Federal Regulations are amended as set forth below.

PART 31—FEDERAL SCHOOLS FOR INDIANS

■ 1. The authority for part 31 continues to read as follows:

Authority: Sec. 1, 41 Stat. 410; 25 U.S.C. 282, unless otherwise noted.

■ 2. Section 31.1 is removed.

■ 3. Section 31.5 is removed.

PART 36—MINIMUM ACADEMIC STANDARDS FOR THE BASIC EDUCATION OF INDIAN CHILDREN AND NATIONAL CRITERIA FOR DORMITORY SITUATIONS

■ 4. The authority for part 36 continues to read as follows:

Authority: Section 502, 25 U.S.C. 2001; section 5101, 25 U.S.C. 2001; Section 1101, 25 U.S.C. 2002; 5 U.S.C. 301; 25 U.S.C. 2 and 9; 25 S.C. 2901, Title I of P.L. 101–477.

■ 5. In § 36.1, paragraph (b) is removed and paragraph (c) is redesignated as paragraph (b).

■ 6. In § 36.2, paragraphs (a), (b), (d), and (e) are removed and the designation ''(c)'' is removed from the beginning of paragraph (c).

■ 7. In § 36.11, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

■ 8. In § 36.20, paragraphs (a) and (b) are removed and paragraphs (c) through (e) are redesignated as paragraphs (a) through (c).

■ 9. Subpart G, consisting of §§ 36.60 and 36.61, is removed.

■ 10. Subpart H is redesignated as subpart G.

[FR Doc. 05–8257 Filed 4–27–05; 8:45 am]

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DEPARTMENT OF JUSTICE

28 CFR Part 28

[Docket No. OAG 109; A.G. Order No. 2762–2005]

RIN 1105–AB10

Preservation of Biological Evidence Under 18 U.S.C. 3600A

AGENCY: Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Justice is publishing this interim rule to implement 18 U.S.C. 3600A. That statute requires the Federal Government to preserve biological evidence in Federal criminal cases in which defendants are under sentences of imprisonment, subject to certain limitations and exceptions. Subsection (e) of the statute requires the Attorney General to promulgate regulations to implement and enforce the statute. This rule adds a new subpart C to 28 CFR part 28 to effect the required implementation and enforcement of 18 U.S.C. 3600A. The new provisions added by this rule explain and interpret the evidence preservation requirement of 18 U.S.C. 3600A, and include provisions concerning sanctions for violations of that requirement.

DATES: *Effective Date:* This interim rule is effective April 28, 2005.

Comment Date: Comments must be received by June 27, 2005.

ADDRESSES: Comments may be mailed to David J. Karp, Senior Counsel, Office of Legal Policy, Room 4509, Main Justice Building, 950 Pennsylvania Avenue, NW., Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 109 on your correspondence. You may view an electronic version of this interim rule at *http://www.regulations.gov.* You may also comment via the Internet to the Justice Department's Office of Legal Policy (OLP) at *olpregs@usdoj.gov* or by using the *www.regulations.gov* comment form for this regulation. When submitting comments electronically you must include OAG Docket No. 109 in the subject box.

SUPPLEMENTARY INFORMATION: Public Law 108–405, the Justice for All Act of 2004, was enacted on October 30, 2004. Section 411 of that Act added two sections to title 18 of the United States Code. One of these, 18 U.S.C. 3600 (hereafter, ''section 3600''), is a new postconviction remedy by means of which persons convicted and imprisoned for Federal offenses may seek DNA testing in support of claims that they are actually innocent of the crimes for which they were convicted. The Act also added 18 U.S.C. 3600A (hereafter, ''section 3600A''), which requires the Government to preserve biological evidence—defined to mean ''sexual assault forensic examination kit[s]'' and ''semen, blood, saliva, hair, skin tissue, or other identified biological material''—that was secured in the investigation or prosecution of a Federal offense for which a defendant is under a sentence of imprisonment, subject to certain limitations and exceptions. The general purpose of section 3600A is to preserve biological evidence for possible DNA testing under section 3600. If a court orders, pursuant to section 3600, DNA testing of biological evidence that has been preserved in the case, the test results may shed light on the defendant's guilt or innocence of the offense by including or excluding the defendant as the source of the biological material.

Subsection (e) of section 3600A directs the Attorney General to promulgate within 180 days of the date of enactment (*i.e.*, October 30, 2004) regulations to implement and enforce section 3600A, including appropriate disciplinary sanctions to ensure compliance by employees. This interim rule carries out that direction. It adds a new Subpart C, entitled ''Preservation of Biological Evidence,'' to 28 CFR Part 28; the general subject of 28 CFR Part 28 is ''DNA Identification System.'' The new Subpart C comprises §§ 28.21 through 28.28.

The first seven sections of the new Subpart, §§ 28.21 through 28.27, primarily explain and interpret the biological evidence preservation requirement of section 3600A. This will ensure that Federal agencies clearly understand their obligations under section 3600A, including both the positive extent of the requirement to preserve biological evidence and the limitations on and exceptions to that requirement under the statute. The final section of the new Subpart, § 28.28, concerns sanctions for violations. The provisions of the regulations are as follows:

Section 28.21

Section 28.21 notes the biological evidence preservation requirement of section 3600A, its general purpose to preserve such evidence for possible DNA testing under 18 U.S.C. 3600, and the requirement of section 3600A(e) to promulgate regulations to implement and enforce section 3600A.

Section 28.22

Section 28.22 provides explanation concerning the applicability, duration, and meaning of the biological evidence preservation requirement, construing subsection (a) of section 3600A.

Paragraph (a)

Paragraph (a) in § 28.22 notes that the biological evidence preservation requirement applies to evidence retained in cases predating the enactment of section 3600A or the promulgation of this rule, as well as to evidence secured in pending and future cases. This reflects the effective date and applicability provision in section 411 of the Justice for All Act, which states that the provisions enacted by that section (including 18 U.S.C. 3600A) ''shall apply with respect to any offense committed, and to any judgment of

conviction entered, before, on, or after [the] date of enactment.'' Public Law 108–405, section 411(c).

