disapproval process involves substantial coordination among several EPA offices. EPA is taking steps to ensure that these offices are providing timely feedback in a coordinated fashion. In addition, EPA is making every effort to communicate to States and Tribes early in the standards revisions process EPA's position with respect to the approvability of specific potential revisions a State or Tribe may be considering. As part of this effort, EPA recently published an updated list of recommended ambient water quality criteria for the protection of human health and aquatic life (see 63 FR 68353) to ensure that States and Tribes have EPA's most current recommendations. In discussions with several States during the development of today's proposal, the States emphasized that in addition to EPA's most current guidance and recommendations, it is necessary to know early in the State regulatory

development process whether or not a revision they are considering is inconsistent with the CWA, preferably before the State proposes it for public comment. EPA will continue to discuss with States and Tribes ways to coordinate efforts to improve the standards development process, including ways for EPA to provide input that is both valuable and timely, and for States and Tribes to seek such input.

Under the Endangered Species Act (ESA), EPA's approval of State and Tribal water quality standards revisions is considered a federal action subject to consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) if the standards may affect a federally listed species. Such consultations can in certain cases be time-consuming and delay approval decisions. In recent years, EPA and Services have increased their efforts to achieve greater integration of ESA and CWA Programs. In an effort to coordinate its consultation efforts more efficiently, EPA, the FWS, and NMFS are working at the national level to develop a Memorandum of Agreement (MOA). A draft of the MOA was published in the **Federal Register** for public comment in January 15, 1999 (see 64 FR 2741). The draft MOA contains procedures for enhancing coordination regarding the protection of endangered and threatened species under section 7 of the Endangered Species Act and the Clean Water Act's Water Quality Standards and National Pollution Discharge Elimination System programs. Among a number of objectives, the draft MOA seeks to make ESA consultations more timely and efficient. Approving/disapproving State and Tribal WQS submissions in the CWA time frames is a priority for EPA. EPA, at both Headquarters and its Regional Offices, is working with a number of States and FWS and NMFS to improve the approval/disapproval process and eliminate frequently encountered delays. Based on the feedback from these discussions, EPA will develop more detailed guidance to achieve the goals discussed above.

IV. Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement Fairness Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), federal agencies generally are required to conduct an initial regulatory flexibility analysis (IRFA) describing the impact of the regulatory action on small entities as part of a proposed rulemaking. However, under section 605(b) of the RFA, if the Administrator for the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is not required to prepare an IRFA. The Administrator certifies, pursuant to section 605(b) of the RFA, that this proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, the Agency did not prepare an initial regulatory flexibility analysis.

The RFA requires analysis of the impacts of a rule on the small entities *subject to the rule's requirements*. See *United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Today's proposed rule establishes no requirements applicable to small entities, and so is not susceptible to regulatory flexibility analysis as prescribed by the RFA. ("[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are *subject to the requirements of the rule*," *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by *United Distribution* court).) Today's proposed rule, once finalized, will only have a direct effect on States and authorized Tribes, which by definition are not small entities under the RFA. The Agency is thus certifying that today's proposed rule will not have a significant economic impact on substantial number of small entities, within the meaning of the RFA.

V. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or the private sector, \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The proposed rule does not affect the process by which State or Tribal water quality standards are adopted under State or Tribal law, but simply specifies when a State or Tribal adoption will be recognized as the applicable water quality standard for general CWA purposes. The rule imposes no enforceable duty on any State, local or Tribal governments or the private sector. This, today's rule is not subject to the requirements of section 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that

might significantly or uniquely affect small governments. EPA's proposed rule will only address a single administrative aspect of the water quality standards approval process (i.e. the timing of the "effectiveness" of State or Tribal standards under the CWA.) There will be no revisions to existing submission requirements and no revisions to EPA's standard for review. Thus, this proposed rule is not subject to the requirements of section 203 of UMRA.

