

Proposed Rules

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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 STATE

22 CFR Part 194

[Public Notice 3118]

Office of the Assistant Legal Adviser for Private International Law; Inter-American Convention on International Commercial Arbitration Rules of Procedure

AGENCY: Office of the Assistant Legal Adviser for Private International Law.
ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of State proposes to make effective under United States law the revised rules of procedure of the Inter-American Commercial Arbitration Commission ("IACAC"). The amended rules of procedure enhance the role of IACAC in the initiation and conduct of arbitration of international contractual disputes to which the International Convention on Commercial Arbitration ("Convention") applies. The amended rules address such issues as notice procedures, the appointment of arbitrators, the role of each National Section of IACAC, and an increased fee schedule. Adoption of these rules will ensure their uniformity of application among states party to the Convention.

DATES: Comments must be received by November 18, 1999.

ADDRESSES: Comments should be addressed to Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, South Building, Suite 203, 2430 E St., NW, Washington, DC 20037-2860. They may also be sent via telefax to (202) 776-8482 or e-mail to <pilddb@his.com>.

FOR FURTHER INFORMATION CONTACT: Ms. Rosie Gonzales (202-776-8423), at the above office address for copies of the proposed revisions to the IACAC rules of procedure. Copies are available in English and Spanish.

SUPPLEMENTARY INFORMATION: IACAC has amended its rules of procedure applicable to arbitration conducted under the Convention. The Convention

entered into force for the United States in 1990 with the reservation that the United States would only be bound by the rules of procedure in effect on July 1, 1988, unless the Secretary of State determines by regulation that any subsequent modification or amendment will apply in the United States. Pursuant to Title 9 section 306 of the United States Code, the rulemaking procedures of Title 5 section 553 of the United States Code apply to any determination to effectuate such a modification or amendment within the United States. In accordance with those procedures, notice must be published in the **Federal Register**, time for comment provided, and the final rule published for 30 days before the rule may become effective.

The proposed changes in the Convention's rules of procedure include, *inter alia*:

- Requiring IACAC approval before the arbitrating parties may use modified rules of procedure;
- Requiring notice from one party to the other also to be delivered to the Director General of IACAC or the IACAC National Section;
- In cases involving a three-person Tribunal, requiring the claimant to designate one arbitrator in the notice of demand for arbitration;
- In the event that one member of a three-person Tribunal is unable to continue, authorizing the remaining two arbitrators to continue at their discretion;
- In the absence of a majority for a decision, giving the Tribunal President the sole and unreviewable authority to decide;
- In cases where the respondent fails to submit its defense, providing the Tribunal discretion whether to continue the arbitration or not;
- Specifying that an award is not subject to appeal;
- Requiring notice of post-award requests for interpretation, correction, or an additional award to be made to the Tribunal, and for the Tribunal to notify the other party;
- Setting forth new procedures for calculating costs and fees, and providing that the IACAC Arbitrator Nominating Committee may request advance deposit of costs;
- Setting forth internal IACAC procedures for cases administered under the rules, including a schedule

of increased fees, establishing an Arbitrator Nominating Committee, and specifying that IACAC National Sections will generally carry out secretarial functions under the rules.

List of Subjects in 22 CFR Part 194

Administrative practice and procedure, Foreign relations, Government contracts.

Jeffrey D. Kovar,

Assistant Legal Adviser for Private International Law.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 132

[FRL-6447-4]

RIN 2040-AD32

Proposal To Amend the Final Water Quality Guidance for the Great Lakes System To Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is today proposing to amend the Final Water Quality Guidance for the Great Lakes System (Guidance)(40 CFR Part 132) to prohibit mixing zones for bioaccumulative chemicals of concern (BCCs) in the Great Lakes System, subject to a limited exception for existing discharges. For existing discharges, the regulation would prohibit mixing zones for BCCs starting 10 years after the publication date of the final BCC mixing zone rule. New discharges of BCCs would be subject to the mixing zone prohibition immediately upon commencing discharge. EPA had promulgated a mixing zone provision similar to this proposed regulation on March 23, 1995, as part of the Water Quality Guidance for the Great Lakes System required by section 118(c)(2) of the Clean Water Act. The provision was vacated by the U.S. Court of Appeals for the District of Columbia Circuit in the case of *American Iron & Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997), and was remanded to the Agency for further consideration. This proposed regulation

reflects EPA's reconsideration of the factual record in response to that remand.

DATES: EPA will accept public comments on the proposal until December 3, 1999.

ADDRESSES: An original and 4 copies of all comments on the proposal should be addressed to Mary Willis Jackson, Water Quality Branch (WT-15J), U.S. EPA Region 5, 77 West Jackson Blvd.,

Chicago, Illinois, 60604. The public docket for this rulemaking, including the proposed rule, economic analysis and other supporting documents are available for inspection and copying at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604 by appointment only. Appointments may be made by calling Mary Willis Jackson (telephone 312-886-3717).

FOR FURTHER INFORMATION CONTACT: Mark L. Morris (4301), U.S. EPA, 401 M

Street, SW, Washington, D.C. 20460 (202-260-0312).

SUPPLEMENTARY INFORMATION:

Potentially Affected Entities

Entities potentially affected by today's action are those discharging or intending to discharge BCCs to waters of the United States in the Great Lakes System. Categories and entities that may ultimately be affected include:

Category	Examples of potentially affected entities
Industry	Industries discharging or intending to discharge BCCs to waters in the Great Lakes System as defined in 40 CFR 132.2.
Municipalities	Publicly owned treatment works discharging or intending to discharge BCCs to waters of the Great Lakes System as defined in 40 CFR 132.2.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the definition of "Great Lakes System" in 40 CFR 132.2 and examine the preamble to 40 CFR Part 132, which describes the Part 132 regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

I. Legal Authority

This regulation is being proposed under the authority of sections 118, 301, 303, 402, and 501 of the Clean Water Act.

II. Background

Section 118(c)(2) of the Clean Water Act (CWA), as amended by the Great Lakes Critical Programs Act of 1990, required EPA to publish proposed and final water quality guidance on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System. On March 23, 1995, EPA published a final rule entitled "Final Water Quality Guidance for the Great Lakes System" in order to satisfy this requirement. See 60 FR 15366. The 1995 Guidance included ambient water quality criteria for 29 pollutants, including BCCs, that reflect the maximum ambient concentrations of those pollutants that could be present in waters of the Great Lakes Basin without impairing aquatic life, wildlife or human health. The 1995 Guidance also

included implementation procedures that Great Lakes States and Tribes are to use to prepare total maximum daily load (TMDL) analyses and to develop water quality-based effluent limits (WQBELs) for facilities discharging these pollutants. See 40 CFR Part 132. The Great Lakes States are the States of Illinois, Indiana, Michigan, Minnesota, Ohio, New York, Pennsylvania, and Wisconsin. The Great Lakes Tribes are those Tribes as defined in 40 CFR 132.2. Great Lakes Tribes consist of any Tribe within the Great Lakes Basin for which EPA has approved water quality standards under section 303 or that EPA has authorized to administer a National Pollutant Discharge Elimination System (NPDES) program under section 402 of the CWA.

Among the implementation procedures in the 1995 Guidance was Procedure 3.C. in Appendix F. Under this procedure, NPDES permits would have been prohibited from including mixing zones in the calculation of water quality-based effluent limits for new discharges of BCCs after March 23, 1997, or for existing discharges of BCCs after March 23, 2007. EPA also codified limited exceptions for existing discharges to account for water conservation and technical and economic considerations.

Great Lakes States and Tribes were required to adopt regulations consistent with the criteria and implementation procedures specified in the 1995 Guidance by March 23, 1997, and to submit those regulations to EPA for approval or disapproval. See 40 CFR 132.5. In the event EPA disapproves a State's or Tribe's submission, EPA would promulgate criteria and implementation procedures as necessary to be consistent with the Guidance. See CWA section 118(c)(2)(C).

After being promulgated, the Guidance was challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1997, the Court issued a decision upholding virtually all of the provisions contained in the 1995 Guidance. *American Iron and Steel Institute, et al. v. EPA (AISI)*, 115 F.3d 979 (D.C. Cir. 1997). However, the Court vacated the provisions of the Guidance that would eliminate mixing zones for BCCs. 115 F.3d at 985. The Court held that EPA had "failed to address whether the measure is cost-justified," and remanded the provision to EPA for an opportunity to address this issue. 115 F.3d at 997. On April 23, 1998, EPA published a notice amending the 1995 Guidance to remove the BCC mixing zone provisions from 40 CFR Part 132. See 63 FR 20107 (April 23, 1998).

III. Discussion of the Proposed Regulations

A. Introduction

Today EPA is proposing to amend 40 CFR Part 132, Appendix F, Procedure 3, to reinstate the mixing zone provisions for BCCs. As discussed in more detail below, EPA has determined that the proposed BCC mixing zone provisions at Procedure 3.C. are important for several reasons. First, phasing out existing mixing zones for BCCs and prohibiting new ones will ensure that the Guidance codified at 40 CFR Part 132 conforms, as required by statute, with the objectives and provisions of the international agreement between the United States and Canada to restore and maintain the environmental integrity of the Great Lakes Basin ecosystem. See CWA section 118(c)(2)(A). See also *AISI*, 115 F.3d at 1001-02 (finding that the BCC mixing zone provisions conform to the Great Lakes Water Quality

Agreement). See also the Great Lakes Water Quality Agreement, Article IV(1)(f). Second, EPA has determined that because of their highly bioaccumulative nature BCCs present a significant potential risk to human health, aquatic life and wildlife in the Great Lakes System when discharged at levels above water quality criteria. The persistent and toxic nature of BCCs is amplified in the Great Lakes by the tendency of the Lakes to act as "sinks" for pollutants discharged to the Great Lakes Basin. Third, the effect of BCC contamination on salmonid sport fisheries and other uses is already documented in the Great Lakes. As a result, EPA has concluded that the benefits associated with the proposed BCC mixing zone provisions justify the costs that would be imposed upon regulated entities. EPA also recognizes, however, that some dischargers may suffer unreasonable economic effects if mixing zones for existing BCC discharges are not authorized. Therefore, EPA is proposing a limited exception that would allow minimal BCC mixing zones under these circumstances. (For a discussion of the potential costs and benefits of the proposed rule, see section V below.)