Paragraph (b)

Paragraph (b) in § 28.22 interprets and specifies a number of consequences of the language in section 3600A that requires the preservation of biological evidence secured in the investigation or prosecution of a Federal offense ''if a defendant is under a sentence of imprisonment for such offense.'' 18 U.S.C. 3600A(a). The general consequence of this limitation is that section 3600A's requirement to preserve biological evidence begins to apply when a defendant is sentenced to imprisonment for the offense in whose investigation or prosecution the evidence was secured, and ceases to apply at the end of such imprisonment.

In some cases the prison terms served by defendants are extended because of convictions for additional offenses, beyond those involving the biological evidence whose preservation is required by section 3600A. This does not change the principle that the biological evidence preservation period under section 3600A(a) continues until the end of imprisonment. For example, consider a case in which a defendant is sentenced to 10 years of imprisonment for a rape in violation of 18 U.S.C. 2241, and the biological evidence is a sexual assault forensic examination kit taken from the victim of that rape. Suppose further that, before the prison term for the rape is completed, the defendant is convicted and sentenced to a consecutive 10 years of imprisonment for some other offense—*e.g.*, a commercial fraud—that was separately investigated and prosecuted and is unrelated to the rape and the biological evidence. The defendant would then not be released on completion of the 10 years of incarceration that would have resulted from the rape conviction alone, but rather is subject to an aggregate prison term of 20 years.

In such a case, the 10-year prison term the defendant received for the rape is merged into the aggregate prison term of 20 years under 18 U.S.C. 3584, and the defendant is deemed to be under a sentence of imprisonment for the rape for purposes of section 3600A's biological evidence preservation requirement until he is released following imprisonment, though that will not occur until a longer period than 10 years has elapsed. Regardless of any effect on the duration of imprisonment resulting from conviction for multiple offenses, the rule is that the biological evidence preservation period under section 3600A(a) begins when a defendant is sentenced to imprisonment for an offense in whose investigation or prosecution the evidence was secured, and ends on release of the defendant or defendants following imprisonment.

Subparagraphs (1) and (2) of paragraph (b) notes two specific consequences of the ''under a sentence of imprisonment'' limitation of section 3600A—inapplicability of the biological evidence preservation requirement of section 3600A at the investigative stage of criminal cases, preceding the conviction and sentencing to imprisonment of a defendant, and inapplicability of the biological evidence preservation requirement to cases in which the defendants receive only non-incarcerative sentences, since in these circumstances no defendant is ''under a sentence of imprisonment'' for the offense.

Paragraph (b)(3) of the regulation explains that as a further consequence of the ''under a sentence of imprisonment'' language, the biological evidence preservation requirement of section 3600A ceases to apply once the defendant or defendants are released following imprisonment, either unconditionally or under supervision. In other words, the biological evidence preservation requirement does not apply even if a defendant remains on supervised release or parole following his release. The legislative history of section 3600A confirms that the ''under a sentence of imprisonment'' language in the statute refers to circumstances in which a defendant remains incarcerated and that the biological evidence retention requirement applies only in such circumstances. See H. Rep. No. 711, 108th Cong., 2d Sess. 2 (2004) (section 3600A requires preservation of biological evidence ''while the defendant remains incarcerated''); id. at 14 (''while a defendant remains incarcerated''); H. Rep. No. 321, 108th Cong., 1st Sess. 19 (2003) (''while the defendant remains incarcerated''); id. at 29 (''while a defendant remains incarcerated''); 149 Cong. Rec. H10357 (daily ed. Nov. 5, 2003) (statement of Rep. Sensenbrenner) (''where the defendant remains incarcerated''); 149 Cong. Rec. S12296 (daily ed. Oct. 1, 2003) (section-by-section analysis inserted in record by Sen. Hatch) (''while a defendant remains incarcerated''). Release on parole, as well as release on supervised release, terminates the requirement to preserve biological evidence under section 3600A(a) in light of the clear legislative intent to have that requirement apply only while a defendant remains incarcerated, even though a parolee may validly be regarded as still in custody under the sentence imposed by the court for other purposes.

Federal agencies will be able to determine whether and when a defendant has been released following imprisonment by asking the Federal Bureau of Prisons. Several federal law enforcement agencies maintain Memorandums of Agreement with the Bureau of Prisons whereby they may directly access computer records of federal inmates to determine their incarceration status. Absent such a relationship, anyone may use the Bureau of Prisons' inmate locator service, which is available on its internet site at: *http://www.bop.gov/inmate_locator/index.jsp.* As a last resort, Bureau of Prisons staff in the Central Office's inmate locator center may be contacted at 202–307–3126.

In general, the Bureau of Prisons determines an imprisoned defendant's release date by applying the prison term specified by the court in sentencing, subject to any good conduct credit awarded under 18 U.S.C. 3624(b) and any credit for prior custody under 18 U.S.C. 3585(b). See 18 U.S.C. 3585, 3624(a). Subsequent modification of a sentence of imprisonment by the court, or reduction of the period of custody by the Bureau of Prisons as authorized by provisions relating to successful completion of drug treatment or shock incarceration programs (18 U.S.C. 3621(e)(2)(B), 4046(c)), are also given effect by the Bureau of Prisons in determining the time of release. However, subsequent occurrences that do not terminate the Bureau of Prisons' custody over a convicted defendant—such as temporary release under 18 U.S.C. 3622 or placement in a halfway house under 18 U.S.C. 3624(c)—do not constitute release following imprisonment in the relevant sense and do not terminate the requirement to preserve biological evidence under section 3600A, since the defendant remains under a sentence of imprisonment for the offense in these circumstances. In contrast to a prisoner who is released at the conclusion of imprisonment, either unconditionally or under supervision, a prisoner furloughed under 18 U.S.C. 3622 remains in the custody of the Bureau of Prisons, and a prisoner given the benefit of 18 U.S.C. 3624(c) likewise is only afforded placement in a different type of confinement near the end of his prison term while remaining in the custody of the Bureau of Prisons.