VI. Regulatory Planning and Review, Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal government communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

VII. Enhancing the Intergovernmental Partnership, Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, any written communications from the governments, and a statement

supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's proposed rule does not create a mandate on State, local or tribal governments. The proposed rule does not impose any enforceable duties on these entities. Today's proposed rule, once finalized, will only address a single administrative aspect of the water quality standards approval process (i.e., the timing of the "effectiveness" of State or Tribal standards under the CWA). There will be no revisions to existing submission requirements and no revisions to EPA's standards for review. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

VIII. Consultation and Coordination With Indian Tribal Governments, Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments, nor does it impose substantial direct compliance costs on them. Today's proposed rule, once finalized, will only address a single administrative aspect of the WQS

approval process (i.e., the timing of the "effectiveness" of Tribal WQS under the CWA). There will be no revisions to existing submission requirements and no revisions to EPA's standards for review. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

IX. Paperwork Reduction Act

This action requires no new information collection activities subject to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Therefore, no Information Collection Request will be submitted to the Office of Management and Budget for review in compliance with the Paperwork Reduction Act.

X. Protection of Children From Environmental Health Risks and Safety Risks, Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets E.O. 13045 as applying only

to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposed rule is not subject to E.O. 13045 because it is not economically significant as defined under E.O. 12866 and, further, it does not establish an environmental standard intended to mitigate health or safety risks.

XI. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Pub. L. No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. EPA welcomes comments on this aspect of the proposed rulemaking, and specifically invites the public to identify potentially applicable voluntary

consensus standards and to explain why such standards should be used in this regulation.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians-lands, Intergovernmental relations, Water pollution control, Water quality standards.

Dated: June 30, 1999.

Carol M. Browner,
Administrator.

For the reasons set forth in the preamble, 40 CFR part 131 is proposed to be amended as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

Subpart C—[Amended]

2. Section 131.21 is amended by revising paragraphs (c) and (d) and by adding paragraphs (e), (f), and (g) to read as follows:

§ 131.21 EPA review and approval of water quality standards.

* * * * *

(c) *How do I determine which water quality standards are applicable for purposes of the Act?*

You may determine which water quality standards are applicable water quality standards for purposes of the Act for the following table:

If	Then	Unless	In which case
(1) A State or authorized Tribe has adopted a water quality standard that is effective under State or Tribal law <i>before</i> [effective date of the final rule].	* * * The State or Tribe's water quality standard is the applicable water quality standard for purposes of the Act.	* * * EPA has promulgated a more stringent water quality standard for the State or Tribe, that is in effect.	* * * The EPA-promulgated water quality standard is the applicable water quality standard for purposes of the Act.
(2) A State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or <i>after</i> [effective date of the final rule].	* * * Once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act.	* * * EPA has promulgated a more stringent water quality standard for the State or Tribe, that is in effect.	* * * The EPA promulgated water quality standard is the applicable water quality standard for purposes of the Act.

(d) *When do I use the applicable water quality standards identified in paragraph (c) of this section?*

Applicable water quality standards for purposes of the Clean Water Act (CWA) are the minimum standards which must be used when the CWA and regulations implementing the CWA refer to water quality standards, for example, in identifying impaired waters and calculating TMDLs under section 303(d), developing NPDES permit limitations under section 301(b)(1)(C),

evaluating proposed discharges or dredged or fill material under section 404, and in issuing certifications under section 401 of the Act.

(e) *For how long does the applicable water quality standard for purposes of the Act remain the applicable water quality standards for purposes of the Act?*

A State or Tribe's applicable water quality standards for purposes of the Act remains in effect until EPA approves a change, deletion, or addition to that water quality standard, or until

EPA promulgates a more stringent water quality standard.

(f) *Can standards other than those identified in paragraph (c) of this section be used for purposes of the Act?*

State or Tribal water quality standards which are not less stringent than the applicable water quality standards may be adopted and enforced within the boundaries of the adopting State or authorized Tribe.

(g) *How can I find out what the applicable standards are for purposes of the Act?*

EPA will maintain a docket system, available to the public, identifying the applicable water quality standards for purposes of the Act.

[FR Doc. 99-17343 Filed 7-8-99; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office Of The Secretary

45 CFR Part 5b

Privacy Act; Implementation

AGENCY: Office of the Secretary, HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Health and Human Services proposes to exempt a new system of records, 09-25-0213, "Administration: Investigative Records, HHS/NIH/OM/OA/OMA," from certain requirements of the Privacy Act to protect records compiled in the course of an inquiry and/or investigation and to protect the identity of confidential sources who furnish information to the Government under an express promise that the identity of such source would be held in confidence.

DATES: Comments on the proposed amendment must be received on or before August 9, 1999.

ADDRESS: Written comments should be sent to: NIH Privacy Act Officer, 6011 Executive Boulevard, Room 601, Rockville, MD 20852.