A mixing zone is the area beyond a point source outfall in which ambient concentrations of a particular pollutant are allowed to exceed the otherwise applicable water quality criterion for that pollutant. In other words, when a discharger wishes to use the receiving water to dilute its polluted effluent, the mixing zone comprises the area of dispersal in the receiving water where the pollutants in the effluent are not yet sufficiently diluted to meet the applicable water quality criteria. Outside the mixing zone, the water quality criterion applies, and the discharger's permit limit must be calculated so that the criterion is met at the edge of the mixing zone. In the absence of a mixing zone, the discharger's permit limit would need to be calculated so that the applicable water quality criterion or criteria are met at the end of the discharger's pipe. In those situations, the discharger would be prohibited from using the receiving water to dilute its effluent, and instead would need to rely on wastewater treatment or pollution prevention measures to assure that its effluent meets the applicable water quality criteria. Because a mixing zone assumes that the applicable water quality criteria will be met at the edge or outer circumference of the mixing zone, it necessarily follows that a mixing zone is available only if the

receiving water itself is achieving water quality standards for the pollutant(s) for which a mixing zone is sought, or if the receiving water will achieve water quality standards for the pollutant(s) through a TMDL. If the receiving water is impaired, e.g., if pollutants are already present or are expected to remain in the water column at levels that exceed the most stringent applicable water quality criterion for the particular pollutant, it follows that no mixing zone would be available for discharges of that pollutant (because there would be no "clean" water available for dilution).

Thus, it is important to note that the proposed regulation prohibiting mixing zones for BCCs in the Great Lakes System would affect only those receiving waters: (1) That are achieving water quality standards for the BCC in question at the time of permit issuance; or (2) that are expected to achieve such standards within a reasonable time through the implementation of a TMDL under CWA section 303(d). As noted above, if water quality standards are not being met in the receiving water for the BCC in question, or are not expected to be met, then no mixing zone would be available for the pollutant irrespective of this proposed rule. See discussion in the Supplemental Information Document for the Guidance at pages 338-358 about permissible approaches for establishing permit limits for discharges to non-attained waters, including setting limits at criteria end-of-pipe.

Although the decision whether to authorize a mixing zone in a particular receiving water or for particular pollutants customarily is committed to the States' discretion, EPA has determined for environmental and public policy reasons that all Great Lakes States and Tribes should implement a consistent approach. The proposed regulations therefore describe minimum mixing zone requirements for the Great Lakes System. The Great Lakes States and Tribes would be required to adopt requirements consistent with (as protective as) any final mixing zone BCC procedure for waters within the Great Lakes System. See CWA section 118(c)(2)(C). Under the authority reserved to them by CWA section 510, States and Tribes remain free to apply more stringent mixing zone requirements than these proposed regulations would establish.

Five of the Great Lakes States (Illinois, Indiana, Minnesota, Michigan, and Wisconsin) already have adopted requirements to eliminate (for existing discharges, phase-out) mixing zones for BCCs that they submitted to EPA for

approval as part of their original Part 132 submissions. EPA has taken no action on those provisions because they are not presently subject to the adoption and submission requirements of 40 CFR 132.4(a) and 132.5(a). However, assuming that the five States retain those requirements and that they are as protective as the final rule, EPA would approve those prior submissions under the procedures set forth in 40 CFR 132.5(f).

Any Great Lakes State or Tribe that has not adopted BCC mixing zone provisions as protective as those ultimately adopted by EPA (e.g., New York, Ohio, and Pennsylvania) would need to adopt such provisions and submit them to EPA for approval or disapproval pursuant to 40 CFR 132.5 within eighteen months after publication in the **Federal Register** of the final BCC mixing zone rule. If a Great Lakes State or Tribe fails to do so or if EPA disapproves the submission, EPA, after giving the State or Tribe an opportunity to make any necessary changes, would publish a final rule six months later identifying the BCC mixing zone provisions that would apply to waters and discharges within that jurisdiction. See 40 CFR 132.5(d) and (f). EPA believes that the 18 months time frame for State adoption and submission is reasonable because it accommodates the legislative or rulemaking processes that the Great Lakes States and Tribes may need to undertake in order to adopt provisions consistent with the final rule. It also allows EPA six months following the submission by the Great Lakes State or Tribe to approve the submission or, in the event of a disapproval, to promulgate its own requirements within the two-year period specified by 33 U.S.C. 118(c)(2)(C). In today's action, EPA proposes to amend 40 CFR 132.5(a) and (c) to apply these procedures to the proposed reinstatement of the BCC mixing zone rule.

B. Components of the Today's Proposed Regulation

Procedure 3.C., as proposed by EPA today, would impose the following limitations on the availability of mixing zones for discharges of BCCs to the Great Lakes System. (The Great Lakes System is defined at 40 CFR 132.2.) EPA's regulations applicable to the Great Lakes System define a BCC, in essence, as any chemical that (1) accumulates in aquatic organisms by a human health bioaccumulation factor greater than 1000 (after considering various specified factors), and (2) has the potential upon entering the surface waters to cause adverse effects, either by

itself or in the form of its toxic transformation product, as a result of that accumulation. See 40 CFR 132.2.

First, the regulation would prohibit the establishment of mixing zones for new discharges of BCCs to the Great Lakes System. See Procedure 3.C.1. That prohibition would take effect as soon as EPA has approved the State's or Tribe's submission with respect to this prohibition or has published a notice identifying that prohibition as applying within the State's or Tribe's jurisdiction. The regulation would define a new discharge, for the purpose of Procedure 3.C., as (i) a "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System from a building, structure, facility, or installation, the construction of which commences after the date the prohibition in Procedure 3.C.1. takes effect in that State or Tribe; (ii) a new discharge from an existing Great Lakes discharger that commences after the date the prohibition in Procedure 3.C.1. takes effect in that State or Tribe; or (iii) an expanded discharge from an existing Great Lakes discharger that commences after the date the prohibition in Procedure 3.C.1. takes effect in that State or Tribe, except for those expanded discharges resulting from changes in loadings of any BCC within the existing capacity and processes (e.g., normal operational variability, changes in intake water pollutants, increasing the production hours of the facility or adding additional shifts, or increasing the rate of production), and that are covered by the existing applicable control document. See Procedure 3.C.2. All other discharges of BCCs would be defined as existing discharges. Second, the regulation would prohibit the establishment of mixing zones for existing discharges of BCCs 10 years after the publication date of the final BCC mixing zone rule, subject to two exceptions. See Procedure 3.C.4.

The first exception, to promote water conservation, would allow States and Tribes to grant mixing zones for any existing discharge of BCCs 10 years after the publication date of the final BCC mixing zone rule where it can be demonstrated, on a case-by-case basis, that failure to grant a mixing zone would preclude water conservation measures that would lead to overall load reductions in BCCs, even though higher concentrations of BCCs occur in the effluent. See Procedure 3.C.5. The water conservation exception would not be available to new discharges of BCCs because point sources responsible for those discharges can more readily design and engineer new unit operations and processes within the facility that will maintain BCC

discharges at levels at or below the applicable water quality criteria, while also conserving water.

The second exception is intended to accommodate technical and economic considerations. Under this exception, a facility with an existing discharge of BCCs could qualify for a mixing zone for one or more BCCs 10 years after the publication date of the final BCC mixing zone rule if the State or Tribe determines that the discharger is complying with all applicable CWA requirements for the BCC in question and is reducing to the maximum extent possible the loading of the BCC for which the mixing zone is sought. See Procedure 3.C.6.a. (This exception is described in more detail in section III.B.2. below.) The purpose of this exception is to ensure that the BCC mixing zone phase-out does not result in unjustified economic impacts in situations where the phase-out may be technically and economically infeasible. However, this exception is intended to apply only in limited circumstances.

Any mixing zones authorized under proposed Procedure 3.C. for existing discharges—whether established during the phase-out period prior to the date 10 years from publication date of the final BCC mixing zone rule or after that date pursuant to one of the exceptions identified above—would need to be consistent with 40 CFR Part 132, Appendix F, Procedures 3.D. and 3.E. See Procedure 3.C.7. Those provisions were promulgated as part of the Guidance in 1995 and are currently in effect for the Great Lakes System. For a discussion of those provisions, see the Supplemental Information Document at 273–288. See also *AISI v. EPA*, 115 F.2d at 997–998 (upholding their validity).

Today's proposed amendments to Part 132 are similar to the rule EPA promulgated in March 1995 except that the phase-out of mixing zones for BCCs would occur 10 years after the publication date of the new rule rather than on March 23, 2007, as originally promulgated. In addition, EPA has reorganized and revised some of the language in Procedure 3.C. of the proposal to improve clarity, reduce repetitiveness with other Part 132 requirements, and ease implementation.

1. Exception for Water Conservation

The proposed amendments to 40 CFR Part 132 would authorize an exception to the mixing zone phase-out for BCCs for existing discharges from a facility implementing water conservation measures. EPA recognizes that, as a result of water conservation measures, concentrations of a BCC in an effluent may increase slightly, while the mass of

the BCC being discharged does not. EPA concludes that because water conservation is desirable, an exception may be appropriate in certain circumstances. The primary concern for BCCs is the mass of the pollutant entering the nearshore waters of the Great Lakes System. This exception would authorize a mixing zone only when the associated water conservation measures will lead to overall reductions in loadings of BCCs. In addition, EPA continues to be concerned about any allowable increases in concentration above criteria and is also proposing to restrict mixing zones under the water conservation provision to those allowed for non-BCCs (*i.e.*, a 10:1 dilution ratio for lakes and 25 percent of design flow for tributaries). See 40 CFR Part 132, Appendix F, Procedure 3.D. and 3.E. This proposed mixing zone exception is virtually identical to the provision promulgated in 1995.

2. Exception for Technical and Economic Considerations

Under the proposed exception for technical and economic considerations, a Great Lakes State or Tribe could authorize a mixing zone for existing discharges of BCCs 10 years after the publication date of the final BCC mixing zone rule, but only under the limited circumstances specified below. The State or Tribal permitting authority would be required to make two affirmative findings: (1) The discharger is complying with all applicable requirements of Clean Water Act sections 118, 301, 302, 303, 304, 306, 307, 401, and 402, including existing NPDES water-quality based effluent limitations, for the BCC for which a mixing zone is requested; and (2) the discharger has reduced and will continue to reduce to the maximum extent possible its discharge of the BCC for which a mixing zone is requested. See Procedure 3.C.6.a.

The proposed regulation provides that, in making a finding that a discharger has reduced the discharge of BCCs for which the mixing zone is sought to the maximum extent possible, the State or Tribe would need to consider the feasibility and cost-effectiveness of additional controls or pollution prevention measures that are available to the facility for reducing and, if possible, ultimately eliminating the BCC in question. See Procedure 3.C.6.a(ii). Relevant treatment or pollution prevention strategies would include strategies applicable to the facility's upstream sources, if appropriate (*e.g.*, a municipality's industrial users). After evaluating feasible BCC reduction strategies

available to the discharger, the State or Tribe would need to document for the record why the implementation of some or all of them could not reasonably be expected to eliminate the discharger's need for a BCC mixing zone. By proposing to require the reduction of the BCC discharges to the maximum extent possible, EPA thus intends to ensure that the exception is available only to dischargers that are doing their best to reduce the level at which that biaccumulative toxic chemical enters the Great Lakes.

