areas of the building; (5) a specific facility operations manual is prepared or adopted; (6) within work areas of the facility, all activities are confined to Class III biological safety cabinets or Class I or Class II biological safety cabinets used in conjunction with one-piece positive pressure personnel suits ventilated by a life support system; and (7) the maximum containment laboratory has special engineering and design features to prevent microorganisms from being disseminated to the environment.

Building

A structure that contains the requisite components necessary to support a facility that is designed according to the required Biosafety Level. The building can contain one or more facilities conforming to one or more Biosafety Level.

Confirmed Exposure

Any mishap with a BDP agent in which there was direct evidence of an actual exposure such as: a measurable rise in antibody titer to the agent, or a confirmed diagnosis of intoxication or disease.

Etiologic Agents

A viable microorganism, or its toxin which causes or may cause human disease, and includes those agents listed in 42 CFR 72.3 of the Department of Health and Human Services regulations, and any agent of biological origin that poses a degree of hazard similar to those agents.

Facility

An area within a building that provides the barriers appropriate to protect persons working in the facility and the environment external to the facility, and outside of the building.

High Efficiency Particulate Air (HEPA) Filter

A filter which removes particulate matter down to sub-micron sized particles from the air passed through it with a minimum efficiency of 99.97%. While the filters remove particulate matter with great efficiency, vapors and gases (e.g. from volatile chemicals) are passed through without restriction. HEPA filters are used as the primary means of removing infectious agents from air exhausted from engineering controls and facilities.

Human Lethal Dose

The estimated quantity of a toxin that is a minimum lethal dose for a 70 kilogram individual based upon published data or upon estimates extrapolated from animal toxicity data.

Commander or Institute Director

The commander or Institute Director of an Army activity conducting RDT&E with BDP etiologic agents, or the equivalent at a research organization under contract to the BDP.

Institution

An organization such as an Army RDT&E activity (Institute, Agency, Center, etc.,) or a contract organization such as a School of Medicine, or Research Institute that conducts RDT&E with BDP etiologic agents.

Laboratory

An individual room or rooms within a facility that provide space in which work with etiologic agents can be performed. It contains all of the appropriate engineering features and equipment required at a given Biosafety Level to protect personnel working in the lab and the environment external to the facility.

Large Scale Operations

Research or production involving viable etiologic agents in quantities greater than 10 liters of culture.

Maximum Containment Area

An area which meets the requirements for a Biosafety Level 4 facility. The area may be an entire building or a single room within the building. See chapter 7 for details.

Molded Masks

Formed masks that fit snugly around the mouth and nose and are designed to protect against non-toxic nuisance level dusts and powders. These do not require approval by NIOSH/MSHA. Masks made of gauze do not qualify.

Potential Accidental Exposure

Any accident in which there was reason to believe that anyone working with a BDRP agent may have been exposed to that agent, yet no measurable rise in antibody titer or diagnosis of intoxication or disease was made. However, the high probability existed for introduction of an agent through mucous membranes, respiratory tract, broken skin or circulatory system as a direct result of the accident, injury or incident.

Resource Conservation Recovery Act of 1976 Listed Hazardous Waste

The waste materials listed by EPA under authority of the RCRA for which the disposal is regulated by the Environmental Protection Agency. A description and listing of these wastes is located in 40 CFR part 261.

Suite

An area consisting of more than one room, and designed to be a functional unit in which entire operations can be facilitated. Suites may contain a combination of laboratories and/or animal holding rooms and associated support areas within a facility that are designed to conform to a particular Biosafety Level. There may be one or more suites within a facility.

Toxin

Toxic material of etiologic origin that has been isolated from the parent organism [4].

Kenneth L. Denton,

Alternate Army Federal Register Liaison Officer.

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BILLING CODE 3710-08-M

[4] The publication "Bacterial Toxins: a Table of Lethal Amounts," (Gill, D.M. (1982) Microbiological Reviews, *46*:86-94) contains a useful table of mammalian toxicities of numerous toxins.

federal register

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March 6, 1991

Part IV

Federal Emergency Management Agency

44 CFR Part 353

Fee for Services in Support, Review and Approval of State and Local Government or Licensee Radiological Emergency Plans and Preparedness; Final rule

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 353

RIN 3067-AB49

Fee for Services in Support, Review and Approval of State and Local Government or Licensee Radiological Emergency Plans and Preparedness

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule

SUMMARY: This rule adopts in final form part 353 of title 44 CFR, Emergency Management and Assistance, chapter 1, Federal Emergency Management Agency (FEMA), subchapter E, Preparedness. This Part establishes a fee charged to nuclear power plant licensees for services that FEMA contributes to site-specific radiological emergency preparedness activities for commercial nuclear power plants. FEMA's services contribute to the fulfillment of emergency preparedness requirements needed for the Nuclear Regulatory Commission's (NRC) licensing purposes under the Atomic Energy Act of 1954, as amended. This rule implements Title V of the Independent Offices Appropriations Act (IOAA) of 1952, 31 U.S.C. 9701, which authorizes the Federal Emergency Management Agency to recover to the fullest extent possible costs attributable to services to identifiable recipients.

EFFECTIVE DATE: This rule is effective April 8, 1991.

FOR FURTHER INFORMATION CONTACT: Vernon Wingert, Chief, Program Development Branch, Technological Hazards Division, FEMA, Washington, DC 20472; 202-646-2872.

SUPPLEMENTARY INFORMATION:

Background

On June 29, 1989, FEMA published in the **Federal Register** (54 FR 27390-27396) a proposed rule to establish a fee system for the services provided by the agency to recipient licensees for services to support site-specific offsite radiological emergency preparedness for commercial nuclear power plants. The fees are based on site-specific costs incurred under FEMA's Radiological Emergency Preparedness (REP) Program in support of the Nuclear Regulatory Commission's (NRC) licensing process under the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, *et seq.* These services are provided in support of a Memorandum of Understanding between NRC and FEMA (50 FR 15485, April 18, 1985) and regulations issued by both FEMA (44 CFR parts 350, 351 and 352) and NRC (10 CFR part 50). Emergency response plans and exercises are evaluated under joint FEMA-NRC criteria, NUREG-0654/FEMA-REP-1, Revision 1 and Supplement 1. When State and local governments do not participate in the development of an emergency plan, the licensee can submit a utility plan to the NRC (see 10 CFR part 50). FEMA, if requested by the NRC through the MOU, can make an assessment, finding and determination on such utility developed plans and exercises, that will be evaluated under the joint FEMA-NRC criteria.

After careful consideration, FEMA has prepared a final rule somewhat more narrow in scope than the proposed rule. The fees in this rulemaking are applicable only to services directly related to the obtaining and maintaining of an operating license. The primary differences between the proposed and final rule are the narrowing of activities eligible for reimbursement to the United States Treasury, including deletion of user fee charges for activities performed by FEMA in connection with continued review of State plans under 44 CFR part 350 once an operating license has been granted or the application has been denied or withdrawn. Licensees continue to be identified as recipients and payors of fees assessed for FEMA services due to the benefit of regulatory compliance with NRC requirements. The fee is based on Title V of the Independent Offices Appropriation Act (IOAA) of 1952, 31 U.S.C. 9701, which authorizes Federal agencies to recover to the fullest extent possible costs attributable to services to identifiable recipients.

Fee Development

A. Radiological Emergency Plans and Preparedness

Under the Radiological Emergency Preparedness (REP) Program, FEMA is responsible for processing applications for the review and approval of offsite radiological emergency plans and preparedness requested directly by a State under 44 CFR part 350 or by the NRC under the MOU (50 FR 15485, April 18, 1985) on behalf of the licensee. The REP Program also has responsibility for processing a licensee's certification when a request is made under Executive Order (E.O.) 12657 for Federal assistance and for providing such assistance, if warranted under 44 CFR part 352.

In identifying the site-specific services FEMA renders to licensees, it was determined that only those elements of the agency that provide such services benefitting licensees would be considered in the calculation of fees. These units are the Office of Natural and Technological Hazards/State and Local Programs and Support Directorate, the FEMA Regional Offices/Natural and Technological Hazards Divisions and the Office of General Counsel.

An estimate of the program's professional staff time is necessary to calculate the fee for site-specific offsite radiological emergency plans and preparedness services provided by FEMA. The costs of personnel who provide these services are included in the calculation of an average cost per work-year rate to maintain a professional employee who provides side-specific services that are billable for radiological emergency planning and preparedness activities. This rate has been developed by using: (1) The program's cost of personnel compensation (salaries) for professional REP and legal staff, (2) personnel benefits for the professional REP and legal staff, (3) administrative support (e.g., clerical salaries and benefits and printing), (4) travel and (5) overhead support (e.g., rent and utilities). This rate will be applied for site-specific services provided for licensees on a professional staff hourly rate basis of $39.00 per hour for FY 91, by FEMA staff. This rate will be revised on a fiscal year basis using the most current fiscal data available and the revised hourly rate will be published as a notice in the **Federal Register** for each fiscal year if the rate increases or decreases.

The professional staff hourly rate will be charged when any FEMA professional staff member works on a site-specific project that contributes to a licensee's compliance with the NRC's regulatory requirements. No charge will be made for work not related to a site-specific project.

Additional costs incurred by FEMA in the use of contractual services will be charged to the licensee by FEMA, at the rate and cost incurred.

Discussion of Comments on Proposed Rule

FEMA requested that comments on the proposed rule be submitted by August 28, 1989, followed by an extension to September 11, 1989. Thirty-one (31) written communications were received and placed in the Docket. These comments were received from eight (8) States, seventeen (17) utilities, two (2) utility associations, one (1) regulatory utility commissioners association, the Tennessee Valley Authority (TVA), one (1) city bar association and two (2) attorneys

representing twenty-five (25) utilities and two (2) citizens.

A number of the comments were general in nature addressing FEMA's basic authority for promulgation of the regulation and the role of FEMA in the planning process. A general comment was directed to the question of the identification of the licensee as the ultimate beneficiary of FEMA's services and thus, responsible for the payment of fees. There were also a number of comments directed to specific sections of the regulation. These specific comments will be related to the applicable section discussed and the agency's response noted with supporting comments.