Paragraph (b)(4) of the regulation explains that the ''under a sentence of imprisonment for such offense'' language in section 3600A(a) refers to imprisonment pursuant to the sentence

imposed upon conviction, and not to imprisonment that occurs later on because of the revocation of probation, supervised release, or parole. Thus, section 3600A does not require the preservation of biological evidence when a probationer, supervised releasee, or parolee is imprisoned on revocation of release. Considerations that support this understanding of the statute include the following:

While imprisonment following a revocation of release is legally part of the penalty for the offense of conviction, see, *e.g., Johnson* v. *United States,* 529 U.S. 694, 700–01 (2000); *United States* v. *Huerta-Moran,* 352 F.3d 766, 770 (2d Cir. 2003), it is a distinct question what Congress intended in section 3600A(a) in stating that biological evidence preservation is required ''if a defendant is under a sentence of imprisonment for such offense.'' In ascertaining the legislative intent, one relevant consideration is that the statute clearly does not require the preservation of biological evidence in a case in which the defendant is only sentenced to probation and remains out on probation. This limitation is in tension with an assumption that 3600A was meant to apply for the benefit of probationers who later violate release conditions and are imprisoned following revocation, because there is no limitation under the statute on disposing of the evidence prior to the time when such a revocation occurs. Hence, the evidence could no longer exist by the time the probationer was imprisoned, making any intended benefit under the statute illusory. Likewise, section 3600A's inapplicability following the release of an initially incarcerated convict—*see* § 28.22(b)(3) in the regulations—would arguably be incongruous had Congress intended to benefit supervised releasees or parolees who violate release conditions and have their release revoked, because there is no inhibition under the statute on destroying the evidence prior to such revocation during the period of postrelease supervision.

The legislative history of title IV of the Justice for All Act (*i.e.*, the ''Innocence Protection Act'') sheds additional light on the legislative intent. The corresponding provision in the version of the Innocence Protection Act that the Senate Judiciary Committee reported in the 107th Congress used broader language—''subject to incarceration''—that could readily have been interpreted to require biological evidence preservation for the benefit of persons released on probation, supervised release, or parole in light of the possibility of later incarceration based on violations of release conditions. *See* S. 486, Rep. No. 315, 107th Cong., 2d Sess. (2002) (proposed 28 U.S.C. 2292(a) in section 101) (evidence that could be subjected to DNA testing must be preserved ''for not less than the period of time that any person remains subject to incarceration in connection with the investigation or prosecution''). Congress rejected this broader language in formulating the provisions that were ultimately enacted by the Justice for All Act, and instead adopted the narrower language that appears in section 3600A. *See* 18 U.S.C. 3600A(a) (biological evidence secured in investigation or prosecution of offense must be preserved ''if a defendant is under a sentence of imprisonment for such offense''). This supports the understanding of section 3600A as not intended to provide any benefit for defendants who are released under probation, supervised release, or parole.

The more immediate legislative history of section 3600A provides additional support for understanding the statute as concerned only with imprisonment pursuant to the original sentence, as opposed to imprisonment dependent on later release condition violations. The references to section 3600A in the legislative history do not state that biological evidence preservation is required whenever a convicted defendant is imprisoned, but rather consistently characterize section 3600A as requiring the preservation of biological evidence while a convicted defendant ''remains incarcerated.'' H. Rep. No. 711, 108th Cong., 2d Sess. 2, 14 (2004); H. Rep. No. 321, 108th Cong., 1st Sess. 19, 29 (2003); 149 Cong. Rec. H10357 (daily ed. Nov. 5, 2003) (statement of Rep. Sensenbrenner); 149 Cong. Rec. S12296 (daily ed. Oct. 1, 2003) (section-by-section analysis inserted in record by Sen. Hatch). This language (''remains incarcerated'') most naturally suggests an intention to provide a benefit or protection for defendants who are initially sentenced to incarceration, which remains applicable for as long as the incarceration continues (subject to the statute's limitations and exceptions to the preservation requirement). It does not suggest an intent to provide any benefit for a probationer who does not ''remain[] incarcerated,'' because he is not sentenced to incarceration in the first place, and only is imprisoned later on because he violates a condition of release. Likewise, it does not suggest an intent to provide any benefit to a convict who has completed the full term of imprisonment for the offense to which he was sentenced by the court; who thereafter does not ''remain[] incarcerated,'' because he is released on supervised release; and later is imprisoned again because of a release condition violation. Nor does it suggest an intent to provide any benefit to a convict eligible for parole (because the offense occurred before November 1, 1987) who does not ''remain[] incarcerated,'' but rather is released on parole, and later is reimprisoned for violating a condition of parole.

Distinguishing between convicted defendants who are under a sentence of imprisonment for the offense to which the biological evidence relates, and those who are subsequently imprisoned because they violate release conditions, is also intelligible in terms of the underlying policies of section 3600A. The general purpose of section 3600A is to preserve biological evidence for possible post-conviction DNA testing. In formulating the statute, however, Congress did not create an unqualified requirement to preserve such evidence, but rather balanced the strength of defendants' interest in the potential availability of post-conviction DNA testing against the costs and burdens of requiring that evidence be retained following conviction in criminal cases, notwithstanding the fact that the defendants in these cases have already been proven guilty beyond a reasonable doubt or have pleaded guilty. *See* 18 U.S.C. 3600A(a) (limiting preservation requirement to circumstances in which defendant is under sentence of imprisonment for offense in whose investigation or prosecution the biological evidence was secured); 18 U.S.C. 3600A(c) (specifying several exceptions to the preservation requirement).

In striking this balance, the strength of defendants' interests is defined in part in terms of the severity and likelihood of the sanctions to which they are subject. For example, section 3600A is expressly inapplicable in relation to convicts whose sanctions include only non-incarcerative sentences, such as fines, probation, or payment of restitution, because in these circumstances no defendant is ''under a sentence of imprisonment.'' 18 U.S.C. 3600A(a). While a defendant under a sentence of probation may be confined, see 18 U.S.C. 3563(b)(9)–(11), (19), and may later be imprisoned if he violates release conditions, *see* 18 U.S.C. 3565, the statute does not treat these interests as sufficient to warrant mandating that biological evidence be preserved when a defendant is on probation. Likewise, a convicted defendant who is released following completion of the term of

imprisonment to which he was sentenced for the offense is not entitled under section 3600A to the continued preservation of biological evidence relating to the offense—*see* section 28.22(b)(3) in the regulations—though he may remain under supervision following his release because of the conviction; his release may be revoked and he may be reimprisoned if he violates release conditions; and his conviction may later be relied on for sentencing enhancement if he is subsequently convicted for other crimes.