When determining whether the discharger is reducing the BCC in question to the maximum extent possible, the State or Tribe would also need to consider whether the discharger, or affected community or communities, will suffer unreasonable economic effects if the mixing zone is eliminated. See Procedure 3.C.6.a(ii). In evaluating economic impacts, EPA would expect the State or Tribe to consider the costs of all pollution reduction options including available treatment technologies and control strategies beyond those already being implemented. Costs should reflect design and current operating flow. EPA would also expect the State or Tribe to evaluate information on the facility's current financial health including, where appropriate, existing municipal and pretreatment user charges and existing profitability. Also potentially relevant, where appropriate, would be information on the current profitability and overall financial health of the facility's parent corporation, where such information is available.

Finally, in determining whether unreasonable economic effects would occur, EPA would also expect the State or Tribe to consider the potential effects on employment rates and tax revenues and, where appropriate, on user fees from increased costs associated with meeting water quality criteria in the absence of a mixing zone. The factors to be considered in assessing economic impacts would likely vary on a facility-by-facility basis. (See Interim Economic Guidance for Water Quality Standards—Workbook, March 1995, EPA-823-B-95-002.)

As noted, a mixing zone for a BCC would be granted under the proposed exception only if the State or Tribe determines that the discharger is meeting all currently applicable CWA requirements for the BCC in question and is reducing its loadings of that BCC to maximum extent possible, based on a consideration of technical and economic factors. Therefore, under this proposal, an exception to the BCC mixing zone provision would not be

granted if cost-effective pollution prevention and/or other control and treatment strategies exist that make it technically possible for the discharger to achieve the applicable water quality criteria at the point of discharge, and if the discharger, or affected community or communities, will not suffer unreasonable (*i.e.*, severe) economic effects in implementing such strategies.

EPA emphasizes that the proposed exception to the elimination of mixing zones for existing discharges of BCCs is intended to be granted only in exceptional circumstances. In addition, the proposed exception would authorize a BCC mixing zone that is very limited in scope. For example, as discussed in more detail below, the mixing zone would need to be designed so that it is no larger than necessary to account for the technical constraints and economic effects to which the discharger is subject. Finally, in no circumstances under the proposed regulation could the amount of allowed mixing exceed the maximum mixing zones specified for non-BCCs in sections D (discharges to Lakes) and E (discharges to tributaries) of 40 CFR Part 132, Appendix F, Procedure 3. These provisions, which were upheld in *AISI*, 115 F.3d at 997-98, apply to all mixing zones in the Great Lakes System, regardless of the type of pollutant being discharged.

If, under the proposed regulation, the State or Tribe decides to allow a mixing zone for existing discharges of BCCs 10 years after the publication date of the final BCC mixing zone rule, the mixing zone would be subject to the following conditions. First, no mixing zone for existing discharges of BCCs could result in limitations that are less stringent than those existing prior to the publication date of the final BCC mixing zone rule. See Procedure 3.C.6.b(i). Second, the permitting authority would need to calculate the mixing zone so that it is no larger than necessary to account for the technical constraints and economic effects that justified the mixing zone in the first place. See Procedure 3.C.6.b(ii).

The first and second requirements are consistent with the United States' international agreement to virtually eliminate persistent toxic substances from the Great Lakes System and are intended to ensure that the discharger would indeed reduce its discharges of the BCC to the maximum extent possible before being allowed to use the receiving water for dilution. Thus, under these proposed requirements, if the State or Tribe determines that it would be technically and economically feasible for a facility to implement controls or pollution prevention strategies beyond those currently in

force in order to reduce its discharge of the BCC in question, then the mixing zone would need to reflect reasonable estimates of the additional anticipated reductions.

In other words, the BCC mixing zone would correspond not to what the facility actually is discharging, but rather to what it could discharge if it employed technically and economically feasible measures to reduce its BCC discharge to the maximum extent possible. Through this provision, EPA intends to encourage all dischargers seeking a BCC mixing zone to implement controls and pollution prevention strategies relevant to that BCC prior to seeking regulatory relief. Because dischargers would have ten years to employ additional controls and strategies in order to phase-out their dependence on mixing zones, EPA believes this would be a reasonable requirement. In the event that further reductions could be achieved (perhaps using technologies or measures identified through the permitting process), a discharger could still qualify for a mixing zone, but would be compelled to achieve those further reductions, as reflected in its new mixing zone.

Third, any BCC mixing zone would need to ensure the attainment of applicable acute and chronic aquatic life, wildlife, and human health criteria and values within and at the edge of the mixing zone, respectively. In non-attained waters, any mixing zone granted for BCCs under the exception would need to be consistent with the TMDL or comparable assessment and remediation plan under Procedure 3.A. of Appendix F of the 1995 Guidance. See Procedure 3.C.6.b(iii).

In addition, any permit authorizing a BCC mixing zone under this exception, when appropriate, would need to require the discharger to develop and implement an ambient monitoring plan. See Procedure 3.C.6.b(iv). Monitoring data compiled by dischargers could be used to supplement State or Tribal monitoring data and provide additional information on the receiving water's assimilative capacity and on the extent of impacts, if any, associated with the mixing zones. Ambient monitoring data would be used, in attained waters, to ensure that the applicable water quality criterion for the BCC is attained at the edge of the mixing zone and, in non-attained waters, to ensure that the projected improvement in water quality under the TMDL or comparable assessment and remediation plan is occurring. Ambient monitoring data can also be used to provide the basis for future decisions on the granting of

mixing zones for BCCs, including any adjustments to the size of a future mixing zone (e.g., if data show that the receiving water did not assimilate the pollutant as quickly as originally believed). The State or Tribe is encouraged to seek additional information, as necessary, to determine whether a mixing zone for BCCs is warranted for an existing discharge.

Fourth, the proposed regulation would limit the exception to the BCC mixing zone prohibition to one permit term. Mixing zones may not be granted thereafter unless the State or Tribe makes the necessary findings discussed above for each successive permit application in which a mixing zone for BCCs is sought. See Procedure 3.C.6.b(v).

EPA expects that exceptions to the BCC mixing zone provision would be granted solely at the discretion of the State or Tribe on a case-by-case basis. Because of the importance of controlling BCCs in the Great Lakes System, it is critical that the public have an opportunity to comment on discharge-specific exceptions to the general policy of prohibiting mixing zones for existing dischargers of BCCs. The proposed amendments to 40 CFR Part 132 would provide that each draft permit that includes a mixing zone for one or more BCCs after the phase-out period must specify, either in the fact sheet or in the statement of basis for the draft permit, the mixing zone provisions used in calculating the permit limits and must identify each BCC for which a mixing zone is proposed. See Procedure 3.C.6.c. The draft permit, including the fact sheet or statement of basis, must be publicly noticed and made available for public comment under 40 CFR 124.6(e). The proposed amendments to Part 132 would specify that any mixing zone for existing BCC discharges authorized under Procedure 3.C.3, 3.C.5, or 3.C.6 of Appendix F must also be consistent with Procedure 3.D. and 3.E. of Appendix F of Part 132. See Procedure 3.C.7.

Under the proposed amendments to Part 132, the mixing zone prohibition would be limited to BCCs. BCCs are the pollutants of primary concern in the Great Lakes System. Documented widespread impacts warrant the special emphasis on controlling BCCs. See section I of the "Final Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID) (EPA, March 1995, 820-B-95-001), and the preamble to the "Proposed Water Quality Guidance for the Great Lakes System" (58 FR 20802, April 16, 1993). In addition, States already have the discretion under section 510 of the

CWA to eliminate mixing zones for other persistent chemicals such as lead and cadmium.

The proposed amendments to Part 132 would establish a 10-year phase-out period for existing discharges. However, this would begin after the publication date of the final BCC mixing zone rule. EPA believes that a longer period would not be reasonable to phase out BCC mixing zones for existing discharges because five of the eight Great Lakes States already have similar BCC mixing zone provisions in their State regulations and the remaining States have known since 1997 that EPA intended to reinstate this provision in Part 132 to ensure consistency with the United States' international agreement to virtually eliminate persistent toxic substances from the Great Lakes System. In addition, EPA has not chosen to reduce the phase-out period to less than 10 years (e.g., March 23, 2007, as promulgated in the 1995 Guidance) because EPA believes that affected dischargers will probably need 10 years to come into compliance.

IV. Request for Public Comment on Exceptions for New Discharges of BCCs From Municipalities

As discussed above, today's proposal would prohibit mixing zones for new discharges of BCCs to the Great Lakes System. EPA is requesting comment on providing a narrow exception for new discharges of BCCs from municipalities. Under Michigan's current regulations, a municipality could obtain a variance for a new discharge of BCCs when necessary to prevent a public health threat to the community. Michigan's variance procedure was adopted to address, for example, a situation where a community with failing septic systems had to be connected to a new POTW to avert a potential public health threat from failing septic tanks. Under EPA's proposed rule the State could not authorize a mixing zone for a new POTW discharge to accommodate BCCs contained in the community's wastewater even if it were not technically and economically feasible for the POTW to achieve its criteria-based WQBEL. EPA requests comment on whether it would be appropriate to allow a narrow exception for new discharges of BCCs from municipalities that commence for the purpose of averting a threat to public health. EPA also requests comment whether narrow exceptions for municipalities would be reasonable in other situations.

V. Economic Analysis

As explained more fully below and in section VI.B., EPA's proposed rule

would not itself establish any requirements directly applicable to regulated entities. The mixing zone provisions would not be enforceable against new or existing discharges until separate steps are taken by States and Tribes to adopt and implement them. Therefore, this proposed rule does not have an immediate effect on dischargers or the community. Until actions are taken to adopt and implement the final version of this rule, there will be no economic effect on any dischargers or the community.

Even after BCC mixing zone provisions are adopted and implemented, EPA believes that they would not have a significant economic impact on a substantial number of dischargers because most BCCs are already banned from use and/or production or are severely restricted in use. Therefore, EPA does not expect BCCs that are banned or severely restricted to be present in discharger effluent above criteria levels. For the few remaining BCCs that may be contaminating effluent as a result of household products or products and chemicals used in production, municipalities and commercial and industrial users of those products should be able to substitute away from these products, rely on cleaner technologies that do not require their use or produce BCCs as a by-product, or engineer source controls to reduce releases of BCCs to acceptable levels. In addition, for existing discharges, there is some flexibility and discretion in how the proposed rule would be implemented by States and Tribes to account for technical and economic considerations. While EPA expects that implementation of today's rule would ultimately result in some new or revised permit conditions for existing dischargers, promulgation of this proposal would not impose any of these as yet unknown requirements on dischargers.

Nonetheless, consistent with the intent of E.O. 12866, EPA has evaluated (within the limits of these uncertainties) the possible impacts that might ultimately result from this rulemaking. The following sections discuss this evaluation.

A. Need for the Regulation

EPA has devoted considerable effort to identifying BCCs and developing the most appropriate criteria, methodologies, policies, and procedures to address them. The 1995 Guidance incorporated bioaccumulation factors (BAFs) in the derivation of criteria and values to protect human health and wildlife and to identify the BCCs.