A. General Comments

The Role and Authority of FEMA in the Regulatory Process

Several commenters expressed the concern that FEMA's role is not that of a regulatory agency and, therefore, is not authorized to recover costs under Title V of the IOAA. However, FEMA's role as the lead agency for review and assessment of the adequacy of offsite emergency plans developed by State and local governments or licensees and their capability to implement such plans is an inherent and necessary part of the regulatory process (FEMA/NRC MOU). Pursuant to 10 CFR 50.47(a) (1) and (2), the NRC will not issue an operating license for a nuclear power plant unless a finding by FEMA is made that there exists reasonable assurance that adequate protective measures can be taken in the event of a radiological emergency. Therefore, FEMA's services convey the benefit of regulatory compliance for the licensee. Further, the IOAA does not explicitly state that only regulatory agencies may assess user fees pursuant to its authorities. It is used by many agencies, including FEMA, to charge for a number of services provided.

The authority for FEMA to assess user fees based on the IOAA was further questioned based on the assertion that FEMA's offsite preparedness activities provide benefits to the general public, as well as State and local governments, rather than to licensees. It is FEMA's intent to assess user fees only for site-specific activities which provide a direct benefit to the licensee. While there will be an offsite benefit to State and local governments in the increased level of preparedness, the ultimate benefit remains with the utility in complying with NRC licensing requirements. Indeed, the REP program and its attendant requirements and regulations would not exist were it not for the existence of commercial nuclear power plants and special safeguards necessary for protection of public health and safety. The aspect of separation of services where there is some public benefit is addressed in *Mississippi Power and Light* v. *United States Nuclear Regulatory Commission*, 601 F.2d 223 (5th Cir. 1979). The Court held that the NRC "is not required to segregate public and private benefits and that it may recover the full cost of providing a service to a private beneficiary, regardless of whether that service may also benefit the public."

Several commenters contended that FEMA cannot assess user fees where the licensees do not make requests directly to FEMA for its services based on the interpretations of the IOAA stating that user fee assessments must be incident to a voluntary act, i.e., at the request of the recipient. However, when utilities seek to obtain or maintain a license with the NRC, such requests are implicitly made of FEMA due to the necessity of FEMA assessments, findings and determinations in the NRC licensing process.

Some commenters asserted that in providing services incident to the FEMA/NRC MOU that FEMA's activities primarily benefit the NRC rather than the licensee. While FEMA is an integral part of the NRC's licensing process, that relationship does not change the fact that the ultimate beneficiaries of FEMA's activities are the utilities seeking to obtain and maintain an operating license. Further, concerns that user fees collected by FEMA in conjunction with NRC licensing activities will exceed the 45% limitation imposed by 42 U.S.C. 2213(b)(1)(a) are not applicable as the cited statute only limits user fee collections by the NRC.

There appears to be a general concern that FEMA's position as a fair and unbiased participant in the planning process may be jeopardized by the collection of fees and that FEMA would be compelled to concur in offsite planning activities to keep nuclear generating facilities in operation and, in turn, assess more user fees in the future. The precedent for collection of fees from licensees for services provided in support of commercial nuclear power plant licensing and other regulatory services is established in NRC regulation, 10 CFR part 170. Both in the circumstances set forth under 10 CFR part 170 and in this rule, fees collected are, in fact, remanded to the U.S. Treasury and are not available to the agency. FEMA will continue to receive appropriated funds for radiological emergency preparedness activities. Concerns were expressed that the agency will attempt to generate revenues by charging excessively for services. As FEMA will not benefit directly from the collection of fees, no incentive is present to bill for other than reasonable services provided.

Relationship to Executive Order 12657

On November 18, 1988, the President issued Executive Order 12657 (3 CFR 1988 comp. p. 611) "Federal Emergency Management Agency Assistance in Emergency Preparedness Planning at Commercial Nuclear Power Plants." This Order was issued to ensure that adequate offsite radiological emergency planning and preparedness exist at commercial nuclear power plants for "decline and fail" situations, in order to satisfy the emergency planning requirements of the NRC for the issuance or retention of operating licenses.

Several comments were made with respect to the relation of this proposal to E.O. 12657. E.O. 12657 applies only to situations where a State or local government declines or fails to prepare adequate offsite radiological emergency plans or fails to participate adequately in demonstrating, testing, exercising or the using of such plans. The suggestion was made that this rulemaking should have been applied solely to the limited purpose of E.O. 12657.

While the procedures and costs established under this rule will also apply in the circumstances presented under Executive Order 12657, the establishment of fees for services within this rule has a much broader purpose. It is intended to apply to those situations where FEMA provides services that are of benefit to commercial nuclear power plant licensees in order to fulfill the broader Presidential initiative of recovering the cost of services provided by a Federal agency, as authorized under the IOAA.

Response to Section-Specific Comments

Section 353.4

Comment: A number of commenters expressed a concern that adequate accounting measures be developed to assure that procedures for the determination of costs incurred by FEMA and attributable to specific licensees provide a sufficient degree of accountability to ensure the reasonableness of fees to be assessed. Specifically, the provision of a fee ceiling or annual cap was suggested.

Discussion: FEMA's position in not establishing a ceiling on fees is

consistent with the NRC revision of fee schedules (10 CFR part 170) where the NRC fee ceiling was removed based on the concept that fees should be consistent with expenditures. Time-keeping procedures developed by the agency will track all site-specific FEMA services.

Response: No change.

Comment: FEMA site-specific cost estimates were requested to allow licensees to adequately project budget needs.

Discussion: It is estimated that the total cost recovery to the U.S. Treasury will be approximately $4 million to $6 million during the next year. The estimated fee that each licensee can expect to be charged will be based on the work performed at a specific site and will vary due to the complexity of the work accomplished.

Response: No change.

Comment: Several commenters were concerned that the proposed rule did not specify provisions for resolving disputed assessments where a licensee might question FEMA expenses.

Discussion: Disputed bills for services will be processed in accordance with FEMA Regulation, 44 CFR part 11, subpart C and procedures regarding debt collection in FEMA Manual 2610.1 (November, 1988). See § 353.7.

Response: No change.

Section 353.5

Comment: Several commenters suggested that the computation of hourly professional charges by combining the FEMA staff cost and contractual staff cost results in a duplicative charge.

Discussion: It is agreed that a more equitable system results from the computation of the hourly rate based on costs directly attributable to FEMA personnel. Contractual support will be charged separately at the rate and cost incurred.

Response: The fee schedule has been revised to implement a more equitable system of site-specific charges for FEMA and FEMA contract support services. See § 353.6.

Section 353.6

Comment: One State questioned whether the fee assessment would apply to exercises conducted for continued FEMA approval as defined in 44 CFR 350.9(c) (1) through (4).

Discussion: It is the intent of the agency for fees to apply to services required on a site-specific basis to assure that appropriate protective measures can be implemented in the event of a radiological emergency. This would include, but not be limited to the preparation, conduct and evaluation of all exercises and drills (including medical drills and remedial exercises) and review of plan revisions required by exercise-identified inadequacies.

Response: This has been clarified in the rule. See § 353.6(a).

Comment: Several commenters representing utilities expressed the concern that licensees are not the identifiable beneficiaries for certain categories of services contained in the rule because these services are not directly required for a utility's NRC license. Specifically, the recovery of fees for "formal review and approval" of State and local offsite plans developed pursuant to 44 CFR part 350 was questioned based on the position that formal part 350 approval is not required for issuance and maintenance of a nuclear power plant license.

Discussion: FEMA has accepted the view that, once an operating license has been granted or the application denied or withdrawn, continued review of State plans under 44 CFR part 350 will generally not have a direct impact on the license except insofar as it is necessary to support biennial exercises under 10 CFR part 50, appendix F. Because FEMA recognizes that there is some difficulty in distinguishing plan review activities which support such exercises from those that do not, FEMA has decided not to charge user fees for continued review of State plans under 44 CFR part 350 once an operating license has been granted or the application denied or withdrawn, except as noted in the next paragraph.

However, FEMA believes that activities that are directly related to biennial exercises of State and local plans are of benefit to the licensee because of the direct relationship between results of exercise activities and the maintenance of the license. Therefore, FEMA has decided to charge user fees for activities that are directly related to biennial exercises of State and local plans, or any other drill or exercise upon which maintenance of a license may be predicated, including but not limited to the following: Development of exercise objectives and scenarios, preexercise logistics, exercise conduct and participation, evaluation, and post-exercise meetings and reports; review and approval of plan revisions that are exercise inadequacy-related; remedial exercise and medical drill preparation, review, conduct, participation, evaluation, meetings and reports and technical assistance that are exercise inadequacy-related.

Response: The rule has been revised to delete charges for formal reviews under 44 CFR part 350 once an operating license has been granted or the application denied or withdrawn, except as is necessary to support exercise related activities. See § 353.6.

Comment: Several commenters questioned whether it is appropriate for FEMA to charge the licensee for participation in site-specific adjudicatory proceedings, particularly where contested hearings are involved.

Discussion: FEMA recognizes that the NRC has adopted a policy of not charging user fees for contested hearings. However, FEMA views that policy as being within the NRC's discretion and not mandated by law. FEMA's participation in contested hearings related to site-specific concerns has a direct impact on receipt or retention of an operating license. FEMA, therefore, adopts a policy of imposing user fees for such participation.

Response: No change.

Comment: One commenter questioned the equity of charging a licensee for the FEMA investigation of third party allegations, particularly where the allegations are unfounded.

Discussion: The circumstances under which FEMA would be called upon to investigate a third party allegation are quite limited. FEMA does not intend to charge a user fee for such activities.

Response: The rule has been revised to make this clear. See § 353.6.

Comment: Several commenters questioned whether technical assistance to State and local governments should be an eligible cost if it is not a requirement for NRC licensing.

Discussion: There are some circumstances where technical assistance directly impacts the issuance and maintenance of a license and others where it does not. FEMA intends to impose user fees for technical assistance only where: (a) It is requested by a utility, or (b) it is requested by a State or local government in order to correct an inadequacy identified as a result of a biennial exercise or any other drill or exercise upon which maintenance of a license may be predicated.

Response: The rule has been changed to specify those circumstances under which technical assistance would be billed to the licensee. See § 353.6.

Comment: Two commenters noted that while the proposed rule specifically states that FEMA will not charge for services by another Federal agency to benefit a licensee, § 353.6(a) indicates that plan review by the Regional Assistance Committee is an eligible cost item.

