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Revision of Existing Variance and Exemption Regulations To Comply With Requirements of the Safe Drinking Water Act; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 141 and 142

[FRL–6144–2]

RIN 2020–AA37

Revision of Existing Variance and Exemption Regulations To Comply With Requirements of the Safe Drinking Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Agency is promulgating regulations to revise the existing regulations regarding Safe Drinking Water Act variances and exemptions. These revisions are based on the 1996 Safe Drinking Water Act Amendments. In addition to revising the existing language regarding variances and exemptions, the rule includes procedures and conditions under which a primacy State/Tribe or the EPA Administrator may issue small system variances to public water systems serving less than 10,000 persons. This rule-making is intended to provide regulatory relief to all public water systems, particularly small systems.

DATES: This rule is effective September 14, 1998. Solely for judicial review purposes, this final rule is promulgated as of 1 p.m. eastern time on August 28, 1998 as provided in 40 CFR 23.7.

ADDRESSES: The rule-making record is available for inspection at the Water Docket, mailcode MC4101, Room EB57, Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460, from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. For access to docket materials, please call (202) 260–3027 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Andrew J. Hudock, Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, Water Enforcement Division (Mailcode: 2243–A), Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460. Phone: (202) 564–6032.

SUPPLEMENTARY INFORMATION:

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Regulated Entities

Potentially regulated entities are public water systems (PWSs).

Category	Example of regulated entities
Industry	Privately-owned utilities, ancillary water systems, homeowner's associations, mobile home parks, municipalities; county governments; water districts; water and sewer authorities.
State/Local/Tribal governments	Publicly-owned PWSs, municipalities, county governments, water districts, State governments.
Federal government	Federally-owned PWSs.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the Agency is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section, **FOR FURTHER INFORMATION CONTACT.** Please note that elsewhere throughout this preamble and rule, the term ''State'' has the same definition as currently exists in 40 CFR 141.2, i.e., ''State means the agency of the State or Tribal government which has jurisdiction over public water systems* * *.''

I. Statutory Authority

Sections 115–117 of the Safe Drinking Water Act (SDWA) Amendments of 1996 (Pub. L. 104–182), enacted August 6, 1996, amended sections 1415 and 1416 of the Act (42 U.S.C. 300g–4, 300g–5) concerning variances and exemptions. This rulemaking codifies, interprets, and implements these new provisions.

A. Overview

As provided under the Act, under certain conditions, variances are available to public water systems that cannot (due to source water quality, or, in the case of small systems, affordability) comply with the national primary drinking water standards. Variances generally allow a system to provide drinking water that may be above the maximum contaminant level on the condition that the quality of the drinking water is still protective of public health. In the case of small system variances, the duration of the variance generally coincides with the life of the technology. An exemption, on the other hand, is intended to allow a system with compelling circumstances an extension of time before the system must comply with applicable Safe Drinking Water Act requirements. An exemption is limited to three years after the otherwise applicable compliance date, although extensions up to a total

of six additional years may be available to small systems under certain conditions.

B. New Small System Variances

Section 1415(e) establishes new provisions by which a small public water system may obtain a variance from complying with National Primary Drinking Water Regulations (NPDWR) under certain specified conditions. These provisions were discussed in detail in the proposal (63 FR 19439–40).

C. General Variances and Exemptions

As discussed in the preamble to the proposed rule, Congress modified the language governing general variances (i.e., those variances available to systems of any size). First, a variance may now be granted on the condition that the system install the best technology, treatment technique, or other means, which the Administrator finds are available. This new modification changes the previous requirement that mandated that the system install variance technologies before a variance could be issued. Second, before a variance can be issued, Congress also requires primacy States/Tribes to conduct an evaluation that satisfies the State/Tribe that alternative sources of water are not reasonably available to a system. Today's rule codifies these changes.

Congress made several changes to the exemption provisions as well. First, the new provisions require the schedule for an exemption to require compliance with each contaminant level and treatment technique for which the exemption was granted as soon as practicable, but not later than three years after the otherwise applicable compliance date established in section 1412(b)(10) of the Act.

The only exception to this exemption time period is in section 1416(b)(2)(C) of the Act, for small systems serving less than 3,300 persons, under certain specified conditions, for which extensions may be renewed for one or more additional two-year periods, but not to exceed a total of six years of extensions, in addition to the three-year original exemption.

Second, the Amendments also modified section 1416 of the Act to specify a wider set of factors that need to be considered before an exemption is granted from the requirements of the NPDWR. Section 1416(a) of the Act now requires the State/Tribe, in determining whether an exemption may be granted, to consider whether the public water system is a ''disadvantaged community'' and whether management or restructuring changes can be made that will result in compliance or, if compliance cannot be achieved, would improve the quality of the drinking water. Section 1416(a)(4) also requires a State/Tribe to consider measures to develop an alternative source of water supply. Finally, section 1416(b)(2)(D) of the Act states that a small system that has received a variance under section 1415(e) cannot receive an exemption under section 1416.

II. Consultation With Public Water Systems, State, Tribal and Local Governments, Environmental Groups, and Public Interest Groups

As required under section 1415 of the SDWA, as amended, the Agency has consulted with State representatives, as well as a broad range of other interested parties, in the development of this rule. These consultations are described in the preamble to the proposed rule (63 FR 19440–41). The rule being promulgated today has been developed in consultation with, and takes into consideration suggestions from, public water systems, environmental groups, public interest groups, the States, Tribes, and other interested parties.

III. Discussion of Final Rule

A. Purpose and Applicability

Through this regulation, the Agency seeks to codify the 1996 SDWA amendments addressing general variances and exemptions provisions, as well as providing a new subpart which addresses the procedures for issuance of small system variances. This rule will be applicable to all eligible public water systems and primacy agencies (States, Tribes, and the Agency).

B. Effective Date

The effective date of this rule will be September 14, 1998. The 30-day effective date in the final regulations allows for a State to issue variances and exemptions as soon as the State adopts regulations no less stringent than today's regulations and submits any revisions to the State's rules to EPA for approval under 40 CFR 142.12(a)(1). A State may adopt these regulations at any time before or after the 30-day effective date.

Upon the effective date, the issuance of all variances and exemptions must meet requirements which are no less stringent than today's rule. If a State has existing regulations which are less stringent than today's rule and the State wishes to issue variances or exemptions, the State must adopt regulations which are no less stringent than today's rule.

In response to commenters who were concerned that the 30-day time period is too short for implementation by the State, EPA wishes to clarify that the effective date in the regulation does *not* require that a State adopt the regulation and modify its program within 30 days of promulgation. A State may choose not to issue variances or exemptions or may choose to delay implementation until new applicable drinking water regulations are promulgated. The effective date provision in the regulation does not limit the State in its decision whether to implement these regulations.

C. Primacy Requirements

Primacy States/Tribes, if they choose to issue variances and exemptions, are required under section 1413(a)(4) of the Safe Drinking Water Act to issue such variances and exemptions under conditions and in a manner which is not less stringent than the variance and exemption provisions of the Act. In addition, section 1415(e)(7)(A) of the Safe Drinking Water Act requires the Administrator to promulgate regulations that specify procedures to be used by the Administrator or the State to grant or deny variances. In reading these two provisions together, EPA believes that Congress intended that States adopt procedures no less stringent than those identified in this rule for issuance of small system variances. Therefore, the Agency has amended § 142.10(d) of the regulations accordingly. Thus, if a primacy State wishes to issue small system variances, it must first enact State regulations which are no less stringent than the requirements in section 1415(e) of the Act and as embodied in this rule, and seek EPA approval of such regulations by submitting a program revision package.

D. ''Plain English'' Format of New Subpart

As discussed in the preamble to the proposed rule, the Agency has drafted Subpart K of these regulations in a question-and-answer format in ''plain English'', in accordance with current Agency policy for regulation development. The intent of ''plain English'' is to produce rules which are clear, concise, straight-forward, understandable, and enforceable, without extensive ''legalese''. Public comments supported this approach.

On June 1, 1998, President Clinton issued a memorandum directing that federal government documents generally be drafted in ''plain language''. Although the Presidential Memorandum does not apply to rules, such as this one, which are proposed before 1999, EPA believes that this rule incorporates and is fully consistent with

the plain language concepts outlined in the Memorandum.

E. General Provisions in Subpart K

Sections 142.301–142.305 of the small system variance regulations essentially codify the statutory provisions governing who can apply for, and who can grant, these variances. EPA has promulgated these provisions as proposed, with slight modifications to address public comments.

For small system variances, section 1415(e)(6) of the Safe Drinking Water Act states that such variances are not available for (1) any maximum contaminant level (MCL) or treatment technique for a contaminant for which a NPDWR was promulgated prior to January 1, 1986, or (2) a NPDWR for a microbial contaminant or an indicator or treatment technique for microbial contaminant. As discussed in the preamble to the proposed rule, the Agency will not be listing small system variance technologies for microbial contaminants. In addition, the Agency will not be listing any variance technology for an MCL or treatment technique for a contaminant for which a NPDWR was promulgated prior to January 1, 1986 and not subsequently revised or allowing any variances for such contaminants (see § 142.304). With respect to this latter category, the Agency interprets the section 1415(e)(6)(A) prohibition in the Act to apply to the level at which any contaminant was regulated before 1986; therefore, variances are not available to systems above the pre-1986 level even if that level was subsequently revised. However, if the Agency revises a pre-1986 level and makes it more stringent (i.e., makes the MCL lower), then a variance would be available for that contaminant, but only up to the pre-1986 MCL.

Generally, public comments were supportive of this interpretation. One public commenter suggested that the Agency allow small system variances above the pre-1986 MCL. As noted in the preamble to the proposed rule (63 FR 19442), EPA believes that the scope of the prohibition on issuing a variance for an MCL or treatment technique for a contaminant with respect to which an NPDWR was promulgated prior to 1986 is somewhat ambiguous. However, EPA believes that the best interpretation of this provision is that the prohibition attaches to the pre-1986 level for the contaminant and that no variances are allowable for revisions to these levels that are less stringent. The interpretation suggested by the commenter would allow variances for revised, less stringent MCLs even where compliance with an earlier, more stringent MCL was required years ago. This interpretation is inconsistent with what EPA surmises as the intent behind this provision, i.e., to disallow variances for contaminants where compliance should have been achieved long ago. Therefore, EPA is finalizing the regulation as proposed, but with a note stating EPA's interpretation of this provision.

The Agency also received a comment suggesting that the Agency prohibit issuance of the small system variance for acute contaminants. EPA believes that such a prohibition is unnecessary. Congress has already prohibited the issuance of small system variances for microbial contaminants, including many of the acute contaminants. For any other contaminants, EPA may not list a variance technology unless the Agency makes a finding that the use of that technology for that contaminant is protective of public health. In addition, prior to issuance of any small system variance, the primacy agency must also make a finding that the specific terms and conditions of the variance will ensure adequate protection of human health. EPA believes that these determinations will appropriately limit variances for acute contaminants.

F. Small System Variance Requirements

Sections 142.306–142.310 of the rule establish the conditions under which the primacy agency can grant small system variances. The Agency attempted in the proposed rule to provide flexibility in the process of applying and reviewing requests for small system variances. For example, the Agency did not specify any particular form of a variance application or who (the system or the State) needs to provide the relevant information; rather, the Agency only specified that the information must be sufficient for the primacy agency to make certain findings and that those findings must be documented in writing.

Some commenters requested that the Agency clarify who has the burden of ensuring that the information necessary to issue a small system variance is available. The Agency recognizes that States may have helpful technical information that may not be readily available to a small system, such as sanitary surveys. States are encouraged to work with the small systems to determine compliance options and to develop information which may improve the quality of the water served by the system. States may provide valuable assistance to small systems that do not have the capacity to obtain necessary information on their own. States may use elements in their Capacity Development Strategies to assist public water systems in gathering all necessary information for the variance to be issued. However, the ultimate responsibility for providing the information necessary to support a variance rests with the public water system requesting a small system variance as prescribed in section 142.306(a) of the regulation. EPA has modified the regulations to clarify this.

1. Section 142.306. Compliance Options Analysis

Sections 1415(e)(1)–(3) of the Act identify the conditions under which small systems may receive a small system variance. In the rule, § 142.306(b) codifies these conditions and includes concepts related to the State Capacity Development Strategy. The compliance options analysis is an integral element of sections 1415 and 1416 of the Act, as well as under the rule at § 142.306(b). Similar in concept to capacity development, a compliance options analysis can allow the State to consider the underlying reasons for noncompliance, and what options are available to the system to return to compliance for the long term. This portion of the regulations is final as proposed.

2. Section 142.306(b). Documentation of State Considerations in Reviewing Small System Variances

The regulations require that States document their findings regarding a small system's eligibility for a small system variance. Where the State does not have primary enforcement responsibility under section 1413 of the Safe Drinking Water Act, the Agency will document its findings for the record, if it grants a small system variance.

Some public comments on the proposed regulations indicated that documentation of State findings and subsequent submittal to the Administrator (as required under § 142.311) imposed an unnecessary and unreasonable burden on the regulatory agency, and stated that this burden should lie more heavily on the public water system. EPA believes that it is imperative for the regulatory agency to clearly specify and document any information used in determining whether to grant a small system variance. A thorough record must be available for interested members of the public to understand, comment on, or possibly object to a proposed variance or otherwise make informed decisions relating to the public water system. In addition, this information is necessary

for EPA to adequately review proposed small system variances issued as well as for the EPA periodic review of the State variance program as required by the Act. Because the State or the Administrator would be the actual decision makers, they are in a better position than the public water system to document and maintain their findings.

Documentation required in the rule must indicate not only that a certain factor listed in § 142.306 of the regulations was considered, but must also include the rationale for decisions by the State or EPA regarding each of the required findings, as well as the underlying facts supporting that decision. Note, however, that EPA does not believe that this documentation necessarily needs to be extensive. Rather, the documentation needs to be sufficient to explain how the variance will meet the statutory and regulatory requirements in enough detail that interested members of the public and EPA can understand the basis for the decision and determine whether to object to the variance.

3. Section 142.306(b)(2). Affordability Criteria

Section 142.306(b)(2) of the rule codifies the statutory requirement that States undertake a compliance options analysis in accordance with the State's own affordability criteria (including noncommunity systems). One commenter expressed concern that, depending on the level of detail required, the cost of undertaking and documenting such an analysis could be excessive relative to the cost of installing an appropriate variance technology. As an example, the commenter indicated that in their experience, the cost of evaluating restructuring and consolidation options for a given project area ranged from $50,000 to $100,000. EPA understands that a rigorous compliance options analysis may be resource-intensive and expects that States and public water systems will tailor the level of analysis to the needs and resource constraints of the specific situation. EPA received no other comments on this section and is promulgating the rule as proposed.

4. Section 142.306(b)(3). Availability of Approved Variance Technologies

Section 1412(b)(15)(D) of the Act requires that, not later than August 6, 1998, the Agency issue guidance or regulations regarding the available variance technologies for each national primary drinking water regulation for which a variance may be granted. The variance regulations include, in various sections (including § 142.306), the requirement that, during review of an application for a small system variance, a primacy State or the Administrator make a finding whether, among other things, the Administrator has published a variance technology in accordance with section 1412(b)(15) for the applicable maximum contaminant level or treatment technique for which that variance is sought.

Pursuant to section 1412(b)(15)(A) of the Act, variance technologies may not suffice to achieve compliance with the relevant maximum contaminant level or treatment technique, but the variance technologies must achieve the maximum reduction or inactivation efficiency that is affordable considering the size of the system and the quality of the source water. In addition, section 1412(b)(15)(B) requires that any identified variance technology be determined by the Administrator to be protective of public health.

Some public comments requested clarification of whether an alternative technology, not listed by the Administrator pursuant to section 1412(b)(15) of the Act, may be installed through a small system variance. Section 142.307(b)(1) of the regulation requires that the terms and conditions of the small system variance include installation of the technology specified under section 1412(b)(15)(D) of the Act. The Agency recognizes the importance and beneficial value of new alternative technologies. However, Congress specifically mandated that the Administrator publish a list of technologies for small systems and that only the listed technologies may be installed through issuance of a small system variance technology. A State or any other party may petition the Administrator to consider the listing of any new alternative technology. However, section 1415(e)(2) of the Act makes clear that the Agency must specifically list a small system technology before a State may allow a system to install such technology through a small system variance.

5. Section 142.306(b)(5). Adequate Protection of Public Health

Section 142.306(b)(5) of the rule codifies the statutory requirement that the primacy agency grant a small system variance only where the terms ensure adequate protection of public health, considering the source water quality and removal efficiencies and expected useful life of the small systems variance technology. Under section 1412(b)(15)(B) of the Act, the Administrator, in identifying variance technologies for small systems, must determine that the technology is protective of public health considering the quality of the source water to be treated and the expected useful life of the technology. As explained in the preamble to the proposed rule, the Agency believes that Congress intended the Administrator to make a determination that, on a national level, any variance technology identified is generally protective of public health when applied within general source water conditions and operating and maintenance procedures. However, recognizing that the level of public health protection afforded by a specific technology could be dependent on site-specific factors that may vary system by system, Congress provided for a corresponding requirement that the State also make a determination that the terms of the variance as applied to a particular system adequately protect public health.

As required under section 1412(b)(15)(C) of the Act, the variance technology guidance under section 1412(b)(15)(D) will identify assumptions used by the Administrator in determining that each technology is protective of public health. In doing so, the guidance will identify the typical removal efficiency achieved by each variance technology listed by the Administrator, considering the overall capabilities of the treatment process and the source waters on which the technology would typically be applied. The guidance will also discuss source water characteristics that can adversely affect the removal of the contaminant by the process. The State may use this information in the guidance to set specific terms and conditions on the operation of the technology that will ensure adequate protection of public health.

In the proposed rule, EPA solicited comment on whether it would be useful and appropriate to provide additional technology-specific guidance on site-specific factors that should be considered and appropriate terms and conditions that may be needed to ensure adequate protection of public health. In general, commenters were strongly supportive of this idea. Therefore, EPA plans to develop such guidance and make it available as expeditiously as possible after promulgation of this rule. This guidance will cover those contaminants, if any, and available small system variance technologies which are identified in the initial listing prepared under section 1412(b)(15)(C). As additional contaminants and small system variance technologies are identified in the future, the new guidance listing these technologies will include information on consideration of

site-specific factors and appropriate terms and conditions that may be needed to ensure adequate protection of public health.

Several commenters, while endorsing the need for such guidance, also indicated that it should be informational in nature, and not undermine the statutory authority of primacy States to determine that the terms of the variance ensure adequate protection of public health. As stated in the preamble to the proposed rule, EPA understands that Congress clearly left the responsibility to consider site-specific factors and define appropriate terms and conditions to ensure adequate protection of public health to the primacy agencies, and EPA does not wish to diminish that responsibility. At the same time, the Agency believes (and commenters seem to agree) that it may be efficient for EPA to identify, in the context of its determination that a technology is protective, those factors of which the Agency is aware that may be appropriate for the State to consider on a site-specific basis and to suggest appropriate responses to situations which pose additional risks. It is in this spirit that EPA has decided to develop the guidance discussed in this section.

EPA also requested comment in the proposed rule regarding the appropriateness of including, in the final rule, a requirement that States specifically consider impacts on sensitive subpopulations in their determination of adequate public health protection. Commenters were not supportive of such a requirement and EPA has decided not to include it in the final rule. As an alternative, EPA indicated that it may include, in the guidance discussed above, information on specific factors that may result in special risks to sensitive subpopulations and suggestions on how to address such risks. States could then use this information as appropriate to support their determination of adequate protection of public health. Commenters were supportive of this alternative approach. Consequently, EPA will include, in the guidance on site-specific factors and appropriate terms and conditions, information on special risks to sensitive subpopulations, where such risks have been identified, and suggestions on how to address them.

6. Section 142.307. Terms and Conditions of Small System Variances

Section 142.307 outlines what terms and conditions must be included in a small system variance. The Agency received no comments on this section and is thus promulgating it as proposed.

7. Section 142.307(c)(4). Compliance Period for Small System Variances

Section 142.307(c)(4) of the rule codifies the statutory language regarding the duration of variances. The Agency is promulgating this section as proposed.

As discussed in the preamble to the proposed rule, the Agency interprets section 1415(e)(4) to allow the primacy agency to grant the two-year extension to the compliance period at the time of issuance of the variance, upon a determination by the primacy State or the Administrator that those two additional years are necessary to ensure compliance. Such a determination should be supported with sufficient documentation. Therefore, it is possible, under certain conditions, that small systems may receive a five-year compliance schedule to achieve compliance with the terms and conditions of the small system variance.

8. Sections 142.308–142.310. Public Participation Requirements for Issuance of a Small System Variance

a. Overview

The Agency is required under section 1415(e)(7)(A)(i) of the Act to promulgate regulations specifying requirements for notifying the consumers of the public water system that a small system variance is proposed to be granted (including information regarding the contaminant and variance) and requirements for a public hearing on the small system variance before the variance is granted. Today's rule addresses this statutory mandate through §§ 142.308–142.310 of the regulations. These requirements are also intended to ensure that persons served by the system who may wish to file a petition with the Administrator to object to the variance, as provided for in section 1415(e)(10)(B) of the Act, have adequate information and time to do so.

The overall structure of the process intended by today's regulations for granting a small system variance has been modified in response to public comment. This process, as modified, is outlined below, with changes to the process discussed in further detail in the paragraphs which follow the outline:

(1) A small public water system submits an application to the primacy agency for a small system variance;

(2) The primacy agency reviews the small system's application and performs a compliance options analysis to determine if a small system variance should be issued to the public water system.

(3) If a small system variance can be issued in accordance with the Act and the regulations, and upon finding and documenting the required information under Section 142.307 of the rule, the primacy agency establishes the terms and conditions of the proposed small system variance;

(4) The primacy agency or public water system provides notice to persons served by the system of the primacy agency's intent to propose the small system variance and of a public hearing on the proposed variance, including information on the contaminant and its potential health effects, the compliance options considered, and the terms and conditions of the proposed variance; this information must be provided at least 30 days prior to the date of the public meeting;

(5) The primacy agency prepares a draft of the small system variance, including terms and conditions, and, if the public meeting occurs prior to proposal of the small system variance, makes the draft variance available to the public no later than the public meeting;

(6) The primacy agency proposes the variance by publishing a notice in the State equivalent of the **Federal Register**, or in a newspaper widely distributed through the State, or, in the case of the Administrator, in the **Federal Register**;

(7) Either before, or within 15 days after publication of this notice that the variance has been proposed, the primacy agency conducts a public hearing on the draft proposed small system variance;

(8) If a State proposes to issue a small system variance to a public water system serving 3,300 or fewer persons, the State must submit the proposed small system variance and all supporting documentation to EPA for review; if a State proposes to issue a small system variance to a public water system serving a population of more than 3,300 and fewer than 10,000 persons, the State must submit the proposed small system variance and all supporting documentation, including any public comments received prior to this submission, to EPA for review and approval of the proposed variance;

(9) Within thirty days of the proposal date (the date on which the primacy agency publishes the notice of the proposed variance) of any small system variance, persons served by the system may petition the Administrator to object to the proposed small system variance; and

(10) The Administrator must respond to all such petitions within 60 days of receiving them and may object to a proposed small system variance within 90 days of the proposal date.

After reviewing public comments on the proposed regulations, EPA has

modified these regulations to provide that either the State or public water system must provide the notice for a public meeting on the small system variance at the same time that the State notifies the public that it intends to propose the small system variance. EPA received many public comments indicating that, in many circumstances, the public water system would be in a better position than the State to identify the persons served by the system and the public water system should have the burden of providing public notice. The revised regulation allows the State to direct the public water system to conduct the public notification requirements in the regulation.

In addition, the Agency received comments that not all States may be able to publish such public notice in a State equivalent to the **Federal Register**. In response, the regulations now provide that the State may publish the notice of the proposed variance in a newspaper with wide circulation in the State.

In summary, the regulation requires that at least one public notice must be provided to the system's consumers (as defined in section III.F.8.d. of the preamble) (in addition to publishing notice of the proposed variance in the State Register or **Federal Register** or in a newspaper widely distributed in the State) to fulfill the requirement of notifying the public of the public hearing and proposal of the small system variance. In any case, the Administrator encourages States and small systems to engage the public in the development and issuance of the small system variance early in the process.

b. Notice by Public Water Systems at the Time that a Small System Variance Application Is Submitted

Based on public comments on the proposed regulations, the Agency is not mandating that the public water system provide notice to the persons served by the system that the system is applying for a small system variance. (Such additional requirements may be imposed through State regulations.) Other regulations, such as the public notification rule and the consumer confidence rule, will ensure that the persons served by the system are aware that the system is operating in violation of the applicable drinking water regulation. Therefore, requiring this initial notice may be redundant in nature and may not be an efficient manner of notifying the public of the condition of the drinking water being supplied by the public water system. Even though this regulation does not require the proposed early notice, the Agency encourages early involvement of the public in the small system variance process.

c. Public Meeting Requirement

Section 142.309 of the regulations addresses the requirements for a public meeting on a draft proposed small system variance and notice of the public meeting. Consistent with section 1415(e)(7)(A)(i) of the Act, a State or the Administrator is required to provide for at least one (1) public meeting on the small system variance before it is granted. However, before holding a public meeting, the State or the Administrator must make public a draft of the proposed small system variance along with various supporting information as specified in § 142.308(c) of the regulations, to ensure that the public is adequately informed of the terms and conditions likely to be in the proposed small system variance. The State or the Administrator must notify the public of the public meeting (and provide the required supporting information) at least 30 days before the date of the meeting. EPA is promulgating this section as proposed.

d. Manner of Public Notification

Section 142.308 of the proposed regulations codifies the Safe Drinking Water Act provision that any person served by the system may petition the Administrator to object to the granting of a variance.

Public comments requested that the Agency clarify the terms ''customers'', ''consumers'', and ''persons served'' as it is used in this regulation. EPA interprets ''customers'' to mean billing units or other service connections to which water is delivered by the public water system. (Other service connections could include, for example, municipal facilities which receive service but which might not be billed.) On the other hand, EPA interprets ''consumers'' and ''persons served'' more broadly to mean persons who receive drinking water from the public water system on a regular basis. The term ''person served'' or ''consumer'' includes customers, as defined above, and other persons who are served by the public water system on a regular basis, such as factory workers and tenants of apartment houses and condominiums, who may not receive water bills. The notice requirements in these regulations are intended to provide adequate notice for persons who may wish to participate in the variance process or petition the Administrator to object to the variance. The Agency sought to ensure that these definitions are consistent with other supporting regulations currently in development, including the Consumer Confidence Report regulations.

Based on public comments, the Agency is clarifying whether the primacy agency or the public water system has the burden for the public notice. The Agency recognizes that there may be certain small systems that would require assistance from the primacy agency to satisfy the public notification requirements within the small system variance process. The Agency encourages the primacy agency to work with such systems to ensure that the public is involved in the variance process. However, the Agency does not intend to place the actual burden of the public notice on the primacy agency in these regulations. In order to clarify the Agency's intention, the final regulations make clear that either the primacy agency or the public water system must provide the public notice. The primacy agency maintains flexibility to direct the public water system to provide such notice. For purposes of Agency review and/or approval of a small system variance, the Agency is concerned that the public notification requirements within the regulations are satisfied, not with which entity actually conducts the notice.

Operators of small systems requested that the Agency address the issue of whether persons who are not billing customers of the system must be provided a notice by direct mail considering the burden associated with identifying and obtaining mailing addresses for non-billed consumers of a system's water. In light of all comments, the Agency is retaining the requirement that individual notice only need be provided to billed customers of the system. In addition, notice must be provided in a brief and concise manner to regular consumers who are not billing customers, by some other reasonable method, such as publication in a local newspaper, posting in public places, or delivery to community organizations. Although this might not reach persons outside the service area, it would reach factory workers and tenants of apartment houses and condominiums, even if those persons do not receive water bills. At the time of variance proposal, however, the State must publish a notice in a State-wide publication, thereby reaching interested persons who might not receive water bills or live in the service area. Today's rule would therefore require a State or public water system to provide some form of notice to all persons served by the system on a regular basis.

e. Content of Notices

Section 1415(e)(7)(A)(i) of the Safe Drinking Water Act requires that public notification include information regarding the contaminant and variance. Section 142.308(c) of the regulations implements this statutory requirement. In this provision, the Agency is requiring, along with other information, specific health effects language to be used in the notices. The Agency is requiring use of the health effects language developed for the Consumer Confidence Report Rule. The Agency believes that there are many benefits to the use of standard health effects language in the various public notice provisions of the amended Safe Drinking Water Act, particularly in reducing confusion for the systems and the public.

In addition, in response to comments, EPA has revised the multilingual notification requirement in § 142.308(c)(7) of the proposed regulations. With this revision, the primacy agency will determine what constitutes a large proportion of non-English-speaking residents, and thus when the multilingual notification requirements are applicable. The multilingual notification requirement is consistent with the Agency's Consumer Confidence Report Rule.

The Agency received several comments expressing concern that small public water systems lack the resources to provide public notification materials in foreign languages, and suggesting that EPA either eliminate this requirement or develop such materials in the ten most frequently used languages. In response, the Agency notes that systems are not required to provide a translation of the materials listed in section 142.308(c), but only ''information in the appropriate language regarding the content and importance of the notice.'' (Section 142.308(c)(7)) EPA envisions that in many cases this would entail a relatively short statement indicating that the enclosed materials contain information on a proposed variance from national drinking water regulations which could affect the level of public health protection afforded to consumers of the system's water. Of course, EPA would encourage systems that do have the resources to provide more complete translations of the public notification materials in cases where a significant non-English-speaking population is present.

f. Consumer Petition Process

Section 1415(e)(10)(B) of the Safe Drinking Water Act allows for persons served by the system to petition the Administrator to object to the granting of a small system variance; such petitions must be submitted not later than thirty days after a State proposes to issue a small system variance. This statutory provision is implemented in section 142.310 of today's rule. EPA has clarified the regulation to specify that the date of ''proposal'' is the date upon which the State publishes its notice of proposal in a State-wide publication. Consumer petitions should be mailed to the EPA Regional Administrator.

G. Sections 142.311 and 142.312. Bases for Administrator's Objections to State-Proposed Small System Variances

Pursuant to section 1415(e)(9) of the Act, § 142.312(a) of the rule requires a primacy State, which is proposing to grant a small system variance to a public water system serving more than 3,300 and fewer than 10,000 persons, to submit that variance to the Administrator for review and approval prior to issuance. Section 142.312(c) requires that, if the Administrator disapproves the variance, the Administrator notify the State in writing of the reasons for such disapproval. Such disapproval must be based upon a determination that the small system did not meet the requirements for a variance under the Act and regulations, including the requirement that the system cannot afford to comply with the maximum contaminant level (MCL) or treatment technique for which the variance is being sought, in accordance with the State affordability criteria.

In addition, § 142.311(a) of the rule requires a primacy State, which is proposing to grant a small system variance to a public water system serving 3,300 or fewer persons, to submit that variance to the Administrator for review prior to issuance. Some public comments to the proposed regulations suggested that the Administrator does not have the statutory authority to review proposed small system variances for systems serving fewer than 3,300 persons and that the proposed regulations are therefore in conflict with section 1415(e)(1) and 1415(e)(8) of the Act. The Agency does not believe that this interpretation of the statute is appropriate since it is inconsistent with the Administrator's broad review authority provided in section 1415(e)(10)(A) of the Act.

The Act specifies two different and distinct procedures for reviewing and objecting to any proposed small system variance proposed by a State. Section 1415(e)(10)(A) of the Act addresses EPA review of ''any'' variance proposed by the State and its ability to object to ''any'' proposed variance. Section 1415(e)(10)(B) of the Act addresses consumer petitions to the Administrator requesting that the Administrator exercise objection authority under section 1415(e)(10)(A) of the Act. Section 1415(e)(10)(B) does not limit EPA's authority to review and object to a proposed small system variance and is independent from the Administrator's authority under section 1415(e)(10)(A).

The Agency's interpretation of section 1415(e)(10) of the Act is not in conflict with section 1415(e)(1) and 1415(e)(8) of the Act. Section 1415(e)(1) allows the primacy agency to issue small system variances in accordance with the Act and regulations. EPA's review and/or objection to a small system variance does not diminish a State's responsibility to decide whether to issue a small system variance. Section 1415(e)(8) of the Act does not conflict with the Agency's ability to review and/or object to a small system variance. Section 1415(e)(8) solely addresses EPA's review of a State's variance program as a whole and is independent from EPA's authority under section 1415(e)(10)(A) to object to a specific proposed variance.

In addition, Congress mandated under section 1415(e)(9) that the State submit for review and approval by the Administrator any small system variance proposed for a system serving more than 3,300 and fewer than 10,000 persons. Before a State grants a small system variance for a public water system serving this population, the Administrator must formally approve the variance. Without such approval, a State may not grant the variance. The Administrator's approval of variances under section 1415(e)(9) of the Act is independent from the Administrator's authority to review ''any'' variance under section 1415(e)(10) of the Act.

Section 142.311(a) of the regulations, which requires that the State submit the proposed small system variance and all supporting information to the Administrator, is necessary to implement section 1415(e)(10)(A) of the Act, which allows the Administrator to review and object to any proposed small system variance. Section 142.311(b) of the regulation is simply the codification of section 1415(e)(10)(A) of the Act included in the regulation for purposes of clarity.

H. Section 142.313. Bases for Administrator's Review of State Small System Variance Program

Pursuant to section 1415(e)(8)(A) of the Safe Drinking Water Act, § 142.313 of the rule requires the Administrator to periodically review the primacy State's

variance program to determine whether variances granted by the State comply with the requirements of the Act. EPA received no comments on this section and is promulgating it as proposed.

I. General Variances: Time Limitation

Section 1415(a)(1)(A)(ii) of the Safe Drinking Water Act states that a schedule prescribed under a general variance must require compliance, by the public water system, with each maximum contaminant level or treatment technique requirement with respect to which the variance was granted, as expeditiously as practicable (as the State may reasonably determine) but sets no specific final date for compliance other than that in the compliance schedule. EPA requested comment on whether the Agency should specify a time-frame in the final rule, consistent with the time frame for small system variances in the Act. Commenters were generally opposed to this approach.

The Agency recognizes that in issuing a general variance the State has the flexibility to prescribe time frames within a schedule to reach compliance with the conditions of the variance and the Act, including installation of the best available technology. However, consistent with section 1415(e) of the Act, the Agency presumes that a reasonable time frame for public water systems to install the best available technology is within five years of granting of the variance. The Agency recognizes that there may be situations in which five years may not be a feasible time frame to install such technology. However, when such situations are presented, efforts must be made to ensure that the public be notified and involved in the variance process. Today's regulations require that if a State prescribes a schedule in a general variance that requires compliance beyond five years of the issuance date the State must (1) document its rationale for the extended compliance schedule, (2) discuss the rationale for the extended compliance schedule in the required public notice and opportunity for public hearing, and (3) provide the shortest practicable time schedule feasible under the circumstances. Such requirements are consistent with the theme of the 1996 Amendments to the Safe Drinking Water to maximize public participation in major decisions affecting drinking water. Under this approach, the State retains flexibility in determining the time frame for compliance under a general variance as expeditiously as practicable.

J. Relationship of Exemptions and Small System Variances

Under section 1416(b)(2)(D) of the Safe Drinking Water Act, a public water system may not receive an exemption under section 1416 if the system was granted a small system variance under section 1415(e) of the Act. The Act is silent on whether a small system variance under section 1415(e) may be issued after the issuance of an exemption under section 1416. In the proposal, EPA asked for comment on this and commenters were generally in favor of allowing a variance after an exemption. However, after consideration of public comment, policy considerations and the statutory framework in sections 1415(e) and 1416, the Agency believes that public water systems should generally not receive a variance after receiving an exemption for the same contaminant.

The Agency interprets section 1416(b)(1)(A) to require that the endpoint of a compliance schedule established under an exemption be full compliance with the maximum contaminant level or treatment technique for which the exemption was granted. During the stakeholders process and the public comment period, the Agency received comments indicating that the regulations should implement the exemption provisions of the Act to allow a public water system which has received an exemption to subsequently receive a variance for that same contaminant if it turns out that there is no affordable compliance technology for the system. While the final rule promulgated today does not explicitly prohibit the issuance of a variance after an exemption, EPA believes that it is generally inappropriate. Rather, EPA believes that the determination of whether there is an affordable compliance technology for the system should be made in the initial compliance options analysis. However, if, during the course of the compliance schedule established for a small public water system's exemption, the regulations for the contaminant for which the exemption was granted were revised and the MCL was made more stringent, then the system, with a new regulatory compliance date and new MCL, would have the option of seeking full compliance with the new MCL by the compliance date, seeking a small system variance or seeking an exemption.

Congress established two distinct mechanisms to allow systems regulatory alternatives. Exemptions were established to allow public water systems more time to comply with a newly promulgated national primary drinking water regulation under certain conditions. Under an exemption, under certain conditions, a small system may have up to 9 years, including extensions, to achieve full compliance. Small system variances were established to allow small public water systems up to a possible 5 years to install alternative technologies under certain conditions. Upon completion of the compliance options analysis, the public water system should know whether an exemption or small system variance is the proper route to pursue. If a small system cannot afford to install a small system technology within the maximum allowable 5-year period, the primacy agency must consider other alternatives to address the noncompliance of the system. To grant a small system variance after an exemption could prolong the installation of the proper treatment technology well beyond the statutory time frames provided for either an exemption or a variance. Therefore, the Agency believes that it is generally inappropriate to grant a small system variance after an exemption.

The Agency also notes that, for a primacy agency to grant a small system variance, it must determine that compliance with the MCL is not affordable, according to the primacy agency's affordability criteria, through treatment, alternate sources of water supply, restructuring or consolidation, or obtaining financial assistance from the drinking water State Revolving Fund (SRF) or any other Federal or State program. In contrast, an exemption must include a schedule to achieve compliance within three years (with up to three two-year extensions for small systems in some circumstances). EPA believes that it would generally be difficult for a primacy agency to determine that compliance with the MCL is not affordable for a system that had previously been granted an exemption, unless there has been a significant unforeseen change in circumstances since the initial compliance options analysis upon which the exemption was based. By ''unforeseen changes in circumstances'' that may cause a primacy agency to determine that a system cannot afford to comply after an initial compliance determination, EPA means the following circumstances:

(1) Significant changes in source water due to natural disasters in the community;

(2) Small public water systems or primacy agencies could not have reasonably obtained all information related to source water quality and the absence of such information led to an improper determination that an

exemption, as opposed to a small system variance, should be granted;

(3) Significant unforeseen change in economic circumstances, such as a severe economic downturn in the community, which would make the cost of the compliance technology unaffordable according to the primacy agency's affordability criteria. Failure to obtain funding from any particular source (e.g., State or Federal assistance program) would not automatically indicate that the compliance technology is unaffordable. The primacy agency should consider all financial circumstances, including alternate funding sources, in determining affordability; or,

(4) The public water system installs and is properly operating the best available technology, as designated by the Administrator, and is in compliance with all other requirements of the Act and regulations, but continues to be in non-compliance with the MCL or treatment technique for which the exemption was granted.

If such a change should occur, and a system will not be able to comply with the MCL within the established time frame, the system should notify the primacy agency immediately, rather than waiting for the next compliance deadline to pass, and the primacy agency should take appropriate action. The Agency believes that the most appropriate mechanism to address such a system is through an administrative order or consent order allowing the small system to install a small system variance technology, as designated by the Administrator, as an interim measure toward achieving full compliance in the future. Regardless of the mechanism selected, however, the primacy agency must ensure that the terms of any variance or order provide adequate protection of public health.

K. State Revolving Fund and Capacity Development Plan Linkage to Exemptions and Small System Variances

Strong statutory linkage exists between the small system variance and exemption provisions in sections 1415(e) and 1416 of the Safe Drinking Water Act and the State Revolving Fund provisions of section 1452 of the Act. This linkage was discussed in the proposal (63 FR 19448). The State Revolving Fund provisions and the variance and exemption provisions can be used together to complete two important tasks: (1) Ensure that State Revolving Fund assistance is targeted toward those public water systems most in need of such assistance, and (2) allow systems which receive such assistance to be able to use it in a way that will either produce full compliance with an MCL within the compliance schedule established by the State (in the case of systems receiving an exemption), or improve the quality of water delivered to consumers (in the case of systems receiving a variance).

This linkage is reflected in today's final rule. Section 142.20(b)(1) requires that before finding that management and restructuring changes cannot be made, as part of the compliance options analysis required for an exemption, the State must consider the availability of SRF loan fund assistance to implement, among other alternatives, activities consistent with the State's Capacity Development Strategy to help the public water system acquire and maintain technical, financial and managerial capacity to come into compliance with the Act. Section 142.306(b)(2)(iv) requires consideration of the possibility of obtaining financial assistance from the drinking water SRF as part of the compliance options analysis required for a small system variance.

Commenters expressed two concerns with these provisions. One commenter was concerned that the provisions not be interpreted in a way that would undermine State authority to develop individual Capacity Development Strategies in accordance with section 1420 of the Act, or used as grounds for withholding SRF funds because of a State decision regarding a particular system. EPA is well aware that under section 1420(c)(4) of the Act, State decisions regarding implementation of the Capacity Development Strategy with respect to individual systems are not subject to review by the Administrator and may not serve as the basis of withholding funds under section 1452 of the Act. EPA has no intention of using its oversight of the variance and exemption provisions of the Act as grounds for withholding funds under section 1452 of the Act, and does not see any conflict between these rules and State authority with respect to Capacity Development Strategies under section 1420 of the Act. Rather, the linkages in these rules are provided to highlight a State's opportunity to use its Capacity Development Strategy to assist systems in acquiring the technical, financial and managerial capacity needed to either come into compliance with an MCL or treatment technique after an appropriate period of time, or to install and operate an appropriate variance technology.

Several commenters expressed concern with the requirement that the SRF be considered as a possible funding source as part of the compliance options analysis to obtain a small system variance. These commenters indicated that small systems may lack the overall capacity required to qualify for SRF loans, and that this requirement in today's rule could be interpreted as limiting State flexibility in managing its SRF programs. EPA does not believe that this is an issue. The requirement to consider the SRF as a possible funding source does not mean that the State must provide SRF assistance to a system seeking a variance (or exemption), only that this option should be considered as part of the initial compliance options analysis. States retain full authority to allocate SRF funds in accordance with the provisions of the Act. EPA believes that the requirement to consider the SRF as a possible funding source to assist small systems in achieving compliance is fully consistent with those provisions.

L. Exemption: Renewals for Small Systems

Under section 1416(b)(2)(A) of the Safe Drinking Water Act, an exemption issued to a public water system must prescribe a schedule requiring compliance by the system with each contaminant level and treatment technique requirement with respect to which the exemption was granted as expeditiously as practicable (as the State may reasonably determine) but not later than three years after the otherwise applicable compliance date established in section 1412(b)(10). Section 1416(b)(2)(C) states ''[i]n the case of a system which does not serve more than a population of 3,300 and which needs financial assistance for the necessary improvements, an exemption * * * may be renewed for one or more additional 2-year periods, but not to exceed a total of 6 years, if the system establishes that it is taking all practicable steps'' to meet the requirements of the established compliance schedule.

The intensive compliance options analysis required, under § 142.20(b)(1) and § 142.50(a), to be performed before an exemption is initially granted should indicate whether an exemption is appropriate. If an exemption is appropriate after the compliance options analysis, the primacy agency should facilitate and work with the system to ensure compliance as soon as practicable, but within three years of the otherwise applicable compliance date, including providing financial assistance under section 1452 of the Act. Under § 142.20(b)(2) and § 142.56 of the rule, two-year extensions of exemptions pursuant to section 1416(b)(2)(C) of the Act may only be granted to systems which serve 3,300 or fewer people and which need financial assistance, and upon State review of the small system's

progress and the State's subsequent determination that the small system is taking all practicable steps to meet the requirements of the Act.

As discussed in the preamble to the proposed rule, the Agency interprets the extension provisions for public water systems serving less than 3,300 persons to allow the primacy agency to grant the additional two-year periods at the time of initial issuance of the exemption for those small systems that need financial assistance for the necessary improvements. Public comments on this issue in the proposed rule were generally supportive of this approach.

This interpretation is based on the statute and EPA's recognition that there may be some instances where certain small systems serving less than 3,300 persons may require more than three years to achieve full compliance under an exemption. Additional time may allow for the small system to acquire the necessary financial assistance, restructure, find an alternative source water and/or make necessary capital improvements. Compliance schedules under exemptions should reflect a practical time line for the small public water system to meet the established milestones as expeditiously as possible. The Agency anticipates that most small systems will achieve full compliance under exemptions in less than 3 years after the otherwise applicable compliance date but recognizes that this determination should be made on a case-by-case basis considering specific factors of the given small public water system. Therefore, a system which serves less than 3,300 persons and which needs financial assistance for the necessary improvements may receive a compliance schedule under an exemption with milestone dates later than three years from the issuance date of the exemption. In any case, the primacy agency is required to establish a schedule requiring compliance as expeditiously as practicable but no later than the statutory time frames.

This interpretation does not affect the requirement under section 1416(b)(2)(C) of the Act that the primacy agency must ''renew'' the exemption every two years after the first 3 years to ensure that the system is taking all practicable steps to meet the requirements of the Act and the established compliance schedule. EPA interprets the ''renewal'' requirement to mean that the primacy agency must review the system's compliance with the exemption and document its findings of continued eligibility. The Agency anticipates that the primacy agency's review of the public water system will involve a review of the public water system's efforts to comply with the established milestones and other requirements of the Act. Even though not required by section 1416 of the Act, the primacy State may wish to consider the incorporation of public participation into this review process. If the primacy agency determines that a small system is not taking all practical steps to comply with the requirements, the exemption should not be continued and the public water system would be subject to an enforcement response to address violations of the established compliance schedule. Where an exemption is continued, the primacy agency must ensure that at the end of the exemption period, the public water system is in full compliance with applicable national primary drinking water regulation.

The Agency received public comments requesting that the Agency clarify how the 6-year limit on renewals of exemptions for small systems applies to existing exemptions issued before enactment of the 1996 Amendments. As discussed above, under section 1416(b)(2)(C), a State may renew an exemption issued to a small system serving less than 3,300 persons for one or more additional 2-year periods under certain conditions, but not to exceed a total of 6 years. The Agency interprets this provision to be effective upon the effective date of the 1996 Amendments to the Safe Drinking Water Act. Therefore, the six-year limit on renewals of exemptions is effective as of August 6, 1996. Therefore, for example, if a three-year, small system exemption was issued by a primacy agency in 1993, the primacy agency may, under certain conditions as specified in the Act, renew the exemption, through extensions and the requisite reviews, until 2002. No existing exemption for a small system may remain in effect for more than nine years beyond the date that it was initially issued.

IV. Cost of Rule

The cost of the rule and economic analysis were described in detail in the preamble to the proposed rule. (63 FR 19448–50)

Based upon this economic impact analysis (EIA), public water systems would realize net economic benefits as a result of today's rule. Results of the impact analysis show that, if all eligible public water systems in all 56 States and territories apply for and are granted variances under sections 1415(a) or 1415(e), or exemptions under today's rule, for the rules considered in this analysis, then the regulation will show a net annualized economic benefit of $573,706 to the Agency, States, and public water systems, not including benefits due to increased public health protection or savings associated with the installation of affordable technologies. A summary of this EIA is available in the Office of Water Docket, #W–97–26.

Based on this economic impact analysis, the variance and exemption rule is not considered to have a significant impact in the form of an unfunded mandate of $100,000,000 or more or in any year as identified under the Unfunded Mandates Reform Act, nor would it have a significant adverse economic impact on a substantial number of small entities, as discussed in the section entitled ''Unfunded Mandates Reform Act'' in the preamble to today's rule.

V. Other Administrative Requirements

A. 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 review by the Office of Management and Budget 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 governments or 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 the 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.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because it may raise novel legal or policy issues. The rule seeks to improve public health protection while providing regulatory relief to small systems by encouraging the adoption, by small systems unable to comply with drinking water standards, of affordable technologies that will improve the quality of their water even if they do not achieve full compliance with the MCL or treatment technique requirement for a particular contaminant. Therefore, EPA submitted this action to OMB for

review. Substantive changes made in response to OMB suggestions or recommendations have been documented in the public record.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), generally requires the Agency to consider explicitly the effect of regulations on small entities. However, under section 605(b) of the RFA, if the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, the Agency is not required to prepare an RFA.

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities. Regulations on variances and exemptions provide regulatory relief from the costs of complying with a maximum contaminant level or a treatment technique under a given national primary drinking water regulation. As directed in the Safe Drinking Water Act, this rule describes procedures and criteria by which small public water systems which cannot afford the appropriate treatment to comply with a given national primary drinking water regulation can receive a variance or exemption. Thus, public water systems show a net economic benefit under today's rule as a result of being granted a variance or exemption, rather than bear process costs associated with litigation and enforcement. Please see section IV, ''Cost of Rule'', in the preamble to the proposed rule (63 FR 19448–50) for a more detailed discussion of the economic costs and benefits of today's rule.

C. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 270.39) to amend the current public Water System Supervision Program ICR (OMB control number 2040–0090), and a copy may be obtained from Sandy Farmer by mail at OP Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460, by email at farmer.sandy@epamail.epa.gov, or by calling (202) 260–2740. A copy may also be downloaded off the internet at http://www.epa.gov/icr. The information requirements are not effective until OMB approves them.

Information required by this regulation allows the State or the Administrator to determine that the circumstances at a public water system satisfy the statutory conditions for granting a small system variance or an exemption. Some of the required information allows the Administrator and the public to determine that the public had adequate opportunity to review and comment on a decision to grant a small system variance. The information collection requirements of this rule are mandatory for public water systems applying for either a variance or an exemption and for primacy States that review and either grant or deny these applications. Information collected by this rule will be provided to the public to facilitate public involvement in this process.

Although it is impossible to determine the burden this rule would impose with respect to seeking a variance or an exemption from a drinking water regulation not yet promulgated, EPA did estimate the burden with respect to the two regulations from which a variance or exemption may hypothetically be sought. With respect to the lead and copper rule and the phase II/V rule, the distribution of burden between public water systems and states is approximately 13,050 hours and 109,080 hours respectively, for a total annualized burden of 122,130 hours. Expressed another way, in a monetization of these hours, all public water systems would bear a total annual cost of approximately $348,716, while States would bear an annual cost of $5,041,694.

Promulgation of this rule, however, is also expected to result in significant reductions in the burden associated with litigation and enforcement actions. EPA has estimated that public water systems would reduce their annual burden by 54,648 hours or by $3,342,616 (a monetization of these hours). States would reduce their annual burden by 62,766 hours or by $2,863,321 (a monetization of these hours). The projected burden reduction has not been netted out of the burden estimate in the ICR because the Agency does not generally include litigation and enforcement actions in its paperwork burden estimates for the Public Water Supply Supervision Program. A more detailed explanation of how EPA calculated these results can be found in the Information Collection Request. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OP Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Comments are requested by September 14, 1998. Include the ICR number in any correspondence.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Tribal, and local governments and the private sector. Under section 202 of the UMRA, the Agency 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, Tribal, and local governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating an Agency rule for which a written statement is needed, section 205 of the UMRA generally requires the Agency 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 of the UMRA do not apply when they are inconsistent with applicable law. Moreover, section 205 of the UMRA allows the Agency 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 the Agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed a small government agency plan under section 203 of the UMRA. 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 Agency regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's 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. This rule imposes no enforceable duty on any State, local or tribal governments or the private sector. States or Tribes may choose whether to acquire or maintain primacy under the Safe Drinking Water Act. Further, States and Tribes with primacy may choose whether to issue variances and exemptions; they can decide to not issue any exemptions or variances at all. If they choose to issue variances or exemptions, they are only required to issue variances and exemptions in a manner not less stringent than the conditions under, and the manner in which, variances and exemptions may be granted under section 1415 and 1416 of the SDWA. Thus, today's rule is not subject to the requirements of section 202 and 205 of the UMRA.

Moreover, because this rule establishes procedures and criteria for public water systems to obtain variances and exemptions from Safe Drinking Water Act requirements, the Agency has determined that this rule contains no regulatory requirements that might significantly or uniquely adversely affect small governments and thus this rule is not subject to the requirement of section 203 of UMRA.

E. Enhancing Intergovernmental Partnerships

To reduce the burden of Federal regulations on States and small governments, the President issued Executive Order 12875, entitled Enhancing the Intergovernmental Partnership, on October 28, 1993 (48 FR 58093). 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 necessary funds to pay the direct costs incurred by the State, local or Tribal government or EPA provides to the Office of Management and Budget a description of the extent of the Agency's prior consultation and written communications with elected officials and other representatives of affected State, local and Tribal governments, the nature of their concerns, and an Agency 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.''

As described in the preamble to the proposed rule (63 FR 19440–41), the Agency held several meetings with a wide variety of State and local representatives, who provided meaningful and timely input toward the development of the proposed rule. Summaries of these meetings have been included in the public docket for this rulemaking. In addition, the Agency conducted outreach efforts to contact and inform Tribal groups regarding this rulemaking.

F. Risk to Children Analysis and Environmental Justice

On April 21, 1997, the President issued Executive Order 13045 entitled Protection of Children From Environmental Health Risks and Safety Risks (62 FR 19883). Under section 5 of the Order, a Federal agency submitting a ''covered regulatory action'' to OMB for review under Executive Order 12866 must provide information regarding the environmental health or safety effects of the planned regulation on children. A ''covered regulatory action'' is defined in section 2–202 as a substantive action in a rulemaking that (a) is likely to result in a rule that may be economically significant'' under Executive Order 12866 and (b) concerns an environmental health risk or safety risk that an agency has reason to believe may disproportionally affect 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. While this rule is not a '' covered regulatory action'' as defined in the Order because it is not economically significant (see section IV above), EPA believes that the rule has the potential to reduce risks to children, as discussed in more detail below.

In addition, under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'', dated February 11, 1994, the Agency must make achieving environmental justice part of its mission.

The Agency believes that this rule has the potential to significantly reduce risks to children caused by inadequate drinking water and address environmental justice problems. After a small public water system applies for a small system variance, § 142.306(b) of the rule requires the State to perform a compliance options analysis for the system. Small noncompliant public water systems are often financially distressed as a result of the service population's inability to pay for safe drinking water and other factors. The public water system could have unprotected source waters or be unable to afford the appropriate treatment technology or technique, certified operator, and/or adequate transmission and distribution systems. As required by § 142.306(b) of the rule, an analysis of the applicant system's compliance options will provide insight into alternative means of compliance. This might include some form of restructuring or consolidation with another system, development of a cleaner, safer water source, or using some alternative treatment technique or technology.

If according to a State's affordability criteria, these compliance options are unaffordable for a drinking water system, the State may grant the system a variance. Prior to issuing a variance, § 142.306(b)(5) of the rule requires that the State find that the terms and conditions of a small system variance ensure ''adequate protection of human health.'' Similarly, an exemption can only be granted if its conditions ensure that there is no ''unreasonable risk to health.'' Both findings are made at the State level on a case-specific basis.

The intent of the small system variance subpart of the rule is to move a system, which is not complying with Safe Drinking Water Act standards because the treatment required is unaffordable, toward or into compliance

status by requiring the system to install, operate and maintain treatment which is affordable and protective of human health. Although the level of treatment provided may not meet the maximum contaminant level, it must be determined to be protective of human health—both by the Agency in identifying the approved variance technology and by the primacy State in making such a finding—if the variance is granted.

The Agency believes that a system operating under a small system variance will provide better treatment than that provided by a system in noncompliance. Although the drinking water system may not be able to provide water that is consistently below the maximum contaminant level, a water system operating under a variance will be able to create a net gain in the quality of its finished water above what it could provide before installing a variance technology. In turn, this will lead to a net gain in public health protection for infants, children, and nursing or pregnant women as well as for persons in low-income areas, thus protecting children's health as well as alleviating environmental justice problems.

In addition to requirements that ensure public participation in granting variances and exemptions, section 142.308(c)(7) of the rule requires that, in communities with a large proportion of non-English speaking persons, as defined by the primacy agency, notices provided to the public must include information in the appropriate language regarding the content and importance of the notice. EPA believes that this provision also addresses Executive Order 12898.

For these reasons, the Agency believes that this rule is consistent with, and implements, the Executive Order on protecting children as well as the Executive Order addressing environmental justice.

G. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act, the Agency is required 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, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. Where available and potentially applicable voluntary consensus standards are not used by the Agency, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards. Because this rule is procedural and does not involve or require the use of any technical standards, the Agency does not believe that this Act is applicable to this rule. Moreover, the Agency is unaware of any voluntary consensus standards relevant to this rulemaking. Therefore, even if the Act were applicable to this kind of rulemaking, the Agency does not believe that there are any ''available or potentially applicable'' voluntary consensus standards.

H. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as enacted under the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on September 14, 1998.

VI. Response to Public Comments

The record for this rulemaking has been established under docket number W–97–26, and includes the Agency's response to all comments submitted, supporting documentation, and copies of comments received, including printed paper versions of electronic comments.

List of Subjects in 40 CFR Parts 141 and 142

Environmental protection, Administrative practice and procedures, Chemicals, Indian-lands, Intergovernmental relations, Radiation protection, Reporting and recordkeeping requirements, Water supply.

Dated: August 6, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, the Environmental Protection Agency amends 40 CFR parts 141 and 142 as follows:

PART 141—NATIONAL PRIMARY DRINKING WATER REGULATIONS

1. The authority citation for part 141 is revised to read as follows:

Authority: 42 U.S.C. 300f, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4, 300j–9, and 300j–11.

2. Section 141.4(a) is revised to read as follows:

§ 141.4 Variances and exemptions.

(a) Variances or exemptions from certain provisions of these regulations may be granted pursuant to sections 1415 and 1416 of the Act and subpart K of part 142 of this chapter (for small system variances) by the entity with primary enforcement responsibility, except that variances or exemptions from the MCL for total coliforms and variances from any of the treatment technique requirements of subpart H of this part may not be granted.

* * * * *

PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS IMPLEMENTATION

3. The authority citation for part 142 continues to read as follows:

Authority: 42 U.S.C. 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4, and 300j–9.

4. Section 142.10 is amended by revising paragraph (d) to read as follows:

§ 142.10 Requirements for a determination of primary enforcement responsibility.

* * * * *

(d) Variances and exemptions.

(1) If it permits small system variances pursuant to Section 1415(e) of the Act, it must provide procedures no less stringent than the Act and Subpart K of this part.

(2) If it permits variances (other than small system variances) or exemptions, or both, from the requirements of the State primary drinking water regulations, it shall do so under conditions and in a manner no less stringent than the requirements of Sections 1415 and 1416 of the Act. In granting these variances, the State must adopt the Administrator's findings of best available technology, treatment techniques, or other means available as specified in Subpart G of this part. (States with primary enforcement responsibility may adopt procedures different from those set forth in Subparts E and F of this part, which apply to the issuance of variances (other than small system variances) and exemptions by the Administrator in States that do not have primary enforcement responsibility, provided that the State procedures meet the requirements of this paragraph); and

* * * * *

5. Section 142.20 is revised to read as follows:

§ 142.20 State-issued variances and exemptions under Section 1415(a) and Section 1416 of the Act.

(a) States with primary enforcement responsibility may issue variances to public water systems (other than small system variances) from the requirements of primary drinking water regulations under conditions and in a manner which are not less stringent than the requirements under Section 1415(a) of the Act. In States that do not have primary enforcement responsibility, variances may be granted by the Administrator pursuant to Subpart E of this part.

(1) A State must document all findings that are required under Section 1415(a) of the Act.

(2) If a State prescribes a schedule pursuant to section 1415(a) of the Act requiring compliance with a contaminant level for which the variance is granted later than five years from the date of issuance of the variance the State must—

(i) Document its rationale for the extended compliance schedule;

(ii) Discuss the rationale for the extended compliance schedule in the required public notice and opportunity for public hearing; and

(iii) Provide the shortest practicable time schedule feasible under the circumstances.

(b) States with primary enforcement responsibility may issue exemptions from the requirements of primary drinking water regulations under conditions and in a manner which are not less stringent than the requirements under Section 1416 of the Act. In States that do not have primary enforcement responsibility, exemptions may be granted by the Administrator pursuant to Subpart F of this part.

(1) A State must document all findings that are required under Section 1416 of the Act:

(i) Before finding that management and restructuring changes cannot be made, a State must consider the following measures, and the availability of State Revolving Loan Fund assistance, or any other Federal or State program, that is reasonably likely to be available within the period of the exemption to implement these measures:

(A) Consideration of rate increases, accounting changes, the appointment of a State-certified operator under the State's Operator Certification program, contractual agreements for joint operation with one or more public water systems;

(B) Activities consistent with the State's Capacity Development Strategy to help the public water system acquire and maintain technical, financial, and managerial capacity to come into compliance with the Act; and

(C) Ownership changes, physical consolidation with another public water system, or other feasible and appropriate means of consolidation which would result in compliance with the Act;

(ii) The State must consider the availability of an alternative source of water, including the feasibility of partnerships with neighboring public water systems, as identified by the public water system or by the State consistent with the Capacity Development Strategy.

(2) In the case of a public water system serving a population of not more than 3,300 persons and which needs financial assistance for the necessary improvements under the initial compliance schedule, an exemption granted by the State under section 1416(b)(2)(B)(i) or (ii) of the Act may be renewed for one or more additional 2-year periods, but not to exceed a total of 6 additional years, only if the State establishes that the public water system is taking all practicable steps to meet the requirements of Section 1416(b)(2)(B) of the Act and the established compliance schedule to achieve full compliance with the contaminant level or treatment technique for which the exemption was granted. A State must document its findings in granting an extension under this paragraph.

Subpart E—Variances Issued by the Administrator Under Section 1415(a) of the Act

6. The heading for Subpart E is revised to read as set forth above.

7. Section 142.42 is amended by revising paragraph (c) to read as follows:

§ 142.42 Consideration of a variance request.

* * * * *

(c) A variance may be issued to a public water system on the condition that the public water system install the best technology, treatment techniques, or other means, which the Administrator finds are available (taking costs into consideration) and based upon an evaluation satisfactory to the Administrator that indicates that alternative sources of water are not reasonably available to the public water system.

* * * * *

Subpart F—[Amended]

8. Section 142.50 is revised to read as follows:

§ 142.50 Requirements for an exemption.

(a) The Administrator may exempt any public water system within a State that does not have primary enforcement responsibility from any requirement regarding a maximum contaminant level or any treatment technique requirement, or from both, of an applicable national primary drinking water regulation upon a finding that—

(1) Due to compelling factors (which may include economic factors, including qualification of the public water system as a system serving a disadvantaged community pursuant to section 1452(d) of the Act), the public water system is unable to comply with such contaminant level or treatment technique requirement or to implement measures to develop an alternative source of water supply;

(2) The public water system was in operation on the effective date of such contaminant level or treatment technique requirement, or for a public water system that was not in operation by that date, no reasonable alternative source of drinking water is available to such new public water system;

(3) The granting of the exemption will not result in an unreasonable risk to health; and

(4) Management or restructuring changes (or both), as provided in § 142.20(b)(1)(i), cannot reasonably be made that will result in compliance with the applicable national primary drinking water regulation or, if compliance cannot be achieved, improve the quality of the drinking water.

(b) No exemption shall be granted unless the public water system establishes that the public water system is taking all practicable steps to meet the standard; and

(1) The public water system cannot meet the standard without capital improvements which cannot be completed prior to the date established pursuant to Section 1412(b)(10) of the Act;

(2) In the case of a public water system which needs financial assistance for the necessary improvements, the public water system has entered into an agreement to obtain such financial assistance or assistance pursuant to Section 1452 of the Act, or any other Federal or State program that is reasonably likely to be available within the period of the exemption; or

(3) The public water system has entered into an enforceable agreement to

become a part of a regional public water system.

(c) A public water system may not receive an exemption under this subpart if the public water system was granted a variance under Section 1415(e) of the Act.

9. Section 142.53 is amended by revising paragraph (c)(1) to read as follows:

§ 142.53 Disposition of an exemption request.

* * * * *

(c) * * *

(1) Compliance (including increments of progress or measures to develop an alternative source of water supply) by the public water system with each contaminant level requirement or treatment technique requirement with respect to which the exemption was granted; and

* * * * *

10. Section 142.55 is amended by revising paragraph (b) and removing and reserving paragraph (c) to read as follows:

§ 142.55 Final Schedule.

* * * * *

(b) Such schedule must require compliance with each contaminant level and treatment technique requirement with respect to which the exemption was granted as expeditiously as practicable but not later than 3 years after the otherwise applicable compliance date established in section 1412(b)(10) of the Act.

(c) [Reserved].

11. Section 142.56 is revised to read as follows:

§ 142.56 Extension of date for compliance.

In the case of a public water system which serves a population of not more than 3,300 persons and which needs financial assistance for the necessary improvements, an exemption granted under § 142.50(b) (1) or (2) may be renewed for one or more additional 2-year periods, but not to exceed a total of 6 additional years, if the public water system establishes that the public water system is taking all practicable steps to meet the requirements of section 1416(b)(2)(B) of the Act and the established compliance schedule.

12. Subpart K is added to read as follows:

Subpart K—Variances for Small System

Sec.

General Provisions

Review of Small System Variance Application

Public Participation

EPA Review and Approval of Small System Variances

Subpart K—Variances for Small System

General Provisions

§ 142.301 What is a small system variance?

Section 1415(e) of the Act authorizes the issuance of variances from the requirement to comply with a maximum contaminant level or treatment technique to systems serving fewer than 10,000 persons. The purpose of this subpart is to provide the procedures and criteria for obtaining these variances. The regulations in this subpart shall take effect on September 14, 1998.

§ 142.302 Who can issue a small system variance?

A small system variance under this subpart may only be issued by either:

(a) A State that is exercising primary enforcement responsibility under Subpart B for public water systems under the State's jurisdiction; or

(b) The Administrator, for a public water system in a State which does not have primary enforcement responsibility.

§ 142.303 Which size public water systems can receive a small system variance?

(a) A State exercising primary enforcement responsibility for public water systems (or the Administrator for other systems) may grant a small system variance to public water systems serving 3,300 or fewer persons.

(b) With the approval of the Administrator pursuant to § 142.312, a State exercising primary enforcement responsibility for public water systems may grant a small system variance to public water systems serving more than 3,300 persons but fewer than 10,000 persons.

(c) In determining the number of persons served by the public water system, the State or Administrator must include persons served by consecutive systems. A small system variance granted to a public water system would also apply to any consecutive system served by it.

§ 142.304 For which of the regulatory requirements is a small system variance available?

(a) A small system variance is not available under this subpart for a national primary drinking water regulation for a microbial contaminant (including a bacterium, virus, or other organism) or an indicator or treatment technique for a microbial contaminant.

(b) A small system variance under this subpart is otherwise only available for compliance with a requirement specifying a maximum contaminant level or treatment technique for a contaminant with respect to which;

(1) a national primary drinking water regulation was promulgated on or after January 1, 1986; and

(2) the Administrator has published a small system variance technology pursuant to Section 1412(b)(15) of the Act.

Note to paragraph (b)(1): Small system variances are not available for public water systems above the pre-1986 maximum contaminant level even if subsequently revised. If the Agency revises a pre-1986 maximum contaminant level and makes it more stringent, then a variance would be available for that contaminant, but only up to the pre-1986 maximum contaminant level.

§ 142.305 When can a small system variance be granted by a State?

No small system variance can be granted by a State until the later of the following:

(a) 90 days after the State proposes to grant the small system variance;

(b) If a State is proposing to grant a small system variance to a public water system serving 3,300 or fewer persons and the Administrator objects to the small system variance, the date on which the State makes the recommended modifications or responds in writing to each objection; or

(c) If a State is proposing to grant a small system variance to a public water system serving a population more than 3,300 and fewer than 10,000 persons, the date the Administrator approves the small system variance. The Administrator must approve or disapprove the variance within 90 days after it is submitted to the Administrator for review.

Review of Small System Variance Application

§ 142.306 What are the responsibilities of the public water system, State and the Administrator in ensuring that sufficient information is available and for evaluation of a small system variance application?

(a) A public water system requesting a small system variance must provide accurate and correct information to the State or the Administrator to issue a small system variance in accordance with this subpart. A State may assist a public water system in compiling information required for the State or the Administrator to issue a small system variance in accordance with this subpart.

(b) Based upon an application for a small system variance and other information, and before a small system variance may be proposed under this subpart, the State or the Administrator must find and document the following:

(1) The public water system is eligible for a small system variance pursuant to §§ 142.303 (i.e., the system serves a population of fewer than 10,000 persons) and 142.304 (i.e., the contaminant for which the small system variance is sought is not excluded from variance eligibility);

(2) The public water system cannot afford to comply, in accordance with the affordability criteria established by the State (or by the Administrator in States which do not have primary enforcement responsibility), with the national primary drinking water regulation for which a small system variance is sought, including by:

(i) Treatment;

(ii) Alternative sources of water supply;

(iii) Restructuring or consolidation changes, including ownership change and/or physical consolidation with another public water system; or

(iv) Obtaining financial assistance pursuant to Section 1452 of the Act or any other Federal or State program;

(3) The public water system meets the source water quality requirements for installing the small system variance technology developed pursuant to guidance published under section 1412(b)(15) of the Act;

(4) The public water system is financially and technically capable of installing, operating and maintaining the applicable small system variance technology; and

(5) The terms and conditions of the small system variance, as developed through compliance with § 142.307, ensure adequate protection of human health, considering the following:

(i) The quality of the source water for the public water system; and

(ii) Removal efficiencies and expected useful life of the small system variance technology.

§ 142.307 What terms and conditions must be included in a small system variance?

(a) A State or the Administrator must clearly specify enforceable terms and conditions of a small system variance.

(b) The terms and conditions of a small system variance issued under this subpart must include, at a minimum, the following requirements:

(1) Proper and effective installation, operation and maintenance of the applicable small system variance technology in accordance with guidance published by the Administrator pursuant to section 1412(b)(15) of the Act, taking into consideration any relevant source water characteristics and any other site-specific conditions that may affect proper and effective operation and maintenance of the technology;

(2) Monitoring requirements, for the contaminant for which a small system variance is sought, as specified in 40 CFR part 141; and

(3) Any other terms or conditions that are necessary to ensure adequate protection of public health, which may include:

(i) Public education requirements; and

(ii) Source water protection requirements.

(c) The State or the Administrator must establish a schedule for the public water system to comply with the terms and conditions of the small system variance which must include, at a minimum, the following requirements:

(1) Increments of progress, such as milestone dates for the public water system to apply for financial assistance and begin capital improvements;

(2) Quarterly reporting to the State or Administrator of the public water system's compliance with the terms and conditions of the small system variance;

(3) Schedule for the State or the Administrator to review the small system variance under paragraph (d) of this section; and

(4) Compliance with the terms and conditions of the small system variance as soon as practicable but not later than 3 years after the date on which the small system variance is granted. The Administrator or State may allow up to 2 additional years if the Administrator or State determines that additional time is necessary for the public water system to:

(i) Complete necessary capital improvements to comply with the small system variance technology, secure an alternative source of water, or restructure or consolidate; or

(ii) Obtain financial assistance provided pursuant to section 1452 of the Act or any other Federal or State program.

(d) The State or the Administrator must review each small system variance granted not less often than every 5 years after the compliance date established in the small system variance to determine whether the public water system continues to meet the eligibility criteria and remains eligible for the small system variance and is complying with the terms and conditions of the small system variance. If the public water system would no longer be eligible for a small system variance, the State or the Administrator must determine whether continuing the variance is in the public interest. If the State or the Administrator finds that continuing the variance is not in the public interest, the variance must be withdrawn.

Public Participation

§ 142.308 What public notice is required before a State or the Administrator proposes to issue a small system variance?

(a) At least fifteen (15) days before the date of proposal, and at least thirty (30) days prior to a public meeting to discuss the proposed small system variance, the State, Administrator, or public water system as directed by the State or Administrator, must provide notice to all persons served by the public water system. For billed customers, identified in paragraph (a)(1) of this section, this notice must include the information listed in paragraph (c) of this section. For other persons regularly served by the system, identified in paragraph (a)(2) of this section, the notice shall include the information identified in paragraph (d) of this section. Notice must be provided to all persons served by:

(1) Direct mail or other home delivery to billed customers or other service connections, and

(2) Any other method reasonably calculated to notify, in a brief and concise manner, other persons regularly served by the system. Such methods may include publication in a local newspaper, posting in public places or delivery to community organizations.

(b) At the time of proposal, the State must publish a notice in the State equivalent to the **Federal Register** or a newspaper or newspapers of wide circulation in the State, or, in the case of the Administrator, in the **Federal Register**. This notice shall include the information listed in paragraph (c) of this section.

(c) The notice in paragraphs (a)(1) and (b) of this section must include, at a minimum, the following:

(1) Identification of the contaminant[s] for which a small system variance is sought;

(2) A brief statement of the health effects associated with the contaminant[s] for which a small system variance is sought using language in Appendix C of Part 141 Subpart O of this chapter;

(3) The address and telephone number at which interested persons may obtain further information concerning the contaminant and the small system variance;

(4) A brief summary, in easily understandable terms, of the terms and conditions of the small system variance;

(5) A description of the consumer petition process under § 142.310 and information on contacting the EPA Regional Office;

(6) a brief statement announcing the public meeting required under § 142.309(a), including a statement of the purpose of the meeting, information regarding the time and location for the meeting, and the address and telephone number at which interested persons may obtain further information concerning the meeting; and

(7) In communities with a large proportion of non-English-speaking residents, as determined by the primacy agency, information in the appropriate language regarding the content and importance of the notice.

(d) The notice in paragraph (a)(2) of this section must provide sufficient information to alert readers to the proposed variance and direct them where to receive additional information.

(e) At its option, the State or the Administrator may choose to issue separate notices or additional notices related to the proposed small system variance, provided that the requirements in paragraphs (a) through (d) of this section are satisfied.

(f) Prior to promulgating the final variance, the State or the Administrator must respond in writing to all significant public comments received relating to the small system variance. Response to public comment and any other documentation supporting the issuance of a variance must be made available to the public after final promulgation.

§ 142.309 What are the public meeting requirements associated with the proposal of a small system variance?

(a) A State or the Administrator must provide for at least one (1) public meeting on the small system variance no later than 15 days after the small system variance is proposed.

(b) At the time of the public meeting, the State or Administrator must prepare and make publicly available, in addition to the information listed in § 142.308(c), either:

(1) The proposed small system variance, if the public meeting occurs after proposal of the small system variance; or

(2) A draft of the proposed small system variance, if the public meeting occurs prior to proposal of the proposed small system variance.

(c) Notice of the public meeting must be provided in the manner required under § 142.308 at least 30 days in advance of the public meeting. This notice must be provided by the State, the Administrator, or the public water system as directed by the State or Administrator.

§ 142.310 How can a person served by the public water system obtain EPA review of a State proposed small system variance?

(a) Any person served by the public water system may petition the Administrator to object to the granting of a small system variance within 30 days after a State proposes to grant a small system variance for a public water system.

(b) The Administrator must respond to a petition filed by any person served by the public water system and determine whether to object to the small system variance under § 142.311, no later than 60 days after the receipt of the petition.

EPA Review And Approval of Small System Variances

§ 142.311 What procedures allow the Administrator to object to a proposed small system variance or overturn a granted small system variance for a public water system serving 3,300 or fewer persons?

(a) At the time a State proposes to grant a small system variance under this subpart, the State must submit to the Administrator the proposed small system variance and all supporting information, including any written public comments received prior to proposal.

(b) The Administrator may review and object to any proposed small system variance within 90 days of receipt of the proposed small system variance. The Administrator must notify the State in writing of each basis for the objection and propose a modification to the small system variance to resolve the concerns of the Administrator. The State must make the recommended modification, respond in writing to each objection, or withdraw the proposal to grant the small system variance.

(c) If the State issues the small system variance without resolving the concerns of the Administrator, the Administrator may overturn the State decision to grant the variance if the Administrator determines that the State decision does not comply with the Act or this rule.

§ 142.312 What EPA action is necessary when a State proposes to grant a small system variance to a public water system serving a population of more than 3,300 and fewer than 10,000 persons?

(a) At the time a State proposes to grant a small system variance to a public water system serving a population of more than 3,300 and fewer than 10,000 persons, the State must submit the proposed small system variance and all supporting information, including public comments received prior to proposal, to the Administrator.

(b) The Administrator must approve or disapprove the small system variance within 90 days of receipt of the proposed small system variance and supporting information. The Administrator must approve the small system variance if it meets each requirement within the Act and this rule.

(c) If the Administrator disapproves the small system variance, the Administrator must notify the State in writing of the reasons for disapproval and the small system variance does not become effective. The State may resubmit the small system variance for review and approval with modifications to address the objections stated by the Administrator.

§ 142.313 How will the Administrator review a State's program under this subpart?

(a) The Administrator must periodically review each State program under this subpart to determine whether small system variances granted by the State comply with the requirements of

the Act, this rule and the affordability criteria developed by the State.

(b) If the Administrator determines that small system variances granted by a State are not in compliance with the requirements of the Act, this rule or the affordability criteria developed by the State, the Administrator shall notify the State in writing of the deficiencies and make public the determinations.

(c) The Administrator's review will be based in part on quarterly reports prepared by the States pursuant to § 142.15(a)(1) relating to violations of increments of progress or other violated terms or conditions of small system variances.

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