Bioaccumulation refers to the uptake and retention of a substance by an aquatic organism from its surrounding medium and from food. For certain chemicals, uptake through the aquatic food chain is the most important route of exposure for wildlife and humans.

The wildlife criteria and the human health criteria and values incorporate appropriate BAFs in order to more accurately account for the total exposure to a chemical. Previous EPA guidelines for the derivation of human health water quality criteria used bioconcentration factors (BCFs), which measure only uptake from water. EPA believes, however, that the BAF is a better predictor of the concentration of a chemical within fish tissues in the Great Lakes System because it includes consideration of the uptake of contaminants from all routes of exposure. Therefore, the Guidance included methods for deriving BAFs for non-polar organic chemicals and identified 22 BCCs by these methods.

Today's proposed rule would prohibit mixing zones for BCCs and thus would require NPDES permit limitations to be set equal to water quality criteria for those pollutants. BCCs are not compatible with mixing zones because of their persistent and bioaccumulative nature. Thus, for BCCs, it is the mass of the pollutant that is problematic, not just the concentration; therefore, mixing zones are not appropriate because by definition they allow an increase in the mass discharged to the receiving waters.

For pollutants that quickly degrade and do not bioaccumulate, limited mixing zones are often acceptable. However, for persistent and highly bioaccumulative pollutants, mixing zones create "hot spots" in the environment where bioaccumulation of toxic pollutants in fish and other aquatic organisms can significantly exceed safe levels for consumption by wildlife and humans. Therefore, this proposal reflects EPA's judgment that mixing zones for BCCs (even of the limited size authorized by 40 CFR Part 132 under certain conditions) should be prohibited absent exceptional circumstances.

The Guidance currently allows a minimum 10:1 dilution ratio for lake discharges and 25 percent of the critical stream flow for tributary discharges in calculating mixing zones for all pollutants, including BCCs. Larger mixing zones are also allowed if a demonstration is performed. See 40 CFR Part 132, Appendix F, Procedure 3.D. and 3.E. Thus, with the currently allowable dilution, the mass of BCCs discharged from point sources to specific nearshore areas of the Great

Lakes System could be reduced significantly, e.g., by a factor of 10 to 100 in certain situations, if mixing zones for BCCs are prohibited.

Virtually all species of Great Lakes fish use the nearshore waters for one or more critical life stages or functions. The nearshore waters are areas of permanent residence for some fishes, migratory pathways for anadromous fishes, and temporary feeding or nursery grounds for other species from the offshore waters. Fish species diversity and production in the nearshore waters are higher than in offshore waters; they are generally highest in the shallower, more enriched embayments with large tributary systems. Thus, because the food web that bioaccumulates BCCs is concentrated near shore where natural sinks exist in the Great Lakes Basin, the elimination of mixing zones for these pollutants will further reduce the probability of adverse effects. The potential problem with allowing mixing zones for BCCs is that the increased loading of these pollutants increases the probability of adverse effects. The goal of virtual elimination of these substances in the international agreement between the United States and Canada reflects these concerns.

B. Potential Benefits Associated With Prohibiting Mixing Zones for BCCs

This proposal to prohibit mixing zones for BCCs targets the types of long-lasting pollutants that accumulate in the food web. The BCCs that have been found to bioaccumulate at levels of concern in the Great Lakes include, but are not limited to, polychlorinated biphenyls (PCBs), mercury, DDT, dioxin, chlordane, and mirex. For humans and wildlife, the main route of exposure to BCCs is through the consumption of Great Lakes fish. Potential adverse effects to aquatic life, wildlife, and humans associated with exposure to BCCs are described below.

In aquatic organisms, effects of BCCs range from death to impairment of reproduction, development, and growth (Sweeney et al., 1993). Effects have been documented at all levels of biological response from changes in physiological function to recruitment and development of benthic communities (Beattie et al., 1996; Landrum et al., 1991; Sasson-Brickson and Burton, 1991). Examples of the types of observed effects include biochemical responses (e.g., decreased calcium and magnesium metabolism, depressed in serum calcium, elevated skeletal magnesium, reduced whole body lipid content, elevated muscle water content); liver abnormalities (e.g., enlarged livers or reduced liver weights); skeletal

abnormalities (e.g., scoliosis and lordosis); reproductive toxicity (e.g., egg mortality, fry deformities, reduced fertilization success, reduced embryo survival, reproductive failure); and somatic (non-reproductive) mutations (Palace et al., 1996; Zabel and Peterson, 1996).

In wildlife, birds exposed to BCCs have exhibited biochemical dysfunction and metabolic effects (e.g., abnormal serum chemistry, reduced levels of dopamine, zinc and calcium metabolism, reduced body temperature), behavioral/neurological disorders, and reproductive impairment (e.g., reduced numbers of eggs, abnormal courtship behavior, impaired nest building abilities, reduced eggshell thickness, delayed reproduction, reduced hatchability, reduced sperm concentration, chromosome abnormalities in embryos) (Elliott et al., 1996). Birth defects (e.g., cleft palate, heart defects), hepatic disorders and enlarged liver, and reproductive impairment and/or failure (e.g., high rate of kit death, increased stillbirths and abortions, altered menstrual cycles, lower birth rates) have been observed in small mammals.

Low concentrations of BCCs in birds and mammals have adverse effects on growth and development, reproduction, behavior, motor coordination, vision, hearing, histology, and metabolism (Driver et al., 1991). Chronic effects on wildlife include changes in enzyme production, hormonal balance, calcium metabolism, changes in behavior and reproduction, eggshell thinning, embryo mortality, and decreased hatchling survival. Studies on Great Lakes double-crested cormorant hatchlings revealed significantly increased congenital abnormalities, decreased hatchability, and increased birth defects as a result of exposure to BCCs (Larson et al., 1996). Rats fed BCC-contaminated Great Lakes walleye, whitefish, and lake trout exhibited abnormal neurological/behavioral effects. Farm raised lake trout injected with a single BCC had increased oxidative stress and altered liver function (Palace et al., 1996).

Potential adverse human health effects resulting from the consumption of fish containing BCCs include both the increased risk of cancer and the potential for systemic or noncancer risks such as kidney damage (U.S. EPA, 1997). Acute exposure can result in kidney damage, kidney failure, seizures, gastrointestinal damage, cardiovascular collapse, shock, and death (U.S. EPA, 1997). Chronic exposure can result in neurotoxicity, fetotoxicity, endocrine effects, hematological effects, reproductive dysfunction, sensory and

equilibrium disturbances, involuntary muscle activity, nausea, confusion, weakness, dizziness, headache, tremor, twitching, disorientation, convulsions, liver toxicity, diarrhea, sweating, wheezing, productive cough, pulmonary edema, paralysis, coma, psychosis, irritability, hyperactivity, aggressiveness, impairment of peripheral vision, blindness, slurred speech, disturbances in sensations, impairments of hearing, speech, and motor coordination, immunological, development, and reproductive impairment, and death (U.S. EPA, 1997). BCCs have been found to be mutagenic, genotoxic, and carcinogenic, causing liver and other types of cancer (U.S. EPA, 1997).

Risks to pregnant women and children are of particular concern (U.S. EPA, 1997). BCCs can induce heritable chromosomal changes in women which could result in birth defects in their infants, cross the human placenta contributing to exposure of the fetus through placental transfer, and accumulate in body tissues persisting for long periods of time. Unfortunately, exposure prior to pregnancy can contribute to the overall maternal body burden and result in exposure of the developing individual. Maternal reproductive dysfunction associated with exposure to BCCs can result in decreased fertility, premature labor, spontaneous abortion, reproductive hormone disorders, increased stillbirths, lack of mammary function, reduced libido, and delayed estrus. Fetal exposure can result in fetotoxicity which includes birth defects such as low birth weight, small head circumference, skeletal anomalies, malformations such as scoliosis and cleft palates, respiratory distress, heart defects and cardiac dysfunction, cranio-facial abnormalities, delayed bone development, central nervous system disorders, cataracts, neurological/behavioral effects, kidney abnormalities, immune dysfunction, and liver disorders and damage.

Children may be at greater risk than adults. BCCs can accumulate in human milk. As a result, lactation may provide a significant dietary source of BCCs in infants of mothers who have been exposed. Lactational exposure is of significant concern because of the rapid transfer of the chemical through breast milk. Risks to infants and children include central nervous system effects, mortality, low IQ scores, cataracts, congestive heart failure, skin disorders such as lesions, cancers such as neuroblastoma and acute leukemia, immune system dysfunction and immunosuppression, skeletal disorders

such as osteoporosis, neurological/behavioral effects such as weakness, convulsions, abnormal behavior, seizures, learning disorders, and endocrinological disorders.

However, quantifying and monetizing the potential benefits associated with the water quality improvements is a challenging exercise in the best of circumstances. For today's proposal, the speculative and site-specific nature of the potential impacts further complicate the task. Although EPA has evaluated the potential cost impact of eliminating mixing zones for BCCs under improved analytical detection methods assuming that all other conditions remain unchanged, it is not meaningful to make predictions of the host of site-specific factors that will influence the level of potential benefits in the future. These factors include the site-specific water quality conditions, the health of the aquatic and aquatic-dependent ecosystems, the baseline level of use of the Great Lakes water resources, the availability of substitute water resources, and the willingness-to-pay for improvements in the Great Lakes water resources by the user and non-user populations.

However, because of the persistent and highly toxic nature of the pollutants regulated, EPA expects that the proposed rule will result in a range of benefits including human health risk reductions (for both cancer and noncancer risks) and ecologic values associated with improving the health of aquatic life and wildlife. In this respect, EPA's benefit analysis is unchanged from the analysis performed at the time EPA promulgated the 1995 Guidance. In evaluating that provision, the Court in the *AISI* case found that EPA "appears adequately to have explained the environmental justification for its decision." *AISI*, 115 F.3d at 997.

C. Potential Costs Associated With Today's Proposal To Prohibit Mixing Zones for BCCs

In the *AISI* litigation, Petitioners pointed to a comment made in a public hearing on the 1995 Guidance by a municipal discharger that was concerned about spending \$300,000 to remove less than a pound of mercury from its discharge. These Petitioners argued that even after employing adjustments for relative toxicity, EPA had not provided adequate justification for requiring dischargers to incur these extraordinary costs. The *AISI* Court agreed and remanded this portion of the 1995 Guidance to EPA to address whether the BCC mixing zone prohibition is cost-justified.