Section 28.2(b)(4) in the regulations understands section 3600A as reflecting a similar legislative judgment in relation to the class of convicted defendants whose release is revoked. The interest of this class of convicts in the preservation of biological evidence is limited by the consideration that the resulting exposure to serious sanctions is generally much less than on original sentencing for an offense. On revocation of supervised release, for example, the convict is not resentenced for the original offense at all, but rather is exposed only to relatively limited periods of imprisonment in lieu of supervision as provided in 18 U.S.C. 3583(e)(3). As a practical matter, for both probation and supervised release violations, the resulting periods of imprisonment are normally limited in duration, and usually reflect the nature of the release condition violation and the convict's criminal history, rather than the character of the offense of conviction. *See* USSG § 7B1.4. The reimprisonment of parolees on revocation of parole is provisional in character, bounded by the time remaining from the maximum prison term allowed under the original sentence, and subject to periodic reconsideration by the U.S. Parole Commission. *See* 18 U.S.C. 4208(a), (h), 4210. Moreover, in decisions about reparole following revocation, the violation of a release condition that resulted in revocation, rather than the original offense of conviction, is normally treated as the current offense to which the post-revocation imprisonment relates. *See* 28 CFR 2.21.

The foregoing considerations support the conclusion that, in the context of section 3600A, Congress would have regarded imprisonment on revocation of release as a sanction pertaining primarily to the release condition violation on which the revocation is premised, rather than ''a sentence of imprisonment for [the] offense'' of conviction in the sense of subsection (a) of section 3600A. Hence, § 28.2(b)(4) in the regulations explains that the reference in section 3600A(a) to a defendant ''under a sentence of imprisonment for such offense'' refers to a defendant who remains incarcerated pursuant to the sentence imposed by the court upon the defendant's conviction of the offense, as opposed to being incarcerated following some period of release based on a later violation of release conditions.

In addition to constituting the most plausible understanding based on the direct indicia of legislative intent, this reading of section 3600A simplifies and facilitates the implementation and administration of the statute's biological evidence preservation requirement. A contrary reading of the statute would mean that the applicability of the biological evidence preservation requirement could repeatedly come and go in the same case—inapplicable when the defendant initially receives a non-incarcerative sentence or is released following imprisonment, but later applicable, potentially following a lapse of years, if the convicted defendant violates a release condition and release is revoked. This complication in determining whether the biological evidence preservation requirement of section 3600A applies is avoided under the reading of the statute adopted in this rule.

Paragraph (c)

Paragraph (c) of § 28.22 explains that the requirement to ''preserve'' biological evidence under section 3600A means that such evidence cannot be destroyed or thrown away, but does not otherwise limit agency discretion concerning the storage or handling of such evidence. The statute requires that biological evidence be preserved in the circumstances it specifies, but does not purport to regulate agency practices relating to the conditions under which evidence is maintained. Agencies accordingly have the same discretion in such practices as they did prior to the enactment of section 3600A. Also, section 3600A requires that ''the Government'' preserve biological evidence under specified circumstances, but does not require that this function be assigned to any particular agency. There are accordingly no resulting restrictions on interagency transfers of biological evidence.

Section 28.23

Section 28.23 explains what types of evidence constitute ''biological evidence'' within the scope of section 3600A, construing the definition of ''biological evidence'' in subsection (b) of that section.

In approaching this issue, the regulations start from a recognition of the fact that practically anything secured in the investigation or prosecution of a criminal case will contain, or consist of, some matter derived from a living organism. For example, almost any object will at least have microorganisms on its surface, and if it has been in contact with human beings, it will also contain microscopic biological residues from that contact, such as sloughed off skin cells. Other items secured in a criminal case will often themselves consist of organic matter in a broad sense because the material they are made of is derived from living things—for example, paper made from wood pulp, or drugs like cocaine or opiates that are derived from plant material.

Hence, misunderstanding section 3600A as requiring the preservation of all evidence that is or contains something of a ''biological'' nature would effectively erase the distinction between ''biological evidence'' whose preservation is required under the statute and other forms of evidence, and would potentially entail the retention of vast amounts of evidence having no relationship to the legislative purpose underlying the enactment of section 3600A—*i.e.*, preserving biological evidence for the purpose of possible DNA testing under 18 U.S.C. 3600. Care is accordingly required in reading the textual definition of covered ''biological evidence'' in subsection (b) of section 3600A and, to the extent that the definition is not fully explicit concerning some interpretive issues, in resolving those issues in a manner that reflects the legislative intent.

Section 28.23 in the regulations notes the statutory definition's self-explanatory coverage of ''sexual assault forensic examination kit[s]'' as biological evidence in subsection (b)(1) of section 3600A, and provides the necessary explanation and elaboration of the general definition of biological evidence in subsection (b)(2) (''semen, blood, saliva, hair, skin tissue, or other identified biological material''). Paragraph (b) in the regulation explicates the general definition as reflecting two key limitations:

First, only identified biological material is covered. This follows from section 3600A(b)(2), which defines covered biological evidence as ''identified biological material,'' and lists by way of illustration ''semen, blood, saliva, hair, [and] skin tissue.'' This limitation is significant because the human body is continually sloughing off skin cells and, as a result, virtually any physical object or thing that has been in contact with or sufficiently near human beings will contain microscopic

biological residues from their bodies. The statutory requirement is not to preserve any and all physical things secured in criminal cases merely because it is known on theoretical grounds that human organic matter is present on their surfaces, but rather applies only to biological material that is detected and identified as such.

Second, biological material within the scope of the definition is limited to organic matter that may derive from the body of a perpetrator of the crime, and hence might be able to shed light on guilt or innocence through DNA testing under 18 U.S.C. 3600 by including or excluding the defendant as the source of the DNA in the material. This understanding follows from the legislative intent indicated by the listing of examples in section 3600A(b)(2)—''semen, blood, saliva, hair, skin tissue''—which covers the types of organic matter that are most likely to be left in identifiable form by perpetrators at crime scenes; from the enactment of section 3600A as a companion statute to 18 U.S.C. 3600, which authorizes post-conviction DNA testing in support of claims of actual innocence by applicants to determine whether they are the source of DNA in specific evidence; and from the underlying purpose of section 3600A to preserve evidence for possible DNA testing under 18 U.S.C. 3600. *See* section 3600A(c)(1), (3), (5) (requirement to preserve biological evidence does not apply if a court has denied a section 3600 motion for DNA testing of the evidence, if the defendant does not file a section 3600 motion within 180 days of notice that the evidence may be destroyed, or if the results of DNA testing under section 3600 include the defendant as the source of the evidence); 18 U.S.C. 3600(f)(1)–(2), (g)(1) (specifying consequences of DNA testing based on whether the test results are inconclusive, show that the applicant was the source of the DNA evidence, or exclude the applicant as the source of the DNA evidence).