Discussion: Fees for services in this rulemaking will apply only to FEMA personnel and FEMA contractors.

Response: Section 353.6(a) has been revised to remove language reflecting charges for other Federal agencies.

Comment: Charging fees for FEMA's response to an actual radiological emergency was questioned, because such a response was viewed as performing a fundamental government service not specific to the licensee, and, therefore, not properly the subject of the assessment of fees under the IOAA.

Discussion: FEMA, in response to the comments received, has determined not to include in its regulation user fees for FEMA's response to an actual radiological emergency. However, should such an event take place, FEMA will evaluate it on a case-by-case basis and reserves the option to consider and utilize whatever legal remedies may be available to secure compensation for its costs incurred in responding to a radiological emergency.

Response: Charges for this service have been deleted from § 353.6.

Regulatory Flexibility Certification

This rule will not have a significant economic impact on a substantial number of small entities and, hence, has not undergone regulatory flexibility analysis.

Environmental Assessment and Finding of No Significant Environmental Impact

The Director has determined under the National Environmental Policy Act of 1989 and FEMA Regulation, 44 CFR part 10, "Environmental Considerations," that this rule is not a major Federal action significantly affecting the quality of the human environment. Therefore, an environmental impact statement is not required. In support of this finding, an environmental assessment has been prepared which is available for inspection and copying for a fee in the Rules Docket. The changes made in the final rule do not require any modification to the prior "Environmental Assessment and Finding of No Significant Environmental Impact."

Regulatory Analysis

This rule is not a "major rule" as the term is used in Executive Order 12291 and implementing OMB guidance. It will not have an annual effect on the economy of $100 million or more, will not result in a major increase in costs or prices to consumers, individual industries, Federal, State or local agencies or geographic regions, and will not have a significant adverse impact on competition, employment, investment, productivity, innovation or the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets. Therefore, no Regulatory Analysis is required.

Paper Work Reduction Act

This rule does not contain collection of information requirements and is not subject, therefore, to the Paper Work Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

Federalism Executive Order

A Federalism assessment under E.O. 12612 has been prepared and a copy is available for inspection and copying for a fee at the Rules Docket.

List of Subjects in 44 CFR Part 353

Nuclear power plants and reactors, Radiation protection, Intergovernmental relations and Federal assistance.

Accordingly, subchapter E chapter 1, title 44 Code of Federal Regulations is amended by adding part 353.

PART 353—FEE FOR SERVICES IN SUPPORT, REVIEW AND APPROVAL OF STATE AND LOCAL GOVERNMENT OR LICENSEE RADIOLOGICAL EMERGENCY PLANS AND PREPAREDNESS

Sec.

Authority: 31 U.S.C. 9701; E.O. 12657 and E.O. 12148.

§ 353.1 Purpose.

This part sets out fees charged for site-specific radiological emergency planning and preparedness services rendered by the Federal Emergency Management Agency, as authorized by 31 U.S.C. 9701.

§ 353.2 Scope.

The regulation in this part applies to all licensees who have applied for or have received a license from the Nuclear Regulatory Commission to operate a commercial nuclear power plant.

§ 353.3 Definitions.

As used in this part, the following terms and concepts are defined:

(a) *FEMA* means the Federal Emergency Management Agency.

(b) *NRC* means the Nuclear Regulatory Commission.

(c) *Certification* means the written justification by a licensee of the need for Federal compensatory assistance, as authorized in 44 CFR part 352 and E.O. 12657.

(d) *Technical assistance* means services provided by FEMA to facilitate offsite radiological emergency planning and preparedness such as provision of support for the preparation of offsite radiological emergency response plans and procedures; provision of advice and recommendations for specific aspects of preparedness such as alert and notification and emergency public information.

(e) *Licensee* means the utility which has applied for or has received a license from the NRC to operate a commercial nuclear power plant.

(f) *Governor* means the Governor of a State or his/her designee.

(g) *RAC* means Regional Assistance Committee chaired by FEMA with representatives from the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Health and Human Services, Department of Energy, Department of Agriculture, Department of Transportation, Department of Commerce and other Federal Departments and agencies as appropriate.

(h) *REP* means FEMA's Radiological Emergency Preparedness Program.

(i) *Fiscal Year* means Federal fiscal year commencing on the first day of October through the thirtieth day of September.

(j) *Federal Radiological Preparedness Coordinating Committee* is the national level committee chaired by FEMA with representatives from the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Health and Human Services, Department of Interior, Department of Energy, Department of Transportation, United States Department of Agriculture, Department of Commerce and other Federal Departments and agencies as appropriate.

§ 353.4 Payment of fees.

Fees for site-specific offsite radiological emergency plans and preparedness services and related site-specific legal services are payable upon notification by FEMA. FEMA services will be billed at 6-month intervals for all accumulated costs on a site-specific basis. Each bill will identify the costs related to services for each nuclear power plant site.

§ 353.5 Average cost per FEMA professional staff-hour.

Fees for FEMA services rendered will be calculated based upon the costs for such services using a professional staff rate per hour equivalent to the sum of the average cost to the agency of maintaining a professional staff member performing site-specific services related to the Radiological Emergency Preparedness Program, including salary, benefits, administrative support, travel and overhead. This rate will be charged when FEMA performs such services as: Development of exercise objectives and scenarios, pre-exercise logistics, exercise conduct and participation, evaluation, meetings and reports; review and approval of Plan revisions that are utility-requested or exercise inadequacy related; remedial exercise, medical drill or any other exercise or drill upon which a license is predicated, with regard to preparation, review, conduct, participation, evaluation, meetings and reports; the issuance of interim findings pursuant to the FEMA/NRC Memorandum of Understanding (MOU) (App. A of this part); review of utility plan submissions through the NRC under the MOU; utility certification submission review under 44 CFR part 352 and follow-on activities; site-specific adjudicatory proceedings and any other site-specific legal costs and technical assistance that is utility requested or exercise inadequacy related. The professional staff rate for FY 91 is $39.00 per hour. The referenced FEMA/NRC MOU is provided in this rule as appendix A. The professional staff rate for the REP Program and related legal services will be revised on a fiscal year basis using the most current fiscal data available and the revised hourly rate will be published as a notice in the **Federal Register** for each fiscal year if the rate increases or decreases.

§ 353.6 Schedule of services.

Recipients shall be charged the full cost of site-specific services based upon the appropriate professional hourly staff rate for the FEMA services described in this Section and for related contractual services which will be charged to the licensee by FEMA, at the rate and cost incurred.

(a) When a State seeks formal review and approval by FEMA of the State's radiological emergency response plan pursuant to 44 CFR part 350 (Review and Approval Process of State and Local Radiological Emergency Plans and Preparedness), FEMA shall provide the services as described in 44 CFR part 350 in regard to that request and fees will be charged for such services to the licensee, which is the ultimate beneficiary of FEMA services. This provision does not apply where an operating license has been granted or the application denied or withdrawn, except as necessary to support biennial exercises and related activities. Fees will be charged for all FEMA, but not other Federal agency activities related to such services, including but not limited to the following:

(1) Development of exercise objectives and scenarios, preexercise logistics, exercise conduct and participation, evaluation, meetings and reports.

(2) Review of plan revisions that are exercise-inadequacy related;

(3) Technical assistance that is exercise-inadequacy related;

(4) Remedial exercise, medical drill, or any other exercise or drill upon which maintenance of a license is predicated, with regard to preparation, review, conduct, participation, evaluation, meetings and reports.

(b) Interim findings. Where the NRC seeks from FEMA under the FEMA/NRC MOU an interim finding of the status of radiological emergency planning and preparedness at a particular time for a nuclear power plant, FEMA shall assess a fee to the licensee for providing this service. The provision of this service consists of making a determination whether the plans are adequate to protect the health and safety of the public living in the vicinity of the nuclear power facility by providing reasonable assurance that appropriate protective measures can be taken offsite in the event of a radiological emergency and that such plans are capable of being implemented.

(c) NRC utility plan submissions. Fees will be charged for all FEMA but not other Federal agency activities related to such services, including but not limited to the following:

(1) Development of exercise objectives and scenarios, preexercise logistics, exercise conduct and participation, evaluation and post-exercise meetings and reports.

(2) Notice and conduct of public meeting.

(3) Regional finding and determination of adequacy of plans and preparedness followed by review by FEMA Headquarters resulting in final FEMA determination of adequacy of plans and preparedness,

(4) Remedial exercise, medical drill, or any other exercise or drill upon which maintenance of a license is predicated, with regard to preparation, review, conduct, participation, evaluation, meetings and reports.

(d) Utility certification submission review. When a licensee seeks Federal assistance within the framework of 44 CFR part 352 due to the decline or failure of a State or local government to adequately prepare an emergency plan, FEMA shall process the licensee's certification and make the determination whether a decline or fail situation exists. Fees will be charged for services rendered in making the determination. Upon the determination that a decline or fail situation does exist, any services provided or secured by FEMA consisting of assistance to the licensee, as described in 44 CFR part 352, will have a fee charged for such services.

(e) FEMA participation in site-specific NRC adjudicatory proceedings and any other site-specific legal costs. Where FEMA participates in NRC licensing proceedings and any related court actions to support FEMA findings as a result of its review and approval of offsite emergency plans and preparedness, or provides legal support for any other site specific FEMA activities comprised in this rule, fees will be charged to the licensee for such participation.

(f) Rendering technical assistance. Where FEMA is requested by a licensee to provide any technical assistance, or where a State or local government requests technical assistance in order to correct an inadequacy identified as a result of a biennial exercise or any other drill or exercise upon which maintenance of a license is predicated, FEMA will charge such assistance to the licensee for the provision of such service.

§ 353.7 Failure to pay.

In any case where there is a dispute over the FEMA bill or where FEMA finds that a licensee has failed to pay a prescribed fee required under this part, procedures will be implemented in accordance with 44 CFR part 11 subpart C to effectuate collections under the Debt Collection Act of 1982 (31 U.S.C. 3711 *et seq.*).

Appendix A to Part 353—Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission

The Federal Emergency Management Agency (FEMA) and the Nuclear Regulatory Commission (NRC) have entered into a new Memorandum of Understanding (MOU) Relating to Radiological Emergency Planning and Preparedness. This supersedes a memorandum entered into on November 1, 1980 (published December 16, 1980, 45

FR 82713). The substantive changes in the new MOU deal principally with the FEMA handling of NRC requests for findings and determinations concerning offsite planning and preparedness. The basis and conditions for interim findings in support of licensing are defined, as well as provisions for status reports when plans are not complete. The text of the MOU is set out below except that an attachment is not included. This attachment concerns membership on a steering committee.

Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness

I. Background and Purposes

This Memorandum of Understanding (MOU) establishes a framework of cooperation between the Federal Emergency Management Agency (FEMA) and the U.S. Nuclear Regulatory Commission (NRC) in radiological emergency response planning matters, so that their mutual efforts will be directed toward more effective plans and related preparedness measures at and in the vicinity of nuclear reactors and fuel cycle facilities which are subject to 10 CFR part 50, appendix E, and certain other fuel cycle and materials licensees which have potential for significant accidental offsite radiological releases. The memorandum is responsive to the President's decision of December 7, 1979, that FEMA will take the lead in offsite planning and response, his request that NRC assist FEMA in carrying out this role, and the NRC's continuing statutory responsibility for the radiological health and safety of the public.

On January 14, 1980, the two agencies entered into a "Memorandum of Understanding Between NRC and FEMA to Accomplish a Prompt Improvement in Radiological Emergency Preparedness," that was responsive to the President's December 7, 1979, statement. A revised and updated memorandum of understanding became effective November 1, 1980. This MOU is a further revision to reflect the evolving relationship between NRC and FEMA and the experience gained in carrying out the provisions of the January and November 1980 MOU's. This MOU supersedes these two earlier versions of the MOU.

The general principles, agreed to in the previous MOU's and reaffirmed in this MOU, are as follows: FEMA coordinates all Federal planning for the offsite impact of radiological emergency response plans [1] and preparedness, makes findings and determinations as to the adequacy and capability of implementing offsite plans and communicates those findings and determinations to the NRC. The NRC reviews those FEMA findings and determinations in conjunction with the NRC onsite findings for the purpose of making determinations on the overall state of emergency preparedness. These overall findings and determinations are used by NRC to make radiological health and safety decisions in the issuance of licenses and the continued operation of licensed plants to include taking enforcement actions as notices of violations, civil penalties, orders, or shutdown of operating reactors. This delineation of responsibilities avoids duplicative efforts by the NRC staff in offsite preparedness matters.

A separate MOU dated October 22, 1980, deals with NRC/FEMA cooperation and responsibilities in response to an actual or potential radiological emergency. Operations Response Procedures have been developed that implement the provisions of the Incident Response MOU. These documents are intended to be consistent with the Federal Radiological Emergency Response Plan which describes the relationships, roles, and responsibilities of Federal agencies for responding to accidents involving peacetime nuclear emergencies.

II. Authorities and Responsibilities

FEMA—Executive Order 12148 charges the Director, FEMA, with the responsibility to "* * * establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies" (Section 2–101) and "* * * represent the President in working with State and local governments and the private sector to stimulate vigorous participation in civil emergency preparedness, mitigation, response, and recovery programs." (Section 2–104.)

On December 7, 1979, the President in response to the recommendations of the Kemeny Commission on the Accident at Three Mile Island, directed that FEMA assume lead responsibility for all offsite nuclear emergency planning and response.

Specifically, the FEMA responsibilities with respect to radiological emergency preparedness as they relate to NRC are:

1. To take the lead in offsite emergency planning and to review and assess offsite emergency plans and preparedness for adequacy.

2. To make findings and determinations as to whether offsite emergency plans are adequate and can be implemented (e.g., adequacy and maintenance of procedures, training, resources staffing levels and qualifications, and equipment adequacy). Notwithstanding the procedures which are set forth in 44 CFR part 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency planning and preparedness around particular sites, referred to as interim findings, will be provided by FEMA for use as needed in the NRC licensing process. Such findings will be provided by FEMA on mutually agreed to schedules or on specific NRC request. The request and findings will normally be by written communications between the co-chairs of the NRC/FEMA Steering Committee. An interim finding provided under this arrangement will be an extension of FEMA's procedures for review and approval of offsite radiological emergency plans and preparedness set forth in 44 CFR part 350. It will be based on the review of currently available plans and, if appropriate, joint exercise results related to a specific nuclear power plant site.

An interim finding based only on the review of currently available offsite plans will include an assessment as to whether these plans are adequate when measured against the standards and criteria of NUREG–0654/FEMA–REP–1, and, pending a demonstration through an exercise, whether there is reasonable assurance that the plans can be implemented. The finding will indicate one of the following conditions: (1) Plans are adequate and there is reasonable assurance that they can be implemented with only limited or no corrections needed; (2) plans are adequate, but before a determination can be made as to whether they can be implemented, corrections must be made to the plans or supporting measures must be demonstrated (e.g., adequacy and maintenance of procedures, training, resources, staffing levels and qualifications, and equipment adequacy); or (3) plans are adequate and cannot be implemented until they are revised to correct deficiencies noted in the Federal review.

[1] Assessments of offsite plans may be based on State and local government plans submitted to FEMA under its rule (44 CFR part 350), and as noted in 44 CFR 350.3(f) may also be based on plans currently available to FEMA or furnished to FEMA through the NRC/FEMA Steering Committee.

If in FEMA's view the plans that are available are not completed or are not ready for review, FEMA will provide NRC with a status report delineating milestones for preparation of the plan by the offsite authorities as well as FEMA's actions to assist in timely development and review of the plans.

An interim finding on preparedness will be based on review of currently available plans and joint exercise results and will include an assessment as to (1) whether offsite emergency plans are adequate as measured against the standards and criteria of NUREG–0654/FEMA–REP–1, Revision 1 and Supplement 1, and (2) whether the exercise(s) demonstrated that there is reasonable assurance that the plans can be implemented.

An interim finding on preparedness will indicate one of the following conditions: (1) There is reasonable assurance that the plans are adequate and can be implemented as demonstrated in an exercise; (2) there are deficiencies that may adversely affect public health and safety that must be corrected in order to provide reasonable assurance that the plans can be implemented; or (3) FEMA is undecided and will provide a schedule of actions leading to a decision.

3. To assume responsibility, as a supplement to State and local, and utility efforts, for radiological emergency preparedness training of State and local officials.

4. To develop and issue an updated series of interagency assignments which delineate respective agency capabilities and responsibilities and define procedures for coordination and direction for emergency planning and response. [Current assignments are in 44 CFR part 351, March 11, 1982 (47 FR 10758).]

NRC—The Atomic Energy Act of 1954, as amended, requires that the NRC grant licenses only if the health and safety of the public is adequately protected. While the Atomic Energy Act does not specifically require emergency plans and related preparedness measures, the NRC requires consideration of overall emergency preparedness as a part of the licensing process. The NRC rules (10 CFR 50.33, 50.34, 50.47, 50.54, and appendix E to 10 CFR part 50) include requirements for the licensee's emergency plans.

Specifically, the NRC responsibilities for radiological emergency preparedness are:

1. To assess licensee emergency plans for adequacy. This review will include organizations with whom licensees have written agreements to provide onsite support services under emergency conditions.

2. To verify that licensee emergency plans are adequately implemented (e.g., adequacy and maintenance of procedures, training, resources, staffing levels and qualifications, and equipment).

3. To review the FEMA findings and determinations as to whether offsite plans are adequate and can be implemented.

4. To make radiological health and safety decisions with regard to the overall state of emergency preparedness (i.e., integration of emergency preparedness onsite as determined by the NRC and offsite as determined by FEMA and reviewed by NRC) such as assurance for continued operation, for issuance of operating licenses, or for taking enforcement actions, such as notices of violations, civil penalties, orders, or shutdown of operating reactors.

III. Areas of Cooperation

A. NRC Licensing Reviews. FEMA will provide support to the NRC for licensing reviews related to reactors, fuel facilities, and materials licensees with regard to the assessment of the adequacy of offsite radiological emergency response plans and preparedness. This will include timely submittal of an evaluation suitable for inclusion in NRC safety evaluation reports.

Substantially prior to the time that a FEMA evaluation is required with regard to fuel facility or materials license review, NRC will identify those fuel and materials licensees with potential for significant accidental offsite radiological releases and transmit a request for review to FEMA as the emergency plans are completed.

FEMA routine support will include providing assessments, findings and determinations (interim and final) on offsite plans and preparedness related to reactor license reviews. To support its findings and determinations, FEMA will make expert witnesses available before the Commission, the NRC Advisory Committee on Reactor Safeguards, NRC hearings boards and administrative law judges, for any court actions, and during any related discovery proceedings.

FEMA will appear in NRC licensing proceedings as part of the presentation of the NRC staff. FEMA counsel will normally present FEMA witnesses and be permitted, at the discretion of the NRC licensing board, to cross-examine the witnesses of parties, other than the NRC witnesses, on matters involving FEMA findings and determinations, policies, or operations; however, FEMA will not be asked to testify on status reports. FEMA is not a party to NRC proceedings and, therefore, is not subject to formal discovery requirements placed upon parties to NRC proceedings. Consistent with available resources, however, FEMA will respond informally to discovery requests by parties. Specific assignment of professional responsibilities between NRC and FEMA counsel will be primarily the responsibility of the attorneys assigned to a particular case. In situations where questions of professional responsibility cannot be resolved by the attorneys assigned, resolution of any differences will be made by the General Counsel of FEMA and the Executive Legal Director of the NRC or their designees. NRC will request the presiding Board to place FEMA on the service list for all litigation in which it is expected to participate.

Nothing in this document shall be construed in any way to diminish NRC's responsibility for protecting the radiological health and safety of the public.

B. FEMA Review of Offsite Plans and Preparedness. NRC will assist in the development and review of offsite plans and preparedness through its membership on the Regional Assistance Committees (RAC). FEMA will chair the Regional Assistance Committees. Consistent with NRC's statutory responsibility, NRC will recognize FEMA as the interface with State and local governments for interpreting offsite radiological emergency planning and preparedness criteria as they affect those governments and for reporting to those governments the results of any evaluation of their radiological emergency plans and preparedness.

Where questions arise concerning the interpretation of the criteria, such questions will continue to be referred to FEMA Headquarters, and when appropriate, to the NRC/FEMA Steering Committee to assure uniform interpretation.

