§ 223.113 [Revised]

3. Revise § 223.113 to read as follows:

§ 223.113 Modification of contracts to prevent environmental damage or to conform to forest plans.

Timber sale contract, permits, and other such instruments may be modified to prevent environmental damage or to make them consistent with amendments or revisions of land and resource management plans adopted subsequent to award or issuance of a timber sale contract, permit, or other such instrument. Compensation to the purchaser, if any, for modifications to a contract shall be made in accordance with provisions set forth in the timber sale contract. When determining compensation under a contract, timber payment rates shall be redetermined in accordance with appraisal methods in § 223.60 of this subpart.

Dated: November 13, 1996.

David G. Unger,

Associate Chief.

[FR Doc. 96–31232 Filed 12–6–96; 8:45 am]

BILLING CODE 3410–11–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL–5659–9]

RIN 2040–AC78

Water Quality Standards for Pennsylvania

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes water quality standards applicable to waters of the United States in the Commonwealth of Pennsylvania. EPA is promulgating this rule pursuant to Section 303(c)(4) of the Clean Water Act (CWA). This rule establishes an antidegradation policy for Pennsylvania, making available additional water quality protection than currently provided by the Commonwealth's antidegradation policy including the ''Special Protection Waters Program,'' which EPA disapproved in part in 1994.

EFFECTIVE DATE: January 8, 1997.

ADDRESSES: This action's administrative record is available for review and copying at Water Protection Division, EPA, Region 3, 841 Chestnut Building, Philadelphia, PA 19107. For access to the docket materials, call Denise Hakowski at 215–566–5726 for an appointment. A reasonable fee will be charged for copies.

FOR FURTHER INFORMATION CONTACT: Evelyn S. MacKnight, Chief, PA/DE Branch, 3WP11, Office of Watersheds, Water Protection Division, EPA, Region 3, 841 Chestnut Building, Philadelphia, PA, telephone: 215–566–5717.

SUPPLEMENTARY INFORMATION:

A. Potentially Affected Entities

This action will establish a Federal antidegradation policy applicable to waters of the United States in the Commonwealth of Pennsylvania. Entities potentially affected by this action are those dischargers (e.g., industries or municipalities) that may request authorization for a new or increased discharge of pollutants to waters of the United States in Pennsylvania. This list is not intended to be exhaustive, but rather a guide for readers regarding entities potentially affected by this action. Other types of entities not listed could also potentially be affected. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Background

Under section 303 (33 U.S.C. 1313) of the Clean Water Act (CWA), States are required to develop water quality standards for waters of the United States within the State. States are required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards. 33 U.S.C. 1313(c). States are required to submit the results of their triennial review of their water quality standards to EPA. EPA reviews the submittal and makes a determination whether to approve or disapprove any new or revised standards.

Minimum elements which must be included in each State's water quality standards regulations include: use designations for all waterbodies in the State, water quality criteria sufficient to protect those designated uses, and an antidegradation policy consistent with EPA's water quality standards regulations (40 CFR 131.6). States may also include in their standards policies generally affecting the standards' application and implementation (40 CFR 131.13). These policies are subject to EPA review and approval (40 CFR 131.6(f), 40 CFR 131.13).

This rule involves antidegradation. 40 CFR 131.12 requires States to adopt antidegradation policies that provide three levels of protection of water quality, and to identify implementation methods. Under 40 CFR 131.12(a)(1), referred to as Tier 1, existing instream water uses and the level of water quality necessary to protect the existing uses are to be maintained and protected. Existing uses are those uses that existed on or since November 28, 1975. Tier 1 represents the ''floor'' of water quality protection afforded to all waters of the United States. Under 40 CFR 131.12(a)(2), referred to as Tier 2 or High Quality Waters, where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after public participation and intergovernmental review, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources.

Finally, under 40 CFR 131.12(a)(3), known as Tier 3 or Outstanding National Resource Waters (ONRWs), where a State determines that high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

Section 303(c)(4) (33 U.S.C. 1313(c)(4)) of the CWA authorizes EPA to promulgate water quality standards for a State when EPA disapproves the State's new or revised water quality standards, or in any case where the Administrator determines that a new or revised water quality standard is needed in a State to meet the CWA's requirements.