Sections 28.24 Through 28.26

Sections 28.24, 28.25, and 28.26 concern the exceptions to the biological evidence preservation requirement that appear in subsection (c) of section 3600A.

Section 28.24 notes the exceptions in subsection (c)(1) and (5) of the statute, which make the biological evidence retention requirement inapplicable if a court has denied a motion for DNA testing under 18 U.S.C. 3600 and no appeal is pending, or if there has been DNA testing under 18 U.S.C. 3600 and the results included the defendant as the source of the evidence. In such cases, the underlying purpose of section 3600A to preserve evidence for possible DNA testing under 18 U.S.C. 3600 is not served, and the statute accordingly provides that the evidence preservation requirement does not apply in these circumstances.

Section 28.25 explains the exceptions in subsection (c)(2)–(3) of the statute relating to waiver of DNA testing by the defendant, and to situations in which the defendant is given notice that biological evidence may be destroyed and does not file a motion for DNA testing under 18 U.S.C. 3600 within 180 days. Section 28.25, in paragraph (b)(3), also includes specifications concerning the procedures for notifying defendants concerning the potential destruction of biological evidence and for determining whether or not a motion under 18 U.S.C. 3600 has been filed within 180 days of such notice. Paragraph (b)(3) provides that notice may be provided by certified mail, and that the Federal Bureau of Prisons (BOP) is to create a record concerning its delivery. Existing BOP procedures already comply with this requirement. *See Dusenberry* v. *United States,* 534 U.S. 161, 180 (2002) (BOP procedures require prisoner to sign log book acknowledging delivery of certified mail, and documentation by prison officer if the prisoner refuses to sign). The agency providing the notice accordingly can obtain confirmation of its delivery to the inmate to which it is addressed and the date of the delivery by asking BOP, and paragraph (b)(3) in the regulation so provides. The post-conviction DNA testing provisions in 18 U.S.C. 3600 require that proceedings under that section be conducted in the court in which the applicant was convicted of the relevant offense. 18 U.S.C. 3600(a). Paragraph (b)(3) in the regulation accordingly provides that an agency may ascertain whether a defendant has filed a motion under 18 U.S.C. 3600 within 180 days of receiving notice that biological evidence may be destroyed by checking court records or checking with the United States Attorney's office in the district in which the defendant was convicted.

Section 28.26 explains and discusses the application of the exception in subsection (c)(4) of the statute, which provides that biological evidence need not be retained if it must be returned to its owner or its retention is impracticable, so long as portions are preserved sufficient to permit DNA testing. Paragraphs (a) and (b) of § 28.26 identify common situations in which section 3600A(c)(4) does not have to be relied on to justify disposing of evidence that must be returned to its owner or whose retention is impracticable—and does not require the preservation of portions of such evidence if it is disposed of—because circumstances exist that make section 3600A entirely inapplicable to the evidence. The specific situations addressed are those in which the evidence is not retained past the investigative stage of a case and those in which the evidence does not constitute biological evidence as defined in section 3600A. Paragraph (c) of § 28.26 addresses situations in which section 3600A(c)(4) does have to be relied on to dispose of evidence that must be returned to the owner or whose retention is impracticable, and the requirement to preserve portions sufficient for future DNA testing in these situations.

Section 28.27

This section of the regulations notes the specification in subsection (d) of section 3600A that section 3600A's biological evidence preservation requirement does not preempt or supersede other requirements to preserve evidence.

Section 28.28

The final section of the new Subpart, § 28.28, concerns sanctions for violations. At a practical level, the greatest impact of the requirement of section 3600A and these regulations to preserve biological evidence secured in the investigation or prosecution of Federal offenses will be on the Department of Justice, because Department of Justice investigative agencies, and particularly the FBI, conduct most investigations of Federal offenses in which biological evidence may be secured, and because the litigating components of the Department of Justice conduct all prosecutions of Federal offenses. However, section 3600A requires ''the Government''—not just agencies within the Department of Justice—to preserve biological evidence. Section 3600A and its implementing rule accordingly are not limited in their application to Justice Department components, but potentially affect all agencies of the Federal Government that may secure biological evidence in the investigation or prosecution of Federal offenses, or may become holders or custodians of such evidence after it is secured. All such agencies provide disciplinary sanctions for violations of statutory or regulatory requirements by their employees, and paragraph (a) of § 28.28 provides that employees who violate the provisions of section 3600A or this rule shall be subject to the disciplinary sanctions authorized by the

rules or policies of their employing agencies.

Section 3600A and these regulations will not, however, generally affect the Department of Defense and its components, since their investigative and prosecutorial jurisdiction relates to offenses under the Uniform Code of Military Justice (UCMJ), committed by members of the Armed Forces, who would be prosecuted in court martial proceedings. These are not investigations or prosecutions for a ''Federal offense'' within the meaning of 18 U.S.C. 3600A. Among other considerations, this is clear from the formulation of section 3600A's companion statute, 18 U.S.C. 3600, which requires that an application for post-conviction DNA testing be made to the court that entered the judgment of conviction for the relevant ''Federal offense.'' See 18 U.S.C. 3600(a). This is impossible in relation to UCMJ offenses, which are adjudicated by courts martial that are convened to try particular cases, and do not exist as permanent courts. Moreover, pre-enactment versions of the Innocence Protection Act would have applied the post-conviction DNA testing and biological evidence retention provisions to UCMJ offenses, dealing with the nonexistence of permanent military trial courts by specifying that postconviction DNA testing applications by military offenders would be presented to the district court having jurisdiction over the place where the court martial was convened. See S. 486, Rep. No. 315, 107th Cong., 2d Sess. (2002) (proposed 28 U.S.C. 2291(a), (i), 2292(a) in section 101). But the enacted statutes substituted provisions that include no affirmative mention of UCMJ offenses and whose application to UCMJ offenses is literally impossible. Hence, it is clear that Congress rejected the application of the new postconviction DNA testing and biological evidence preservation requirements in contexts that would affect the Department of Defense.