C. Preparation for and Evaluation of Joint Exercises. FEMA and NRC will cooperate in determining exercise requirements for licensees, and State and local governments. They will also jointly observe and evaluate exercises. NRC and FEMA will institute procedures to enhance the review of objectives and scenarios for joint exercises. This review is to assure that both the onsite considerations of NRC and the offsite considerations of FEMA are adequately addressed and integrated in a manner that will provide for a technically sound exercise upon which an assessment of preparedness

capabilities can be based. The NRC/FEMA procedures will provide for the availability of exercise objectives and scenarios sufficiently in advance of scheduled exercises to allow enough time for adequate review by NRC and FEMA and correction of any deficiencies by the licensee. The failure of a licensee to develop a scenario that adequately addresses both onsite and offsite considerations may result in NRC taking enforcement actions.

The FEMA reports will be a part of an interim finding on emergency preparedness; or will be the result of an exercise conducted pursuant to FEMA's review and approval procedures under 44 CFR Part 350. Exercise evaluations will identify one of the following conditions: (1) There is reasonable assurance that the plans are adequate and can be implemented as demonstrated in the exercise; (2) there are deficiencies that may adversely impact public health and safety that must be corrected by the affected State and local governments in order to provide reasonable assurance that the plan can be implemented; or (3) FEMA is undecided and will provide a schedule of actions leading to a decision. Within 30 days of the exercise, a draft exercise report will be sent to the State, with a copy to the Regional Assistance Committee, requesting comments and a schedule of corrective actions, as appropriate, from the State in 30 days. When there are deficiencies of the types noted in 2 above, and when there is a potential for a remedial exercise, FEMA Headquarters will promptly discuss these with NRC Headquarters. Within 90 days of the exercise, the FEMA report will be forwarded to the NRC Headquarters. Within 15 days of receipt of the FEMA report, NRC will notify FEMA in writing of action taken with the licensee relative to FEMA initiatives with State and local governments to correct deficiencies identified in the exercise.

D. Emergency Planning and Preparedness Guidance. NRC has lead responsibility for the development of emergency planning and preparedness guidance for licensees. FEMA has lead responsibility for the development of radiological emergency planning and preparedness guidance for State and local agencies. NRC and FEMA recognize the need for an integrated, coordinated approach to radiological emergency planning and preparedness by NRC licensees and State and local governments. NRC and FEMA will each, therefore, provide opportunity for the other agency to review and comment on such guidance (including interpretations of agreed joint guidance) prior to adoption as formal agency guidance.

E. Support for Document Management System. FEMA and NRC will each provide the other with continued access to those automatic data processing support systems which contain relevant emergency preparedness data.

At NRC this includes Document Management System support to the extent that it does not affect duplication or records retention. At FEMA, this includes technical support to the Radiological Emergency Preparedness Management Information System. This agreement is not intended to include the automated information retrieval support for the national level emergency response facilities.

F. Ongoing NRC Research and Development Programs. Ongoing NRC and FEMA research and development programs that are related to State and local radiological emergency planning and preparedness will be coordinated. NRC and FEMA will each provide opportunity for the other agency to review and comment on relevant research and development programs prior to implementing them.

G. Public Information, and Education Programs. FEMA will take the lead in developing public information and educational programs. NRC will assist FEMA by reviewing for accuracy educational materials concerning radiation, and its hazards and information regarding appropriate actions to be taken by the general public in the event of an accident involving radioactive materials.

IV. NRC/FEMA Steering Committee

The NRC/FEMA Steering Committee on Emergency Preparedness will continue to be the focal point for coordination of emergency planning, preparedness, and response activities between the two agencies. The Steering Committee will consist of an equal number of members to represent each agency with one vote per agency. When the Steering Committee cannot agree on the resolution of an issue, the issue will be referred to NRC and FEMA management. The NRC members will have lead responsibility for licensee planning and preparedness and the FEMA members will have lead responsibility for offsite planning and preparedness. The Steering Committee will assure coordination of plans and preparedness evaluation activities and revise, as necessary, acceptance criteria for licensee, State and local radiological emergency planning and preparedness. NRC and FEMA will then consider and adopt criteria as appropriate in their respective jurisdictions.

V. Working Arrangements

A. The normal point of contact for implementation of the points in this MOU will be the NRC/FEMA Steering Committee.

B. The Steering Committee will establish the day-to-day procedures for assuring that the arrangements of this MOU are carried out.

VI. Memorandum of Understanding

A. This MOU shall be effective as of date of signature and shall continue in effect unless terminated by either party upon 30 days notice in writing.

B. Amendments or modifications to this MOU may be made upon written agreement by both parties.

Approved for the U.S. Nuclear Regulatory Commission.

Dated: April 3, 1985.

William J. Dircks,

Executive Director for Operations.

Approved for the Federal Emergency Management Agency.

Dated: April 3, 1985.

Samuel W. Speck.

Associate Director, State and Local Programs and Support.

Dated: January 25, 1991.

Wallace E. Stickney,

Director of FEMA.

[FR Doc. 91-5137 Filed 3-5-91; 8:45 am]

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Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed 1991–1992 Hunting Regulations (Preliminary)

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018-AA24

Migratory Bird Hunting; Proposed 1991-92 Migratory Game Bird Hunting Regulations (Preliminary)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rulemaking.

SUMMARY: The U.S. Fish and Wildlife Service (hereinafter the Service) proposes to establish annual hunting regulations for certain migratory game birds. The taking of migratory birds is prohibited unless specifically provided for by regulation. These regulations will permit the taking of the designated species during the 1991-92 season. The Service annually prescribes outside limits (frameworks) within which States may select hunting seasons. These seasons provide recreational hunting opportunities to the public and aid Federal and State governments in the management of migratory game birds, and are designed to maintain harvests at levels compatible with migratory bird population and habitat conditions.

DATES: The comment period for proposed early-season regulations frameworks will end on July 22, 1991; and for late-season proposals on August 26, 1991. The public hearing for early-season regulations will be held on June 20, 1991, at 9 am. The public hearing for late-season regulations will be held on August 2, 1991, at 9 a.m.

ADDRESSES: Both public hearings will be held in the Auditorium, Department of the Interior Building, 1849 C Street NW., Washington, DC. Written comments on the proposals and notice of intention to testify at either hearing may be mailed to the Director, (FWS/MBMO), U.S. Fish and Wildlife Service, Department of the Interior, room 634—Arlington Square, Washington, DC 20240. Comments received will be available for public inspection during normal business hours in room 634, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Thomas J. Dwyer, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, room 634—Arlington Square, Washington, DC 20240 (703) 358-1714.

SUPPLEMENTARY INFORMATION:

Notice of Intention To Establish Open Seasons

This notice announces the intention of the Director, U.S. Fish and Wildlife Service, to establish open hunting seasons and daily bag and possession limits for certain designated groups or species of migratory game birds for 1991-92 in the contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands, under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K of 50 CFR part 20.

"Migratory game birds" are those migratory birds so designated in conventions between the United States and several foreign nations for the protection and management of these birds. For the 1991-92 hunting season, regulations will be proposed for certain designated members of the avian families: Anatidae (ducks, geese, brant, and swans); Columbidae (doves and pigeons); Gruidae (cranes); Rallidae (rails, coots, and moorhens and gallinules); and Scolopacidae (woodcock and snipe). These proposals are described under Proposed 1991-92 Migratory Game Bird Hunting Regulations (Preliminary) in this document. Definitions of waterfowl flyways and mourning dove management units, as well as a description of the data used in and the factors affecting the regulatory process were published in the March 14, 1990, **Federal Register** (55 FR 9618).

Regulatory Schedule for 1991-92

This is the first in a series of proposed and final rulemaking documents for migratory game bird hunting regulations. Proposed season frameworks are set forth for various groups of migratory game birds for which these regulations ordinarily do not vary significantly from year to year. Proposals relating to the harvest of migratory game birds that may be initiated after publication of this proposed rulemaking will be made available for public review in supplemental proposed rulemakings to be published in the **Federal Register**. Also, additional supplemental proposals will be published for public comment in the **Federal Register** as population, habitat, harvest, and other information becomes available.

Because of the late dates when certain of these data become available, it is anticipated that comment periods on some proposals will necessarily be abbreviated. Special circumstances that limit the amount of time which the Service can allow for public comment are involved in the establishment of these regulations. Specifically, two considerations compress the time in which the rulemaking process must operate: The need, on one hand, to establish final rules at a time early enough in the summer to allow State agencies to select and publish season dates and bag limits prior to the hunting seasons and, on the other hand, the lack of current data on the status of most waterfowl before late July.

Because the process is strongly influenced by the times when information is available for consideration, the overall regulations process is divided into two segments. Early seasons are those seasons that generally open prior to October 1, and include seasons in Alaska, Hawaii, Puerto Rico, and the Virgin Islands. Late seasons are those seasons opening in the remainder of the United States about October 1 and later, and include most of the waterfowl seasons.

Major steps in the 1991-92 regulatory cycle relating to public hearings and **Federal Register** notifications are illustrated in the accompanying diagram. Dates shown relative to publication of **Federal Register** documents are target dates.

The proposed or final regulations section of this and subsequent documents outline hunting frameworks and guidelines that are organized under numbered headings. These headings are:

1. Ducks
2. Sea Ducks
3. Mergansers
4. Canada Geese
5. White-fronted Geese
6. Brant
7. Snow and Ross's Geese
8. Tundra Swans
9. Sandhill Cranes
10. Coots
11. Moorhens and Gallinules
12. Rails
13. Snipe
14. Woodcock
15. Band-tailed Pigeons
16. Mourning Doves
17. White-winged and White-tipped Doves
18. Alaska
19. Hawaii
20. Puerto Rico and Virgin Islands
21. Falconry
22. Other

Subsequent documents will refer only to numbered items requiring attention. Therefore, items requiring no attention will be omitted and the remaining item numbers will be discontinuous and appear incomplete.

Hearings

Two public hearings pertaining to 1991-92 migratory game bird hunting regulations are scheduled. Both hearings will be conducted in accordance with 455 DM 1 of the Departmental Manual.