In June 1994, EPA Region 3 disapproved portions of Pennsylvania's standards pursuant to Section 303© of the CWA and 40 CFR 131.21, including portions of the antidegradation policy, known in Pennsylvania as the Special Protection Waters Program, relating to protection of existing uses, criteria used to define High Quality Waters and protection afforded to Exceptional Value Waters as equivalent to ONRWs. For a detailed review of the correspondence and discussions between the Pennsylvania Department of Environmental Protection (''Pennsylvania'' or ''the Department'') resulting from EPA's disapproval, see

the August 29, 1996, Federal Register proposal of this rule. (61 FR 45379).

As a result of EPA's disapproval, Pennsylvania initiated a regulatory negotiation, or ''reg-neg,'' to reassess its antidegradation policy, or Special Protection Waters Program, while involving stakeholders in the process. EPA participated in the reg-neg process in an advisory capacity and informed the reg-neg group of this rulemaking action.

Based on the reg-neg process and an interim report produced by the group, the Department announced in the *Pennsylvania Bulletin*, May 4, 1996, the availability of proposed changes to the antidegradation provisions of the Commonwealth's water quality standards. The reg-neg group's final meeting was on August 1, 1996, where the stakeholders declared that a group consensus could not be reached, disbanded and issued two separate reports, representing the opinions of the conservation stakeholders and the regulated community stakeholders respectively. The Department is currently developing a new regulatory proposal using these reports and input it received in response to its May 4, 1996 *Pennsylvania Bulletin* notice.

On April 18, 1996, concerned with the time that had elapsed since EPA's disapproval, the United States District Court for the Eastern District of Pennsylvania ordered EPA to prepare and publish proposed regulations setting forth revised or new water quality standards for the Commonwealth's antidegradation provisions disapproved in June 1994. *Raymond Proffitt Foundation* v. *Browner*, Civil Docket No. 95–0861 (E.D.Pa). The court stated that EPA was not to delay its rulemaking any more to accommodate the Commonwealth's schedule.

Consistent with the Court's order, on August 29, 1996, EPA published a Federal Register notice proposing standards related to Pennsylvania's antidegradation policy (61 FR 45379). Since the Commonwealth has not adopted revised water quality standards which EPA determined are in accordance with the CWA, an action that would have made EPA's rulemaking unnecessary, EPA is promulgating this rule in accordance with Section 303(c)(3) and (4) of the CWA.

EPA's long-standing practice in the water quality standards program has been to withdraw the Federal rule if, and when, a State subsequently adopts rules that are then approved by EPA. Thus, notwithstanding today's action, EPA strongly encourages the Commonwealth to pursue its on-going effort to adopt appropriate standards which will make this Federally promulgated rule unnecessary.

C. Summary of Final Rule and Response to Major Comments

A description of EPA's final action, and a summary of major comments regarding the proposal and EPA's response, are set forth below. Additional comments and responses to comments are in the administrative record.

1. Ensuring That Existing Uses Will Be Maintained and Protected as Required Under 40 CFR 131.12(a)(1)

Pennsylvania's regulation at 25 PA Code Sec. 93.4 explicitly protects existing uses only through Pennsylvania's designated use process. That process requires that when an evaluation of technical data establishes that a waterbody attains the criteria for an existing use that is more protective of the waterbody than the current designated use, that waterbody will be protected at its existing use until the conclusion of a rulemaking action. After the rulemaking action the waterbody will be protected only at its designated use and in some cases the designated use will not adequately protect the existing use. For a more detailed discussion of EPA's disapproval of this provision and Pennsylvania's resulting actions, see the preamble discussion in the August 29, 1996, proposal, 61 FR 45379.

In order to ensure that the standards governing Tier 1 antidegradation protection in Pennsylvania are consistent with the CWA, EPA proposed to promulgate for Pennsylvania language that ensures existing uses shall be maintained and protected in accordance with 40 CFR 131.12(a)(1). The comments EPA received regarding Federal Tier 1 protection were generally supportive of EPA's proposed action and raised no significant issues. See the Response to Comments document in the Administrative Record to this rule for responses to specific comments.

This final rule is promulgating our proposal without changes. This regulation will be the applicable Federal antidegradation Tier 1 policy in Pennsylvania for purposes of the CWA and, to the extent it is more stringent, supersedes Pennsylvania Regulations at 25 PA Code 93.4(d)(1). EPA is taking this action to protect all existing uses, including providing protection for existing uses that may be more specific, or require more protection, than Pennsylvania's designated uses.

Pennsylvania has recently proposed changes to its antidegradation policy that would protect existing uses without the limitations imposed by its use designation process. See 25 *Pennsylvania Bulletin* 2131–32 (May 4, 1996). If Pennsylvania promulgates this proposal as a final rule and it is approved by EPA, EPA would expect to withdraw the part of the Federal rule relating to Tier 1.

2. Ensuring That Pennsylvania's High Quality Designation Adequately Protects All Waters That Qualify for Protection Under the Federal Tier 2 Set Forth in 40 CFR 131.12(a)(2)

In order to afford equivalent protection to that afforded by Tier 2 of the Federal policy set forth in 40 CFR 131.12(a)(2), Pennsylvania has developed a Special Protection Waters Program which utilizes the designational approach, i.e., designates specific waters as High Quality. The High Quality Waters Policy is set forth in 25 PA Code Secs. 93.3, 93.7, 93.9 & 95.1, and the Department's Special Protection Waters Handbook (November 1992). High Quality Waters are defined in Pennsylvania's water quality standards as ''[a] stream or watershed which has excellent quality waters and environmental or other features that require special water quality protection''. 25 Pa Code Sec. 93.3. Once designated as High Quality, those waters are afforded a level of protection consistent with EPA's Tier 2.

EPA disapproved a portion of Pennsylvania's High Quality Waters Policy because the policy requires that a stream must possess ''excellent quality waters *and* environmental or other features that require special water quality protection'' [emphasis added]. That definition may exclude waters that would be protected under the Federal Tier 2 policy which provides Tier 2 protection to all waters with water quality exceeding levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water regardless of any other feature. Additional details concerning EPA's disapproval and Pennsylvania's response to the disapproval are available in the preamble to the August 29, 1996, proposal. 61 FR 45379.

EPA proposed language based on 40 CFR 131.12(a)(2) to make available Federal Tier 2 protection for Pennsylvania waters on the basis of water quality alone. That language would have the effect of making Tier 2 protection available to all waters whose quality ''exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.''

Discussion of major comments relating to Tier 2

Comment: Two commenters stated that the EPA proposed language concerning social and economic justification for lowering water quality will weaken the present Pennsylvania program. Pennsylvania's program requires that a proposed project that will add a new or increased discharge into a Special Protection waters must be ''necessary'' and ''of significant benefit to the public,'' whereas the Federal language requires that lowering of water quality be ''necessary'' and ''to support important social and economic benefit in the area in which the waters are located.''

Response: Under the wording of 40 CFR § 131.32(a)(2), the Commonwealth will be responsible for determining whether a particular lowering of water quality is ''necessary to support important social and economic benefit in the area in which the waters are located.'' In making that determination the Commonwealth may equate ''important social and economic benefit'' with ''of significant benefit to the public'' if that phrase as used by Pennsylvania is interpreted to be at least as stringent as EPA's wording. We note that the word ''important'' was selected by EPA in 1983 because it was believed to be more protective than ''significant.'' Accordingly, EPA does not believe that the language of the Federal regulation will weaken the level of protection of Tier 2 waters.

Comment: One commenter stated that the Federal Tier 2 designation should be strictly interpreted in Pennsylvania as disallowing the Commonwealth from designating a stream as high quality or Tier 2 if even one of the stream's water quality standards is violated.

Response: EPA does not interpret 40 CFR 131.32(a)(2) as excluding a water from Tier 2 protection merely because one parameter exceeds water quality standards.

For additional comments and responses, see the Response to Comments document in the Administrative Record to this rule.

In the August 29, 1996, proposal, EPA also discussed another option of simply promulgating the definition of High Quality Water from 25 Pa Code Sec. 93.3 but without the phrase ''and environmental or other features which require special criteria.'' EPA sought comments on both of these options through the August 29, 1996, Federal Register proposal. Under either option, the current State process for establishing designations and reviewing proposals to lower water quality would remain in effect. The only comment supporting the second option was based on the concern that using the language of 131.12(a)(2) would weaken Pennsylvania's program. This concern is discussed above. Accordingly, the final rule retains the proposed approach.

Pennsylvania has not yet satisfied EPA's disapproval of its High Quality waters policy. Therefore, promulgation of the rule is still necessary. EPA has decided to retain the proposed language in this final rule since the rule is still necessary, and EPA received no comments on the proposed rule that would necessitate modification.

As discussed in the BACKGROUND section of this notice, Pennsylvania has considered enhancements to its High Quality Waters program through a regulatory negotiation process. As a result of this process, the Department indicated in the *Pennsylvania Bulletin*, May 4, 1996, that it may consider revising the High Quality Water definition to delete the requirements for additional ''environmental or other features.'' If Pennsylvania were to finalize this proposal and EPA approves it, EPA would expect to withdraw the portion of the Federal promulgation relating to Tier 2.

3. Ensuring That Pennsylvania's Highest Quality Waters May Be Provided a Level of Protection Fully Equivalent to Tier 3 of the Federal Policy

Pennsylvania considers its Exceptional Value Waters designation as part of the Special Protection Waters Program to be equivalent to Tier 3. The Exceptional Value Policy is set forth in 25 PA Code Secs. 93.3, 93.7, 93.9 & 95.1, and the Department's Special Protection Handbook, which contains implementation procedures for Exceptional Value protection. The Code and the Handbook must be read together to understand the effect of the Exceptional Value policy.

As described in the Handbook, Pennsylvania requires Exceptional Value Waters to be protected at their existing quality to the extent that no adverse measurable change in existing water quality would occur as a result of a point source permit. A change is considered measurable ''if the long-term average in-stream concentration of the parameter of concern can be expected, after complete mix of stream and wastewater, to differ from the mean value established from historical data describing background conditions in the receiving stream'' or at selected Pennsylvania reference sites.

EPA disapproved the Commonwealth's Exceptional Value designation because it is not convinced that this level of protection is sufficient to assure that water quality shall be maintained and protected as required by the Federal Tier 3 requirement at 40 CFR 131.12(a)(3). EPA believes that, in practice, Pennsylvania's policy of ''no adverse measurable change'' could allow potentially significant discharges and loading increases from point and nonpoint sources. See the August 29, 1996, Federal Register proposal of this rule (61 FR 45382).

EPA proposed promulgating language derived from 40 CFR 131.12(a)(3) (see 61 FR 45379). The language states that where waters are identified by the Commonwealth as ONRWs, their water quality shall be maintained and protected. It is EPA's recommendation that, while not required by EPA's regulation, ''no new or increased discharges'' to Tier 3 waters is the best and most reliable method to assure that water quality is fully maintained and protected in ONRWs. In the preamble to the proposed rule, and consistent with the recommended interpretation in its National guidance, EPA Water Quality Standards Handbook at 4–8 (2nd ed. 1994), EPA interpreted the proposed language at 40 CFR 131.32(a)(3) to prohibit, in waters identified by the Commonwealth as ONRWs, new or increased dischargers, aside from limited activities which have only temporary or short-term effects on water quality.

Despite EPA's position that Pennsylvania's Exceptional Value designation is not as protective as EPA's Tier 3 regulation, EPA recognized that the Commonwealth's success in having so many waters designated Exceptional Value might not have occurred if new or increased discharges were strictly prohibited. In light of this situation, rather than modify the Exceptional Value policy, EPA proposed in the August 29, 1996 Federal Register notice to promulgate language to provide Pennsylvania the opportunity to designate appropriate Pennsylvania waters as ONRWs, to which no new or increased discharges would be allowed. The intent of this ONRW proposal was not to replace or supplant the Exceptional Value category and designations already in place in Pennsylvania, but rather to supplement them. It would give the citizens of the Commonwealth the opportunity to request the highest level of protection be afforded to particular waters where appropriate. Under the proposal, EPA will not designate waters as ONRWs; that will be the Commonwealth's prerogative.

Discussion of Major Comments Relating to Tier 3

Comment: While some comments supported the creation of a new tier of protection, a number of comments requested that Pennsylvania's EV category be upgraded to be equivalent to Federal Tier 3 protection.

Response: EPA proposed a new tier, rather than a modification of Pennsylvania's Exceptional Value category because this seemed least disruptive to the state and most protective of the environment. The Exceptional Value category, which is not quite as protective as Tier 3, but still better than Tier 2, covers more waters than are likely to be designated ONRWs. Had EPA proposed to modify the Exceptional Value category, the State might have felt the need to reconsider the inclusion of some of the currently designated Exceptional Value waters.

Comment: Several commenters asserted that Section 131.12(a)(3) does not require a prohibition against new or increased discharges.

Response: The literal Federal regulatory requirement is that the water quality of designated ONRWs ''be maintained and protected.'' For the reasons explained in the preamble to the proposed rule (see 61 FR 45382), EPA believes that prohibition of new or increased discharges is a reasonable interpretation of its regulatory language and is the most dependable way of ensuring that ONRWs will be maintained and protected. There is no Federal requirement for states to adopt such a prohibition as a water quality standard regulation. EPA notes that there may be other formulations that States may adopt to meet the requirements of 40 CFR 131.12(a)(3) and provide a level of protection substantially equivalent for maintaining and protecting water quality in ONRWs. However, with respect to Pennsylvania, the Commonwealth's level of protection falls short of ''maintaining and protecting'' water quality in ONRWs and hence fails to meet Federal requirements. Because EPA is promulgating a Federal regulation for Pennsylvania, EPA wishes to make it clear how it will interpret today's regulation.

Comment: One commenter stated that EPA improperly considered Pennsylvania's implementation of its antidegradation procedures, as the Commonwealth is not required by the CWA to submit water quality standards implementation procedures to EPA for review and approval.

Response: This is incorrect. In reviewing those elements of water quality standards that have been submitted as required in 40 CFR 131.6, EPA may use any information available in determining what the State actually means by its water quality standards language. EPA's water quality standards regulation also requires in 40 CFR 131.12(a) that ''the State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart.'' In this case, EPA disapproved Pennsylvania's antidegradation policy based on the Commonwealth's interpretation of its policy as reflected in the Special Protection Waters Handbook.

See the Response to Comments document, which is part of the Administrative Record to this rule, for additional comments and responses concerning
Tier 3.

Today's final rule is identical to the rule as proposed on August 29, 1996. Federal promulgation is still necessary since the Commonwealth has not yet satisfied EPA's disapproval of its Exceptional Value designation. EPA received no comments that necessitated changes to the proposal and believes that promulgation of the language as proposed is the most effective way to provide to Pennsylvania the level of protection equivalent to the Federal Tier 3.

Pennsylvania's reg-neg group discussed this issue but did not reach an agreement to recommend that Pennsylvania create a new Tier 3 ONRW category of protection. If Pennsylvania adopts either EPA's recommended interpretation or an appropriate alternative formulation for maintaining and protecting water quality in ONRWs, and it is approved by EPA as meeting the requirements of 40 CFR 131.12(a)(3), EPA would expect to propose to withdraw the portion of its rule relating to Tier 3.

D. Relationship of This Rulemaking to the Great Lakes Water Quality Guidance

On March 23, 1995, pursuant to section 118(c)(2) of the CWA, EPA published Final Water Quality Guidance for the Great Lakes System (60 FR 15366), which applies to the Great Lakes System, including a small portion of Pennsylvania waters. The Guidance includes water quality criteria, implementation procedures and antidegradation policies which are intended to provide the basis for consistent, enforceable protection for the Great Lakes System. In particular, the antidegradation requirements are more specific than those set out in 40 CFR 131.12. Pennsylvania and the other Great Lakes States and Tribes must adopt provisions into their water quality programs which are consistent with the Guidance, or EPA will promulgate the provisions for them.

This rulemaking, which is being undertaken pursuant to section 303 of the Act, is independent of, and does not supersede, the Guidance. Regardless of this rulemaking, Pennsylvania must still adopt an antidegradation policy for its waters in the Great Lakes Basin consistent with the Guidance, or EPA will promulgate such provisions for them. At that time, EPA will withdraw any portion of this rule which is inconsistent with such Great Lakes provisions and which applies to Pennsylvania waters within the Great Lakes basin.

E. Endangered Species Act

Pursuant to section 7 of the Endangered Species Act (16 U.S.C. § 1656 *et seq.*), Federal agencies must assure that their actions are unlikely to jeopardize the continued existence of listed threatened or endangered species or adversely affect designated critical habitat of such species.

EPA initiated section 7 informal consultation under the Endangered Species Act with the U. S. Fish and Wildlife Service (FWS) regarding this rulemaking, and requested concurrence from the FWS that this action is unlikely to adversely affect threatened or endangered species. The FWS originally responded in a letter dated July 31, 1996, that they could not concur with a finding of no adverse affect to threatened or endangered species, but proposed five options that would facilitate a ''not likely to adversely affect'' determination. In EPA's August 29, 1996 proposal of this rule (61 FR 45379), EPA sought comment on these five options, which were available in the administrative record.

Since that proposal, EPA and FWS have continued to consult informally, and have reached agreement on an alternative approach. Under that approach, EPA will make every effort to ensure that, prior to the final Commonwealth rulemaking pertaining to antidegradation (but no later than June 30, 1997), the State will draft an antidegradation policy which accords full antidegradation protection, including Tier 1 requirements, for threatened and endangered species and that, by December 31, 1997, the State will identify implementation methods for this policy. The policy and implementation methods must fully protect threatened and endangered

species as existing uses of the waterbody. EPA will request that Pennsylvania submit both the policy and implementation methods to EPA and the FWS by the dates listed above to allow for review and early coordination prior to the final State rulemaking. EPA will encourage the State to develop the draft regulatory language and implementation methods in close coordination with the Service and EPA. In any case, EPA will consult with FWS on any revisions to Pennsylvania's water quality standards which are submitted to EPA for review and approval and welcomes the State as a partner in this process.

Also, as part of EPA's role in overseeing Pennsylvania's implementation of the National Pollutant Discharge Elimination System (NPDES) program, where EPA finds (based on analysis conducted by EPA or FWS) that issuance of a PADEP NPDES permit, as drafted, is likely to have an adverse effect on Federally-listed species or critical habitat, EPA will require changes to a State-issued draft permit under Section 402(d)(4) of the CWA, or take other appropriate actions.

By letter to the FWS dated November 7, 1996, EPA offered to implement this alternative approach, explained our concerns with the other options, and again sought FWS's concurrence. Based upon EPA's commitment to fully implement the approach outlined above, the FWS provided concurrence with EPA's finding of no adverse affect to threatened or endangered species by letter dated November 7, 1996.

Discussion of Major Comments Concerning the Endangered Species Act

Comment: EPA received comment that EPA lacks authority or obligation to consult with the FWS on the proposed antidegradation rule, since EPA has taken no action that would jeopardize listed species, as the rule would have a beneficial effect on listed species.

Response: EPA agrees that issuance of the antidegradation rule will improve water quality in Pennsylvania. Nonetheless, EPA had an obligation to consult FWS under the controlling regulations.

The commenters' view that issuance of the rule is not an ''action'' under the ESA ignores FWS's definition of agency action. That definition expressly includes ''actions intended to conserve listed species or their habitat * * * the promulgation of regulations * * *. or actions directly or indirectly causing modifications to the * * * water.'' 50 CFR § 402.02. Issuance of the rule is agency ''action'' under this broad definition.

In addition, under the FWS' regulations, the fact that the effect of an action may be beneficial does not exempt EPA from the obligation to consult. EPA agrees that the antidegradation rule will have a positive effect, but that effect triggers consultation under FWS's regulatory interpretation of section 7(a)(2), 16 U.S.C. § 1536(a)(2)—*i.e.,* whether an agency's action ''may affect'' listed species. *See* 50 CFR § 402.14(a). FWS interprets this standard to require consultation even when an action will have ''beneficial'' effects. 51 Fed. Reg. 19,949. Thus, although the rule will improve water quality in Pennsylvania, this beneficial effect is sufficient, under FWS's regulations, to trigger the consultation obligation. See also *TVA* v. *Hill,* 437 U.S. 153, 178 (1978) (''the heart of'' the ESA is the ''institutionalization of * * * caution'').

Comment: EPA received several comments that EPA should not adopt any of the five options proposed by the FWS for resolving § 7 consultation.

Response: To the extent that this objection is based on a general belief that the FWS lacked authority to require anything in connection with this rule, see the response to the previous comment. With respect to the specifics of the five options, EPA agrees that the particular options, as formulated by the FWS in its letter of July 31, 1996, were inappropriate and has not adopted them. As indicated above, as a result of further discussions with the FWS, EPA offered an alternative approach consisting of a modification of two of the options, and on that basis the FWS concurred that the rule is not likely to adversely affect listed species. See the Response to Comments document for this rule for further discussion of comments related to the Endangered Species Act.

F. Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs of the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because the annualized cost of this final rule would be significantly less than $100 million and the rule would meet none of the other criteria specified in the Executive Order, it has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866, and is therefore not subject to OMB review.

Comment: Comment was received that, in light of the options raised by the FWS in the context of the rulemaking, EPA was incorrect in its finding that the proposed rule is not a significant regulatory action under Executive Order 12866, particularly the FWS option that would extend Tier 3 protection to streams that contain listed species, and another that would federalize NPDES permits on waterbodies that contain Federally listed species, and grant the FWS a role in each permit action on those waters.

Response: In making its determination under Executive Order 12866 that the proposed rule was not a significant regulatory action, EPA evaluated the rule as proposed. EPA did not adopt any of the Service's options, and therefore stands by its original assessment.

G. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by section 804(2) of the APA as amended.

H. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) provides that, whenever an agency promulgates a final rule under 5 U.S.C. 553, after being required to publish a general notice of proposed rulemaking, an agency must prepare a final regulatory flexibility analysis unless the

head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604 & 605. The Administrator is today certifying, pursuant to section 605(b) of the RFA, that this rule will not have a significant impact on a substantial number of small entities. Therefore, the Agency did not prepare a regulatory flexibility analysis.

Under the Clean Water Act water quality standards program, States must adopt water quality standards for their waters that must be submitted to EPA for approval. If the Agency disapproves a state standard, EPA must promulgate standards consistent with the statutory requirements. These State standards (or EPA-promulgated standards) are implemented through the NPDES program that limits discharges to navigable waters except in compliance with an EPA permit or permit issued under an approved state program. The CWA requires that all NPDES permits must include any limits on discharges that are necessary to meet State water quality standards.

Thus, under the CWA, EPA's promulgation of water quality standards where state standards are inconsistent with statutory requirements establishes standards that the state implements through the NPDES permit process. The state has discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. While the state's implementation of federally-promulgated water quality standards *may* result in new or revised discharge limits being placed on small entities, the standards themselves do not apply to any discharger, including small entities.

Today's rule imposes obligations on the Commonwealth of Pennsylvania but, as explained above, does not itself establish any requirements that are applicable to small entities. As a result of EPA's action here, the Commonwealth of Pennsylvania will need to ensure that permits it issues comply with the antidegradation provisions in today's rule. In so doing, the Commonwealth will have a number of discretionary choices associated with permit writing. In addition, the Commonwealth has the threshold choice whether to designate particular waters as Outstanding National Resource Waters. While Pennsylvania's implementation of today's rule may ultimately result in some new or revised permit conditions for some dischargers, including small entities, EPA's action today does not impose any of these as yet unknown requirements on small entities.

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

Although the statute does not require EPA to prepare an RFA when it promulgates water quality standards for Pennsylvania, EPA has undertaken a limited assessment, to the extent it could, of possible outcomes and the economic effect of these on small entities. Given the fact that any economic impact on small entities is dependent on a number of currently unknown factors, EPA's quantitative consideration of possible effects is necessarily restricted. The final version of that evaluation is available in the administrative record for today's action.

Comment: One commenter stated that EPA's proposed regulation fails to comply with the RFA because it reaches the conclusion that this rule would not have a significant economic impact on a substantial number of small entities without providing a factual basis for this certification, and it is incorrect in its assumption that this rule would not impact small business in Pennsylvania.

Response: The commenter is incorrect in asserting that EPA has no basis for its Section 605(b) certification. Further, as explained above, though not required by the RFA, EPA prepared with contractor assistance an assessment which identified and evaluated, as best it could given the unknown, the potential costs to small entities that might follow state implementation of today's standards. The assessment is based on data developed by the contractor from a variety of sources including data from the U.S. Department of Commerce, EPA reports, and telephone surveys of industrial and municipal dischargers and each Commonwealth regional office. EPA referenced this assessment in the proposal (61 FR 45379, 45384), made it available in the administrative record, and specifically invited comment on it. No comments were received pointing out errors in this assessment, or the data on which it was based. With regard to the impact to small businesses, EPA stands by its assessment.

I. Unfunded Mandates Reform Act

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

As noted above, this rule is limited to antidegradation designations within the Commonwealth of Pennsylvania. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. EPA has also determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

Thus, today's rule is not subject to the requirements of section 202, 203, or 205 of the UMRA.

Comment: One commenter stated that EPA failed to comply with UMRA in that it did not provide the basis for conclusions that this rule will not significantly or uniquely affect small governments, that this rule will not result in expenditure of $100 million or more for State, local and tribal governments, in the aggregate, or the private sector in any one year, or develop a small government agency plan.

Response: EPA disagrees. EPA has assessed the effects of this regulatory action on State and local governments and the private sector, and based its conclusions on the report entitled *Economic Analysis of the Potential Impact of the Proposed Antidegradation Requirements for Pennsylvania.*

J. Paperwork Reduction Act

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

List of Subjects in 40 CFR Part 131

Environmental protection, Water pollution control, Water quality standards.

Dated: November 27, 1996.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, part 131 of title 40 of the Code of Federal Regulations is amended as follows:

PART 131—WATER QUALITY STANDARDS

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

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

Subpart D—[Amended]

2. Section 131.32 is added to read as follows:

§ 131.32 Pennsylvania.

(a) Antidegradation policy. This antidegradation policy shall be applicable to all waters of the United States within the Commonwealth of Pennsylvania, including wetlands.

(1) Existing in-stream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Commonwealth finds, after full satisfaction of the inter-governmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Commonwealth shall assure water quality adequate to protect existing uses fully. Further, the Commonwealth shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources.

(3) Where high quality waters are identified as constituting an outstanding National resource, such as waters of National and State parks and wildlife refuges and water of exceptional recreational and ecological significance, that water quality shall be maintained and protected.

(b) (Reserved)

[FR Doc. 96–31007 Filed 12–6–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 572

[Docket No. 94–31]

Information Form and Post-Effective Reporting Requirements for Agreements Among Ocean Common Carriers Subject to the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Amendment to final rule.

SUMMARY: The Federal Maritime Commission is amending the final rule in this proceeding so that the list of effective agreements that must be included in the Information Form for a new filed agreement is limited to those agreements which authorize specified activities that are of significant regulatory concern. The purpose of this amendment is to lessen the reporting burden on ocean carriers, while ensuring that the Commission obtains information relevant to its regulatory responsibilities.

EFFECTIVE DATE: December 9, 1996.

FOR FURTHER INFORMATION CONTACT:

Austin L. Schmitt, Director, Bureau of Economics and Agreement Analysis, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573–0001, (202) 523–5787.

SUPPLEMENTARY INFORMATION: In Docket No. 94–31, *Information Form and Post-Effective Reporting Requirements for Agreements Among Ocean Common Carriers Subject to the Shipping Act of 1984*, the Federal Maritime Commission amended its regulations set forth in 46 CFR Part 572 governing the filing, processing and review of agreements subject to the Shipping Act of 1984. 61 FR 11564 (Mar. 21, 1996). The revised Information Forms for newly filed agreements, codified as Appendices A and B to Part 572, require the submission of a list of all effective agreements covering all or part of the geographic scope of the filed agreement, whose parties include one or more of the parties to the filed agreement.

In implementing the new regulations, the Commission has received inquiries regarding the scope of ''effective agreements.'' For example, it has been suggested that there is no useful purpose in including agreements that are exempt from filing because of their lack of competitive impact (see 46 CFR 572.302–311).

In response to these concerns, the Commission is amending the instructions to Appendices A and B to state that the required list should include only agreements that authorize specified activities that are of significant regulatory concern. These are rate agreements (including agreements that authorize discussion of rates or ''non-binding'' rate agreements), joint service agreements, pooling agreements, agreements authorizing discussion or exchange of data on vessel-operating costs, sailing agreements, space charter agreements, agreements authorizing regulation or discussion of service contracts, and agreements authorizing capacity management or capacity regulation. This amendment will lessen the burden on agreement carriers, while ensuring that the Commission obtains information relevant to its regulatory responsibilities.

Notice and opportunity for public comment were not necessary prior to issuance of this amendment because it reduces existing requirements and is less burdensome on the public. For the same reasons, the amendments are effective upon publication in the Federal Register, rather than being delayed for 30 days. 5 U.S.C. 553.