Comments will be available for public inspection at this address on Monday through Friday of each week from 9 am to 3 pm.

FOR FURTHER INFORMATION CONTACT: NIH Privacy Act Officer, 6011 Executive Boulevard, Room 601, Rockville, MD 20852, 301-496-2832. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: The Office of Management Assessment (OMA) assumes the lead responsibility on cases received through the DHHS Office of Inspector General (OIG) hotline that are referred to NIH for action. OMA serves as NIH's central liaison on matters involving the Office of Audit Services, OIG; General Accounting Office; Federal Bureau of Investigation; congressional staff members; etc., related to management controls and audits. OMA also has overall responsibility for all matters related to management controls to prevent fraud, waste, abuse, and conflict of interest or the appearance of these, including the development and implementation of policy and the Annual Management Control Plan and the development of a planned

management oversight activity that focuses on early identification and prevention of such occurrences.

To perform these responsibilities, OMA compiles and maintains administrative and investigative records related to alleged or suspected violations of statutes, regulations, and policies governing the conduct of Federal employees, recipients of Federal funding, and others who transact, or seek to transact business with the NIH.

These records contain information related to complaints of incidents, inquiries and investigative findings, administrative and other matters involving complainants, suspects and witnesses, and court dispositions.

The administrative and investigation records are located in the OMA and constitute a "system of records" as defined by the Privacy Act. Concurrent with this notice of proposed rulemaking, the National Institutes of Health is publishing a notice for this new system in the **Federal Register**.

Under the Privacy Act, individuals have a right of access to information pertaining to them which is contained in a system of records. At the same time, the Act permits certain types of systems to be exempt from some of the Privacy Act requirements. Subsection (k)(2) allows agency heads to exempt a system of records containing investigatory material compiled for enforcement purposes. This exemption is qualified in that if the material results in denial of any right, privilege, or benefit to an individual to which that individual would be entitled by Federal law, the individual must be granted access to the material, unless the access would reveal the identity of a source who furnished information to the Government under an express promise of confidentiality. In addition, paragraph (k)(5) permits an agency to exempt material from the individual access, notification, and correction and amendment provisions of the Act where investigatory material is compiled for the purpose of determining suitability, eligibility, or qualification for federal employment or financial assistance if release of the material would cause the identity of a confidential source to be revealed.

Because the administrative and investigative records are compiled by a distinct component of the agency whose principal function is investigations which compile material for law enforcement purposes, the specific exemption (k)(2) requirements are met and the exemption is justified.

Investigations compiled for the purpose of determining suitability, eligibility, or qualification for federal employment or financial assistance may be undertaken

when the investigations result from a direct allegation or through suspected violations of statutes, regulations and policies uncovered during an administrative management control review or audit. Determinations that applicants are not suitable, eligible or qualified would justify the need to invoke the paragraph (k)(5) exemption.

The system contains sensitive investigative records. The release of these records to the subject of the investigation could have a chilling effect on the willingness of informants to provide information freely, not only because of fear of retribution, but because they might hesitate to provide any information other than that of which they are entirely certain. Disclosure could impede ongoing investigations and violate the privacy rights of individuals other than the subject of the investigation, thereby diminishing the ability of the OMA to conduct a thorough and accurate investigation. Disclosure of information from these records might also reveal to the subjects of the investigation that their actions are being scrutinized, allowing them the opportunity to prevent detection of illegal activities. Finally, disclosure of information from the records might reveal investigative techniques and thereby jeopardize the integrity of the investigation.

Sources may be reluctant to provide sensitive information unless they can be assured that their identities will not be revealed. These exemptions are proposed to ensure that: (1) Efforts to obtain accurate and objective information will not be hindered; (2) investigative records will not be disclosed inappropriately; and (3) identities of confidential sources and OMA investigators will be protected. Accordingly, the Department proposes to exempt this system under paragraphs (k)(2) and (k)(5) of the Privacy Act from the notification, access, correction, and amendment provisions of the Privacy Act (paragraphs (c)(3), (d)(1)-(4), (e)(1), (e)(4)-(G) and (H) and (f)).

Regulatory Impact Statement

Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, requires the Department to prepare an analysis for any rule that meets one of the E. O. 12866 criteria for a significant regulatory action; that is, that may—

Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment,