

# Proposed Rules

Federal Register

Vol. 61, No. 178

Thursday, September 12, 1996

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Rural Housing Service

### Rural Business-Cooperative Service

### Rural Utilities Service

### Farm Service Agency

### 7 CFR Part 1780

RIN 0572-AB20

### Streamlining the Rural Utilities Service Water and Waste Program Regulations

**AGENCIES:** Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency; USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Utilities Service (RUS) hereby amends the regulations utilized to administer the water and waste loan and grant programs. The proposed rule will combine the water and waste loan and grant regulations into one regulation. Unnecessary and burdensome requirements for entities seeking financial assistance under the programs will be eliminated. The streamlining of the regulation will allow RUS to provide better service to rural entities needing assistance in correcting and alleviating health and sanitary problems in their communities, and in general improve the quality of life in rural areas. This rule will also incorporate changes in the water and waste loan and grant program mandated by the 1996 Farm Bill. This rule could impact the amount of loan and grant an applicant could receive. Therefore, RUS will honor all written commitments of loan and grant amounts issued prior to the effective date of this rule.

**DATES:** Comments on the proposed rule must be received on or before October 15, 1996.

**ADDRESSES:** Submit written comments on the proposed rule. RUS requires a signed original and 3 copies of all comments (7 CFR 1700.30(e)) to the Program Support and Regulatory Analysis Group, Rural Utilities Service,

14th & Independence Avenue SW., AG Box 1522, Washington, DC 20250, Telephone: (202) 720-0736.

**FOR FURTHER INFORMATION CONTACT:** Jerry W. Cooper, Loan Specialist, Water and Waste Division, Rural Utilities Service, USDA, South Agriculture Building, Room 6328, AG Box 1548, Washington, DC 20250, telephone: (202) 720-9589.

### SUPPLEMENTARY INFORMATION:

#### Classification

We are issuing this proposed rule in conformance with Executive Order 12866 and the Office of Management and Budget has determined that it is a "significant regulatory action".

#### Intergovernmental Review

These programs are listed in the Catalog of Federal Domestic Assistance under number 10.760, Water and Waste Systems For Rural Communities and are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

#### Environmental Impact Statement

This action has been reviewed in accordance with FmHA Instruction 1940-G, "Environmental Program." It has been determined that the action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Public Law 91-190, an Environmental Impact Statement is not required.

#### Compliance With Executive Order 12778

The regulation has been reviewed in light of Executive Order 12778 and meets the applicable standards provided in sections 2(a) and (2)(b)(2) of that Order. Provisions within this part which are inconsistent with State law are controlling. All administrative remedies pursuant to 7 CFR part 11 must be exhausted prior to filing suit.

#### Information Collection and Paperwork Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) RUS is requesting comments on the information collection incorporated in this proposed rule.

Comments are invited on: (a) Whether the proposed collection of information

is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

For further information contact Jerry W. Cooper, Loan Specialist, Water and Waste Division, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., STOP 1548, Washington, DC 20250-1548, telephone: (202) 720-9589.

**Title:** Water and Waste Disposal Loan and Grant Program.

**OMB Control Number:** 0575-0015.

**Type of Request:** Addendum to a previously approved information collection.

The program provides loan and grant funds for water and waste disposal projects serving the most financially needy rural communities. Financial assistance should result in reasonable user costs for rural residents, rural businesses, and other rural users. The program is limited to rural areas and small towns with a population of 10,000 or less. Communities seeking financial assistance through the program must provide certain detailed information to RUS that is used to determine eligibility and the credit worthiness of the applicant. Additional information is needed to assure that proposed projects will meet the needs of the community, are properly constructed, and that the financial interest of the Government is protected. All the information collected is used by RUS to manage and account for Government resources. The reports and forms are required to ensure the proper and judicious use of public funds.

This proposed rule eliminates the pre-application procedures which were previously required under 7 CFR part 1940 subpart A. The addendum will reflect the reduction in reporting burden by 8,726 hours due to the elimination of this reporting requirement.

*Estimate of Burden:* The public reporting burden for this collection of information is estimated to average 2.7 hours per respondent.

*Respondents:* Non-profit institutions and state, local or tribal governments.

*Estimated Number of Respondents:* 10,520.

*Estimated Number of Responses:* 85,182.

*Estimated Total Annual Burden on Respondents:* 227,128 hours.

Copies of this information collection can be obtained from Dawn Wolfgang, Program Support and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., STOP 1522, Washington, DC 20250-1522. Telephone: (202) 720-0812. Fax: (202) 720-4120.

Comments may be sent to F. Lamont Heppe, Jr., Director, Program Support and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW, STOP 1522, Washington, DC 20250-1522. Telephone: (202) 720-0812. Fax: (202) 720-4120.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this rule.

All comments will become a matter of public record.

#### National Performance Review

This regulatory action is being taken as part of the National Performance Review program to eliminate unnecessary regulations and improve those that remain in force.

#### Unfunded Mandate Reform Act

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandate Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus today's rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandate Reform Act of 1995.

#### Cross References of Regulations

The Rural Utilities Service is an Agency resulting from a reorganization of programs administered by the former Farmers Home Administration, the former Rural Development Administration, and the former Rural Electrification Administration. Dual-references or cross-references to former Farmers Home Administration regulations and forms are provided for by the Department of Agriculture Reorganization Act of 1994.

#### Regulatory Flexibility Act Certification

The Administrator of RUS has determined that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply to this rule.

#### Background

The water and waste loan and grant programs are authorized by various sections of the Consolidated Farm and Rural Development Act, (7 U.S.C. 1921 *et seq.*), as amended. The regulations for these programs, particularly the loan program, have not been completely reviewed for many years. The recent streamlining and reorganization of the Department of Agriculture provided an opportunity to review and rewrite the water and waste loan and grant regulations. A task force, was formed to review and rewrite the regulations. The aim of the task force was to make the regulations easier to understand, eliminate unnecessary requirements, and continue to protect the interest of the U.S. taxpayer.

The program provides loan and grant funds for water and waste disposal projects serving the most financially needy rural communities. Financial assistance should result in reasonable user costs for rural residents, rural businesses, and other rural users. The program is limited to rural areas and small towns with a population of 10,000 or less.

The proposed rule will divide the regulation into four subparts: A, B, C, and D. Subpart A contains the general policies and requirements of the loan and grant program. Subpart B contains the loan and grant application processing requirements. Subpart C contains all the requirements for planning, designing, bidding, contracting, constructing, and inspections. Subpart D has information required in the preparation of notes or bonds and bond transcript documents for public body applicants.

Major changes are:

1. Redirects additional grant funds to communities that truly need the assistance in order to construct a project. Communities with incomes over 100 percent of the State nonmetropolitan median household income will not qualify for any grant funds as in the current regulations.

2. Stretches the grant dollars appropriated by Congress to help more communities by changing the maximum percentage of grant funds that a higher income community can receive from 55 percent to 45 percent of RUS's share of the project costs. This change could have an indirect effect of having an incentive for development of regional projects.

3. The process used to select projects for funding has been revised to direct funds to low income, small communities that need to correct health problems. Also, the priority points awarded for regional systems have been increased.

4. The application process has been streamlined to reduce unnecessary paperwork and improve service to the rural communities. There will be less regulations and the number of pages will be greatly reduced.

5. The application process has been shortened by eliminating the preapplication process.

6. A preliminary engineering report (PER) must be submitted earlier in the application process. The requirement of submitting a PER earlier in the process will assist the staff in making better decisions. Also, applicants have to have this type of document to help them determine what, where, and how they are going to build needed facilities. This change will force applicants to have a clear picture of what they want to construct prior to applying for assistance. A majority of applicants have a PER at the preapplication stage now, therefore the change will tend to put all applicants on a level field.

The major 1996 Farm Bill changes are:

1. Funds made available for these programs may be made available for a water system that is making significant progress toward meeting the Safe Drinking Water Act standards.

2. Funds made available for water treatment discharge or waste disposal system must meet applicable Federal and State water pollution control standards.

3. Not earlier than 60 days before filing an application for loan or grant assistance, a notice of intent shall be published in a general circulation newspaper.

4. When applicants hire outside engineers, the selection of an engineer for a project design shall be done by a request for proposals.

5. Assistance under any rural development program administered by the Secretary or any agency of the Department of Agriculture shall not be conditioned on any requirement that the recipient of the assistance accept or receive electric service from any particular utility, supplier, or cooperative. This is being implemented for the water and waste loan and grant programs.

#### List of Subjects in 7 CFR Part 1780

Community development, Community facilities, Grant programs-Housing and community development, Rural areas, Waste treatment and

disposal-Domestic, Water supply-Domestic.

Therefore, RUS proposes to amend chapter XVII, title 7, Code of Federal Regulations as follows:

## **PART 1780—WATER AND WASTE LOANS AND GRANTS**

1. Part 1780, is added to read as follows:

## **PART 1780—WATER AND WASTE LOANS AND GRANTS**

### **Subpart A—General Policies and Requirements**

Sec.

- 1780.1 General.
- 1780.2 Purpose.
- 1780.3 Definitions and grammatical rules of construction.
- 1780.4 Availability of forms and regulations.
- 1780.5 [Reserved]
- 1780.6 Application information.
- 1780.7 Eligibility.
- 1780.8 [Reserved]
- 1780.9 Eligible loan and grant purposes.
- 1780.10 Limitations.
- 1780.11 Service area requirements.
- 1780.12 [Reserved]
- 1780.13 Rates and terms.
- 1780.14 Security.
- 1780.15 Other Federal, state, and local requirements.
- 1780.16 [Reserved]
- 1780.17 Selection priorities and process.
- 1780.18 Public information.
- 1780.19–1780.22 [Reserved]
- 1780.23 [Reserved]
- 1780.24 Approval authorities.
- 1780.25 Exception authority.
- 1780.26–1780.30 [Reserved]

### **Subpart B—Loan and Grant Application Processing**

- 1780.31 General.
- 1780.32 Timeframes for application processing.
- 1780.33 Application requirements.
- 1780.34 [Reserved]
- 1780.35 Processing office review.
- 1780.36 Approving official review.
- 1780.37 Applications determined ineligible.
- 1780.38 [Reserved]
- 1780.39 Application processing.
- 1780.40 [Reserved]
- 1780.41 Loan or grant approval.
- 1780.42 Transfer of obligations.
- 1780.43 [Reserved]
- 1780.44 Actions prior to loan or grant closing or start of construction, whichever occurs first.
- 1780.45 Loan and grant closing and delivery of funds.
- 1780.46 [Reserved]
- 1780.47 Borrower accounting methods, management reporting and audits.
- 1780.48 Regional commission grants.
- 1780.49 Rural or Native Alaskan villages.
- 1780.49–1780.52 [Reserved]

### **Subpart C—Planning, Designing, Bidding, Contracting, Constructing and Inspections**

- 1780.53 General.
- 1780.54 Technical services
- 1780.55 Preliminary engineering reports.
- 1780.56 [Reserved]
- 1780.57 Design policies.
- 1780.58–1780.60 [Reserved]
- 1780.61 Construction contracts.
- 1780.62 Utility purchase contracts.
- 1780.63 Sewage treatment and bulk water sales contracts.
- 1780.64–1780.66 [Reserved]
- 1780.67 Performing construction.
- 1780.68 Owner's contractual responsibility.
- 1780.69 [Reserved]
- 1780.70 Owner's procurement regulations.
- 1780.71 [Reserved]
- 1780.72 Procurement methods.
- 1780.73 [Reserved]
- 1780.74 Contracts awarded prior to applications.
- 1780.75 Contract provisions.
- 1780.76 Contract administration.
- 1780.77–1780.79 [Reserved]

### **Subpart D—Information Pertaining to Preparation of Notes or Bonds and Bond Transcript Documents for Public Body Applicants**

- 1780.80 General.
- 1780.81 Policies related to use of bond counsel.
- 1780.82 [Reserved]
- 1780.83 Bond transcript documents.
- 1780.84–1780.86 [Reserved]
- 1780.87 Permanent instruments for Agency loans.
- 1780.88 [Reserved]
- 1780.89 Multiple advances of Agency funds using permanent instruments.
- 1780.90 Multiple advances of Agency funds using temporary debt instruments.
- 1780.91–1780.93 [Reserved]
- 1780.94 Minimum bond specifications.
- 1780.95 Public bidding on bonds.
- 1780.96–1780.100 [Reserved]

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 16 U.S.C. 1005.

### **Subpart A—General Policies and Requirements**

#### **§ 1780.1 General.**

(a) This part outlines the policies and procedures for making and processing direct loans and grants for water and waste projects. The Rural Utilities Service (RUS) shall cooperate fully with State and local agencies in making loans and grants to assure maximum support to the State strategy for rural development. Agency officials and their staffs shall maintain coordination and liaison with State agency and substate planning districts.

(b) The income data used in this part to determine median household income must be that which most accurately reflects the income of the service area. The median household income of the service area and the nonmetropolitan median household income of the State will be determined from income data

from the most recent decennial census of the United States. If there is reason to believe that the census data is not an accurate representation of the median household income within the area to be served, the reasons will be documented and the applicant may furnish, or the Agency may obtain, additional information regarding such median household income. Information will consist of reliable data from local, regional, State or Federal sources or from a survey conducted by a reliable impartial source. The nonmetropolitan median household income of the State may only be updated on a national basis by the RUS National Office. This will be done only when median household income data for the same year for all Bureau of the Census areas is available from the Bureau of the Census or other reliable sources. Bureau of the Census areas would include areas such as: Counties, County Subdivisions, Cities, Towns, Townships, Boroughs, and other places.

(c) RUS debt instruments will require an agreement that if at any time it shall appear to the Government that the borrower is able to refinance the amount of the indebtedness to the Government then outstanding, in whole or in part, by obtaining a loan for such purposes from responsible cooperative or private credit sources, at reasonable rates and terms for loans for similar purposes and periods of time, the borrower will, upon request of the Government, apply for and accept such loan in sufficient amount to repay the Government and will take all such actions as may be required in connection with such loan.

(d) Funds allocated for use under this part are also for the use of Indian tribes within the State, regardless of whether State development strategies include Indian reservations within the State's boundaries. Native Americans residing on such reservations must have equal opportunity to participate in the benefits of these programs as compared with other residents of the State. Such tribes might not be subject to State and local laws or jurisdiction. However, any requirements of this part that affect applicant eligibility, the adequacy of RUS's security, or the adequacy of service to users of the facility and all other requirements of this part must be met.

(e) RUS financial programs must be extended without regard to race, color, religion, sex, national origin, marital status, age, or physical or mental handicap.

(f) Any processing or servicing activity conducted pursuant to this part involving authorized assistance to Agency employees, members of their

families, known close relatives, or business or close personal associates, is subject to the provisions of subpart D of part 1900 of this title. Applicants for assistance are required to identify any known relationship or association with a RUS employee.

(g) Water and waste facilities will be designed, installed, and operated in accordance with applicable laws which include but are not limited to the Safe Drinking Water Act, Clean Water Act and the Resource Conservation and Recovery Act.

(h) RUS financed facilities will be consistent with any current development plans of State, multijurisdictional areas, counties, or municipalities in which the proposed project is located.

(i) Each RUS financed facility will be in compliance with appropriate State or Federal agency regulations which have control of the appropriation, diversion, storage and use of water and disposal of excess water.

(j) Water and waste applicants must demonstrate that they possess the financial, technical, and managerial capability necessary to consistently comply with pertinent Federal and State laws and requirements. In developing water and waste systems, applicants must consider alternatives of ownership, system design, and the sharing of services.

(k) Applicants should be aware of and comply with other Federal statute requirements including but not limited to:

(1) Section 504 of the Rehabilitation Act of 1973. Under section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), no handicapped individual in the United States shall, solely by reason of their handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving RUS financial assistance;

(2) Civil Rights Act of 1964. All borrowers are subject to, and facilities must be operated in accordance with, title VI of the Civil Rights Act of 1964 and subpart E of part 1901 of this title, particularly as it relates to conducting and reporting of compliance reviews. Instruments of conveyance for loans and/or grants subject to the Act must contain the covenant required by § 1901.202(e) of this title;

(3) The Americans with Disabilities Act (ADA) of 1990. This Act prohibits discrimination on the basis of disability in employment, State and local government services, public transportation, public accommodations, facilities, and telecommunications. Title

II of the Act applies to facilities operated by State and local public entities which provides services, programs and activities. Title III of the Act applies to facilities owned, leased, or operated by private entities which accommodate the public; and

(4) Age Discrimination Act of 1975. This Act provides that no person in the United States shall on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

#### **§ 1780.2 Purpose.**

Provide loan and grant funds for water and waste projects serving the most financially needy communities. Financial assistance should result in reasonable user costs for rural residents, rural businesses, and other rural users.

#### **§ 1780.3 Definitions and grammatical rules of construction.**

(a) Definitions. For the purposes of this part:

*Agency* means any United States Department of Agriculture (USDA) employee acting on behalf of the Rural Utilities Service in accordance with appropriate delegations of authority.

*Approval official* means the USDA official at the State level who has been delegated the authority to approve loans or grants.

*Equivalent Dwelling Unit (EDU)* means the level of service provided to a typical rural residential dwelling.

*Parity bonds* means bonds which have equal standing with other bonds of the same issuer.

*Poverty line* means the level of income for a family of four, as defined in section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)).

*Processing office* means the office designated by the State program official to accept and process applications for water and waste disposal assistance.

*Project* means all activity that an applicant is currently undertaking to be financed in whole or part with RUS assistance.

*Protective advances* are payments made by a lender for items such as insurance or taxes in order to preserve and protect the security or the lien or priority of the lien securing the loan.

*Rural and Rural Areas* means any area not in a city, or town with a population in excess of 10,000 inhabitants, according to the latest decennial census of the United States.

*Rural Development* means the mission area of the Under Secretary for Rural Development. Rural Development

State and local offices will administer this water and waste program on behalf of the Rural Utilities Service.

*RUS* means the Rural Utilities Service, an agency of the United States Department of Agriculture established pursuant to section 232 of the Department of Agriculture Reorganization Act of 1994 (Pub. L. 103-354), successor to the Farmer's Home Administration and the Rural Development Administration with respect to certain water and waste disposal loan and grant programs.

*Service area* means the area reasonably expected to be served by the project.

*Servicing office* means the office designated by the State program official to service water and waste disposal loans and grants.

*Similar system cost* means the average annual EDU user cost of a system within a community having similar economic conditions and being served by the same type of established system. Similar system cost shall include all charges, taxes, and assessments attributable to the system including debt service, reserves and operation and maintenance costs.

*State program official* means the USDA official at the State level who has been delegated the responsibility of administering the water and waste disposal programs under this regulation for a particular State or States.

*Statewide nonmetropolitan median household income* means the median household income of all rural areas of a state.

(b) Rules of grammatical construction. Unless the context otherwise indicates, "includes" and "including" are not limiting, and "or" is not exclusive. The terms defined in paragraph (a) of this section include the plural as well as the singular, and the singular as well as the plural.

#### **§ 1780.4 Availability of forms and regulations.**

Information about the availability of forms, regulations, bulletins and publications cited in this part is available from any USDA/Rural Development office or the Rural Utilities Service, United States Department of Agriculture, Washington, DC 20250-1500.

#### **§ 1780.5 [Reserved]**

#### **§ 1780.6 Application information.**

(a) The Rural Development State Director in each State will determine the office and staff that will be responsible for delivery of the program (processing office) and designate an approving

office. Applications will be accepted by the processing office.

(b) The applicant's governing body should designate one person to act as contact person with the Agency during loan and grant processing. Agency personnel should make every effort to involve the applicant's contact person when meeting with the applicant's professional consultants or agents.

#### **§ 1780.7 Eligibility.**

Facilities financed by water and waste disposal loans or grants must serve rural areas.

(a) *Eligible applicant.* An applicant must be:

(1) A public body, such as a municipality, county, district, authority, or other political subdivision of a State, territory or commonwealth,

(2) An organization operated on a not-for-profit basis, such as an association, cooperative, or private corporation. The organization must be an association controlled by a local public body or bodies, or have a broadly based ownership by or membership of people of the local community, or

(3) Indian tribes on Federal and State reservations and other Federally recognized Indian tribes.

(b) *Eligible facilities.* Facilities financed by RUS may be located in non-rural areas. However, loan and grant funds may be used to finance only that portion of the facility serving rural areas, regardless of facility location.

(c) *Eligible projects.* (1) Projects must serve a rural area which, if such project is completed, is not likely to decline in population below that for which the project was designed.

(2) Projects must be designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area to the extent practicable. Water systems should have sufficient capacity to provide for reasonable fire protection to the extent practicable.

(3) Projects must be necessary for orderly community development and consistent with a current comprehensive community water, waste disposal, or other current development plan for the rural area.

(d) *Credit elsewhere.* Applicants must certify in writing and the Agency shall determine and document that the applicant is unable to finance the proposed project from their own resources, through commercial credit at reasonable rates and terms, or other funding sources.

(e) *Legal authority and responsibility.* Each applicant must have or will obtain

the legal authority necessary for owning, constructing, operating, and maintaining the proposed facility or service and for obtaining, giving security for, and repaying the proposed loan. The applicant shall be responsible for operating, maintaining, and managing the facility, and providing for its continued availability and use at reasonable rates and terms. This responsibility shall be exercised by the applicant even though the facility may be operated, maintained, or managed by a third party under contract or management agreement. Guidance for preparing a management agreement is available from the Agency. Such contracts, management agreements, or leases must not contain options or other provisions for transfer of ownership.

(f) *Economic feasibility.* All projects financed under the provisions of this section must be based on taxes, assessments, income, fees, or other satisfactory sources of revenues in an amount sufficient to provide for facility operation and maintenance, reasonable reserves, and debt payment. If the primary use of the facility is by business and the success or failure of the facility is dependent on the business, then the economic viability of that business must be assessed.

(g) *Federal Debt Collection Act of 1990.* An outstanding judgment obtained by the United States in a Federal Court (other than in the United States Tax Court), which has been recorded, shall cause the applicant to be ineligible to receive a loan or grant until the judgment is paid in full or otherwise satisfied.

(h) *Expanded eligibility for timber-dependent communities in Pacific Northwest.* In the Pacific Northwest, defined as an area containing national forest covered by the Federal document entitled, "Forest Plan for a Sustainable Economy and a Sustainable Environment," dated July 1, 1993, the population limits contained in section 1780.3(a) of this part are expanded to include communities with not more than 25,000 inhabitants until September 30, 1998, if:

(1) Part or all of the community lies within 100 miles of the boundary of a national forest covered by the Federal document entitled, "Forest Plan for a Sustainable Economy and a Sustainable Environment," dated July 1, 1993; and

(2) The community is located in a county in which at least 15 percent of the total primary and secondary labor and proprietor income is derived from forestry, wood products, or forest-related industries such as recreation and tourism.

#### **§ 1780.8 [Reserved]**

#### **§ 1780.9 Eligible loan and grant purposes.**

Loan and grant funds may be used only for the following purposes:

(a) To construct, enlarge, extend, or otherwise improve rural water, sanitary sewage, solid waste disposal, and storm wastewater disposal facilities;

(b) To construct or relocate public buildings, roads, bridges, fences, or utilities, and to make other public improvements necessary for the successful operation or protection of facilities authorized in paragraph (a) of this section;

(c) To relocate private buildings, roads, bridges, fences, or utilities, and other private improvements necessary for the successful operation or protection of facilities authorized in paragraph (a) of this section;

(d) For payment of other utility connection charges as provided in service contracts between utility systems; and

(e) When a necessary part of the project relates to those facilities authorized in paragraphs (a), (b), (c) or (d) of this section the following may be considered:

(1) Loan or grant funds may be used for:

(i) Reasonable fees and costs such as: legal, engineering, administrative services, fiscal advisory, recording, environmental analyses and surveys, possible salvage or other mitigation measures, planning, establishing or acquiring rights;

(ii) Costs of acquiring interest in land; rights, such as water rights, leases, permits, rights-of-way; and other evidence of land or water control or protection necessary for development of the facility;

(iii) Purchasing or renting equipment necessary to install, operate, maintain, extend, or protect facilities;

(iv) Cost of applicant labor necessary to install and extend service; and

(v) In unusual cases, the cost for connecting the user to the main service line.

(2) Only loan funds may be used for:

(i) Interest incurred during construction in conjunction with multiple advances or interest on interim financing;

(ii) Initial operating expenses, including interest, for a period ordinarily not exceeding one year when the applicant is unable to pay such expenses;

(iii) The purchase of existing facilities when it is necessary either to improve service or prevent the loss of service; and

(iv) Refinancing debts incurred by, or on behalf of, an applicant when all of the following conditions exist:

(A) The debts being refinanced are a secondary part of the total loan;

(B) The debts were incurred for the facility or service being financed or any part thereof;

(C) Arrangements cannot be made with the creditors to extend or modify the terms of the debts so that a sound basis will exist for making a loan; and

(v) Prepayment of costs for which RUS grant funds were obligated.

(3) Grant funds may be used to restore loan funds used to prepay grant obligated costs.

(f) Construction incurred before loan or grant approval.

(1) Funds may be used to pay obligations for construction incurred before loan or grant approval if such requests are made in writing by the applicant and the Agency determines that:

(i) Compelling reasons exist for incurring obligations before loan or grant approval;

(ii) The obligations will be incurred for authorized loan or grant purposes; and

(iii) The Agency's authorization to pay such obligations is on the condition that it is not committed to make the loan or grant; it assumes no responsibility for any obligations incurred by the applicant; and the applicant must subsequently meet all loan or grant approval requirements, including environmental and contracting requirements.

(2) If construction is started without Agency approval, post-approval in accordance with this section may be considered, provided the construction meets applicable requirements including those regarding approval and environmental matters.

(g) Water or sewer service may be provided through individual installations or small clusters of users within an applicant's service area. The approval official should consider items such as: Quantity and quality of the individual installations that may be developed; cost effectiveness of the individual facility compared with the initial and long term user cost on a central system; health and pollution problems attributable to individual facilities; operational or management problems peculiar to individual installations; and permit and regulatory agency requirements.

(1) Applicants providing service through individual facilities must meet the eligibility requirements in § 1780.7.

(2) The Agency must approve the form of agreement between the

applicant and individual users for the installation, operation, maintenance and payment for individual facilities.

(3) If taxes or assessments are not pledged as security, applicants providing service through individual facilities must obtain security necessary to assure collection of any sum the individual user is obligated to pay the applicant.

(4) Notes representing indebtedness owed the applicant by a user for an individual facility will be scheduled for payment over a period not to exceed the useful life of the individual facility or the RUS loan, whichever is shorter. The interest rate will not exceed the interest rate charged the applicant on the RUS indebtedness.

(5) Applicants providing service through individual or cluster facilities must obtain:

(i) Easements for the installation and ingress to and egress from the facility if determined necessary by RUS; and

(ii) An adequate method for denying service in the event of nonpayment of user fees.

#### **§ 1780.10 Limitations.**

(a) Loan and grant funds may not be used to finance:

(1) Facilities which are not modest in size, design, and cost;

(2) Loan or grant finder's fees;

(3) The construction of any new combined storm and sanitary sewer facilities;

(4) Any portion of the cost of a facility which does not serve a rural area;

(5) That portion of project costs normally provided by a business or industrial user, such as wastewater pretreatment, etc.;

(6) Rental for the use of equipment or machinery owned by the applicant;

(7) For other purposes not directly related to operating and maintenance of the facility being installed or improved; and

(8) A judgment which would disqualify an applicant for a loan or grant as provided for in § 1780.7(g) of this part.

(b) Grant funds may not be used to:

(1) Reduce EDU costs to a level less than similar system cost;

(2) Pay any costs of a project when the median household income of the service area is and more than 100 percent of the nonmetropolitan median household income of the State;

(3) Pay project costs when other loan funding for the project is not at reasonable rates and terms; and

(4) Pay project costs when other funding is a guaranteed loan obtained in accordance with subpart I of part 1980 of this chapter.

(c) Grants may not be made in excess of the following percentages of the RUS funded project development costs.

Facilities previously installed will not be considered in determining the development costs.

(1) 75 percent when the median household income of the service area is below the higher of the poverty line or 80% of the state nonmetropolitan median income and the project is necessary to alleviate a health or sanitary problem.

(2) 45 percent when the median household income of the service area exceeds the 80 percent requirements described in paragraph (c)(1) of this section but is not more than 100 percent of the statewide nonmetropolitan median household income.

(3) Applicants are advised that the percentages contained in paragraph (c)(1) and (c)(2) of this section are maximum amounts and may be further limited due to availability of funds or the grant determination procedures contained in § 1780.35 (d) of this part.

#### **§ 1780.11 Service area requirements.**

(a) All facilities financed under the provisions of this part shall be for public use. The facilities will be installed so as to serve any potential user within the service area who desires service and can be feasibly and legally served. This does not preclude:

(1) Financing or constructing projects in phases when it is not practical to finance or construct the entire project at one time; and

(2) Financing or constructing facilities where it is not economically feasible to serve the entire area, provided economic feasibility is determined on the basis of the entire system and not by considering the cost of separate extensions to or parts thereof; the applicant publicly announces a plan for extending service to areas not initially receiving service from the system; and potential users located in the areas not to be initially served receive written notice from the applicant that service will not be provided until such time as it is economically feasible to do so.

(b) Should the Agency determine that inequities exist within the applicants service area for the same type service proposed (i.e., water or waste disposal) such inequities will be remedied by the applicant prior to loan or grant approval or included as part of the project.

Inequities are defined as unjustified variations in availability, adequacy or quality of service. User rate schedules for portions of existing systems that were developed under different financing, rates, terms or conditions do not necessarily constitute inequities.

(c) Developers are normally expected to provide utility-type facilities in new or developing areas in compliance with appropriate State statutes. RUS financing will be considered to an eligible applicant only in such cases when failure to complete development would result in an adverse economic condition for the rural area (not the community being developed); the proposal is necessary to the success of a current area development plan; and loan repayment can be assured by:

(1) The applicant already having sufficient assured revenues to repay the loan; or

(2) Developers providing a bond or escrowed security deposit as a guarantee sufficient to meet expenses attributable to the area in question until a sufficient number of the building sites are occupied and connected to the facility to provide enough revenues to meet operating, maintenance, debt service, and reserve requirements. Such guarantees from developers will meet the requirements in § 1780.39(c)(4)(ii); or

(3) Developers paying cash for the increased capital cost and any increased operating expenses until the developing area will support the increased costs; or

(4) The full faith and credit of a public body where the debt is evidenced by general obligation bonds; or

(5) The loan is to a public body evidenced by a pledge of tax revenue or assessments; or

(6) The user charges can become a lien upon the property being served and income from such lien can be collected in sufficient time to be used for its intended purposes.

#### § 1780.12 [Reserved]

#### § 1780.13 Rates and terms.

(a) *General.* (1) Each loan will bear interest at the rate prescribed in FmHA Instruction 440.1, exhibit B. The interest rates will be set by the Agency for each quarter of the fiscal year. All rates will be adjusted to the nearest one-eighth of one per centum. The rate will be the lower of the rate in effect at the time of loan approval or the rate in effect at the time of loan closing unless the applicant otherwise chooses.

(2) If the interest rate is to be that in effect at loan closing on a loan involving multiple advances of RUS funds using temporary debt instruments, the interest rate charged shall be that in effect on the date when the first temporary debt instrument is issued.

(b) *Poverty rate.* The poverty interest rate will not exceed 5 per centum per annum. All poverty rate loans must comply with the following conditions:

(1) The primary purpose of the loan is to upgrade existing facilities or construct new facilities required to meet applicable health or sanitary standards; and

(2) The median household income of the service area is below the higher of the poverty line, or 80 percent of the Statewide nonmetropolitan median household income.

(c) *Intermediate rate.* The intermediate interest rate will be set at the poverty rate plus one-half of the difference between the poverty rate and the market rate, not to exceed 7 percent per annum. It will apply to loans that do not meet the requirements for the poverty rate and for which the median household income of the service area is not more than 100 percent of the nonmetropolitan median household income of the State.

(d) *Market rate.* The market interest rate will be set using as guidance the average of the Bond Buyer Index for the four weeks prior to the first Friday of the last month before the beginning of the quarter. The market rate will apply to all loans that do not qualify for a different rate under paragraph (b) or (c) of this section.

(e) *Repayment terms.* The loan repayment period shall not exceed the useful life of the facility, State statute or 40 years from the date of the note or bond, whichever is less. Where RUS grant funds are used in connection with an RUS loan, the loan will be for the maximum term permitted by this part, State statute, or the useful life of the facility, whichever is less, unless there is an exceptional case where circumstances justify making an RUS loan for less than the maximum term permitted. In such cases, the reasons must be fully documented.

(1) Principal payments may be deferred in whole or in part for a period not to exceed 36 months following the date the first interest installment is due. If for any reason it appears necessary to permit a longer period of deferment, the Agency may authorize such deferment. Deferments of principal will not be used to:

(i) Postpone the levying of taxes or assessments;

(ii) Delay collection of the full rates which the borrower has agreed to charge users for its services as soon as those services become available;

(iii) Create reserves for normal operation and maintenance;

(iv) Make any capital improvements except those approved by the Agency which are determined to be essential to the repayment of the loan or to maintain adequate security; and

(v) Make payment on other debt.

(2) Payment date. Loan payments will be scheduled to coincide with income availability and be in accordance with State law. If State law only permits principal plus interest (P&I) type bonds, annual or semiannual payments will be used. Insofar as practical monthly payments will be scheduled one full month following the date of loan closing; or semiannual or annual payments will be scheduled six or twelve full months, respectively, following the date of loan closing or any deferment period. Due dates falling on the 29th, 30th or 31st day of the month will be avoided.

(3) In all cases, including those in which RUS is jointly financing with another lender, the RUS payments of principal and interest should approximate amortized installments.

#### § 1780.14 Security.

Loans will be secured by the best security position practicable in a manner which will adequately protect the interest of RUS during the repayment period of the loan. Specific security requirements for each loan will be included in a letter of conditions.

(a) *Public bodies.* Loans to such borrowers, including Federally recognized Indian tribes as appropriate, will be evidenced by notes, bonds, warrants, or other contractual obligations as may be authorized by relevant laws and by borrower's documents, resolutions, and ordinances. Security, in the following order of preference, will consist of:

(1) The full faith and credit of the borrower when the debt is evidenced by general obligation bonds; and/or

(2) Pledges of taxes or assessments; and/or

(3) Pledges of facility revenue and, when it is the customary financial practice in the State, liens will be taken on the interest of the applicant in all land, easements, rights-of-way, water rights, water purchase contracts, water sales contracts, sewage treatment contracts, and similar property rights, including leasehold interests, used or to be used in connection with the facility whether owned at the time the loan is approved or acquired with loan funds.

(b) *Other-than-public bodies.* Loans to other-than-public body applicants and Federally recognized Indian tribes, as appropriate, will be secured in the following order of preference:

(1) Assignments of borrower income will be taken and perfected by filing, if legally permissible; and

(2) A lien will be taken on the interest of the applicant in all land, easements, rights-of-way, water rights, water purchase contracts, water sales



contracts, sewage treatment contracts and similar property rights, including leasehold interest, used, or to be used in connection with the facility whether owned at the time the loan is approved or acquired with loan funds. In unusual circumstances where it is not legally permissible or feasible to obtain a lien on such land (such as land rights obtained from Federal or local government agencies, and from railroads) and the approval official determines that the interest of RUS is otherwise adequately secured, the lien requirement may be omitted as to such land rights. For existing borrowers where the Agency already has a security position on real property, the approval official may determine that the interest of the Government is adequately secured and not require additional liens on such land rights. When the subsequent loan is approved or the acquisition of real property is subject to an outstanding lien indebtedness, the next highest priority lien obtainable will be taken if the approval official determines that the loan is adequately secured.

(c) *Joint financing security.* For projects utilizing joint financing, when adequate security of more than one type is available, the other lender may take one type of security with RUS taking another type. For projects utilizing joint financing with the same security to be shared by RUS and another lender, RUS will obtain at least a parity position with the other lender. A parity position is to ensure that with joint security, in the event of default, each lender will be affected on a proportionate basis. A parity position will conform with the following unless an exception is granted by the approval official:

(1) It is not necessary for loans to have the same repayment terms. Loans made by other lenders involved in joint financing with RUS should be scheduled for repayment on terms similar to those customarily used in the State for financing such facilities.

(2) The use of a trustee or other similar paying agent by the other lender in a joint financing arrangement is acceptable to RUS. A trustee or other similar paying agent will not normally be used for the RUS portion of the funding unless required to comply with State law. The responsibilities and authorities of any trustee or other similar paying agent on projects that include RUS funds must be clearly specified by written agreement and approved by the State program official and the Office of the General Counsel (OGC). RUS must be able to deal directly with the borrower to enforce the

provisions of loan and grant agreements and perform necessary servicing actions.

(3) In the event adequate funds are not available to meet regular installments on parity loans, the funds available will be apportioned to the lenders based on the respective current installments of principal and interest due.

(4) Funds obtained from the sale or liquidation of secured property or fixed assets will be apportioned to the lenders on the basis of the pro rata amount outstanding; provided, however, funds obtained from such sale or liquidation for a project that included RUS grant funds will be apportioned as required by the grant agreement.

(5) Protective advances must be charged to the borrower's account and be secured by a lien on the security property. To the extent consistent with State law and customary lending practices in the area, repayment of protective advances made by either lender, for the mutual protection of both lenders, should receive first priority in apportionment of funds between the lenders. To ensure agreement between lenders, efforts should be made to obtain the concurrence of both lenders before one lender makes a protective advance.

#### **§ 1780.15 Other Federal, State, and local requirements.**

Proposals for facilities financed in whole or in part with RUS funds will be coordinated with appropriate Federal, State and local agencies. If there are conflicts between this part and State or local laws or regulatory commission regulations, the provisions of this part will control. Applicants will be required to comply with Federal, State, and local laws and any regulatory commission rules and regulations pertaining to:

- (a) Organization of the applicant and its authority to own, construct, operate, and maintain the proposed facilities;
- (b) Borrowing money, giving security therefore, and raising revenues for the repayment thereof;
- (c) Land use zoning; and
- (d) Health and sanitation standards and design and installation standards unless an exception is granted by RUS.

#### **§ 1780.16 [Reserved]**

#### **§ 1780.17 Selection priorities and process.**

When ranking eligible applications for consideration for limited funds, Agency officials must consider the priority items met by each application and the degree to which those priorities are met. Points will be awarded as follows:

(a) *Population priorities.* (1) The proposed project will primarily serve a rural area having a population not in excess of 1,000—20 points;

(2) The proposed project primarily serves a rural area having a population between 1,001 and 2,500—15 points;

(3) The proposed project primarily serves a rural area having a population between 2,501 and 5,500—5 points.

(b) *Health priorities.* The proposed project is:

(1) Needed to alleviate an emergency situation, correct unanticipated diminution or deterioration of a water supply, or to meet Safe Drinking Water Act requirements which pertain to a water system—25 points;

(2) Required to correct inadequacies of a wastewater disposal system, or to meet health standards which pertain to a wastewater disposal system—25 points;

(3) Required to meet administrative orders issued to correct local, State, or Federal solid waste violations—15 points.

(c) *Income priorities.* The median household income of the population to be served by the proposed project is:

(1) Less than the poverty line if the poverty line is less than 80% of the statewide nonmetropolitan median income—30 points;

(2) Less than 80 percent of the statewide nonmetropolitan median household income—20 points;

(3) Equal to or more than the poverty line and between 80% and 100%, inclusive, of the State's nonmetropolitan median household income—15 points.

(d) *Other priorities.* (1) The proposed project will: merge ownership, management, and operation of smaller facilities providing for more efficient management and economical service—15 points;

(2) The proposed project will enlarge, extend, or otherwise modify existing facilities to provide service to additional rural areas—10 points;

(3) Applicant is a public body or Indian tribe—5 points;

(4) Amount of other than RUS funds committed to the project is:

- (i) 50% or more—15 points;
- (ii) 20% to 49%—10 points;
- (iii) 5%—19% —5 points.

(5) Projects that will serve Agency identified target areas—10 points;

(6) Projects that primarily recycle solid waste products thereby limiting the need for solid waste disposal—5 points;

(7) The proposed project will serve an area that has an unreliable quality or supply of drinking water—10 points.

(e) *In certain cases the State program official may assign up to 15 points to a project.* The points may be awarded to projects in order to improve compatibility and coordination between RUS's and other agencies' selection



systems, to ensure effective RUS fund utilization, and to assist those projects that are the most cost effective. A written justification must be prepared and placed in the project file each time these points are assigned.

(f) *Cost overruns.* An application may receive consideration for funding before others at the State or National Office level when it is a subsequent request for a previously approved project which has encountered construction cost overruns. The cost overruns must be due to high bids or unexpected construction problems that cannot be reduced by negotiations, redesign, use of bid alternatives, rebidding or other means. Cost overruns exceeding 20% of the development cost at time of loan or grant approval or where the scope of the original purpose has changed will not be considered under this paragraph.

(g) *National office priorities.* In selecting projects for funding at the National Office level State program official points may or may not be considered. The Administrator may assign up to 15 additional points to account for items such as geographic distribution of funds, the highest priority projects within a State, and emergency conditions caused by economic problems or natural disasters. The Administrator may delegate the authority to assign up to 15 of the administrator's points to appropriate National Office staff.

#### **§ 1780.18 Public information.**

(a) *Public notice of intent to file an application with the Agency.* Within 60 days of filing an application with the Agency the applicant must publish a notice of intent to apply for a RUS loan or grant. The notice of intent must be published in a newspaper of general circulation in the proposed area to be served.

(b) *General public meeting.* Applicants should inform the general public regarding the development of any proposed project. Any applicant not required to obtain authorization by vote of its membership or by public referendum, to incur the obligations of the proposed loan or grant, must hold at least one public information meeting. The public meeting must be held after the application is filed and not later than loan or grant approval. The meeting must give the citizenry an opportunity to become acquainted with the proposed project and to comment on such items as economic and environmental impacts, service area, alternatives to the project, or any other issue identified by the Agency. To the extent possible, this meeting should cover items necessary to satisfy all

public information meeting requirements for the proposed project. To minimize duplication of public notices and public involvement, the applicant shall, where possible, coordinate and integrate the public involvement activities of the environmental review process into this requirement. The applicant will be required, at least 10 days prior to the meeting, to publish a notice of the meeting in a newspaper of general circulation in the service area, to post a public notice at the applicant's principal office, and to notify the Agency. The applicant will provide the Agency a copy of the published notice and minutes of the public meeting. A public meeting is not normally required for subsequent loans or grants which are needed to complete the financing of a project.

#### **§§ 1780.19–1780.23 [Reserved]**

#### **§ 1780.24 Approval authorities.**

Appropriate reviews, concurrence, and authorization must be obtained for all loans or grants in excess of the amounts indicated in RUS Staff Instruction 1780–1.

(a) *Redelegation of authority by State Directors.* Unless restricted by memorandum from the RUS Administrator, State Directors can redelegate their approval authorities to State employees by memorandum.

(b) *Restriction of approval authority by the RUS Administrator.* The RUS Administrator can make written restrictions or revocations of the authority given to any approval official.

#### **§ 1780.25 Exception Authority.**

The Administrator may, in individual cases, make an exception to any requirement or provision of this part which is not inconsistent with the authorizing statute or other applicable law and is determined to be in the Government's interest.

#### **§§ 1780.26–1780.30 [Reserved]**

### **Subpart B—Loan and Grant Application Processing**

#### **§ 1780.31 General.**

(a) Applicants are encouraged to contact the Agency processing office early in the planning stages of their project. Agency personnel are available to provide general advice and assistance regarding RUS programs, other funding sources, and types of systems or improvements appropriate for the applicant's needs. The Agency can also provide access to technical engineering and environmental assistance and information resources for other project

development issues such as public information, income surveys, developing rate schedules, system operation and maintenance, and environmental compliance requirements. Throughout the planning, application processing and construction of the project, Agency personnel will work closely and cooperatively with the applicant and their representatives, other State and Federal agencies and technical assistance providers.

(b) The processing office will handle initial inquiries and provide basic information about the program. They are to provide the application, SF 424.2, "Application for Federal Assistance (For Construction)," assist applicants as needed in completing SF 424.2, and in filing a request for intergovernmental review. Federally recognized Indian tribes are exempt from intergovernmental review. The processing office will explain eligibility requirements and meet with the applicant whenever necessary to discuss application processing.

(c) Applications that are not developed in a reasonable period of time taking into account the size and complexity of the proposed project may be removed from the State's active file. Applicants will be consulted prior to taking such action.

(d) Starting with the earliest discussions with prospective applicants or review of applications and continuing throughout application processing, environmental issues must be considered. Throughout the application process the State Environmental Coordinator will discuss with the applicant and their engineer, environmental review requirements for evaluating a project's potential for environment impacts. This should provide flexibility to consider alternatives to the project and develop methods to mitigate identified adverse environmental impacts. The environmental review requirements shall be performed simultaneously and concurrently with the project's engineering design and mitigation measures integrated into the design to minimize any adverse environmental impacts.

#### **§ 1780.32 Timeframes for application processing.**

(a) The processing office will determine if the application is properly assembled. If not, the applicant will be notified within fifteen days as to what additional submittal items are needed.

(b) The processing and approval offices will coordinate their reviews to ensure that the applicant is advised about eligibility and anticipated fund

availability within 45 days of the receipt of a completed application.

**§ 1780.33 Application requirements.**

An initial application consists of the following:

- (a) One copy of a completed SF 424.2;
- (b) A copy of the State intergovernmental comments or one copy of the filed application for State intergovernmental review; and
- (c) Two copies of the preliminary engineering report (PER) for the project. The PER should be completed in accordance with RUS Bulletins 1780-2 through 1780-5.

(1) The PER may be submitted to the processing office prior to the rest of the application material if the applicant desires a preliminary review.

(2) The processing office will forward one copy of the PER with comments and recommendations to the State staff engineer for review upon receipt from the applicant.

(3) The State staff will consult with the applicant's engineer as appropriate to resolve any questions concerning the PER and any environmental concerns. Written comments will be provided by the State staff engineer and State Environmental Coordinator to the processing office to meet eligibility determination time lines.

(d) Written certification that other credit is not available.

(e) Supporting documentation necessary to make an eligibility determination such as financial statements, audits, organizational documents, or existing debt instruments. The processing office will advise applicants regarding the required documents. Applicants that are indebted to RUS will not need to submit documents already on file with the processing office.

(f) Form FmHA 1940-20, "Request for Environmental Information." The applicant should consult with the processing office to determine what information should be included with this form.

(g) The applicants Internal Revenue Service Taxpayer Identification Number (TIN). The TIN will be used by the Agency to assign a case number which will be the applicant's or transferee's TIN preceded by State and County Code numbers. Only one case number will be assigned to each applicant regardless of the number of loans or grants or number of separate facilities, unless an exception is authorized by the National Office.

(h) Other Forms and certifications. Applicants will be required to submit the following items to the processing office, upon notification from the

processing office to proceed with further development of the full application:

(1) Form FmHA 442-7, "Operating Budget";

(2) Form FmHA 1910-11, "Application Certification, Federal Collection Policies for Consumer or Commercial Debts";

(3) Form FmHA 400-1, "Equal Opportunity Agreement";

(4) Form FmHA 400-4, "Assurance Agreement";

(5) Form AD-1047, "Certification Regarding Drug-Free Workplace requirements (Grants) Alternative I for Grantees Other Than Individuals";

(6) Form AD-1049, Certification regarding Drug-Free Workplace Requirements (Grants) Alternative I For Grantees Other Than Individuals;

(7) Certifications for Contracts, Grants, and Loans (Regarding Lobbying); and

(8) Certification regarding prohibited tying arrangements. Applicants that provide electric service must provide the Agency a certification that they will not require users of a water or waste facility financed under these regulations to accept electric service as a condition of receiving assistance.

**§ 1780.34 [Reserved]**

**§ 1780.35 Processing office review.**

Review of the application will usually include the following:

(a) *Nondiscrimination.* Boundaries for the proposed service area must not be chosen in such a way that any user or area will be excluded because of race, color, religion, sex, marital status, age, handicap, or national origin. This does not preclude construction of the project in phases as noted in § 1780.11 as long as it is not done in a discriminatory manner.

(b) *Grant determination.* Grants will be determined by the processing office in accordance with the following provisions and will not result in EDU costs below similar system user cost.

(1) *Maximum grant.* Grants may not exceed the percentages in § 1780.10(c) of this part of the eligible RUS funded project development costs listed in § 1780.9 of this part.

(2) *Debt service.* Applicants will be considered for grant assistance when the debt service portion of the average annual EDU cost, for users in the applicant's service area, exceeds the following percentages of median household income:

(i) 0.5 percent when the median household income of the service area is equal to or below 80% of the statewide nonmetropolitan median income.

(ii) 1.0 percent when the median household income of the service area

exceeds the 0.5 percent requirement but is not more than 100 percent the statewide nonmetropolitan household income.

(3) *Similar system cost.* If the grant determined in paragraph (b)(2) of this section results in an annual EDU cost that is not comparable with similar systems, the Agency will determine a grant amount based on achieving EDU costs that are not below similar system user costs.

(4) *Wholesale service.* When an applicant provides wholesale sales or services on a contract basis to another system or entity, similar wholesale system cost will be used in determining the amount of grant needed to achieve a reasonable wholesale user cost.

(5) *Subsidized cost.* When annual cost to the applicant for delivery of service is subsidized by either the State, commonwealth, or territory, and uniform flat user charges regardless of usage are imposed for similar classes of service throughout the service area, the Agency may proceed with a grant in an amount necessary to reduce such delivery cost to a reasonable level.

(c) *User charges.* The user charges should be reasonable and produce enough revenue to provide for all costs of the facility after the project is complete. The planned revenue should be sufficient to provide for all debt service, debt reserve, operation and maintenance, and if appropriate, additional revenue for facility replacement of short lived assets without building a substantial surplus. Ordinarily, the total debt reserve will be equal to one average annual loan installment which will accumulate at the rate of one-tenth of the total each year.

**§ 1780.36 Approving official review.**

Projects may be obligated as their applications are completed and approved.

(a) *Selection of applications for further processing.* The application and supporting information submitted will be used to determine the applications selected for further development and funding. After completing the review, the approval official will normally select those eligible applications with the highest priority scores for further processing. When authorizing the development of an application for funding, the following will be considered:

(1) Funds available in State allocation;

(2) Anticipated allocation of funds for the next fiscal year; and

(3) Time necessary for applicant to complete the application.

(b) *Lower scoring projects.* (1) In cases where preliminary cost estimates indicate that an eligible, high scoring application is unfeasible or would require an amount of funding from RUS that exceeds either 25 percent of a State's current annual allocation or an amount greater than that remaining in the State's allocation, the approval official may instead select the next lower scoring application for further processing provided the high scoring applicant is notified of this action and given an opportunity to revise the proposal and resubmit it.

(2) If it is found that there is no effective way to reduce costs, the approval official, after consultation with applicant, may submit a request for an additional allocation of funds for the proposed project to the National Office. The request should be submitted during the fiscal year in which obligation is anticipated. Such request will be considered along with all others on hand. A written justification must be prepared and placed in the project file.

**§ 1780.37 Applications determined ineligible.**

If at any time an application is determined ineligible, the processing office will notify the applicant in writing of the reasons. The notification to the applicant will state that an appeal of this decision may be made by the applicant under 7 CFR part 11.

**§ 1780.38 [Reserved]**

**§ 1780.39 Application processing.**

(a) *Processing conference.* Before starting to assemble the full application and after the applicant selects its professional and technical representatives, it should arrange with the processing office for an application conference to provide a basis for orderly application assembly. The processing office will explain program requirements, public information requirements and provide guidance on preparation of items necessary for approval.

(b) *Professional services and contracts related to the facility.* Fees provided for in contracts or agreements shall be reasonable. The Agency shall consider fees to be reasonable if they are not in excess of those ordinarily charged by the profession as a whole for similar work when RUS financing is not involved. Applicants will be responsible for providing the services necessary to plan projects including design of facilities, preparation of cost and income estimates, development of proposals for organization and financing, and overall operation and maintenance of the facility. Contracts or

other forms of agreement between the applicant and its professional and technical representatives are required and are subject to RUS concurrence.

(1) *Engineering services.* Applicants selection of engineering services for project design shall be done by publishing a request for proposal in a newspaper of general circulation. Guidance on entering into an agreement for engineering services is available from the Agency.

(2) *Other professional services.* Professional services of the following may be necessary: Attorney, bond counsel, accountant, auditor, appraiser, environmental professionals, and financial advisory or fiscal agent (if desired by applicant). Guidance on entering into an agreement for legal services is available from the Agency.

(3) *Bond counsel.* Unless otherwise provided by subpart D of this part, public bodies are required to obtain the service of recognized bond counsel in the preparation of evidence of indebtedness.

(3) *Contracts for other services.* Contracts or other forms of agreements for other services including management, operation, and maintenance will be developed by the applicant and presented to the Agency for review and concurrence. Guidance on entering into an management agreement is available from the Agency.

(c) *User estimates.* Applicants dependent on users fees for debt payment or operation and maintenance expenses shall base their income and expense forecast on realistic user estimates. For users presently not receiving service, consideration must be given to the following:

(1) An estimated number of maximum users should not be used when setting user fees and rates since it may be several years before all residents will need service by the system. In establishing rates a realistic number of users should be employed.

(2) Meaningful user cash contributions. The amount of cash contributions required will be set by the applicant and concurred in by the approval official. Contributions should be an amount high enough to indicate sincere interest on the part of the potential user, but not so high as to preclude service to low income families. Contributions ordinarily should be an amount approximating one year's minimum user fee, and shall be paid in full before loan closing or commencement of construction, whichever occurs first. Once economic feasibility is ascertained based on a demonstration of meaningful potential user cash contributions, the

contribution, membership fee or other fees that may be imposed are not a loan requirement under this section. A meaningful user cash contribution is not required when:

(i) The Agency determines that the potential users as a whole in the applicant's service area cannot make cash contributions, or

(ii) State statutes or local ordinances require mandatory use of the system and the applicant or legal entity having such authority agrees in writing to enforce such statutes, or ordinances.

(3) An enforceable user agreement with a penalty clause is required (RUS Bulletin 1780-9 can be used) except:

(i) For users presently receiving service; or

(ii) Where mandatory use of the system is required.

(4) Individual vacant property owners will not be considered when determining project feasibility unless:

(i) The owner has plans to develop the property in a reasonable period of time and become a user of the facility; and

(ii) The owner agrees in writing to make a monthly payment at least equal to the proportionate share of debt service attributable to the vacant property until the property is developed and the facility is utilized on a regular basis. A bond or escrowed security deposit must be provided to guarantee this monthly payment and to guarantee an amount at least equal to the owner's proportionate share of construction costs. If a bond is provided, it must be executed by a surety company that appears on the Treasury Department's most current list (Circular 570, as amended) and be authorized to transact business in the State where the project is located. The guarantee shall be payable jointly to the borrower and the United States of America.

(5) Applicants must provide a positive program to encourage connection by all users as soon as service is available. The program will be available for review and concurrence by the processing office before loan closing or commencement of construction, whichever occurs first. Such a program shall include:

(i) An aggressive information program to be carried out during the construction period. The applicant should send written notification to all signed users in advance of the date service will be available, stating the date users will be expected to have their connections completed, and the date user charges will begin;

(ii) Positive steps to assure that installation services will be available. These may be provided by the contractor installing the system, local

plumbing companies, or local contractors;

(iii) Aggressive action to see that all signed users can finance their connections.

(d) *Interim financing.* For all loans exceeding \$500,000, where funds can be borrowed at reasonable interest rates on an interim basis from commercial sources for the construction period, such interim financing may be obtained so as to preclude the necessity for multiple advances of RUS loan funds. However, the approval official may make an exception when interim financing is cost prohibitive or unavailable. Guidance on informing the private lender of RUS's commitment is available from the Agency. When interim commercial financing is used, the application will be processed, including obtaining construction bids, to the stage where the RUS loan would normally be closed, that is immediately prior to the start of construction. The RUS loan should be closed as soon as possible after the disbursal of all interim funds.

(e) *Reserve requirements.* Provision for the accumulation of necessary reserves over a reasonable period of time will be included in the loan documents.

(1) *General obligation or special assessment bonds.* Ordinarily, the requirements for reserves will be considered to have been met if general obligation or other bonds which pledge the full faith and credit of the political subdivision are used, or special assessment bonds are used, and if such bonds provide for the annual collection of sufficient taxes or assessments to cover debt service.

(2) Other than general obligation or special assessment bonds. Each borrower will be required to establish and maintain reserves sufficient to assure that loan installments will be paid on time, for emergency maintenance, for extensions to facilities, and for replacement of short-lived assets which have a useful life significantly less than the repayment period of the loan. Borrowers issuing bonds or other evidences of debt pledging facility revenues as security will plan their reserve to provide for a annual reserve equal to one-tenth of an average annual loan installment each year for the life of the loan unless prohibited by state law.

(f) *Membership authorization.* For organizations other than public bodies, the membership will authorize the project and its financing. Form FmHA 1942-8, "Resolution of Members or Stockholders" may be used for this authorization. The approval official may, with the concurrence of OGC,

accept the loan resolution without such membership authorization when State statutes and the organization's charter and bylaws do not require such authorization; and

(1) The organization is well established and is operating with a sound financial base; or

(2) The members of the organization have all signed an enforceable user agreement with a penalty clause and have made the required meaningful user cash contribution.

(g) *Insurance.* The purpose of RUS's insurance requirements is to protect the government's financial interest based on the facility financed with loan funds. It is the responsibility of the applicant and not that of RUS to assure that adequate insurance and fidelity or employee dishonesty bond coverage is maintained. The requirements below apply to all types of coverage determined necessary. The approval official may grant exceptions to normal requirements when appropriate justification is provided establishing that it is in the best interest of the applicant and will not adversely affect the government's interest.

(1) Insurance requirements proposed by the applicant will be accepted if the processing office determines that proposed coverage is adequate to protect the government's financial interest. Applicants are encouraged to have their attorney, consulting engineer, and/or insurance provider(s) review proposed types and amounts of coverage, including any deductible provisions.

(2) The use of deductibles may be allowed by RUS providing the applicant has financial resources which would likely be adequate to cover potential claims requiring payment of the deductible.

(3) *Fidelity or employee dishonesty bonds.* Applicants will provide coverage for all persons who have access to funds, including persons working under a contract or management agreement. Coverage may be provided either for all individual positions or persons, or through "blanket" coverage providing protection for all appropriate employees. An exception may be granted by the approval official when funds relating to the facility financed are handled by another entity and it is determined that the entity has adequate coverage or the government's interest would otherwise be adequately protected. The amount of coverage required by RUS will normally approximate the total annual debt service requirements for the RUS loans.

(4) *Property insurance.* Fire and extended coverage will normally be maintained on all structures except as

noted below. Ordinarily, RUS should be listed as mortgagee on the policy when RUS has a lien on the property.

Normally, major items of equipment or machinery located in the insured structures must also be covered.

Exceptions:

(i) Reservoirs, pipelines and other structures if such structures are not normally insured;

(ii) Subsurface lift stations except for the value of electrical and pumping equipment therein.

(5) General liability insurance, including vehicular coverage.

(6) Flood insurance required for facilities located in special flood- and mudslide-prone areas.

(7) *Worker's compensation.* The borrower will carry worker's compensation insurance for employees in accordance with State laws.

(h) The processing office will conduct appropriate environmental reviews in accordance with RUS requirements.

(i) The processing office will assure that appropriate forms and documents listed in RUS Bulletin 1780-6 are complete. Letters of conditions will not be issued unless funds are available.

#### **§ 1780.40 [Reserved]**

#### **§ 1780.41 Loan or grant approval.**

(a) The processing office will submit the following to the approval official:

(1) Form FmHA 1942-45, "Project Summary";

(2) Form FmHA 442-7, "Operating Budget";

(3) Form 442-3, "Balance Sheet" or a financial statement or audit that includes a balance sheet;

(4) Form FmHA 442-14, "Association Project Fund Analysis";

(5) Letter of Conditions";

(6) Form FmHA 1942-46, "Letter of Intent to Meet Conditions";

(7) Form FmHA 1940-1, "Request for Obligation of Funds";

(8) Completed environmental review documents including copies of required publication evidence; and

(9) Grant determination, if applicable.

(b) Approval and applicant notification will be accomplished by mailing to the applicant on the obligation date a copy of Form FmHA 1940-1. The date the applicant is notified is also the date the interest rate at loan approval is established.

#### **§ 1780.42 Transfer of obligations.**

An obligation of funds established for an applicant may be transferred to a different (substituted) applicant provided:

(a) The substituted applicant is eligible and has the authority to receive

the assistance approved for the original applicant; and

(b) The need, purpose(s) and scope of the project for which RUS funds will be used remain substantially unchanged.

**§ 1780.43 [Reserved]**

**§ 1780.44 Actions prior to loan or grant closing or start of construction, whichever occurs first.**

(a) Applicants must provide evidence of adequate insurance and fidelity or employee dishonesty bond coverage.

(b) *Verification of users and other funds.* In connection with a project that involves new users and will be secured by a pledge of user fees or revenues, the processing office will authenticate the number of users. Ordinarily each signed user agreement will be reviewed and checked for evidence of cash contributions. If during the review any indication is received that all signed users may not connect to the system, there will be such additional investigation made as deemed necessary to determine the number of users who will connect to the system.

(c) *Initial compliance review.* An initial compliance review should be completed under subpart E of part 1901 of this chapter.

(d) *Applicant contribution.* An applicant contributing funds toward the project cost shall deposit these funds in its project account before start of construction. Project costs paid with applicant funds prior to the required deposit time shall be appropriately accounted for.

(e) *Excess RUS loan and grant funds.* If there is a significant reduction in project cost, the applicant's funding needs will be reassessed. Decreases in RUS funds will be based on revised project costs and current number of users, however, other factors including RUS regulations used at the time of loan or grant approval will remain the same. Obligated loan or grant funds not needed to complete the proposed project will be deobligated. Any reduction will be applied to grant funds first. In such cases, applicable forms, the letter of conditions, and other items will be revised.

(f) *Evidence of and disbursement of other funds.* Applicants expecting funds from other sources for use in completing projects being partially financed with RUS funds will present evidence of the commitment of these funds from such other sources. An agreement should be reached with all funding sources on how funds are to be disbursed before the start of construction. RUS funds will not be used to pre-finance funds committed to the project from other sources.

(g) *Acquisition of land, easements, water rights, and existing facilities.*

Applicants are responsible for acquisition of all property rights necessary for the project and will determine that prices paid are reasonable and fair. RUS may require an appraisal by an independent appraiser or Agency employee.

(1) *Rights-of-way and easements.* Applicants will obtain valid, continuous and adequate rights-of-way and easements needed for the construction, operation, and maintenance of the facility.

(i) The applicant must provide a legal opinion relative to the title to rights-of-way and easements. Form FmHA 442-22, "Opinion of Counsel Relative to Rights-of-Way," may be used. When a site is for major structures such as a reservoir or pumping station and the applicant is able to obtain only a right-of-way or easement on such a site rather than a fee simple title, the applicant will furnish a title report thereon by the applicant's attorney showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any.

(ii) For user connections funded by RUS, applicants will obtain adequate rights to construct and maintain the connection line or other facilities located on the users property. This right may be obtained through formal easement or user agreements.

(2) *Title for land or existing facilities.* Title to land essential to the successful operation of facilities or title to facilities being purchased, must not contain any restrictions that will adversely affect the suitability, successful operation, security value, or transferability of the facility. Preliminary and final title opinions must be provided by the applicant's attorney. The opinions must be in sufficient detail to assess marketability of the property. Form FmHA 1927-9, "Preliminary Title Opinion," and Form FmHA 1927-10, "Final Title Opinion," may be used to provide the required title opinions.

(i) In lieu of receiving title opinions from the applicant's attorney, the applicant may use a title insurance company. If a title insurance company is used, the company must provide the Agency a title insurance binder, disclosing all title defects or restrictions, and include a commitment to issue a title insurance policy. The policy should be in an amount at least equal to the market value of the property as improved. The title insurance binder and commitment should be provided to the Agency prior to requesting closing instructions. The Agency will be provided a title insurance policy which

will insure RUS's interest in the property without any title defects or restrictions which have not been waived by the Agency.

(ii) The approval official may waive title defects or restrictions, such as utility easements, that do not adversely affect the suitability, successful operation, security value, or transferability of the facility.

(3) *Water rights.* The following will be furnished as applicable:

(i) A statement by the applicant's attorney regarding the nature of the water rights owned or to be acquired by the applicant (such as conveyance of title, appropriation and decree, application and permit, public notice and appropriation and use).

(ii) A copy of a contract with another company or municipality to supply water; or stock certificates in another company which represents the right to receive water.

(4) *Lease agreements.* Where the right of use or control of real property not owned by the applicant is essential to the successful operation of the facility during the life of the loan, such right will be evidenced by written agreements or contracts between the owner of the property and the applicant. Lease agreements shall not contain provisions for restricted use of the site of facility, forfeiture or summary cancellation clauses. Lease agreements shall provide for the right to transfer, encumber, assign and sub-lease without restriction. Lease agreements will ordinarily be written for a term at least equal to the term of the loan. Such lease contracts or agreements will be approved by the approval official with the advice and counsel of OGC, as necessary.

(h) *Obtaining loan closing instructions.* The information required by OGC will be transmitted to OGC with request for closing instructions. Upon receipt of closing instructions, the processing office will discuss with the applicant and its engineer, attorney, and other appropriate representatives, the requirements contained therein and any actions necessary to proceed with closing. State program officials have the option to work with OGC to obtain waivers for closing instructions in certain cases. Closing instructions are not required for grants.

**§ 1780.45 Loan and grant closing and delivery of funds.**

(a) *Loan closing.* Notes and bonds will be completed on the date of loan closing except for the entry of subsequent RUS multiple advances where applicable. The amount of each note will be in multiples of not less than \$100. The

amount of each bond will ordinarily be in multiples of not less than \$1,000.

(1) Form FmHA 440-22, "Promissory Note (Association or Organization)," will ordinarily be used for loans to nonpublic bodies.

(2) Forms FmHA 1942-47, "Loan Resolution (Public Bodies)," or FmHA 1942-9, "Loan Resolution (Security Agreement)" will be adopted by public and other-than-public bodies. These resolutions supplement other provisions in this part.

(3) Subpart D of this part contains instructions for preparation of notes and bonds evidencing indebtedness of public bodies.

(b) *Loan disbursement.*

(1) *Multiple advances.* Multiple advances will be used only for loans in excess of \$100,000. Advances will be made only as needed to cover disbursements required by the borrower over a 30-day period.

(i) Subpart D of this part contains instructions for making multiple advances to public bodies.

(ii) Advances will be requested by the borrower in writing. The request should be in sufficient amounts to pay cost of construction, rights-of-way and land, legal, engineering, interest, and other expenses as needed. The borrower may use Form FmHA 440-11, "Estimate of Funds Needed for 30 Day Period Commencing XXX," to show the amount of funds needed during the 30-day period.

(2) RUS loan funds obligated for a specific purpose, such as the paying of interest, but not needed at the time of loan closing will remain in the Finance Office until needed unless State statutes require all funds to be delivered to the borrower at the time of closing. Loan funds may be advanced to prepay costs under § 1780.9(e)(2)(iv). If all funds must be delivered to the borrower at the time of closing to comply with State statutes, funds not needed at loan closing will be handled as follows:

(i) Deposited in an appropriate borrower account, such as debt service or construction accounts, or

(ii) Deposited in a joint bank account under paragraph (e)(3) of this section.

(c) *Grant closing.* RUS Bulletin 1780-12 "Water or Waste System Grant Agreement" of this part will be completed and executed in accordance with the requirements of grant approval. The grant will be considered closed when RUS Bulletin 1780-12 has been properly executed. Processing or approval officials are authorized to sign the grant agreement on behalf of RUS. For grants that supplement RUS loan funds, the grant should be closed simultaneously with the closing of the

loan. However, when grant funds will be disbursed before loan closing, as provided in paragraph (d)(1) of this section, the grant will be closed not later than the delivery date of the first advance of grant funds.

(d) *Grant disbursements.* RUS policy is not to disburse grant funds from the Treasury until they are actually needed by the applicant. Applicant funds will be disbursed before the disbursal of any RUS grant funds. RUS loan funds will be disbursed before the disbursal of any RUS grant funds except when:

(1) Interim financing of the total estimated amount of loan funds needed during construction is arranged, and

(2) All interim funds have been disbursed, and

(3) RUS grant funds are needed before the RUS loan can be closed.

(e) *Use and accountability of funds.*—

(1) Arrangements will be agreed upon for the prior concurrence by the Agency of the bills or vouchers upon which warrants will be drawn. Form FmHA 402-2, "Statement of Deposits and Withdrawals," or similar form will be used by the Agency to monitor funds. Periodic reviews of these accounts shall be made by the Agency.

(2) Pledge of collateral for grants to nonprofit organizations. Grant funds must be deposited in a bank with Federal Deposit Insurance Corporation (FDIC) insurance coverage. Also, if the balance in the account containing grant funds exceeds the FDIC insurance coverage, the excess amount must be collaterally secured. The pledge of collateral for the excess will be in accordance with Treasury Circular 176.

(3) *Joint RUS/borrower bank account.* RUS funds and any funds furnished by the borrower including contributions to purchase major items of equipment, machinery, and furnishings will be deposited in a joint RUS/borrower bank account if determined necessary by the approval official. When RUS has a Memorandum of Understanding with another agency that provides for the use of joint RUS/borrower accounts, or when RUS is the primary source of funds for a project and has determined that the use of a joint RUS/borrower bank account is necessary, project funds from other sources may also be deposited in the joint bank account. RUS shall not be accountable to the source of the other funds nor shall RUS undertake responsibility to administer the funding program of the other entity. Joint RUS/borrower bank accounts should not be used for funds advanced by an interim lender. When funds exceeds the FDIC insurance coverage, the excess must have a pledge of

collateral in accordance with Treasury Circular 176.

(4) *Payment for project costs.* Project costs will be monitored by the RUS processing office. Invoices will be approved by the borrower and their engineer, as appropriate, and submitted to the processing office for concurrence. The review and acceptance of project costs, including construction pay estimates, by RUS does not attest to the correctness of the amounts, the quantities shown or that the work has been performed under the terms of the agreements or contracts.

(f) *Use of remaining funds.* Funds remaining after all costs incident to the basic project have been paid or provided for will not include applicant contributions. Funds remaining, may be considered in direct proportion to the amounts obtained from each source. Remaining funds will be handled as follows:

(1) Remaining funds may be used for eligible loan or grant purposes, provided the use will not result in major changes to the facility design or project scope and that the purpose of the loan or grant remains the same;

(2) RUS loan funds that are not needed will be applied as an extra payment on the RUS indebtedness unless other disposition is required by the bond ordinance, resolution, or State statute; and

(3) Grant funds not expended under paragraph (f)(1) of this section will be cancelled. Prior to the actual cancellation, the borrower, its attorney and its engineer will be notified of RUS's intent to cancel the remaining funds. The applicant will be given appropriate appeal rights.

(g) *Post review of loan closing.* In order to determine that the loan has been properly closed the loan docket will be reviewed by OGC. The State program official has the option to consult with OGC to obtain waivers of this review.

#### § 1780.46 [Reserved]

#### § 1780.47 Borrower accounting methods, management reporting and audits.

(a) Borrowers are required to provide RUS an annual audit or financial statements.

(b) Method of accounting and preparation of financial statements. Annual organization-wide financial statements must be prepared on the accrual basis of accounting, in accordance with generally accepted accounting principles (GAAP), unless State statutes or regulatory agencies provide otherwise, or an exception is granted by the Agency. An organization

may maintain its accounting records on a basis other than accrual accounting, and make the necessary adjustments so that annual financial statements are presented on the accrual basis.

(c) *Record retention.* Each borrower shall retain all records, books, and supporting material for 3 years after the issuance of the audit or management reports. Upon request, this material will be made available to RUS, Office of the Inspector General (OIG), United States Department of Agriculture (USDA), the Comptroller General, or to their assignees.

(d) *Audits.* All audits are to be performed in accordance with the latest revision of the generally accepted government auditing standards (GAGAS), developed by the Comptroller General of the United States. In addition, the audits are also to be performed in accordance with various Office of Management and Budget (OMB) Circulars. The type of audit each borrower is required to submit will be designated by RUS. Further guidance on preparing an acceptable audit can be obtained from RUS. It is not intended that audits required by this part be separate and apart from audits performed in accordance with State and local laws. To the extent feasible, the audit work should be done in conjunction with those audits. Audits shall be annual unless otherwise prohibited and supplied to the processing office as soon as possible but in no event later than 150 days following the period covered by the audit. OMB Circulars are available in any USDA/RUS office.

(e) *Borrowers exempt from audits.* All borrowers who are exempt from audits, will, within 60 days following the end of each fiscal year, furnish the RUS with annual financial statements, consisting of a verification of the organization's balance sheet and statement of income and expense by an appropriate official of the organization. Forms FmHA 442-2, "Statement of Budget, Income and Equity," and 442-3 may be used.

(f) *Management reports.* These reports will furnish management with a means of evaluating prior decisions and serve as a basis for planning future operations and financial strategies. In those cases where revenues from multiple sources are pledged as security for an RUS loan, two reports will be required; one for the project being financed by RUS and one combining the entire operation of the borrower. In those cases where RUS loans are secured by general obligation bonds or assessments and the borrower combines revenues from all sources, one management report combining all such revenues is acceptable. The following

management data will be submitted by the borrower to the processing office. These reports at a minimum will include a balance sheet and income and expense statement.

(1) *Quarterly reports.* A quarterly management report will be required for the first year for new borrowers and for all borrowers experiencing financial or management problems for one year from the date problems were noted. If the borrower's account is current at the end of the year, the processing office may waive the required reports.

(2) *Annual management reports.* Prior to the beginning of each fiscal year the following will be submitted to the processing office. (If Form FmHA 442-2 is used as the annual management report, enter data in column three only of Schedule 1, and complete all of Schedule 2.)

(i) Two copies of the management reports and proposed "Annual Budget".

(ii) Financial information may be reported on Form FmHA 442-2 which includes Schedule 1, "Statement of Budget, Income and Equity" and Schedule 2, "Projected Cash Flow" or information in similar format.

(iii) A copy of the rate schedule in effect at the time of submission.

(g) *Substitute for management reports.* When RUS loans are secured by the general obligation of the public body or tax assessments which total 100 percent of the debt service requirements, the State program official may authorize an annual audit to substitute for other management reports if the audit is received within 150 days following the period covered by the audit.

#### **§ 1780.48 Regional commission grants.**

Grants are sometimes made by regional commissions for projects eligible for RUS assistance. RUS has agreed to administer such funds in a manner similar to administering RUS assistance.

(a) When RUS has funds in the project, no charge will be made for administering regional commission funds.

(b) When RUS has no loan or grant funds in the project, an administrative charge will be made pursuant to the Economy Act of 1932, as amended (31 U.S.C. 1535). A fee of 5 percent of the first \$50,000 of a regional commission grant and 1 percent of any amount over \$50,000 will be paid RUS by the commission.

(1) *Appalachian Regional Commission (ARC).* RUS Bulletin 1780-23 of this part will be followed in determining the responsibilities of RUS. The ARC Federal Co-chairman and the State program official will provide each

other with the necessary notification and certification.

(2) *Other regional commissions.* Title V of the Public Works and Economic Development Act of 1965 authorizes other commissions similar to ARC. RUS Bulletin 1780-23 of this part will be used to develop a separate project management agreement between RUS and the commission for each project. The agreement should be prepared by the State program official as soon as notification is received that a commission grant will be made and the amount is confirmed.

(c) Regional commission grants should be obligated as soon as possible in accordance with § 1780.41 of this part, except that the announcement procedure referred to in § 1780.41(c) is not applicable. Regional commission grants will be disbursed from the Finance Office in the same manner as RUS funds.

#### **§ 1789.49 Rural or Native Alaskan villages.**

(a) *General.*—(1) This section contains regulations for providing grants to remedy the dire sanitation conditions in rural Alaskan villages using funds specifically made available for this purpose.

(2) Unless specifically modified by this section, grants will be made, processed, and serviced in accordance with this subpart.

(b) *Definitions.*—(1) *Dire sanitation condition.* For the purpose of this section a dire sanitation condition exists where:

(i) Recurring instances of a waterborne communicable disease has been documented; or

(ii) No community-wide water and sewer system exists and individual residents must haul water to or human waste from their homes and/or use pit privies.

(2) *Rural or Native Alaskan village.* A rural or Native Alaskan community which meets the definition of a village under State statutes and does not have a population in excess of 10,000 inhabitants, according to the latest decennial Census of the United States.

(c) *Eligibility.*—(1) The applicant must be a rural or Native Alaskan village.

(2) The median household income of the village cannot exceed 110 percent of the statewide nonmetropolitan household income.

(3) A dire sanitation condition must exist in the village.

(4) The applicant must obtain 50 percent of project development costs from State or local contributions. The local contribution can be from loan funds authorized under subpart A of this part.



(d) *Grant amount.* Grants will be made for up to 50 percent of the project development costs.

(e) *Use of funds.* Grant funds can be used to pay reasonable costs associated with providing potable water or waste disposal services to residents of rural or Native Alaskan villages.

(f) *Construction.* (1) If the State of Alaska is contributing to the project costs, the project does not have to meet the construction requirements of this subpart.

(2) If a loan is made in accordance with this part for part of the local contribution, all of the requirements of this part apply.

#### §§ 1780.50–1780.52 [Reserved]

### Subpart C—Planning, Designing, Bidding, Contracting, Constructing and Inspections.

#### § 1780.53 General.

This subpart is specifically designed for use by owners including the professional or technical consultants or agents who provide assistance and services such as engineering, environmental, inspection, financial, legal or other services related to planning, designing, bidding, contracting, and constructing water and waste disposal facilities. These procedures do not relieve the owner of the contractual obligations that arise from the procurement of these services. For this subpart, an owner is defined as an applicant, borrower, or grantee.

#### § 1780.54 Technical services.

Owners are responsible for providing the engineering and environmental services necessary for planning, designing, bidding, contracting, inspecting, and constructing their facilities. Services may be provided by the owner's "in house" engineer or through contract, subject to Agency concurrence. Engineers must be licensed in the State where the facility is to be constructed.

#### § 1780.55 Preliminary engineering reports.

Preliminary engineering reports (PER)s must conform with customary professional standards. PER guidelines for water, sanitary sewer, solid waste, and storm sewer are available from the Agency.

#### § 1780.56 [Reserved]

#### § 1780.57 Design policies.

Facilities financed by the Agency will be designed and constructed in accordance with sound engineering practices, and must meet the requirements of Federal, State and local agencies.

(a) *Environmental review.* Facilities financed by the Agency must undergo an environmental impact analysis in accordance with RUS requirements. Facility planning and design must not only be responsive to the owner's needs but must consider the environmental impacts of the proposed project. Facility designs shall incorporate and integrate, where practicable, mitigation measures that avoid or minimize adverse environmental impacts. Environmental reviews serve as a means of assessing environmental impacts of project proposals, rather than justifying decisions already made. Applicants may not take any action on a project proposal that will have an adverse environmental impact or limit the choice of reasonable project alternatives being reviewed prior to the completion of the Agency's environmental review.

(b) *Architectural barriers.* All facilities intended for or accessible to the public or in which physically handicapped persons may be employed or reside must be developed in compliance with the Architectural Barriers Act of 1968 (Pub. L. 90–480) as implemented by 41 CFR 101–19.6, section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112) as implemented by 7 CFR, parts 15 and 15b, and Titles II and III of the Americans with Disabilities Act of 1990.

(c) *Energy conservation.* Facility design should consider cost effective energy saving measures.

(d) *Fire protection.* Water facilities should have sufficient capacity to provide reasonable fire protection to the extent practicable.

(e) *Growth capacity.* Facilities should have sufficient capacity to provide for reasonable growth to the extent practicable.

(f) *Water conservation.* Owners are encouraged, when economically feasible, to incorporate water conservation practices into a facility's design. For existing water systems, evidence must be provided showing that the distribution system water losses do not exceed reasonable levels.

(g) *Conformity with state drinking water standards.* No funds shall be made available under this regulation for a water system unless the Agency determines that the water system will make significant progress toward meeting the standards established under title XIV of the Public Health Service Act (commonly known as the 'Safe Drinking Water Act') (42 U.S.C. 300f et seq.).

(h) *Conformity with federal and state water pollution control standards.* No funds shall be made available under this regulation for a water treatment discharge or waste disposal system

unless the Agency determines that the effluent from the system conforms with applicable Federal and State water pollution control standards.

(i) *Combined sewers.* New combined sanitary and storm water sewer facilities will not be financed by the Agency. Extensions to existing combined systems can only be financed when separate systems are impractical.

(j) *Dam safety.* Projects involving any artificial barrier which impounds or diverts water, or the rehabilitation or improvement of such a barrier, must comply with the provisions for dam safety as set forth in the Federal Guidelines for Dam Safety (Government Printing Office stock No. 041–001–00187–5) as prepared by the Federal Coordinating Council for Science, Engineering and Technology.

(k) *Pipe.* All pipe used shall meet current American Society for Testing Materials (ASTM) or American Water Works Association (AWWA) standards.

(l) *Water system testing.* For new water systems or extensions to existing water systems, leakage shall not exceed limits set by either ASTM or AWWA whichever is the more stringent.

(m) *Metering devices.* Water facilities financed by the Agency will have metering devices for each connection. An exception to this requirement may be granted by the State program official when the owner demonstrates that installation of metering devices would be a significant economic detriment and that environmental consideration would not be adversely affected by not installing such devices. Sanitary sewer projects should incorporate water system metering devices whenever practicable.

(n) *Economical service.* The facility's design must provide the most economical service practicable.

#### §§ 1780.58–1780.60 [Reserved]

#### § 1780.61 Construction contracts.

Contract documents must be sufficiently descriptive and legally binding in order to accomplish the work as economically and expeditiously as possible.

(a) *Standard construction contract documents.* If the construction contract documents utilized are not in the format previously approved by the Agency, OGC's review of the construction contract documents will be obtained prior to their use.

(b) *Contract review and concurrence.* The owner's attorney will review the executed contract documents, including performance and payment bonds, and will certify that they are adequate, and that the persons executing these

documents have been properly authorized to do so. The contract documents, engineer's recommendation for award, and bid tabulation sheets will be forwarded to the Agency for concurrence prior to awarding the contract. All contracts will contain a provision that they are not effective until they have been concurred in by the Agency. The State program official or designee is responsible for concurring in construction contracts with the legal advice and guidance of the OGC when necessary.

#### **§ 1780.62 Utility purchase contracts.**

Applicants proposing to purchase water or other utility service from private or public sources shall have written contracts for supply or service which are reviewed and concurred in by the Agency. To the extent practical, the Agency review and concurrence of such contracts should take place prior to their execution by the owner. OGC advice and guidance may be requested. Form FmHA 442-30, "Water Purchase Contract," may be used when appropriate. If the Agency loan will be repaid from system revenues, the contract will be pledged to the Agency as part of the security for the loan. Such contracts will:

(a) Include a commitment by the supplier to furnish, at a specified point, an adequate quantity of water or other service and provide that, in case of shortages, all of the supplier's users will proportionately share shortages.

(b) Set out the ownership and maintenance responsibilities of the respective parties including the master meter if a meter is installed at the point of delivery.

(c) Specify the initial rates and provide a type of escalator clause which will permit rates for the association to be raised or lowered proportionately as certain specified rates for the supplier's regular customers are raised or lowered. Provisions may be made for altering rates in accordance with the decisions of the appropriate State agency which may have regulatory authority.

(d) Cover period of time which is at least equal to the repayment period of the loan. State program officials may approve contracts for shorter periods of time if the supplier cannot legally contract for such period, or if the owner and supplier find it impossible or impractical to negotiate a contract for the maximum period permissible under State law, provided:

(1) The supplier is subject to regulations of the Federal Energy Regulatory Commission or other Federal or State agency whose jurisdiction can

be expected to prevent unwarranted curtailment of supply; or

(2) The contract contains adequate provisions for renewal; or

(3) A determination is made that in the event the contract is terminated, there are or will be other adequate sources available to the owner that can feasibly be developed or purchased.

(e) Set out in detail the amount of connection or demand charges, if any, to be made by the supplier as a condition to making the service available to the owner. However, the payment of such charges from loan funds shall not be approved unless the Agency determines that it is more feasible and economical for the owner to pay such a connection charge than it is for the owner to provide the necessary supply by other means.

(f) Provide for a pledge of the contract to the Agency as part of the security for the loan.

(g) Not contain provisions for:

(1) Construction of facilities which will be owned by the supplier. This does not preclude the use of money paid as a connection charge for construction to be done by the supplier.

(2) *Options for the future sale or transfer.* This does not preclude an agreement recognizing that the supplier and owner may at some future date agree to a sale of all or a portion of the facility.

(h) If it is impossible to obtain a firm commitment for either an adequate quantity or sharing shortages proportionately, a contract may be executed and concurred in provided adequate evidence is furnished to enable the Agency to make a determination that the supplier has adequate supply and/or treatment facilities to furnish its other users and the applicant for the foreseeable future; and

(1) The supplier is subject to regulations of the Federal Energy Regulatory Commission or other Federal or State agency whose jurisdiction can be expected to prevent unwarranted curtailment of supply; or

(2) A suitable alternative supply could be arranged within the repayment ability of the borrower if it should become necessary; or

(3) Concurrence in the proposed contract is obtained from the National Office.

#### **§ 1780.63 Sewage treatment and bulk water sales contracts.**

Owners entering into agreements with private or public parties to treat sewage or supply bulk water shall have written contracts for such service and all such contracts shall be subject to the Agency

concurrence. Section 1780.62 of this part should be used as a guide to prepare such contracts.

#### **§§ 1780.64–1780.66 [Reserved]**

#### **§ 1780.67 Performing construction.**

Owners are encouraged to accomplish construction through contracts with qualified contractors. Owners may accomplish construction by using their own personnel and equipment provided the owners possess the necessary skills, abilities and resources to perform the work and provided a licensed engineer prepares design drawings and specifications and inspects construction and furnishes inspection reports as required by § 1780.76 of this part. Inspection services may be provided by individuals as approved by the State staff engineer. Payments for construction will be handled under § 1780.76(d) of this part.

#### **§ 1780.68 Owner's contractual responsibility.**

This part does not relieve the owner of any responsibilities under its contract. The owner is responsible for the settlement of all contractual and administrative issues arising out of procurement entered into in support of a loan or grant. These include, but are not limited to: source evaluation, protests, disputes, and claims. Matters concerning violation of laws are to be referred to the applicable local, State, or Federal authority.

#### **§ 1780.69 [Reserved]**

#### **§ 1780.70 Owner's procurement regulations.**

Owner's procurement requirements must comply with the following standards:

(a) *Code of conduct.* Owners shall maintain a written code or standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Agency funds. No employee, officer or agent of the owner shall participate in the selection, award, or administration of a contract supported by Agency funds if a conflict of interest, real or apparent, would be involved. Examples of such conflicts would arise when: the employee, officer or agent; any member of their immediate family; their partner; or an organization which employs, or is about to employ, any of the above; has a financial or other interest in the firm selected for the award.

(1) The owner's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of

monetary value from contractors, potential contractors, or parties to subagreements.

(2) To the extent permitted by State or local law or regulations, the owner's standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the owner's officers, employees, agents, or by contractors or their agents.

(b) *Maximum open and free competition.* All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition. Procurement procedures shall not restrict or eliminate competition. Examples of what are considered to be restrictive of competition include, but are not limited to: placing unreasonable requirements on firms in order for them to qualify to do business; noncompetitive practices between firms; organizational conflicts of interest; and unnecessary experience and bonding requirements. In specifying materials, the owner and its consultant will consider all materials normally suitable for the project commensurate with sound engineering practices and project requirements. The Agency shall consider fully any recommendation made by the owner concerning the technical design and choice of materials to be used for a facility. If the Agency determines that a design or material, other than those that were recommended should be considered by including them in the procurement process as an acceptable design or material in the water or waste disposal facility, the Agency shall provide such owner with a comprehensive justification for such a determination. The justification will be documented in writing.

(c) *Owner's review.* Proposed procurement actions shall be reviewed by the owner's officials to avoid the purchase of unnecessary or duplicate items. Consideration should be given to consolidation or separation of procurement items to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency, owners are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(d) Solicitation of offers, whether by competitive sealed bid or competitive negotiation, shall:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product or service to be procured. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used to define the performance or other salient requirements of a procurement. The specific feature of the name brands which must be met by the offeror shall be clearly stated; and

(ii) Clearly specify all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(e) Affirmative steps should be taken to assure that small, minority, and women businesses are utilized when possible as sources of supplies, equipment, construction and services.

(f) *Contract pricing.* Cost plus a percentage of cost method of contracting shall not be used.

(g) *Unacceptable bidders.* The following will not be allowed to bid on, or negotiate for, a contract or subcontract related to the construction of the project:

(1) An engineer as an individual or firm who has prepared plans and specifications or who will be responsible for monitoring the construction;

(2) Any firm or corporation in which the owner's engineer is an officer, employee, or holds or controls a substantial interest;

(3) The governing body's officers, employees, or agents;

(4) Any member of the immediate family or partners in the entities referred to in paragraphs (g)(1), (g)(2) or (g)(3) of this section; or

(5) An organization which employs, or is about to employ, any person in the entities referred to in paragraph (g)(1), (g)(2) or (g)(3) or (g)(4) of this section.

(h) *Contract award.* Contracts shall be made only with responsible parties possessing the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall include but not be limited to matters such as integrity, record of past performance, financial and technical resources, and accessibility to other necessary resources. Contracts shall not be made with parties who are suspended or debarred by any Agency of the United States Government.

## **§ 1780.71 [Reserved]**

## **§ 1780.72 Procurement methods.**

Procurement shall be made by one of the following methods: small purchase procedures; competitive sealed bids (formal advertising); competitive negotiation; or noncompetitive negotiation. Competitive sealed bids (formal advertising) is the preferred procurement method for construction contracts.

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than \$100,000. If small purchase procedures are used for a procurement, written price or rate quotations shall be requested from at least three qualified sources.

(b) *Competitive sealed bids.* In competitive sealed bids (formal advertising), an invitation for sealed bids is publicly advertised and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest, price and other factors considered. When using this method the following shall apply:

(1) The invitation for bids shall be publicly advertised at a sufficient time prior to the date set for opening of bids. The invitation shall comply with the requirements in § 1780.70(d). Bids shall be solicited from an adequate number of qualified sources;

(2) All bids shall be opened publicly at the time and place stated in the invitation for bids;

(3) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. When specified in the bidding documents, factors such as discounts and transportation costs shall be considered in determining which bid is lowest; and

(4) Any or all bids may be rejected by the owner when it is in its best interest.

### **(c) Competitive negotiation.**

Competitive negotiation is required for the procurement of engineering services for project design. In competitive negotiations, proposals are requested from a number of sources and the Request for Proposal is publicized. Negotiations are normally conducted with more than one of the sources submitting offers. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising and where discussions and bargaining with a view to reaching

agreement on the technical quality, price, other terms of the proposed contract and specifications may be necessary. If competitive negotiation is used for a procurement, the following requirements shall apply:

(1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the Procurement. The Request for Proposal shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable;

(2) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required, and their relative importance;

(3) The owner shall provide mechanisms for technical evaluation of the proposals received, determination of responsible offerors for the purpose of written or oral discussions, and selection for contract award;

(4) Award may be made to the responsible offeror whose proposal will be most advantageous to the owner, price and other factors considered. Unsuccessful offerors should be promptly notified; and

(5) Owners may utilize competitive negotiation procedures for procurement of other professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiations of fair and reasonable compensation.

(d) *Noncompetitive negotiation.* Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is not feasible under small purchase or competitive sealed bids. Circumstances under which a contract may be awarded by noncompetitive negotiations are limited to the following:

(1) The item is available only from a single source; or

(2) There exists a public exigency or emergency and the urgency for the requirement will not permit a delay incident to competitive solicitation; or

(3) After solicitation of a number of sources, competition is determined inadequate; or

(4) No acceptable bids have been received after formal advertising; or

(5) The procurement is for professional services other than design engineering; or

(6) The aggregate amount does not exceed \$100,000.

#### **§ 1780.73 [Reserved]**

#### **§ 1780.74 Contracts awarded prior to applications.**

Owners awarding construction or other procurement contracts prior to filing an application, must provide evidence that is satisfactory to the Agency that the contract was entered into without intent to circumvent the requirements of Agency regulations.

(a) *Modifications.* The contract shall be modified to conform with the provisions of this part. Where this is not possible, modifications will be made to the extent practicable and, as a minimum, the contract must comply with all State and local laws and regulations as well as statutory requirements and executive orders related to the Agency financing. When all construction is complete and it is impracticable to modify the contracts, the owner must provide the certification required by paragraph (d) of this section.

(b) *Consultant's certification.* Provide a certification by an engineer, licensed in the State where the facility is constructed, that any construction performed complies fully with the plans and specifications.

(c) *Owner's certification.* Provide a certification by the owner that the contractor has complied with applicable statutory and executive requirements related to Agency financing for construction already performed.

#### **§ 1780.75 Contract provisions.**

In addition to provisions required for a valid and legally binding contract, any recipient of Agency funds shall include the following contract provisions in all contracts.

(a) *Remedies.* Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. A realistic liquidated damage provision should also be included.

(b) *Termination.* All contracts exceeding \$10,000, shall contain suitable provisions for termination by the owner including the manner by which it will be affected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) *Surety.* In all contracts for construction or facility improvements

exceeding \$100,000, the owner shall require bonds or cash deposit in escrow assuring performance and payment each in the amount of 100 percent of the contract cost. The surety will be in the form of performance bonds and payment bonds. For contracts of lesser amounts, the owner may require surety. When a surety is not provided, contractors will furnish evidence of payment in full for all materials, labor, and any other items procured under the contract. Form FmHA 1924-10, "Release by Claimants," and Form FmHA 1924-9, "Certificate of Contractor's Release," may be used for this purpose. Companies providing performance bonds and payment bonds must hold a certificate of authority as an acceptable surety on Federal bonds as listed in Treasury Circular 570 as amended and be legally doing business in the State where the facility is located.

(d) *Equal Employment Opportunity.* All contracts awarded in excess of \$10,000 by owners shall contain a provision requiring compliance with Executive Order 11246, entitled, "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by Department of Labor regulations 41 CFR part 60.

(e) *Anti-kickback.* All contracts for construction shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874). This Act provides that each contractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which they are otherwise entitled. The owner shall report suspected or reported violations to the Agency.

(f) *Records.* All negotiated contracts (except those of \$10,000 or less) awarded by owners shall include a provision to the effect that the owner, the Agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to a specific Federal loan or grant program for the purpose of making audits, examinations, excerpts, and transcriptions. Owners shall require contractors to maintain all required records for 3 years after making final payment and all other pending matters are closed.

(g) *State Energy Conservation Plan.* Contracts shall incorporate mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(h) *Change orders.* The construction contract shall require that all contract change orders be concurred in by the Agency.

(i) *Agency concurrence.* All contracts must contain a provision that they shall not be effective unless and until the State program official or designee concurs in writing.

(j) *Retainage.* All construction contracts shall contain adequate provisions for retainage. No payments will be made that would deplete the retainage nor place in escrow any funds that are required for retainage nor invest the retainage for the benefit of the contractor. The retainage shall not be less than an amount equal to 5 percent of an approved partial payment estimate until the project is substantially complete and accepted by the owner, consulting engineer and Agency. The contract must provide that additional amounts may be retained if the job is not proceeding satisfactorily.

(k) *Other compliance requirements.* Contracts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency (EPA) regulations 40 CFR part 15, which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the Agency and to the U.S. Environmental Protection Agency, Assistant Administrator for Enforcement. Solicitations and contract provisions shall include the requirements of 4 CFR 15.4(c) as set forth in RUS Bulletin 1780-14 of this part.

#### **§ 1780.76 Contract administration.**

Owners shall be responsible for maintaining a contract administration system to monitor the contractors' performance and compliance with the terms, conditions, and specifications of the contracts.

(a) *Preconstruction conference.* Prior to beginning construction, the owner will schedule a preconstruction conference where the consulting engineer will review the planned development with the Agency, owner, resident inspector, attorney, contractor, and other interested parties. The conference will thoroughly cover applicable items included in Form FmHA 1924-16, "Record of Preconstruction Conference," and the

discussions and agreements will be documented.

(b) *Monitoring reports.* The owner is required to monitor construction and provide a report to the Agency giving a full explanation under the following circumstances:

(1) Reasons why approved construction schedules were not met.

(2) Analysis and explanation of cost overruns and how payment is to be made for the same; and

(3) If events occur which have a significant impact upon the project.

(c) *Inspection.* Full-time resident inspection is required for all construction unless a written exception is made by the Agency upon written request of the owner. Unless otherwise agreed, the resident inspector will be provided by the consulting engineer. Prior to the preconstruction conference, the consulting engineer will submit a resume of qualifications of the resident inspector to the owner and to the Agency for acceptance in writing. If the owner provides the resident inspector, it must submit a resume of the inspector's qualifications to the project engineer and the Agency for acceptance in writing prior to the preconstruction conference. The resident inspector will work under the technical supervision of the project engineer and the role and responsibilities will be defined in writing.

(d) *Inspector's daily diary.* The resident inspector will maintain a record of the daily construction progress in the form of a daily diary and daily inspection reports. The daily entries shall be made available to the Agency personnel and will be reviewed during project inspections. The original complete set will be furnished to the owner upon completion of construction. RUS Bulletin 1780-18 is available from the Agency for preparing daily inspection reports.

(e) *Payment for Construction.* Form FmHA 1924-18, "Partial Payment Estimate," or other similar form may be used for construction payments. If Form 1924-18 is not used, prior concurrence by the State staff engineer must be obtained.

(1) Payment of contract retainage will not be made until such retainage is due and payable under the terms of the contract.

(2) Invoices for the payment of construction costs must be approved by the owner, project engineer and concurred in by the Agency.

(3) The review and acceptance of project costs, including construction payment estimates by the Agency shall not attest to the correctness of the amounts, the quantities shown, or that

the work has been performed under the terms of agreements or contracts.

(f) *Prefinal inspections.* A prefinal inspection will be made by the owner, resident inspector, project engineer, contractor, representatives of other agencies involved, and Agency representative (preferably the State staff engineer or designee). The inspection results will be recorded by the project engineer and a copy provided to all interested parties.

(g) *Final inspection.* A final inspection will be made by the Agency before final payment is made.

(h) *Changes in development plans.* (1) Changes in development plans shall be reviewed and approved by the Agency provided:

(i) Funds are available to cover any additional costs; and

(ii) The change is for an authorized loan or grant purpose; and

(iii) It will not adversely affect the soundness of the facility operation or the Agency's security; and

(iv) The change is within the scope of the contract.

(2) Changes will be recorded on Form FmHA 1924-7, "Contract Change Order," or other similar form if approved by the State program official or designee. Regardless of the form, change orders must be approved by the State program official or designee.

(3) Changes should be accomplished only after Agency approval and shall be authorized only by means of contract change order. The change order will include items such as:

(i) Any changes in labor and material;

(ii) Changes in facility design;

(iii) Any decrease or increase in quantities based on final measurements that are different from those shown in the bidding schedule; and

(iv) Any increase or decrease in the time to complete the project.

(4) All changes shall be recorded on chronologically numbered contract change orders as they occur. Change orders will not be included in payment estimates until approved by all parties.

#### **§§ 1780.77-1780.79 [Reserved]**

#### **Subpart D—Information Pertaining to Preparation of Notes or Bonds and Bond Transcript Documents for Public Body Applicants**

##### **§ 1780.80 General.**

This subpart includes information for use by public body applicants in the preparation and issuance of evidence of debt (bonds, notes, or debt instruments, herein referred to as bonds) and other necessary loan documents.

**§ 1780.81 Policies related to use of bond counsel.**

The applicant is responsible for preparation of bonds and bond transcript documents. The applicant will obtain the services and opinion of recognized bond counsel experienced in municipal financing with respect to the validity of a bond issue, except for issues of \$100,000 or less. With prior approval of the approval official, the applicant may elect not to use bond counsel. Such issues will be closed in accordance with the following:

(a) The applicant must recognize and accept the fact that application processing may require additional legal and administrative time;

(b) It must be established that not using bond counsel will produce significant savings in total legal costs;

(c) The local attorney must be able and experienced in handling this type of legal work;

(d) The applicant must understand that it will likely have to obtain an opinion from bond counsel at its expense should the Agency require refinancing of the debt;

(e) Bonds will be prepared in accordance with this regulation and conform as closely as possible to the preferred methods of preparation stated in section 1780.94; and

(f) Closing instructions must be issued by OGC.

**§ 1780.82 [Reserved]****§ 1780.83 Bond transcript documents.**

Any questions relating to Agency requirements should be discussed with Agency representatives. Bond counsel or local counsel, as appropriate, must furnish at least two complete sets of the following to the applicant, who will furnish one complete set to the Agency:

(a) Copies of all organizational documents;

(b) Copies of general incumbency certificate;

(c) Certified copies of minutes or excerpts from all meetings of the governing body at which action was taken in connection with the authorizing and issuing of the bonds;

(d) Certified copies of documents evidencing that the applicant has complied fully with all statutory requirements incident to calling and holding a favorable bond election, if one is necessary;

(e) Certified copies of the resolutions, ordinances, or other documents such as the bond authorizing resolutions or ordinances and any resolution establishing rates and regulating use of facility, if such documents are not included in the minutes furnished;

(f) Copies of the official Notice of Sale and the affidavit of publication of the Notice of Sale when State statute requires a public sale;

(g) Specimen bond, with any attached coupons;

(h) Attorney's no-litigation certificate;

(i) Certified copies of resolutions or other documents pertaining to the bond award;

(j) Any additional or supporting documents required by bond counsel;

(k) For loans involving multiple advances of Agency loan funds, a preliminary approving opinion of bond counsel (or local counsel if no bond counsel is involved) if a final unqualified opinion cannot be obtained until all funds are advanced. The preliminary opinion for the entire issue shall be delivered at or before the time of the first advance of funds. It will state that the applicant has the legal authority to issue the bonds, construct, operate and maintain the facility, and repay the loan, subject only to changes occurring during the advance of funds, such as litigation resulting from the failure to advance loan funds, and receipt of closing certificates.

(l) Final unqualified approving opinion of bond counsel, (and preliminary approving opinion, if required) or local counsel if no bond counsel is involved, including an opinion as to whether interest on bonds will be exempt from Federal and State income taxes. With approval of the State program official, a final opinion may be qualified to the extent that litigation is pending relating to Indian claims that may affect title to land or validity of the obligation. It is permissible for such opinion to contain language referring to the last sentence of section 306 (a)(1) or to Section 309A (h) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926 (a)(1) or 1929a (h)).

**§§ 1780.84 and 1780.86 [Reserved]****§ 1780.87 Permanent instruments for Agency loans.**

Agency loans will be evidenced by an instrument determined legally sufficient and in accordance with the following order of preference:

(a) *First preference—Form FmHA 440-22, "Promissory Note"*. Refer to paragraph (b) of this section for methods of various frequency payment calculations; and

(b) *Second preference—single instruments with amortized installments*. A single instrument providing for amortized installments which follows Form FmHA 440-22 as closely as possible. The full amount of the loan must show on the face of the

instrument, and there must be provisions for entering the date and amount of each advance on the reverse or an attachment. When principal payments are deferred, the instrument will show that "interest only" is due on interest-only installment dates, rather than specific dollar amounts. The payment period including the "interest only" installment cannot exceed 40 years, the useful life of the facility, or State statute limitations, whichever occurs first. The amortized installment, computed as follows, will be shown as due on installment dates thereafter.

(1) *Monthly payments*. Multiply by twelve the number of years between the due date of the last interest-only installment and the final installment to determine the number of monthly payments. When there are no interest-only installments, multiply by twelve the number of years over which the loan is amortized. Then multiply the loan amount by the amortization factor and round to the next higher dollar.

(2) *Semiannual payments*.—Multiply by two the number of years between the due date of the last interest-only installment and the due date of the final installment to determine the correct number of semiannual periods. When there are no interest-only installments, multiply by two the number of years over which the loan is amortized. Then multiply the loan amount by the applicable amortization factor.

(3) *Annual payments*. Subtract the due date of the last interest-only installment from the due date of the final installment to determine the number of annual payments. When there are no interest-only installments, the number of annual payments will equal the number of years over which the loan is amortized. Then multiply the loan amount by the applicable amortization factor and round to the next higher dollar.

(c) *Third preference—single instruments with installments of principal plus interest*. If a single instrument with amortized installments is not legally permissible, use a single instrument providing for installments of principal plus interest accrued on the principal balance. For bonds with semiannual interest and annual principal, the interest is calculated by multiplying the principal balance times the interest rate and dividing this figure by two. Principal installments are to be scheduled so that total combined interest and principal payments closely approximate amortized payments.

(1) The repayment terms concerning interest only installments described in paragraph (b) of this section apply.

(2) The instrument shall contain in substance provisions indicating:

(i) Principal maturities and due dates;  
(ii) Regular payments shall be applied first to interest due through the next principal and interest installment due date and then to principal due in chronological order stipulated in the bond; and

(iii) Payments on delinquent accounts will be applied in the following sequence:

- (A) billed delinquent interest;
- (B) past due interest installments;
- (C) past due principal installments;
- (D) interest installment due; and
- (E) principal installment due.

(d) *Fourth preference—serial bonds with installments of principal plus interest.* If instruments described under the first, second, and third preferences are not legally permissible, use serial bonds with a bond or bonds delivered in the amount of each advance. Bonds will be numbered consecutively and delivered in chronological order. Such bonds will conform to the minimum requirements of § 1780.94 of this part. Provisions for application of payments will be the same as those set forth in paragraphs (c)(2)(ii) of this section.

(e) *Coupon bonds.* Coupon bonds will not be used unless required by State statute. Such bonds will conform to the minimum requirements of § 1780.94 of this part.

#### § 1780.88 [Reserved]

#### § 1780.89 Multiple advances of Agency funds using permanent instruments.

Where interim financing from commercial sources is not used, Agency loan proceeds will be disbursed on an "as needed by borrower" basis in amounts not to exceed the amount needed during 30-day periods.

#### § 1780.90 Multiple advances of Agency funds using temporary debt instruments.

When none of the instruments described in § 1780.87 of this part are legally permissible or practical, a bond anticipation note or similar temporary debt instrument may be used. The debt instrument will provide for multiple advances of Agency funds and will be for the full amount of the Agency loan. The instrument will be prepared by bond counsel, or local counsel if bond counsel is not involved, and approved by the State program official and OGC. At the same time the Agency delivers the last advance, the borrower will deliver the permanent bond instrument and the canceled temporary instrument will be returned to the borrower. The approved debt instrument will show at least the following:

(a) The date from which each advance will bear interest;

(b) The interest rate as determined by § 1780.13 of this part;

(c) A payment schedule providing for interest on outstanding principal at least annually; and

(d) A maturity date which shall be no earlier than the anticipated issuance date of the permanent instruments and no longer than the 40-year statutory limit.

#### §§ 1780.91–1780.93 [Reserved]

#### § 1780.94 Minimum bond specifications.

The provisions of this paragraph are minimum specifications only and must be followed to the extent legally permissible.

(a) *Type and denominations.* Bond resolutions or ordinances will provide that the instruments be either a bond representing the total amount of the indebtedness or serial bonds in denominations customarily accepted in municipal financing (ordinarily in multiples of not less than \$1,000). Single bonds may provide for repayment of principal plus interest or amortized installments. Amortized installments are preferred by the Agency.

(b) *Bond registration.* Bonds will contain provisions permitting registration for both principal and interest. Bonds purchased by the Agency will be registered in the name of "United States of America" and will remain so registered at all times while the bonds are held or insured by the Government. The Agency address for registration purposes will be that of the Finance Office.

(c) *Size and quality.* Size of bonds and coupons should conform to standard practice. Paper must be of sufficient quality to prevent deterioration through ordinary handling over the life of the loan.

(d) *Date of bond.* Bonds will normally be dated as of the day of delivery. However, the borrower may use another date if approved by the Agency. Loan closing is the date of delivery of the bonds or the date of delivery of the first bond when utilizing serial bonds, regardless of the date of delivery of the funds. The date of delivery will be stated in the bond if different from the date of the bond. In all cases, interest will accrue from the date of delivery of the funds.

(e) *Payment date.* Loan payments will be scheduled to coincide with income availability and be in accordance with State law.

(1) If income is available monthly, monthly payments are recommended

unless precluded by State law. If income is available quarterly or otherwise more frequently than annually, payments must be scheduled on such basis.

However, if State law only permits principal plus interest (P&I) type bonds, annual or semiannual payments will be used.

(2) The payment schedule will be enumerated in the evidence of debt, or if that is not feasible, in a supplemental agreement.

(3) If feasible, the first payment will be scheduled one full month, or other period, as appropriate, from the date of loan closing or any deferment period. Due dates falling on the 29th, 30th, and 31st day of the month will be avoided. When principal payments are deferred, interest-only payments will be scheduled at least annually.

(f) *Extra payments.* Extra payments are derived from the sale of basic chattel or real estate security, refund of unused loan funds, cash proceeds of property insurance and similar actions which reduce the value of basic security. At the option of the borrower, regular facility revenue may also be used as extra payments when regular payments are current. Unless otherwise established in the note or bond, extra payments will be applied as follows:

(1) For loans with amortized debt instruments, extra payments will be applied first to interest accrued to the date of receipt of the payment and second to principal.

(2) For loans with debt instruments with P&I installments, the extra payment will be applied to the final unpaid principal installment.

(3) For borrowers with more than one loan, the extra payment will be applied to the account secured by the lowest priority of lien on the property from which the extra payments was obtained. Any balance will be applied to other Agency loans secured by the property from which the extra payment was obtained.

(4) For assessment bonds, see paragraph (m) of this section.

(g) The place of payments on bonds purchased by the Agency will be determined by the Agency.

(h) *Redemptions.* Bonds will normally contain customary redemption provisions. However, no premium will be charged for early redemption on any bonds held by the Government.

(i) *Additional revenue bonds.* Parity bonds may be issued to complete the project. Otherwise, parity bonds may not be issued unless acceptable documentation is provided establishing that net revenues for the fiscal year following the year in which such bonds are to be issued will be at least 120



percent of the average annual debt serviced requirements on all bonds outstanding, including the newly-issued bonds. For purposes of this section, net revenues are, unless otherwise defined by State statute, gross revenues less essential operation and maintenance expenses. This limitation may be waived or modified by the written consent of bondholders representing 75 percent of the then-outstanding principal indebtedness. Junior and subordinate bonds may be issued in accordance with the loan resolution.

(j) *Precautions.* The following types of provisions in debt instruments should be avoided:

(1) Provisions for the holder to manually post each payment to the instrument.

(2) Provisions for returning the permanent or temporary debt instrument to the borrower in order that it, rather than the Agency, may post the date and amount of each advance or repayment on the instrument.

(3) Provisions that amend covenants contained in Forms FmHA 1942-47 or FmHA 1942-9.

(4) *Defeasance provisions in loan or bond resolutions.* When a bond issue is defeased, a new issue is sold which supersedes the contractual provisions of the prior issue, including the refinancing requirement and any lien on revenues. Since defeasance in effect precludes the Agency from requiring refinancing before the final maturity date, it represents a violation of the statutory refinancing requirement; therefore, it is disallowed. No loan documents shall include a provision of defeasance.

(k) *Assessment bonds.* When security includes special assessment to be collected over the life of the loan, the instrument should address the method of applying any payments made before they are due. It may be desirable for such payments to be distributed over remaining payments due, rather than to be applied in accordance with normal procedures governing extra payments, so that the account does not become delinquent.

(l) *Multiple debt instruments.* The following will be adhered to when preparing debt instruments:

(1) When more than one loan type is used in financing a project, each type of loan will be evidenced by a separate debt instrument or series of debt instruments;

(2) Loans obligated in different fiscal years and those obligated with different terms in the same fiscal year will be evidenced by separate debt instruments;

(3) Loans obligated for the same loan type in the same fiscal year with the

same term may be combined in the same debt instrument;

(4) Loans obligated in the same fiscal year with different interest rates that will be closed at the same interest rate may be combined in the same debt instrument.

#### **§ 1780.95 Public bidding on bonds.**

Bonds offered for public sale shall be offered in accordance with State law and in such a manner to encourage public bidding. The Agency will not submit a bid at the advertised sale unless required by State law, nor will reference to Agency's rates and terms be included. If no acceptable bid is received, the Agency will negotiate the purchase of the bonds.

#### **§§ 1780.96-1780.100 [Reserved]**

Dated: September 4, 1996.

Inga Smulkstys,

*Acting Under Secretary for Rural Development.*

[FR Doc. 96-23082 Filed 9-11-96; 8:45 am]

BILLING CODE 3410-15-P

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 71**

#### **[Airspace Docket No. 96-AGL-12]**

#### **Establishment of Class E Airspace; Gettysburg, SD, Gettysburg Municipal Airport**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish Class E airspace at Gettysburg, SD. A Global Positioning System (GPS) standard instrument approach procedure (SIAP) to Runway 31 has been developed for Gettysburg Municipal Airport. Controlled airspace extending upward from 700 to 1200 feet above ground level (AGL) is needed to contain aircraft executing the approach. The intended affect of this proposal is to provide segregation of aircraft using instrument approach procedures in instrument conditions from other aircraft operating in visual weather conditions.

**DATES:** Comments must be received on or before October 4, 1996.

**ADDRESSES:** Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, AGL-7, Rules Docket No. 96-AGL-12, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Assistant Chief Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois. An informal docket may also be examined during normal business hours at the Air Traffic Division, Operations Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

**FOR FURTHER INFORMATION CONTACT:** John A. Clayborn, Air Traffic Division, Operations Branch, AGL-530, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294-7568.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provides the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 96-AGL-12." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of the Assistant Chief Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### **Availability of NPRM's**

Any person may obtain a copy of the Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of