Paragraph (b) of § 28.28 notes that violations of section 3600A are also subject to criminal sanctions in certain circumstances, pursuant to subsection (f) of section 3600A.

Subsection (g) of section 3600A states that ''[n]othing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.'' The inclusion of this provision in the statute reflects a legislative intent that section 3600A's requirements are to be enforced through the disciplinary sanctions referenced in subsection (e) of the statute and the criminal sanctions authorized by subsection (f) of the statute, rather than by enlarging the grounds for overturning criminal convictions in postconviction proceedings. Hence, a failure to preserve biological evidence as required by section 3600A does not provide any basis for a convict to challenge his or her conviction for the offense to which the evidence relates. Paragraph (c) of § 28.28 notes the means that are available and the means that are unavailable for the enforcement of section 3600A.

Administrative Procedure Act

The implementation of this rule as an interim rule, with provision for post-promulgation public comments, is based on the exception found at 5 U.S.C. 553(a)(2) for ''matter[s] relating to * * * public property,'' and on the ''good cause'' exceptions found at 5 U.S.C. 553(b)(3)(B).

The ''public property'' exception found at 5 U.S.C. 553(a)(2) applies to ''property held by the United States in trust or as guardian,'' as well as to property owned by the Federal Government. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946); Attorney General's Manual on the Administrative Procedure Act 27 (1947). This rule concerns the requirement of 18 U.S.C. 3600A that the Government preserve biological evidence secured in the investigation or prosecution of Federal offenses. Hence, the rule is about the Government's management of property in its possession, and it involves matters relating to such property ''clearly and directly.'' H.R. Rep. No. 1980, 79th Cong, 2d Sess. 23 (1946). ''Biological evidence'' in the relevant sense is defined to mean ''sexual assault forensic examination kit[s]'' and ''semen, blood, saliva, hair, skin tissue, or other identified biological material.'' 18 U.S.C. 3600A(b). Normally, the Government exercises exclusive ownership of such property, in that no private party claims any right to or interest in its possession; the Government retains the property for as long as it is needed for evidentiary purposes; and the Government ultimately decides whether and when to dispose of the property, subject to legal requirements. Occasionally, biological evidence in the relevant sense is embedded in some larger object or item that must be returned to its owner—for example, blood-stained upholstery in a stolen car that was used in the commission of a crime.

Even in such a case, however, the Government acquires a sufficient proprietary interest in the item to function as its guardian while it is needed for evidentiary purposes, and to remove and preserve portions of it sufficient to permit DNA testing. See 42 U.S.C. 10607(c)(6) (Government to ensure that property of victim is maintained in good condition and returned when ''it is no longer needed for evidentiary purposes''); 18 U.S.C. 3600A(c)(4) (Government to preserve portions sufficient to permit DNA testing where evidence must be returned to owner). The requirements of 5 U.S.C. 553 accordingly do not apply to this rule because it involves ''matter[s] relating to * * * public property.'' 5 U.S.C. 553(a)(2).

There are also features of 18 U.S.C. 3600A that indicate that Federal agencies need not implement the evidence preservation requirement until the Attorney General issues regulations, see 18 U.S.C. 3600A(e), and affected Federal agencies will have no authoritative guidance concerning the meaning of 18 U.S.C. 3600A's provisions until the Attorney General issues such regulations. Hence, delay in the issuance of an effective implementing rule could result in the loss or destruction of biological evidence that would otherwise be preserved pursuant to 18 U.S.C. 3600A. To the extent this occurred, it would thwart the objective of 18 U.S.C. 3600A to preserve biological evidence for purposes of possible DNA testing under 18 U.S.C. 3600—testing that might exonerate an innocent defendant who was wrongly convicted, or confirm guilt if the defendant was in fact the perpetrator. It would accordingly be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

The Department will carefully consider comments that it receives on this interim rule and will issue a final rule in as timely a manner as feasible. The Department seeks comment on an appropriate performance standard to ensure that biological evidence is preserved in a manner that will allow for effective DNA testing.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reason: The regulation concerns the preservation by the Federal Government of biological evidence secured in the investigation or prosecution of Federal offenses.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 28

Crime, Information, Law enforcement, Prisons, Prisoners, Records, Probation and parole.

■ For the reasons stated in the preamble, the Department of Justice amends 28 CFR chapter I, part 28, as follows:

PART 28—DNA IDENTIFICATION SYSTEM

■ 1. The authority citation for part 28 is revised to read as follows:

Authority: 28 U.S.C. 509, 510; 42 U.S.C. 14132, 14135a, 14135b; 10 U.S.C. 1565; 18 U.S.C. 3600A; Pub. L. 106–546, 114 Stat. 2726; Pub. L. 107–56, 115 Stat. 272; Pub. L. 108–405, 118 Stat. 2260.

■ 2. Part 28 is amended by adding a new Subpart C, as follows:

Subpart C—Preservation of Biological Evidence

Sec.

Subpart C—Preservation of Biological Evidence

§ 28.21 Purpose.

Section 3600A of title 18 of the United States Code (''section 3600A'') requires the Government to preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under a sentence of imprisonment for such offense, subject to certain limitations and exceptions. The general purpose of this requirement is to preserve biological evidence for possible DNA testing under 18 U.S.C. 3600. Subsection (e) of section 3600A requires the Attorney General to promulgate regulations to implement and enforce section 3600A, including appropriate disciplinary sanctions to ensure that employees comply with such regulations.

§ 28.22 The requirement to preserve biological evidence.

(a) Applicability in general. The requirement of section 3600A to preserve biological evidence applies to evidence that has been retained in cases in which the offense or conviction occurred prior to the enactment of section 3600A or the adoption of this subpart, as well as to evidence secured in pending and future cases.

(b) Limitation to circumstances in which a defendant is under a sentence of imprisonment for the offense. The requirement of section 3600A to preserve biological evidence secured in the investigation or prosecution of a Federal offense begins to apply when a defendant is convicted and sentenced to imprisonment for the offense, and ceases to apply when the defendant or defendants are released following such imprisonment. The evidence preservation requirement of section 3600A does not apply in the following situations:

(1) Inapplicability at the investigative stage. The requirement of section 3600A to preserve biological evidence does not apply at the investigative stage of criminal cases, occurring prior to the conviction and sentencing to imprisonment of a defendant. Biological evidence may be collected and preserved in the investigation of Federal offenses prior to the sentencing of a defendant to imprisonment, reflecting sound investigative practice and the need for evidence in trial proceedings that may result from the investigation, but section 3600A does not govern these activities.

(2) Inapplicability to cases involving only non-incarcerative sentences. The requirement of section 3600A to preserve biological evidence does not apply in cases in which defendants receive only nonincarcerative sentences, such as probation, fines, or payment of restitution.

(3) Inapplicability following release. The requirement of section 3600A to preserve biological evidence ceases to apply when the defendant or defendants are released following imprisonment, either unconditionally or under supervision. The requirement does not apply during any period following the release of the defendant or defendants from imprisonment, even if the defendant or defendants remain on supervised release or parole.

(4) Inapplicability following revocation of release. The requirement of section 3600A to preserve biological evidence applies during a defendant's imprisonment pursuant to the sentence imposed upon conviction of the offense, as opposed to later imprisonment resulting from a violation of release conditions. The requirement does not apply during any period in which the defendant or defendants are imprisoned based on the revocation of probation, supervised release, or parole.

(c) Conditions of preservation. The requirement of section 3600A to preserve biological evidence means that such evidence cannot be destroyed or disposed of under the circumstances in which section 3600A requires its preservation, but does not limit agency

discretion concerning the conditions under which biological evidence is maintained or the transfer of biological evidence among different agencies.

§ 28.23 Evidence subject to the preservation requirement.

(a) Biological evidence generally. The evidence preservation requirement of section 3600A applies to ''biological evidence,'' which is defined in section 3600A(b). The covered evidence is sexual assault forensic examination kits under section 3600A(b)(1) and semen, blood, saliva, hair, skin tissue, or other identified biological material under section 3600A(b)(2).

(b) Biological evidence under section 3600A(b)(2). Biological evidence within the scope of section 3600A(b)(2) is identified biological material that may derive from a perpetrator of the offense, and hence might be capable of shedding light on the question of a defendant's guilt or innocence through DNA testing to determine whether the defendant is the source of the material. In greater detail, evidence within the scope of section 3600A(b)(2) encompasses the following:

(1) Identified biological material. Beyond sexual assault forensic examination kits, which are specially referenced in section 3600A(b)(1), section 3600A requires preservation only of evidence that is detected and identified as semen, blood, saliva, hair, skin tissue, or some other type of biological material. Section 3600A's preservation requirement does not apply to an item of evidence merely because it is known on theoretical grounds that physical things that have been in proximity to human beings almost invariably contain unidentified and imperceptible amounts of their organic matter.

(2) Material that may derive from a perpetrator of the crime. Biological evidence within the scope of section 3600A(b)(2) must constitute ''biological material.'' In the context of section 3600A, this term does not encompass all possible types of organic matter, but rather refers to organic matter that may derive from the body of a perpetrator of the crime, and hence might be capable of shedding light on a defendant's guilt or innocence by including or excluding the defendant as the source of its DNA.

Example 1. In a murder case in which the victim struggled with the killer, scrapings of skin tissue or blood taken from under the victim's fingernails would constitute biological material in the sense of section 3600A(b)(2), and would be subject to section 3600A's requirement to preserve biological evidence, assuming satisfaction of the statute's other conditions. Such material, which apparently derives from the perpetrator of the crime, could potentially shed light on guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether a defendant was the source of this material.

Example 2. Biological material in the sense of section 3600A(b)(2) would not include the body of a murder victim who was shot from a distance, the carcasses of cattle in a meat truck secured in an investigation of the truck's hijacking, a quantity of marijuana seized in a drug trafficking investigation, or articles made from wood or from wool or cotton fiber. While such items of evidence constitute organic matter in a broader sense, they are not biological material within the scope of section 3600A(b)(2), because they do not derive from the body of a perpetrator of the crime, and hence could not shed light on a defendant's guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether the defendant is the source of the evidence.

§ 28.24 Exceptions based on the results of judicial proceedings.

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to the results of judicial proceedings:

(a) Judicial denial of DNA testing. Section 3600A(c)(1) exempts situations in which a court has denied a motion for DNA testing under 18 U.S.C. 3600 and no appeal is pending.

(b) Inclusion of defendant as source. Section 3600A(c)(5) exempts situations in which there has been DNA testing under 18 U.S.C. 3600 and the results included the defendant as the source of the evidence.

§ 28.25 Exceptions based on a defendant's conduct.

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to action (or inaction) by the defendant:

(a) Waiver by defendant. Section 3600A(c)(2) makes the biological evidence preservation requirement inapplicable if the defendant knowingly and voluntarily waived DNA testing in a court proceeding conducted after the date of enactment, *i.e.*, after October 30, 2004. Hence, for example, if a defendant waives DNA testing in the context of a plea agreement, in a pretrial colloquy with the court, in the course of discovery in pretrial proceedings, or in a postconviction proceeding, and the proceeding in which the waiver occurs takes place after October 30, 2004, the biological evidence preservation requirement of section 3600A does not apply.

(b) Notice to defendant. (1) Section 3600A(c)(3) makes the biological evidence preservation requirement inapplicable if the defendant is notified that the biological evidence may be destroyed ''after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction,'' and ''the defendant does not file a motion under section 3600 within 180 days of receipt of the notice.''

(2) Effective notice concerning the possible destruction of biological evidence for purposes of section 3600A(c)(3) cannot be given if the case is pending on direct review of the conviction before a court of appeals or the Supreme Court, if time remains for the defendant to file a notice of appeal from the judgment of conviction in the court of appeals, or if time remains for the defendant to file a petition for certiorari to the Supreme Court following the court of appeals' determination of an appeal of the conviction.