On June 22, a public hearing will be held at 9 a.m. in the Auditorium of the Department of the Interior Building, on C Street, between 18th and 19th Streets, NW., Washington, DC. This hearing is for the purpose of reviewing the status of migratory shore and upland game birds. Proposed hunting regulations will be discussed for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the Virgin Islands; special September waterfowl seasons in designated States; special sea duck seasons in the Atlantic Flyway, and extended falconry seasons. On August 2, a public hearing will be held at 9 a.m. in the Auditorium of the Department of the Interior Building, address above. This hearing is for the purpose of reviewing the status and proposed regulations for waterfowl not previously discussed at the June 22 public hearing. The public is invited to participate in both hearings.

Persons wishing to make a statement at these hearings should write the Director (FWS/MBMO), U.S. Fish and Wildlife Service, Department of the Interior, room 634—Arlington Square, Washington, DC 20240. Copies of statements should be filed with the Director before or during each hearing.

Public Comments Solicited

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons are invited to submit written comments, suggestions, or recommendations regarding the proposed amendments. Final promulgation of migratory game bird hunting regulations will take into consideration all comments received by the Service. Such comments, and any additional information received, may lead to final regulations that differ from these proposals. Interested persons are invited to participate in this rulemaking by submitting written comments to the address indicated under the caption **ADDRESSES.**

Comments received on the proposed annual regulations will be available for public inspection during normal business hours at the Service's office in room 634, 4401 North Fairfax Drive, Arlington, Virginia. Specific comment periods will be established for each series of proposed rulemakings. All relevant comments will be accepted through the closing date of the comment period on the particular proposal under consideration. The Service will consider, but possibly may not respond in detail to each comment. As in the past, the Service will summarize all comments received during the comment period and respond to them after the closing date.

Flyway Council Meetings

Departmental representatives will be present at the following winter meetings of the various flyway councils:

DATE: March 24, 1991.

—Atlantic Flyway Council, 9:00 a.m.
—Mississippi Flyway Council, 8:30 a.m.
—Central Flyway Council, 8:30 am.
—Pacific Flyway Council, 9:00 am.
—National Flyway Council, 3:00 pm.

The Council meetings will be held at the Edmonton Convention Centre in Edmonton, Alberta, Canada.

NEPA Consideration

NEPA considerations are covered by the programmatic document, "Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14)", filed with the Environmental Protection Agency on June 9, 1988. Notice of Availability was published in the **Federal Register** on June 16, 1988 (53 FR 22582). The Service's Record of Decision was published on August 18, 1988 (53 FR 31341).

Endangered Species Act Consideration

Prior to issuance of the 1991–92 migratory game bird hunting regulations, consideration will be given to provisions of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531–1543; hereinafter the Act) to insure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened or modify or destroy its critical habitat and is consistent with conservation programs for those species. Consultations under section 7 of this Act may cause changes to be made to proposals in this and future supplemental proposed rulemaking documents.

Regulatory Flexibility Act, Executive Order (E.O.) 12291, and the Paperwork Reduction Act

A Determination of Effects approved by the Director, on February 5, 1991, concluded that the hunting frameworks being proposed for 1991–92 were "major" rules, subject to regulatory analysis. In accordance with Office of Management and Budget instructions, a Final Regulatory Impact Analysis (FRIA) was prepared in 1990. This analysis was updated for 1991. The 1991 FRIA update included waterfowl hunter and harvest information from the 1989–90 season. The summary of the 1991 update follows:

New information which can be compared to that appearing in the 1990 Final Regulatory Impact Analysis (FRIA) includes estimates of the 1989 fall flight of ducks from surveyed areas, and hunter activity and harvest information from the 1989–90 hunting season. The total 1989 fall flight of ducks and the fall flights in each flyway were predicted to be unchanged from those of 1988. However, because of the continued poor status of ducks, hunting regulations were developed that maintained the reduced hunting opportunity that was established in the 1988–89 season. Hunter numbers remained unchanged, but waterfowl hunters spent more days afield than in the previous year. Many non-regulatory factors influence hunter participation. This was evident during the 1989–90 hunting season, when waterfowl hunters spent 8% more days hunting and bagged 25% more ducks than in 1988–89, while season length and bag limits remained unchanged.

Copies of the updated FRIA are available upon request from the Office of Migratory Bird Management. The address is indicated under the caption **ADDRESSES.**

The Department of the Interior has determined that this document is a major rule under E.O. 12291 and certifies that this document will have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq. The Service plans to issue its Memorandum of Law for the migratory game bird hunting regulations at the time the first of these rules is finalized.

Authorship

The primary author of the proposed rules on annual hunting regulations is Robert J. Blohm, Office of Migratory Bird Management, working under the direction of Thomas J. Dwyer, Chief (703) 358–1714.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 1991–92 hunting season are authorized under the Migratory Bird Treaty Act of 1918, as amended, (40 Stat. 755; 16 U.S.C. 701–711) and the Fish and Wildlife Improvement Act of 1978, as amended, (92 Stat. 3112; 16 U.S.C. 712).

Dated: February 6, 1991.

Bruce Blanchard,

Acting Director, U.S. Fish and Wildlife Service.

Proposed 1991–92 Migratory Game Bird Hunting Regulations (Preliminary)

The following general frameworks and guidelines for hunting migratory game birds during the 1991–92 season are proposed. Changes or possible changes, when noted, are in relation to 1990–91 final frameworks. In this respect, minor date changes due to annual variation in the calendar dates of specific days of the week, are regarded as "no change." All mentioned dates are inclusive; shooting hours, unless otherwise specified, are one-half hour before sunrise to sunset; and possession limits, unless otherwise specified, are twice the daily bag limit. Items in this proposed rulemaking are subject to change depending on public comments, and additional data and information that may be received later.

1. *Ducks.* (Possible change.) Pending the availability of current information on duck populations, harvest, and habitat conditions, and the receipt of recommendations from the four Flyway Councils, specific duck framework proposals for opening and closing dates, season lengths, and bag limits are deferred. Closed seasons will be considered by the Service if they are warranted.

There are several possible changes that the Service can address in this document. These include the evaluation of framework dates for regular duck seasons, the evaluation of September duck seasons, delineation of canvasback populations and regulation criteria, review of implementation alternatives for stabilized regulations, and the "open season" for States to modify their usage of zones and splits.

A. *Framework Dates for Regular Duck Seasons*: During the 1990 regulations-development cycle, the Service was requested to consider setting framework dates on a permanent basis (i.e., no longer using framework dates to regulate duck harvest). Framework dates are uniform within a flyway and routinely have been either fixed (e.g., an exact date) or floating (e.g., the first Saturday in October). Although framework dates have been changed in response to changes in duck abundance, the dates typically have been between the first week of October and the third week of January. Generally, northern States prefer the opening date to be as early as possible in October, while southern States prefer closing dates to be as late as possible in January. These date preferences reflect the availability of ducks and weather conditions in each State. Mid-latitude States generally are not affected by different framework dates.

The Service currently uses framework dates in combination with other measures in the management of duck harvest levels. The Service agreed to review the role of framework dates in regulating harvest levels. This review will be available in draft form for comment by the Flyway Council Technical Sections during the spring of 1991.

B. *September Duck Seasons:* In 1981, the Service offered Florida, Kentucky, and Tennessee the opportunity to conduct experimental 5-day September duck seasons targeted at blue-winged teal and southern wood ducks. The daily bag limit was 4 birds, only 1 of which could be a species other than teal or wood duck. Memoranda of Agreement between the Service and individual States outlined evaluation procedures for the 1981–83 hunting seasons, which focused on assessing the impacts on wood ducks and non-target waterfowl. Although the three States completed their evaluations and submitted final reports, questions remained about the effects of these seasons and they were continued on an experimental basis. Declines in the survival rates of local wood ducks precipitated a reduction in the daily bag limit to 2 wood ducks in Kentucky and Tennessee in 1986. In 1988, all species except wood ducks were excluded from the September seasons, and the bag limit in Florida was reduced to 3, in response to concerns over the status of continental duck populations. In the June 7, 1988, **Federal Register** (53 FR 20875), the Service asked the Atlantic and Mississippi Flyway Councils to review existing wood duck harvest strategies and give consideration to their proper evaluation. In the March 14, 1990, **Federal Register** (55 FR 9622), the Service gave notice that unless arrangements could be made to initiate regional banding programs and to facilitate widespread data collection, the experimental seasons in Florida, Kentucky, and Tennessee might be modified further or suspended.

In September 1990, representatives from the Service and the Atlantic and Mississippi Flyway Technical Sections met to discuss ways to improve capabilities for monitoring and managing wood duck populations. The feasibility of implementing these improvements will be considered by the Flyway Technical Sections and Councils at their 1991 winter meetings. The Service is encouraged by this recent initiative and, therefore, does not propose to modify or discontinue the September duck seasons in Florida, Kentucky, and Tennessee in 1991. The Service believes this position is justified because the Flyway Councils and the three States involved are continuing efforts to evaluate these seasons and no adverse impacts on wood duck populations are apparent. However, continuation of these seasons beyond 1991 will be contingent upon the ability of the Flyway Councils and States to demonstrate significant progress in developing regional wood duck monitoring plans and evaluation and decision criteria for September wood duck seasons.

In the September 21, 1990, **Federal Register** (55 FR 38901), the Service published a strategy governing the use of shooting hours, which allows shooting to begin at one-half hour before sunrise during the regular duck season, or any season in which most species of ducks can be legally taken. For species-specific seasons, however, shooting hours will begin at sunrise unless States can demonstrate that the impact of pre-sunrise shooting on non-target populations is negligible. With respect to September duck seasons in Florida, Kentucky, and Tennessee, shooting hours have always begun at one-half hour before sunrise. This practice would be consistent with the Service's shooting hours strategy if most species of ducks could be legally taken. However, since 1988, September duck seasons have been limited to wood ducks only. Therefore, the three States involved will be allowed to continue pre-sunrise shooting during their September season under the condition that they conduct studies or provide information that demonstrates a negligible impact on species other than wood ducks. Unless such information is provided or studies initiated, shooting hours for the September wood duck seasons will begin at sunrise during the 1991 season.

C. *Canvasback Harvest Guidelines:* The Service announced in the harvest management strategies developed for the 1990 duck hunting season that it intended to continue using the decision criteria stated in the "1983 Environmental Assessment on Canvasback Hunting" as a basis for managing Western and Eastern Populations for that year. However, the Service recommended that Flyway Councils review the bases for the current guidelines to determine whether these criteria are still appropriate. Presently, these guidelines call for consideration of all possible actions, including season closure, in order to maintain 3-year average breeding

population indices (BPI's) above specific levels.