EPA believes that this proposal to prohibit mixing zones for BCCs is justified even in view of the costs it could pose. As a preliminary matter, EPA notes that the costs associated with the proposed rule are highly speculative for a number of reasons. First, EPA assumes that this proposed rule would have no effect in waters where water quality standards are not being met for the BCC in question or are not expected to be met, because no mixing zone would be available for the pollutant irrespective of this proposed rule since no dilution ("clean" water) would be available for mixing with the discharge. For those waters, this proposed rule would have no cost impact until the water attains water quality standards for BCCs or until a TMDL or comparable mechanism is established that will lead toward water quality standards attainment. EPA is unable to forecast at this time when and where those events might occur and, correspondingly, what point source discharges might be affected and to what degree. Second, irrespective of this proposal, some Great Lakes States already prohibit mixing zones for BCCs or have incorporated flexibility into their regulations to ensure that control of BCCs, such as mercury, do not result in extraordinary costs. Therefore, this proposed rule would have little or no effect in those States. Third, as noted above, the proposal contains a mechanism for existing discharges by which Great Lakes States can mitigate conditions of potential widespread social and economic hardship resulting from today's proposed rule. Thus, some potential costs may never materialize.

Nonetheless, EPA evaluated potential cost impacts to the universe of point source facilities located in the Great Lakes Basin based on two conservative assumptions: (1) that, but for the proposal, all facilities would receive a mixing zone for BCCs; and (2) that few facilities would obtain an exception to the mixing zone prohibition contained in the proposed rule. In other words, EPA's cost analysis assumes that every facility discharging or planning to discharge BCCs to the Great Lakes System would need to reduce the BCCs in its effluent to levels corresponding to criteria end-of-pipe, regardless of current water quality conditions or State regulations. At the time EPA issued the Final Water Quality Guidance for the Great Lakes System in 1995, EPA had evaluated potential costs of all of its provisions, including the original provision to prohibit mixing zones for BCCs. EPA presented the findings of these analyses in the "Assessment of

Compliance Costs Resulting from Implementation of the Final Great Lakes Water Quality Guidance" (EPA, 1995,820-B-95-010). As part of this rulemaking, EPA has evaluated just the incremental impact of today's proposal to prohibit mixing zones for BCCs.

For this proposed rule, EPA departed from its 1995 Guidance cost evaluation in two respects. First, EPA considered new effluent data that was not evaluated as part of the cost analysis for the 1995 Guidance. Second, EPA changed the way it estimated the amount of pollutant loads that would need to be removed—and hence the costs incurred—under this proposal. With respect to the data, EPA evaluated the same sample of facilities used for evaluation of the 1995 Guidance. However, EPA subsequently collected additional data on pollutants in the effluent of nine publicly owned treatment works (POTWs) in the sample using "high-resolution" and "super-clean" methods for detecting pollutants. Thus, EPA supplemented the original data set with this data, which showed the infrequent presence and relatively low concentrations of BCCs in effluents using state-of-the-art analytical methods. This information is particularly significant because these methods are more sensitive than the analytical methods that dischargers are currently required to use, and thus provide a more accurate picture of effluent quality than most of EPA's discharger-generated data. Thus, for this proposal, EPA evaluated potential costs both with and without the new data.

EPA's second departure from its 1995 Guidance analysis involved the methodology for estimating potential compliance costs associated with the BCC mixing zone provision. In 1995, EPA's sensitivity analysis for the BCC mixing zone provision was constrained by analytical method detection levels (MDLs) used for compliance purposes at that time and did not account for improvements in MDLs in the future. While this analysis accurately predicted the impact of the BCC mixing zone provision based on 1995 MDLs, it may have resulted in an underestimate of compliance costs associated with the BCC mixing zone provision if MDLs improved to criteria levels in the future and "hidden" loadings of BCCs are discovered and removed. For this proposal, EPA assumed that analytical detection methods would improve so that all BCCs can be quantified at the applicable water quality criteria level. This is significantly different than the evaluation performed in 1995 for the BCC mixing zone provision.

Employing this assumption, EPA made a new estimate of the pollutant load that would need to be reduced if this proposed rule were promulgated, based on the difference between implementing the Guidance as presently codified at 40 CFR Part 132 (with no special BCC mixing zone provisions) and implementing the Guidance if amended by today's proposal (prohibiting mixing zones for BCCs). That is, the increment evaluated is just the impact of prohibiting BCC mixing zones and does not include the total cost of implementing the Guidance.

Apart from these differences, EPA's method for establishing costs followed the methodology used for the 1995 Guidance and the sensitivity analysis for the future impact of detection levels. See "Assessment of Compliance Costs Resulting from Implementation of the Final Great Lakes Water Quality Guidance" (March 1995). For a sample of 50 facilities representing 588 major municipal and nonmunicipal dischargers, EPA calculated projected limits based on the 1995 Guidance and allowed mixing zones for BCCs (*i.e.*, reflecting the requirements as currently codified at 40 CFR Part 132). This was the baseline. EPA then compared these limits to projected limits based on the 1995 Guidance as amended by today's proposed rule (*i.e.*, prohibiting mixing zones for BCCs). In developing the limits associated with the proposed rule, EPA used the two sets of data described above. The comparison of the limits under the baseline and the proposed rule produced an incremental pollutant load reduction attributable to the proposed rule. EPA then determined the cost of reducing this pollutant load based on the estimated cost per pound of toxic pollutant removed (including BCCs) established for the 1995 Guidance.

The cost per pound to remove toxic pollutants reflects EPA's higher cost estimate for the 1995 Guidance (updated to January 1999 dollars). As described in the "Regulatory Impact Analysis of the Final Great Lakes Water Quality Guidance" (March 1995), for EPA's higher cost estimate, capital and operation and maintenance (O&M) costs related to the installation of treatment technologies accounted for over 90 percent of the total annual costs. Further, EPA assumed that the regulatory flexibility available to existing BCC discharges based on economic and technical considerations (as set forth in the 1995 Guidance and, now, in this proposal), was used only under exceptional circumstances.

Based on the pre-1995 data updated with new information from nine POTWs

(Scenario 1), EPA estimates annual compliance costs to be approximately \$12 million (January 1999 dollars) and BCC load reductions to be just over 225,000 toxic pound-equivalents per year. Pound-equivalents are calculated by multiplying pounds of each pollutant removed by the toxic weight (based on the toxicity of copper) for that pollutant. Under this scenario, POTWs and indirect dischargers to POTWs are expected to incur almost 92 percent of the total annual costs. Nonmunicipal facility categories account for the remaining 8 percent of the total costs. Controls for 2,3,7,8-TCDD, mercury, lindane, and toxaphene account for nearly 97 percent of the estimated annual costs.

Based exclusively on pre-1995 data (Scenario 2), EPA estimates the annual compliance costs to be approximately \$35 million. This estimate is based on expected BCC load reductions of approximately 668,000 toxic pound-equivalents per year. Under this scenario, the majority of estimated costs are associated with POTWs and indirect dischargers to POTWs (accounting for just over 97 percent of the total annual costs). Nonmunicipal facility categories account for just under 3 percent of the total costs. Mercury, lindane, 2,3,7,8-TCDD, pentachlorobenzene, and toxaphene account for almost 80 percent of the estimated annual costs. In either scenario, mercury and 2,3,7,8-TCDD account for over 50 percent of all costs.

The costs and loadings reductions were lower for Scenario 1 than for Scenario 2 because Scenario 1 employed more recent effluent data (based on high-resolution/super-clean methods for detecting pollutants) for the nine sample POTWs that indicated the infrequent presence and relatively low concentrations of BCCs in effluents. EPA expects that Scenario 1 better approximates the estimated total annual costs and BCC load reductions attributable to this proposal because use and/or production of many BCCs are already banned (*e.g.*, PCBs and DDT) or are severely restricted by regulation (*e.g.*, dieldrin and toxaphene) and are not expected to be present in effluents above criteria levels.

D. Factors That May Result in Lower Cost Impacts

As previously acknowledged in EPA's 1995 analyses of the BCC mixing zone provisions in the 1995 Guidance, estimating treatment costs for WQBELs below current minimum levels (MLs) of quantification, and most likely below MDLs, is inherently speculative. The ML is the level at which the analytical system or method gives recognizable

signals and an acceptable calibration point. In other words, it is the minimum level at which a pollutant's concentration in the effluent can be reliably quantified. The MDL, in turn, is the minimum level at which the pollutant can even be reliably detected (never mind quantified). This means that EPA cannot reliably quantify BCC loadings in effluents below the MLs for the BCCs in question or predict the effectiveness of control strategies needed to reduce them to achieve WQBELs based on criteria end-of-pipe. This makes it very difficult for EPA to provide a meaningful estimate of the economic impact of this proposed rule on new discharges (which would be subject to its prohibitions within two years of the publication date of the final rule). The same uncertainties interfere with cost estimates applicable to existing discharges, which under the proposal would have ten years from the publication date of the final rule to phase-out their BCC mixing zones. EPA expects that WQBELs for many BCCs will remain well below MLs and possibly MDLs even beyond the time the mixing zone phase-out is fully implemented for existing discharges of BCCs because criteria for many of these pollutants are still far below quantitation levels for the most advanced analytical methods currently being evaluated by the Agency. In any case, even if EPA were confident today that the relevant analytical methods would become more stringent in the next years, it is difficult for EPA to speculate today what the new MLs would be. Equally speculative would be EPA's assumptions regarding dischargers' treatment or pollution prevention response to any future changes in analytical methods, or the States' response to what additional controls would be considered technically and economically feasible. For these reasons, potential economic effects on dischargers in the Great Lakes Basin resulting from prohibiting mixing zones for BCCs are speculative.

For some BCCs, notably mercury, the applicable analytical method used for compliance purposes has a minimum level that is lower than the WQBELs based on criteria end-of-pipe (*i.e.*, the WQBEL that would be calculated if no mixing zone is available). Even in this situation, however, estimating costs associated with that projected WQBEL would be speculative using the new method, which was published by EPA in June of 1999, 64 FR 30417 (June 8, 1999), because the method has not been in use long enough to demonstrate the effectiveness of pollution prevention/

waste minimization control strategies, including source controls, or the effectiveness of existing or new and innovative treatment technologies that could be used to reduce mercury to levels needed to achieve WQBELs based on criteria end-of-pipe. In addition, as stated above and discussed in more detail below about Ohio's mercury variance, there is considerable uncertainty in how the technical and economic feasibility exception provision in today's proposal will be implemented by the Great Lakes States.

Notwithstanding the speculative nature of potential future costs on BCC dischargers, however, there are several factors that could ultimately lower the potential cost impacts from today's proposed rule. Some of these factors are discussed below.

1. Lower BCC Levels Than Anticipated

While developing the 1995 Guidance, EPA received numerous comments asserting that, because of the ubiquitous nature of BCCs in the environment, many BCCs will be detected above permitted limits and significantly above criteria in wastewater discharges as improvements to analytical methods are made.

As a result, EPA attempted to determine the potential presence of BCCs in treated wastewater discharges to the Great Lakes Basin using the most sensitive, state-of-the-art analytical methods available to the Agency. Particularly, EPA performed limited sampling of treated wastewater discharges from the nine major POTWs that the Agency had randomly selected as its sample to estimate compliance costs for the Guidance. EPA concentrated its BCC sampling efforts on POTWs because although BCCs could potentially be present in non-POTW discharges, the presence and control of BCCs for non-POTWs are in most cases highly dependent upon the manufacturing processes and raw materials utilized by a facility. In contrast, EPA assumed BCCs to be more ubiquitous at major POTWs, which have less control of the potential sources of BCCs being discharged to their collection systems.

As a result of the sampling effort, EPA found BCCs or suspected BCCs to be present only infrequently in POTW effluent (25 detected analytes or congener mixtures in 288 possible observations, approximately nine percent of all analytes and congener mixtures) and, in those samples, in relatively low concentrations (11 detected concentrations above criteria, less than four percent of all analytes and congener mixtures). Of the pollutants

detected in EPA's sampling effort, mercury was detected at each of the POTWs (either as total mercury or in the methyl mercury form). The concentrations of mercury found in POTW effluents exceeded the most stringent Guidance criteria for mercury in only five of the nine POTWs. Other BCCs with Tier I criteria that were detected include lindane (found in seven of nine POTWs, none above the Guidance criteria), hexachlorobenzene (found in four out of nine POTWs, three of which were above the Guidance criteria), and dioxins (found in two out of nine POTWs, both above criteria expressed as a toxicity equivalent factor of 2,3,7,8-TCDD). Coplanar PCBs (treated as a mixture), a suspected BCC without a Tier I criterion, were found in one POTW above the expected Tier II value. Pentachlorobenzene, another BCC without Tier I criterion, was also detected in two of the nine POTWs at levels EPA expects to be below Tier II values established in accordance with Tier II procedures contained in the Guidance.

2. Availability of Lower Cost Control Options

Commenters also expressed concern related to the controls that will be necessary to ensure compliance with associated WQBELs for BCCs once they are detected in wastewater discharges. EPA's estimates of the potential cost of today's proposed rule are based on the cost per pound-equivalent removed that was associated with EPA's higher cost estimate from its analysis of the 1995 Guidance. In 1995, EPA developed the high end estimate of potential compliance costs under the assumption that needed pollutant reductions would largely be met through installation of end-of-pipe treatment.

However, EPA believes that a facility, when faced with the challenge to achieve compliance with WQBELs for BCCs after mixing zones are eliminated, will select the most cost-effective controls. The controls to be applied for a facility, and the effectiveness of those controls, will vary depending upon many factors including, for example, volume of discharge, type of manufacturing processes, raw materials, number and types of BCCs present in the discharge, etc. However, EPA believes that, prior to design and installation of a treatment system, a facility would evaluate whether lower-cost options, such as modernizing certain unit operations and processes within the facility or implementing other waste minimization or pollution prevention techniques, are feasible.

For example, there are several documented instances in the Great Lakes Basin and elsewhere where the development and implementation of aggressive source control programs have resulted in the virtual elimination of pollutants, including BCCs. For example, the Western Lake Superior Sanitary District (WLSSD), which after evaluating the costs involved to meet more stringent WQBELs for mercury with end-of-pipe treatment, concluded that pollution prevention techniques were the preferable control strategy. As a result, WLSSD published a Blueprint for Mercury Elimination, which is a guide designed to "assist wastewater treatment plant staff with creating and implementing their own mercury reduction projects." As a result of the efforts of WLSSD, effluent mercury levels decreased significantly in the wastewater effluent.

EPA understands that lower-cost alternatives may not be feasible or available for all facilities, and that some may require the installation of new or expanded treatment systems when mixing zones are eliminated for BCCs. Depending upon the circumstances of the discharger, the installation of these treatment systems could be expensive and not cost-effective. However, except for mercury which was discussed earlier, because criteria for many of the BCCs covered by the 1995 Guidance and today's proposal are well below quantification levels (MLs), the actual quantity of BCC loads that would need to be removed from a wastestream would be unknown using current Part 136 analytical methods. As such, it is uncertain whether a facility would actually incur the capital costs associated with the construction of new or expanded treatment systems.

3. Availability of Regulatory Alternatives

There are several regulatory alternatives that are available to dischargers of BCCs that could provide some relief in the event that EPA promulgates the proposed restrictions on BCC mixing zones.

a. Variance from Water Quality Standards—The Guidance allows States and Tribes to provide existing Great Lakes dischargers relief from a water quality standard in the form of a variance to the standard. See 40 CFR Part 132, Appendix F, Procedure 2. Variances are available for BCCs. The variance, in effect, provides a substitute standard for the point source; water quality-based effluent limits would be based on that substitute standard. The intent of the variance provision is to: (1) Provide a mechanism by which permits

can be written to meet a modified standard where compliance with the underlying water quality standard is demonstrated to be infeasible; (2) encourage States to maintain original standards as goals rather than to provide relief to point sources by removing uses; (3) identify conditions under which such variances may be granted; (4) identify the requirements for variance applications; and (5) ensure the highest level of water quality achievable while the variance is in effect.

Variances may be available for certain dischargers where the intake water contains a ubiquitous pollutant that is found in almost all water bodies in a watershed at about the same concentration due to watershed-wide contributions from nonpoint sources and where removing the pollutant would cause a substantial and widespread social and economic impact. The State or Tribe may renew the variance every 5 years, or at the time of permit reissuance, whichever is less, by recertifying the eligibility of the discharger. Procedure 2 of Appendix F of the Guidance identifies the terms and conditions that must be met if a State or Tribe wants to grant a variance.

Traditionally, variances are chemical-specific and facility-specific. For situations where a number of dischargers are located in the same watershed and the circumstances for granting a variance are the same, a State or Tribe may wish to process a multiple-source variance for a group of dischargers at one time. The State or Tribe would need to make a showing that all of the individual facilities in a group meet the terms and conditions described in Procedure 2. After the multiple source variance is approved for the initial group of facilities, additional facilities could be included in the multiple source variance, provided they met the terms and conditions of Procedure 2. As with individual variances, a multiple source variance would be subject to review and approval by EPA; however, individual agreements between the States or Tribes and their respective EPA Regional offices could be developed to streamline such review and approval.

In addition to the specific requirements of Procedure 2, a State or Tribe must make a showing that each of the individual facilities in a specific group meets the criteria for granting a variance and must:

1. Identify the facilities proposed for coverage under the variance;
2. Identify the geographic area of the watershed impacted by the variance;
3. Evaluate the geographic area for the existence of any endangered or

threatened species listed under section 4 of the Endangered Species Act; and

4. Recertify the eligibility of individual facilities at a minimum of every 5 years, or at the time of permit reissuance, whichever is less.

New and recommencing dischargers are not eligible for variances. As with any variance granted under Procedure 2, dischargers must continue to implement all applicable technology-based treatment and pretreatment requirements of CWA sections 301, 302, 304, 306, 307, 401 and 402 and WQBELs not affected by the variance.

b. Site-specific Criteria—Procedure 1 of Appendix F of the 1995 Guidance provides for changing the criteria to account for site-specific environmental conditions that affect the stringency of the criteria (e.g., toxicity to indigenous species). EPA recommends that States and Tribes develop site-specific modifications to human health, wildlife and aquatic life Tier I criteria or Tier II values to reflect local physical, chemical, biological and/or hydrological conditions, especially in situations where such modifications improve the cost-effectiveness of treatment or other control alternatives. Further, site-specific modifications to criteria and values should take into consideration differences in species sensitivity; bioaccumulation factors (BAFs) including food chain multipliers; particulate organic carbon and dissolved organic carbon concentrations; fish lipid content; and fish consumption rate.

An important component of a site-specific modification is the definition of the site to which the modification is applicable. A site may range from being a portion of a watershed to the entire part of the Great Lakes System under the jurisdiction of the State or Tribe proposing the modification. EPA encourages States and Tribes to work with permittees to modify criteria and values, where appropriate, on as large an area as practical to avoid duplication of effort and to conserve resources. However, EPA notes that it could be more cost-effective to develop a site-specific criteria for a very small area as well.

c. Exceptions to the BCC Mixing Zone Prohibitions for Existing Discharges—As described earlier in section III.B. of this preamble, today's proposed rule would provide for limited exceptions for existing discharges of BCCs to the Great Lakes System. First, today's proposed rule would allow an exception with respect to existing discharges for facilities implementing water conservation measures. In order to be granted this exception, the discharger must show that the failure to grant a

mixing zone would preclude the use of water conservation measures that would lead to overall load reductions of BCCs even though BCCs would consequently appear in higher concentrations.

Second, the proposal would allow for the granting of mixing zones for existing discharges of BCCs after the phase-out period because of technical and economic considerations. In order to authorize a mixing zone for an existing discharge of BCCs, the permitting authority must determine that: (1) The discharger is in compliance with existing technology-based and water quality-based effluent limitations for the BCC for which a mixing zone is requested; and (2) the discharger has reduced and will continue to reduce the loading of the BCC for which a mixing zone is requested to the maximum extent possible, such that any additional controls or pollution prevention measures to reduce or ultimately eliminate the BCC would result in unreasonable economic effects on the discharger or the affected community because the technology is not feasible or cost-effective.

In addition to the possible alternatives provided for by EPA in the 1995 Guidance and today's proposed rule, States within the Great Lakes Basin can also provide some additional limited relief to dischargers when faced with complying with the phase-out of mixing zones for BCCs. For example, the State of Ohio's water quality standards adopted in compliance with the Guidance contain a variance provision for mercury that relieves dischargers from constructing end-of-pipe treatment for mercury once detection levels improve. The basis for the mercury variance provision was a Statewide analysis that showed that it was not cost-effective to install end-of-pipe treatment to reduce mercury from Ohio's pre-Guidance standard of 12 nanograms per liter (ng/L) to its post-Guidance mercury criteria of 3.1 and 1.3 ng/L for the protection of human health and wildlife, respectively. In exchange for relief from installation of end-of-pipe treatment, a facility is required to implement a pollutant minimization program and must demonstrate that it can, or projects that it can, achieve an average annual mercury effluent concentration of 12 ng/L or less. EPA expects that Great Lakes States will use an analysis similar to the one performed by Ohio on a facility-by-facility basis to support an exception to the mixing zone prohibition for existing discharges of BCCs in those cases where it would be technically or economically infeasible to achieve criteria-based WQBELs for BCCs absent a mixing zone.

VI. Administrative Requirements

A. Regulatory Planning and Review (Executive Order 12866)

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA 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 or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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

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

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act, generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Administrator certifies that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities for the reasons explained below. Consequently, EPA has not prepared a regulatory flexibility analysis.

This proposal would amend the Water Quality Guidance for the Great Lakes System to establish requirements that apply in the first instance to Great Lakes States and Tribes. These requirements would restrict the current discretion of States and Tribes, in establishing water quality-based effluent limitations for dischargers discharging BCCs, to allow for mixing zones for BCCs. The proposed changes would do two things. First, in the case of NPDES permits issued to new dischargers, States and Tribes would need to ensure that new discharges of BCCs achieve limits equal to the water quality criteria for those BCCs. Second, in the case of existing discharges, while States and Tribes would retain some discretion to authorize mixing zones for BCCs in limited circumstances, by and large, dischargers of BCCs would also need to achieve limits equal to water quality criteria for those pollutants.

The RFA only requires analysis of the economic impacts of a rule on the small entities that are subject to the requirements of a rule. *United Distribution Cos. v. FERC*, 88 F.3d 1105 at 1170 (D.C. Cir. 1996), quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985). Today's proposal applies to States and Tribes in the Great Lakes System when issuing NPDES permits. It would establish requirements that States and Tribes must adopt and apply to all new and virtually all existing dischargers, including small entities. The universe of dischargers affected by the rule, if adopted, is certain and States and Tribes have no discretion in implementing the rule with respect to new dischargers and only limited authority to modify the requirements with respect to existing dischargers. In this sense, the proposal would impose requirements on new and existing dischargers in the Great Lakes System.

The proposal would impose requirements on dischargers in much the same way that, for example, effluent limitations guideline regulations do. The guideline regulations do not become binding requirements on dischargers until the guideline discharge limitations are included as conditions in an NPDES permit issued to the discharger. These guideline limitations, however, must be included by NPDES permitting authorities as permit conditions when the permitting authority issues or reissues permits to dischargers in the guideline industry point source category. Based on this consideration, EPA has concluded that small entities will be subject to the proposed regulation for purposes of the RFA and EPA has accordingly evaluated

the impact of the proposal on small entities. Based on its assessment, the Agency concludes that the proposal would not have a significant economic impact on a substantial number of small entities for the reasons explained below.

EPA prepared a screening analysis to evaluate the potential impact to existing small entity dischargers that would be subject to the requirements of the rule, if it is promulgated as proposed (*i.e.*, NPDES permit holders that may discharge BCCs). EPA identified existing small dischargers potentially affected by the mixing zone provisions using the definitions of small businesses, small governmental jurisdictions, and small nonprofit organizations established by the RFA. For this analysis, EPA considered the potential effect of this proposed rule only on direct dischargers. Under these assumptions, EPA estimated that there are approximately 2,329 small entities that potentially would be subject to the requirements of the proposed rule, if promulgated (61.4 percent of the 3,795 total NPDES permit holders that may discharge BCCs to the Great Lakes Basin), consisting of "small businesses" and "small governmental jurisdictions." EPA does not expect any existing small nonprofit organization to be potentially subject to the requirements of today's proposed rule.

EPA's screening analysis compared annualized facility-level compliance costs (estimated as described above in section V) with (1) total sales for nonmunicipal establishments, and (2) total government revenues for municipal owners of industrial establishments or domestic wastewater treatment plants. EPA compared the costs of compliance under two different assumptions. EPA's assessment showed that under neither assumption would the proposal have a significant economic impact on a substantial number of small entities.

Under Scenario 1, the cost to comply with the proposal would represent greater than 3 percent of estimated revenues for only 7 (or 0.7 percent) small municipalities, 0 small businesses, and 0 small nonprofit organizations. In aggregate, the cost to comply with the proposal would represent greater than 3 percent of estimated revenues for 7 (or 0.3 percent) small entities.

Under Scenario 2, compliance costs would represent greater than 3 percent of estimated revenues for 43 (or 4.4 percent) small municipalities, 0 small businesses, and 0 small nonprofit organizations. In aggregate, the cost to comply with the proposal would represent greater than 3 percent of

estimated revenues for 43 (or 1.9 percent) small entities. Thus, under either scenario, fewer than 100 small entities would experience an economic impact of 3 percent or greater on their revenues.

Moreover, the number of small entities for which compliance costs would represent greater than 1 percent of estimated revenues is 39 (4.0 percent) for small municipalities and 0 for small businesses under Scenario 1. In aggregate, the number is 39 (1.7 percent) small entities under Scenario 1. The number of small entities for which compliance costs would represent greater than 1 percent of estimated revenues is 127 (12.9 percent) for small municipalities and 0 for small businesses under Scenario 2. In aggregate, the number is 127 (5.5 percent) small entities under Scenario 2. EPA concludes that these estimates are not a significant economic impact on a substantial number of small entities. EPA's screening analysis is discussed in greater detail in "RFA/SBREFFA Screening Analysis for the Proposal to Amend the Final Water Quality Guidance for the Great Lakes System to Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern" (August 1999).

EPA's analysis was based on the projected impact of the rule on existing small entities. However, the proposed rule may also affect small entities that do not yet exist or that do not discharge BCCs at this time but may choose to do so in the future. EPA does not expect that new small entities discharging to the Great Lakes will experience significant economic impacts because in EPA's view, it is highly unlikely that any new discharger would discharge BCCs in quantities to be affected by the proposed mixing zone prohibition. First, most BCCs are already banned from use and/or production or are severely restricted in use. Therefore, EPA does not expect them to be present in a new discharger's effluent above criteria levels. Second, for the few remaining BCCs that may be contaminating effluent as a result of household products or products and chemicals used in production, municipalities and commercial and industrial users of those products should be able to substitute away from these products, rely on cleaner technologies that do not require their use or that do not produce BCCs as a by-product, or employ source controls to reduce releases of BCCs to acceptable levels. These pollution prevention alternatives often are significantly more cost-effective than the end-of-pipe treatment technologies that could be used in their place.

In other words, while EPA expects that implementation of today's proposed rule would ultimately result in some new or revised permit conditions for small entities, for the reasons set forth above EPA expects that neither new nor existing small entities will actually experience estimated economic impacts as great as those quantified under Scenario 2. In addition, for existing discharges, there is some flexibility and discretion in how the proposed rule would be implemented by States and Tribes within the NPDES permit program.

The Agency thus is certifying that today's proposed rule would not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

C. Paperwork Reduction Act

An agency may not consider or sponsor a collection of information, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Once this proposed rule is promulgated, the Great Lakes States and Tribes must adopt and submit to EPA provisions that are as protective as this amendment. See 40 CFR 132.1 and 132.5(a). EPA has already received approval from OMB for that information collection as part of the 1995 rulemaking. The OMB control number is 2040-0180.

D. 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 EPA promulgates a 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 to 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 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 the affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

As noted above, this proposed rule would amend Part 132 to prohibit mixing zones for BCCs in the Great Lakes System. EPA has determined that this proposed 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. The total annual impact of this rule on State, local, and Tribal governments and the private sector is not expected to exceed \$12 million to \$35 million. Thus, today's proposal to amend Part 132 to prohibit mixing zones for BCCs in the Great Lakes System is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. As described above, EPA does not expect that small governments, including Tribal governments with responsibility for implementing this rule, and small governments operating POTWs discharging to the Great Lakes, will experience significant economic impacts because most BCCs are already banned from use or are severely restricted in use. In those rare instances where the few remaining BCCs (*i.e.*, BCCs that are not already banned or severely restricted) are found contaminating effluent to unacceptable levels as a result of household products or products and chemicals used in production, municipalities and commercial and industrial users of those products should be able to substitute away from these products, rely on cleaner technologies that do not require their use or that do not produce BCCs as a by-product, or employ source controls to reduce releases of BCCs to acceptable levels. In addition, for existing discharges, there is some

flexibility and discretion in how the proposed rule would be implemented by States and Tribes within the NPDES permit program. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

E. Executive Orders on Federalism

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or Tribal government unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by those governments or to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and Tribal governments, the nature of their concerns, any written communications from the governments and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process allowing elected officials and other representatives of State, local and Tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

In compliance with Executive Order 12875, EPA has extensively involved Great Lakes State, Tribal and local governments in the development of this proposed amendment, notably during the process of developing the 1995 Guidance, which contained the original version of this proposed rule. The rulemaking that promulgated the Guidance in 1995 was subject to Executive Order 12875. The process used to develop the Guidance marked the first time that EPA had developed a major rulemaking effort in the water quality standards program through a regional public forum. The public process, which lasted over a seven year period and involved Great Lakes States, EPA, and other Federal agencies in open dialogue with citizens, Tribal and local governments, and industry in the Great Lakes Basin, is described further in the preamble to the Guidance. See 60 FR 15383-15384 (March 23, 1995).

As described above, today's action by EPA proposes to reinstate a provision nearly identical to the provision in the 1995 Guidance that was vacated by the Court in *AISI*. It thus reflects the State, local and Tribal government input EPA received during the 1995 Guidance rulemaking.

On August 4, 1999, President Clinton issued a new executive order on federalism, Executive Order 13132, see 64 FR 43255 (August 10, 1999), which

will take effect on November 2, 1999. In the interim, the current Executive Order 12612, see 52 FR 41685 (October 30, 1987), on federalism still applies. This rule, if promulgated as proposed, will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 12612. Today's proposed rule simply would require the Great Lakes States to add one discrete provision to the regulations and policies they have already adopted as part of the Great Lakes Water Quality Initiative, 60 FR 15366 (March 23, 1995). Similarly, this proposed rule would not have a substantial direct effect upon the distribution of power and responsibilities among the various levels of government because the Great Lakes States retain primary responsibility for administering their NPDES permit programs, through which this proposed rule would be implemented. It would authorize EPA to promulgate these mixing zone provisions only if a State or Tribe has failed to act. Accordingly, these provisions will not have a substantial direct effect on States or on intergovernmental relationships or responsibilities.

F. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

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

significantly or uniquely affect their communities.”

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments or impose substantial direct compliance costs on them. Therefore, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule. Nonetheless, in compliance with Executive Order 12875, EPA has extensively involved Great Lakes State, Tribal and local governments in the development of this proposed amendment, notably during the process of developing the 1995 Guidance, which contained the original version of this proposed rule. Today's action by EPA proposes to reinstate a provision nearly identical to the provision in the 1995 Guidance that was vacated by the Court in *AISI*. It thus reflects the State, local and Tribal government input EPA received during the 1995 Guidance rulemaking.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

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

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in E.O. 12866. Further, EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. However, as noted earlier, children may be a greater risk to BCCs than adults. If they are at greater risk, they will benefit the most from this rule to prohibit mixing zones for BCCs.

The public is invited to submit or identify peer-reviewed studies and data, of which the agency may not be aware, that assessed results of early life exposure to BCCs.

H. Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), to ensure their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which have been designated as "critical." Consultation is designed to assist federal agencies in complying with the requirements of section 7 by supplying a process within which FWS and NMFS provide such agencies with advice on whether an action complies with the substantive requirements of ESA.

In accordance with these requirements, EPA completed consultation with the FWS on the 1995 Guidance, and the FWS issued a biological opinion concluding that the Guidance was not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of species' critical habitat. As explained above, today's proposal essentially reinstates, with some clarification, the BCC mixing zone provisions of the 1995 Guidance. Since the substance of today's proposal has already been the subject of section 7 consultation, the effects of today's proposal have been addressed by the Services' prior biological opinion.

I. National Technology Transfer and Advancement Act

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

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

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

VII. References

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List of Subjects in 40 CFR Part 132

Environmental protection, Administrative practice and procedure, Great Lakes, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: September 24, 1999.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 132 of the Code of Federal Regulations is proposed to be amended as follows:

PART 132—WATER QUALITY GUIDANCE FOR THE GREAT LAKES SYSTEM

1. The authority citation for Part 132 continues to read as follows:

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

2. Section 132.5 is amended by revising paragraphs (a) and (c) to read as follows:

§ 132.5 Procedures for adoption and EPA review.

(a) Except as provided herein and in paragraph (c) of this section, the Great Lakes States and Tribes shall adopt and submit for EPA review and approval the criteria, methodologies, policies, and procedures developed pursuant to this part no later than September 23, 1996. With respect to procedure 3.C of appendix F of this part, the Great Lakes States and Tribes shall make its submission to EPA no later than 18 months after the publication date of the final rule to prohibit mixing zones for BCCs.

* * * * *

(c) The Regional Administrator may extend the deadline for the submission required in paragraph (a) of this section if the Regional Administrator believes that the submission will be consistent with the requirements of this part and can be reviewed and approved pursuant to this section no later than March 23, 1997, or, for procedure 3.C. of appendix F of this part, no later than 2 years after the publication date of the final rule to prohibit mixing zones for BCCs.

* * * * *

3. Appendix F of Part 132 is amended by adding Procedure 3.C. to read as follows:

Appendix F of Part 132—Great Lakes Water Quality Initiative Implementation Procedures

* * * * *

Procedure 3: * * *

C. *Mixing Zones for Bioaccumulative Chemicals of Concern (BCCs)*. The following requirements shall be applied in establishing

TMDLs, WLAs in the absence of TMDLs, and preliminary WLAs for purposes of determining the need for WQBELs under procedure 5 of appendix F, for BCCs:

1. There shall be no mixing zones available for new discharges of BCCs to the Great Lakes System. WLAs established through TMDLs, WLAs in the absence of TMDLs, and preliminary WLAs for purposes of determining the need for WQBELs for new discharges of BCCs shall be set equal to the most stringent applicable water quality criteria or values for the BCCs in question. This prohibition takes effect for a State or Tribe on the date EPA approves the State's or Tribe's submission of such prohibition or publishes a notice under 40 CFR 132.5(f) identifying that prohibition as applying to discharges within the State or Federal Tribal reservation.

2. For purposes of section C of procedure 3 of appendix F, new discharges are defined as: (1) A "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System from a building, structure, facility, or installation, the construction of which commences after the date the prohibition in section C.1 takes effect in that State or Tribe; (2) a new discharge from an existing Great Lakes discharger that commences after the date the prohibition in section C.1 takes effect in that State or Tribe; or (3) an expanded discharge from an existing Great Lakes discharger that commences after the date the prohibition in section C.1 takes effect in that State or Tribe, except for those expanded discharges resulting from changes in loadings of any BCC within the existing capacity and processes (e.g., normal operational variability, changes in intake water pollutants, increasing the production hours of the facility or adding additional shifts, or increasing the rate of production), and that are covered by the existing applicable control document. All other discharges of BCCs are defined as existing discharges.

3. Up until 10 years from the publication date of the final BCC mixing zone rule, mixing zones for BCCs may be allowed for existing discharges to the Great Lakes System pursuant to the procedures specified in sections D and E of this procedure.

4. Except as provided in sections C.5 and C.6 of this procedure, permits issued on or after the publication date of the final BCC mixing zone rule shall not authorize mixing zones for existing discharges of BCCs to the Great Lakes System 10 years after the publication date of the final BCC mixing zone rule. After 10 years from the publication date of the final BCC mixing zone rule, WLAs established through TMDLs, WLAs established in the absence of TMDLs, and preliminary WLAs for purposes of determining the need for WQBELs under procedure 5 of appendix F for existing discharges of BCCs to the Great Lakes System shall be set equal to the most stringent applicable water quality criteria or values for the BCCs in question.

5. *Exception for Water Conservation*. States and Tribes may grant mixing zones for any existing discharge of BCCs to the Great Lakes System beyond the date specified in section C.4 of this procedure where it can be

demonstrated, on a case-by-case basis, that failure to grant a mixing zone would preclude water conservation measures that would lead to overall load reductions in BCCs, even though higher concentrations of BCCs occur in the effluent. Such mixing zones must also be consistent with sections D and E of this procedure.

6. *Exception for Technical and Economic Considerations*. States and Tribes may grant mixing zones beyond the date specified in section C.4 of this procedure for any existing discharges of a BCC to the Great Lakes System upon the request of a discharger subject to the limited circumstances specified in sections C.6.a through C.6.c below.

a. The State or Tribe must determine that:

- The discharger is in compliance with and will continue to implement, for the BCC in question, all applicable requirements of Clean Water Act sections 118, 301, 302, 303, 304, 306, 307, 401, and 402, including existing National Pollutant Discharge Elimination System (NPDES) water-quality based effluent limitations; and
- The discharger has reduced and will continue to reduce the loading of the BCC for which a mixing zone is requested to the maximum extent possible such that any additional controls or pollution prevention measures to reduce or ultimately eliminate the BCC would result in unreasonable economic effects on the discharger or the affected community because the controls or measures are not feasible or cost-effective.

b. Any exceptions granted pursuant to this section shall:

- Not result in any less stringent limitations than those existing prior to the publication date of the final BCC mixing zone rule;

- Reflect all information relevant to ensure that the mixing zone is no larger than necessary to account for the technical constraints and economic effects identified pursuant to paragraph C.6.a above;

- Meet all applicable acute and chronic aquatic life, wildlife and human health criteria and values within and at the edge of the mixing zone or be consistent with the applicable TMDL or assessment and remediation plan authorized under procedure 3.A.

- As appropriate, require the discharger to implement an ambient monitoring plan to ensure compliance with water quality standards and consistency with any applicable TMDL or such other strategy consistent with section A of this procedure, including the evaluation of alternative means for reducing BCCs elsewhere in the watershed; and

- Be limited to one permit term unless the permitting authority makes a new determination in accordance with this section for each successive permit application in which a mixing zone for the BCC(s) is sought.

c. For each draft NPDES permit that would allow a mixing zone for one or more BCCs 10 years after the publication date of the final BCC mixing zone rule, the fact sheet or statement of basis for the draft permit that is required to be made available through public notice under 40 CFR 124.6(e) shall:

- Specify the mixing provisions used in calculating the permit limits; and

ii. Identify each BCC for which a mixing zone is proposed.

7. Any mixing zone authorized under section C.3, C.5 or C.6 must be consistent with sections D and E of this procedure, as applicable.

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[FR Doc. 99-25436 Filed 10-1-99; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54, 61, and 69

[CC Docket Nos. 96-262; 94-1; 99-249; 96-45; FCC 99-235]

Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, and Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document seeks comment on whether the Commission should adopt, in its entirety, a proposal submitted by the Coalition for Affordable Local and Long Distance Services (CALLS), as requested by the CALLS members. The CALLS proposal is an integrated interstate universal service and interstate access reform plan covering price cap incumbent local exchange carriers. The document also solicits comment on whether there are any aspects of the proposal that the Commission should incorporate into any of the Commission's concurrent proceedings, in the event we do not adopt the CALLS proposal in its entirety. In addition, the document invites commenting parties to propose alternative plans to that submitted by CALLS.

DATES: Comments are due on or before October 29, 1999. Reply comments are due on or before November 19, 1999.

ADDRESSES: Federal Communications Commission, Secretary, Room TW-A325, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Richard Lerner, Deputy Division Chief, Common Carrier Bureau, Competitive Pricing Division, (202) 418-1520.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's NPRM adopted September 14, 1999, and released September 15, 1999. The plan as submitted by CALLS is attached as Appendix A. The full text of this NPRM, as well as the complete files for the relevant dockets, is available for

inspection and copying during the weekday hours of 9:00 a.m. to 4:30 p.m. in the Commission's Reference Center, Room CY-A257, 445 12th St., SW, Washington, DC, (202) 418-0270, or copies may be purchased from the Commission's duplicating contractor, ITS, Inc., 1231 20th St., NW, Washington, DC 20036, (202) 857-3800. The complete text of the NPRM also may be obtained through the Internet, at http://www.fcc.gov/Bureaus/Common_Carrier/Notices/1999/fcc99235.doc.

Synopsis of Notice of Proposed Rulemaking

1. This NPRM seeks comment on an integrated proposal submitted by CALLS. The CALLS proposal is an interstate universal service and interstate access reform plan covering incumbent price cap local exchange carriers (LECs). The proposal was developed through negotiations among those local exchange carriers and interexchange carriers who are coalition members. It is designed to be implemented over a five-year period beginning in January of 2000 and would apply to those carriers who voluntarily elect to participate. CALLS requests that the Commission adopt the plan without modification as an integrated package. CALLS believes this plan will promote comparable and affordable universal service, reduce long distance bills, and promote competition in rural and residential markets.

2. The NPRM seeks comment on the CALLS proposal to revise the current system of common line charges by combining existing carrier and subscriber line charges into one flat-rated subscriber line charge, and permitting deaveraging of those charges subject to specific conditions. In addition, the NPRM invites parties to comment on the proposal by the CALLS members to establish a portable universal service fund that provides explicit support to replace support currently implicit in interstate access charges. The NPRM solicits further comment on the CALLS proposal to establish a "social contract" under which traffic-sensitive switched access rates are reduced annually until they reach an agreed level; once that level is reached, rates for all access elements are frozen until July 1, 2004. Finally, as part of the Commission's continuing efforts to reform regulation of universal service and interstate access charges to accelerate the development of competition in all telecommunications markets, commenting parties are invited to submit alternative plans to that proposed by CALLS.

3. Because some of the issues addressed by the CALLS Proposal involve matters that are already the subject of pending Commission and court proceedings (62 FR 31868, June 11, 1997), the Commission initiates this rulemaking to determine whether it should adopt the CALLS proposal in its entirety, as requested by the CALLS members, or whether certain elements of the proposal should be incorporated into any of the Commission's concurrent efforts to reform interstate access charges and universal service.

A. Ex Parte Presentations

4. This NPRM is a permit-but-disclose proceeding and is subject to the permit-but-disclose requirements under 47 CFR 1206(b), as revised. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written presentations are set forth in section 1.1206(b), as well.

B. Initial Regulatory Flexibility Act Analysis

5. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IFRA) of the possible significant economic impact on small entities by the proposals in this NPRM. See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Written public comments are requested on the IFRA. Comments must be identified as responses to the IFRA and must be filed in accordance with the same filing deadlines as comments on the rest of this NPRM. Parties should address the extent to which the CALLS proposal would affect large and small price cap incumbent local exchange carriers differently, and how small business entities, including small price cap incumbent local exchange carriers, would be affected. The Office of Public Affairs, Reference Operations Division, will send a copy of the NPRM, including this IFRA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. 603(a). In addition, the NPRM and IFRA (or summaries thereof) will be published in the **Federal Register**.