(3) Once direct review has been completed, or the time for seeking direct review has expired, section 3600A(c)(3) allows notice to the defendant that biological evidence may be destroyed. The biological evidence preservation requirement of section 3600A thereafter does not apply, unless the defendant files a motion under 18 U.S.C. 3600 within 180 days of receipt of the notice. Notice to a defendant that biological evidence may be destroyed may be provided by certified mail, and the Federal Bureau of Prisons shall create a record concerning the delivery of such mail to an inmate. To determine whether a defendant has filed a motion under 18 U.S.C. 3600 within 180 days of receipt of such a notice, the agency providing the notice may obtain confirmation of delivery and the date of delivery by inquiry with the Federal Bureau of Prisons, and may ascertain whether the defendant has filed a motion under 18 U.S.C. 3600 within 180 days of that date by checking the records of the district court which entered the judgment of conviction of the defendant for the offense or asking the United States Attorney's office in that district.

§ 28.26 Exceptions based on the nature of the evidence.

Subsection (c)(4) of section 3600A provides that the section's biological evidence preservation requirement does not apply if ''the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable.'' This exception is subject to the condition that the Government must ''take[] reasonable measures to remove and preserve portions of the material

evidence sufficient to permit future DNA testing.''

(a) Evidence not retained beyond the investigative stage. Section 3600A(c)(4) has no application if items of the sort it describes—*e.g.*, items that must be returned to the rightful owner, or items that are so large that their retention is impracticable—are not kept until the time when a defendant is convicted and sentenced to imprisonment. Investigative agents may take samples from such items during the investigative stage of the case, in accordance with their judgment about what is needed for purposes of DNA testing or other evidentiary use, or may conclude that the nature of the items does not warrant taking such samples, and the items themselves may then be returned to the owners or otherwise disposed of prior to the trial, conviction, or sentencing of any defendant. In such cases, section 3600A is inapplicable, because its evidence preservation requirement does not apply at all until a defendant is sentenced to imprisonment, as noted in § 28.22(b)(1).

(b) Evidence not constituting biological material. It is rarely the case that a bulky item of the sort described in section 3600A(c)(4), or a large part of such an item, constitutes biological evidence as defined in section 3600A(b). If such an item is not biological evidence in the relevant sense, it is outside the scope of section 3600A. For example, the evidence secured in the investigation of a bank robbery may include a stolen car that was used in the getaway, and there may be some item in the car containing biological material that derives from a perpetrator of the crime, such as saliva on a discarded cigarette butt. Even if the vehicle is kept until a defendant is sentenced to imprisonment, section 3600A's preservation requirement would not apply to the vehicle as such, because the vehicle is not biological material. It would be sufficient for compliance with section 3600A to preserve the particular items in the vehicle that contain identified biological material or portions of them that contain the biological material.

(c) Preservation of portions sufficient for DNA testing. If evidence described in section 3600A(c)(4) is not otherwise exempt from the preservation requirement of section 3600A, and section 3600A(c)(4) is relied on in disposing of such evidence, reasonable measures must be taken to preserve portions of the evidence sufficient to permit future DNA testing. For example, considering a stolen car used in a bank robbery, it may be the case that one of the robbers was shot during the getaway and bled all over the interior of the car. In such a case, if the car is kept until a defendant is sentenced to imprisonment for the crime, there would be extensive biological material in the car that would potentially be subject to section 3600A's requirement to preserve biological evidence. Moreover, the biological material in question could not be fully preserved without retaining the whole car or removing and retaining large amounts of matter from the interior of the car. Section 3600A(c)(4) would be relevant in such a case, given that fully retaining the biological evidence is likely to be impracticable or inconsistent with the rightful owner's entitlement to the return of the vehicle. In such a case, section 3600A(c)(4) could be relied on, and its requirements would be satisfied if samples of the blood were preserved sufficient to permit future DNA testing. Preserving such samples would dispense with any need under section 3600A to retain the vehicle itself or larger portions thereof.

§ 28.27 Non-preemption of other requirements.

Section 3600A's requirement to preserve biological evidence applies cumulatively with other evidence retention requirements. It does not preempt or supersede any statute, regulation, court order, or other provision of law that may require evidence, including biological evidence, to be preserved.

§ 28.28 Sanctions for violations.

(a) Disciplinary sanctions. Violations of section 3600A or of this subpart by Government employees shall be subject to the disciplinary sanctions authorized by the rules or policies of their employing agencies for violations of statutory or regulatory requirements.

(b) Criminal sanctions. Violations of section 3600A may also be subject to criminal sanctions as prescribed in subsection (f) of that section. Section 3600A(f) makes it a felony offense, punishable by up to five years of imprisonment, for anyone to knowingly and intentionally destroy, alter, or tamper with biological evidence that is required to be preserved under section 3600A with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding.

(c) No effect on validity of convictions. Section 3600A's requirements are enforceable through the disciplinary sanctions and criminal sanctions described in paragraphs (a) and (b) of this section. A failure to preserve biological evidence as required by section 3600A does not provide a basis for relief in any postconviction proceeding.

Dated: April 25, 2005.

Alberto R. Gonzales,

Attorney General.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R01–OAR–2004–ME–0004; A–1–FRL–7900–6]

Approval and Promulgation of Air Quality Implementation Plans; Maine; Low Emission Vehicle Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maine on February 25, 2004 and December 9, 2004 which includes the Maine Low Emission Vehicle (LEV) Program. It was proposed for approval on January 24, 2005 (70 FR 3335). EPA received an adverse comment on the proposal, which is addressed in this action. The regulations adopted by Maine include the California LEV I light-duty motor vehicle emission standards beginning with model year 2001, the California LEV II light-duty motor vehicle emission standards effective in model year 2004, the California LEV I medium-duty standards effective in model year 2003, and the smog index label specification effective model year 2002. The Maine LEV regulation submitted does not include any zero emission vehicle (ZEV) requirements. Maine has adopted these revisions to reduce emissions of volatile organic compounds (VOC) and nitrogen oxides (NO_X) in accordance with the requirements of the Clean Air Act (CAA). In addition, they have worked to ensure that their program is identical to California's, as required by section 177 of the CAA. The intended effect of this action is to approve the Maine LEV program. This action is being taken under section 110 of the Clean Air Act.

DATES: Effective Date: This rule will become effective on May 31, 2005.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) Docket ID Number R01-OAR–2004-ME–0004. All documents in the docket are listed in