Canvasbacks are among the least abundant of the harvested duck species and have a long history of season closures and various restrictive harvest strategies. The lack of an adequate database, particularly banding data, has limited any meaningful evaluation of hunting impacts and has hindered the development of a consistent harvest strategy for canvasbacks.

The fundamental questions prompting a review of canvasback harvest guidelines at this time include:

i. Whether existing guidelines based on specific BPI levels are the most appropriate harvest strategy for maintaining desired population levels; and, if not, what new approaches should be considered?

ii. Whether the delineation of the breeding survey area (strata 1–50) into a Western population (strata 1–12 and 26–29) and an Eastern Population (strata 13–25 and 30–50) correctly represent two distinct populations; and, if not, should harvest management by population units be continued?

The Service will work with the Flyway Councils in accomplishing the review recommended above. It is doubtful that this process can be completed for the 1991–92 season.

D. *Stabilized Regulations:* In 1988, the Service prepared a programmatic document entitled "Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14)". In this document, alternatives for promulgating framework regulations (i.e., opening/closing dates, season length, daily bag limits, shooting hours) were considered. The Service chose as its preferred alternative "stabilized regulations", in which frameworks would remain relatively constant for fixed periods of time, but would be subject to annual review and modification as dictated by waterfowl population status. Stabilized regulations have many advantages, including improved ability to discern the effects of regulations on populations, more efficient use of resources to achieve migratory bird objectives, and greater predictability in the regulations setting process. Therefore, the Service proposes to develop guidelines to govern the use of stabilized regulations for ducks, including: (1) Frameworks that are appropriate for various population levels, with special considerations for species of concern, and (2) criteria for changing frameworks, such as changes in breeding populations, recruitment, or harvest rates. In accordance with the Supplemental Environmental Impact Statement, the Service hereby requests assistance from the Flyway Councils, States, and other interested parties in accumulating necessary data and in developing harvest guidelines. The Service will then prepare draft guidelines for public review and comment in 1992.

E. *Zones and splits for duck seasons:* In 1988, the Service initiated reviews of several regulatory tools for managing the harvest of ducks. One of these reviews involved zones, which have been operating under a moratorium since 1985, and split seasons, which have been operating under a partial moratorium since 1986. This review revealed that it was not possible to determine the effects of zones and split seasons at the State level. The ability to examine the cumulative effect of zones and splits was somewhat better, and this assessment suggested that these regulatory tools, as used in the past, had not increased continental harvest pressure on ducks.

Nonetheless, the ability to predict the impact of additional zones and split seasons is poor, and the Service felt that some limits should be imposed. Consequently the Service, with assistance from the Flyway Councils, developed a strategy to guide the future use of these regulatory options and published this strategy in the September 21, 1990, **Federal Register** (55 FR 38901). In accordance with the implementation schedule for that strategy, 1991 will be the first of the periodic "open seasons" in which modifications to zones and split seasons can be made.

States planning to change their use of zones and split seasons under the new guidelines in 1991 should advise the Service in writing as soon as possible so that proposed changes may be reviewed prior to the July regulations meetings. Proposed changes must adhere to the guidelines in the above-mentioned **Federal Register** document.

The Service should also be notified by States wishing to take advantage of the "grandfather clause" to continue a zone/split-season configuration that does not adhere to the new guidelines, but which was developed under the Service's 1977 zoning criteria published in the May 25, 1977, **Federal Register** (42 FR 26671). States that have not fulfilled obligations for evaluation as specified in Memoranda of Agreement must complete those requirements or they will be subject to the new, more restrictive guidelines. Major changes in zone boundaries from previous years will not be permitted under the grandfather clause, although some minor modifications of an administrative nature may be allowed.

After the 1991 hunting season, modifications to zone/split-season configurations will only be permitted at 5-year intervals (i.e., 1996, 2001, etc.). However, States may abandon the use of zones or 3-way split seasons in favor of a Statewide continuous or 2-way split season at any time. Five years after any modification of zones or 3-way split seasons, States will be asked to review the effects of that modification.

2. *Sea ducks.* (No change.) A maximum open season of 107 days is proposed during the period between September 15, 1991, and January 20, 1992, with a daily bag limit of 7 scoter, eider, and oldsquaw ducks, singly or in the aggregate, in special sea duck hunting areas (as described in the August 14, 1990, **Federal Register** at 55 FR 33270), provided that any such areas have been described, delineated, and designated as special sea duck hunting areas under the hunting regulations adopted by the respective States. These limits may be in addition to regular duck bag limits during the regular duck season in the special sea duck hunting areas. In all other areas of these States and in all other States in the Atlantic Flyway, sea ducks may be taken only during the regular open season for ducks and they must be included in the regular duck season daily bag and possession limits.

3. *Mergansers.* (No change.) States in the Atlantic, Mississippi, and Central Flyways may select separate bag limits for mergansers in addition to the regular duck bag limits during the regular duck season. The daily bag limit is 5 mergansers, including no more than 1 hooded merganser. Elsewhere, mergansers are included within the regular daily bag and possession limits for ducks.

4. *Canada Geese.* (No change.) The Canadian Wildlife Service, the four waterfowl Flyway Councils, State conservation agencies, and others traditionally provide population and harvest information used in setting annual regulations for geese and brant. The Midwinter Waterfowl Survey, the past season's waterfowl harvest surveys, and satellite imagery and ground studies for May and June of 1991 will provide additional information. Seasons and bag limits are deferred pending receipt of additional information and recommendations. No significant changes from those in effect in 1990–91 are anticipated at this time.

With the increase in resident Canada goose flocks in many parts of the nation, the Service has endorsed the concept of special seasons to control numbers of local breeders and/or nuisance

problems. Criteria for special early seasons were addressed in the June 7, 1988, **Federal Register** (53 FR 20877), but the Service recognizes the need, in certain circumstances, for special late seasons. The Service herein proposes to develop guidelines, including criteria, to provide for the implementation of special late Canada goose seasons, and will solicit comments from Flyway Councils. Any criteria developed will be published for public comment before being implemented.

5. *White-fronted Geese.* (No change.) See item number 4.

6. *Brant.* (No change.) See item number 4.

7. *Snow and Ross's Geese.* (No change.) See item number 4.

8. *Tundra Swan.* (No change.) In Alaska, Montana, Nevada, New Jersey, North Carolina, North Dakota, South Dakota, Utah, and Virginia, an open season for taking a limited number of tundra swans may be selected. Permits will be issued by the States and will authorize each permittee to take no more than 1 tundra swan per season. These seasons will be subject to the following conditions:

In the *Atlantic Flyway.*

—The season will be experimental.
—The season may be 90 days and must occur during the white goose season, but may not extend beyond January 31.
—The States must obtain harvest and hunter participation data.
—In New Jersey, no more than 200 permits may be issued.
—In North Carolina, no more than 6,000 permits may be issued.
—In Virginia, no more than 600 permits may be issued.

In the *Central Flyway.*

—In the Central Flyway portion of Montana, no more than 500 permits may be issued. The season must run concurrently with the season for taking geese.
—In North Dakota, no more than 1,000 permits may be issued. The season must run concurrently with the season for taking light geese.
—In South Dakota, no more than 500 permits may be issued. The season must run concurrently with the season for taking light geese.

In the *Pacific Flyway* (except Alaska).

—A 93-day season may be selected between the Saturday closest to October 1 (September 30, 1991), and the Sunday closest to January 20 (January 21, 1992). Seasons may be split into 2 segments.
—The States must obtain harvest and hunter participation data.
—In Utah, no more than 2,500 permits may be issued.
—In Nevada, no more than 650 permits may be issued. Permits will be valid for Churchill, Lyon, or Pershing Counties.
—In the Pacific Flyway portion of Montana, no more than 500 permits may be issued. Permits will be valid for Cascade, Hill, Liberty, Pondera, Teton, or Toole Counties.

In *Alaska.*

—The season will be experimental.
—The season must run concurrently with the duck season.
—The State must obtain harvest and hunter participation data and report the results to the Service by June 1, 1992.
—No more than 300 permits may be issued. Permits will be valid in Gam, Management Unit 22.

9. *Sandhill cranes.*

Central Flyway—Regular seasons (No change). Pending evaluation of harvest data from the 1990–91 seasons, sandhill crane hunting seasons may be selected within specified areas in Colorado, Kansas, Montana, North Dakota, South Dakota, Wyoming, New Mexico, Oklahoma and Texas outside the range of the Rocky Mountain Population of sandhill cranes, with no substantial changes in dates from the 1990–91 seasons. The daily bag limit will be 3 and the possession limit 6 sandhill cranes. The provision for a Federal sandhill crane hunting permit is continued in all of the above areas.

Central and Pacific Flyways—Special seasons (No change). Pending evaluation of harvest data from the 1990–91 seasons, sandhill crane hunting seasons within the range of the Rocky Mountain Population may be selected by Arizona, Colorado, Idaho, Montana, New Mexico, Utah and Wyoming subject to the following conditions:

A. Outside dates are September 1–November 30, 1991; except September 1, 1991–January 31, 1992, in the Hatch-Deming Zone of southwestern New Mexico.

B. Season(s) in any State or zone may not exceed 30 days.

C. Daily bag limits may not exceed 3, and season limits may not exceed 9.

D. Participants must have in their possession, while hunting, a valid permit issued by the appropriate State.

E. Numbers of permits, areas open, season dates, protection plans for other species, and other provisions of seasons are consistent with the management plan and approved by the Central and Pacific Flyway Councils.

F. All hunts, except those in Arizona, Wyoming, and the Middle Rio Grande Valley of New Mexico, will be experimental.

10. *Coots.* (No change.) States in the Atlantic, Mississippi, and Central Flyways may permit a daily bag limit of 15 coots, concurrent with the regular duck season; while States in the Pacific Flyway may permit 25 coots daily and in possession, singly or in the aggregate with gallinules, between the first opening date of the duck season and the last closing date of the duck season, but the season length may not exceed 93 days.

11. *Common Moorhens and Purple Gallinules.* (No change.) States in the Atlantic, Mississippi, and Central Flyways may select hunting seasons of not more than 70 days between September 1, 1991, and January 20, 1992. Any State may split its moorhen/gallinule season into two segments without penalty. The daily bag limits may not exceed 15 common moorhens and purple gallinules, singly or in the aggregate of the two species.

States in the Pacific Flyway must select their moorhen/gallinule hunting seasons to occur between the first opening date of the duck season and the last closing date of the duck season, but the season length may not exceed 93 days. The daily bag and possession limits may not exceed 25 coots and moorhens, singly or in the aggregate of the two species.

12. *Rails.* (No change.) The States included herein may select seasons between September 1, 1991, and January 20, 1992, on clapper, king, sora, and Virginia rails as follows:

The season length for all species of rails may not exceed 70 days, and any State may split its rail season into two segments without penalty.

Clapper and king rails.

A. In Rhode Island, Connecticut, New Jersey, Delaware, and Maryland, the daily bag limits may not exceed 10 clapper and king rails, singly or in the aggregate of these two species.

B. In Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, SouthCarolina, North Carolina, and Virginia, the daily bag limits may not exceed 15 clapper and king rails, singly or in the aggregate of these two species.

C. The season will remain closed on clapper and king rails in all other States.

Sora and Virginia rails.

In addition to the prescribed limits for clapper and king rails, daily bag and possession limits not exceeding 25, singly or in the aggregate of sora and Virginia rails, may be selected in States in the Atlantic, Mississippi, and Central Flyways, and portions of Colorado, Montana, New Mexico, and Wyoming in

the Pacific Flyway. No hunting season is proposed for rails in the remainder of the Pacific Flyway.

13. *Common snipe.* (No change.) The Service completed a preliminary assessment of the framework closing date for snipe. The Service believes that a closing date of February 28 will not negatively impact snipe populations because snipe, in contrast to woodcock, tend to nest in more northern areas and at a later date. In addition, there is currently no indication of a declining trend in snipe populations.

States may select hunting seasons between September 1, 1991, and February 28, 1992, not to exceed 107 days. Daily bag limits may not exceed 8 snipe. Any State may split its snipe season into two segments.

14. *Woodcock.* (Possible change.) The Service, in cooperation with the Flyway Councils, is reviewing the framework closing date, based on concern about the potential impacts of woodcock harvest during late winter and during spring migration to their breeding areas in light of the downward trend of woodcock populations in both the Eastern and Central Regions. Before 1970, the closing framework date offered by the Service for woodcock hunting seasons could be no later than January 31. In 1970, States were offered a February 15 woodcock season closing date. Starting in 1972, the Federal framework closing date was shifted to the last day in February. Subsequently, there were reports of nesting woodcock being shot during February seasons in some southern States. In 1985, the Service responded to declining breeding populations in the Eastern Region by moving the closing date to January 1 as part of a broader harvest-reduction package. The closing framework date for Central-Region States remained the last day of February. Four Central-Region States (Arkansas, Louisiana, Mississippi, and Tennessee) currently select woodcock seasons ending in February. In 1988, Pennsylvania (through the Atlantic Flyway council) asked the Service to discontinue this option. Pennsylvania felt that late-season mortality also affected the Eastern Region woodcock that winter in the southern States of the Central Region. In 1989, the Northeast Association of Fish and Wildlife Resource Agencies, the Ruffed Grouse Society, National Audubon Society, and the State of Alabama suggested that the Service restrict the option of hunting woodcock in February. In the August 14, 1990, **Federal Register** (55 FR 33266), the Service stated its intent to work with the Flyway Councils to develop background materials on hunting of woodcock in February. However, the Service stated that unless sufficient justification was developed to continue February woodcock hunting, the Service would propose a change.

The Service proposes changing the outside closing date for hunting woodcock to January 31 based on the following reasons: (1) Breeding occurs earlier and at higher densities in the South than was previously believed; (2) there are indications of long-term breeding population declines in both the Eastern and Central Regions; (3) hunting mortality is more likely to adversely affect the population dynamics of woodcock when it occurs immediately before or during the breeding season; (4) sportsmen express concern when woodcock flushed and shot during February seasons are found to have been nesting or contain eggs in their reproductive tracts; and (5) the impact on the population status of woodcock would be even greater if more States select February seasons.

The hunting of a few other migratory bird species is permitted during February (e.g., common snipe, snow geese). However, those situations are distinct from this proposal because those species are not declining and are not beginning their reproductive season at that time. The Service reiterates its request for any additional information that the States or Flyway councils may be able to provide. The Service proposes a framework closing date of January 31 pending any new proposals or information that may be provided.

A. *Central and Mississippi Flyways.*

States in the Central and Mississippi Flyways may select hunting seasons of not more than 65 days with a daily bag limit of 5 woodcock, to occur between September 1, 1991 and January 31, 1992. States may split their woodcock season without penalty.

B. *Atlantic Flyway.*

States in the Atlantic Flyway may select hunting seasons of not more than 45 days with a daily bag limit of 3 woodcock, to occur between October 1, 1991, and January 31, 1992. States may split their woodcock season without penalty.

New Jersey may select seasons by North and South zones divided by State highway 70. The season in each zone may not exceed 35 days.

15. *Band-tailed pigeons.* (No change.)

A. *Pacific Coast States* (California, Oregon, Washington, and the Nevada counties of Carson City, Douglas, Lyon, Washoe, Humboldt, Pershing, Churchill, Mineral, and Storey). These States may select hunting seasons not to exceed 16 consecutive days between September 15, 1991, and the Sunday closest to January 1, 1992. The daily bag and possession limits may not exceed 2 band-tailed pigeons.

California may zone by selecting hunting seasons of 16 consecutive days for each of the following two zones:

i. In the counties of Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity; and

ii. The remainder of the State.

The season in the north zone of California must close by October 6.

B. *Four-Corners States* (Arizona, Colorado, New Mexico, and Utah). These States may select hunting seasons not to exceed 30 consecutive days between September 1 and November 30, 1991. The daily bag and possession limits may not exceed 5 and 10, respectively. The season shall be open only in the areas delineated by the respective States in their hunting regulations. New Mexico may divide its State into a North Zone and a South Zone along a line following U.S. Highway 60 from the Arizona State line east to Interstate Highway 25 at Socorro and along Interstate Highway 25 from Socorro to the Texas State line. Between September 1 and November 30, 1991, in the North Zone, and October 1 and November 30, 1991, in the South Zone; hunting seasons not to exceed 20 consecutive days in each zone may be selected.

16. *Mourning doves.* (No change.) Pending results of the call-count survey and receipt of additional information and recommendations, the Service proposes the following frameworks during the 1991–92 hunting season. Outside framework dates will be September 1, 1991, and January 15, 1992, except as otherwise provided. States in the Eastern (EMU) and Central (CMU) Management Units are offered an option of a season length of 70 days with a daily bag limit of 12, or a season length of 60 days with a daily bag limit of 15 birds. EMU and CMU States may select hunting seasons by zone without penalty and split the season into not more than 3 segments. In the Western Management Unit (WMU), seasons in Idaho, Nevada, Oregon, Utah, and Washington may not exceed 30 consecutive days between September 1, 1991, and January 15, 1992; and seasons in Arizona and California may not exceed 60 days to be split between 2 periods, September 1–15, 1991, and November 1, 1991–January 15, 1992. The daily bag limit is 10 mourning doves.

17. *White-winged and white-tipped doves.* (Possible change.) The Service

proposes the following frameworks during the 1991–92 season: Arizona, California, Nevada, New Mexico, and Texas may select hunting seasons between September 1 and December 31, 1991, and daily bag limits as stipulated below.

A. *Arizona* may select a hunting season of not more than 30 consecutive days running concurrently with the mourning dove season (see mourning dove frameworks-WMU above). The daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate, no more than 6 of which may be white-winged doves.

B. *Nevada,* in the counties of Clark and Nye, and in the California counties of Imperial, Riverside, and San Bernardino, the daily bag limit of mourning doves and white-winged doves may not exceed 10, singly or in the aggregate. The season length must conform to the mourning dove season (either a 60-day split season or a 30-day consecutive season as stipulated under mourning dove frameworks-WMU above).

C. *New Mexico* may select a hunting season with daily bag limits not to exceed 12 (or 15 if the 60-day option for mourning doves is selected) white-winged and mourning doves, singly or in the aggregate of the two species. Dates, limits, and hours are to conform with those for mourning doves.

D. *Texas* may select a hunting season of not more than 2 days for the special white-winged dove area of the South Zone. In that portion of the special area north and west of Del Rio, the experimental daily bag limit may not exceed 10 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 2 may be white-tipped doves. In that portion of the special area south and east of Del Rio, the experimental daily bag limit may not exceed 10 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 5 may be mourning doves and 2 may be white-tipped doves. The experimental daily bag limits are dependent on annual review of the special white-winged dove season. The Service remains concerned about the status of white-winged doves in this portion of Texas and, pending 1991 breeding population information, may consider modification of this season and other alternative actions.

In addition, Texas may also select a hunting season of not more than 70 (or 60 under the alternative) days to be held between September 1, 1991 (September 20, 1991, in South Zone), and January 25, 1992, and coinciding with the mourning dove season. The daily bag limit may not exceed 12 white-winged, mourning, and white-tipped doves (or 15 under the alternative) in the aggregate, of which not more than 2 may be white-winged and 2 may be white-tipped doves.

E. *Florida* may select a white-winged dove season of not more than 70 (or 60 under the alternative) days to be held between September 1, 1991, and January 15, 1992, and coinciding with the mourning dove season. The daily bag limit of both species in the aggregate may not exceed 12 (or 15 under the alternative), of which not more than 4 may be whitewings.

18. *Migratory bird hunting seasons in Alaska.* (No change.)

Proposed Frameworks for Selecting Open Season Dates for Hunting Migratory Birds in Alaska, 1991–92

Outside Dates: Between September 1, 1991, and January 26, 1992 Alaska may select seasons on waterfowl, snipe, sandhill cranes, and tundra swans subject to the following limitations:

Hunting Seasons:

Ducks, geese, and brant—Not more than 107 consecutive days for ducks, geese, and brant in each of the following: North Zone (State Game Management Units 11–13 and 17–26); Gulf Coast Zone (State Game Management Units 5–7, 9, 14–16, and 10-Unimak Island only); Southeast Zone (State Game Management Units 1–4); Pribilof and Aleutian Islands Zone (State Game Management Unit 10-except Unimak Island); Kodiak Zone (State Game Management Unit 8). The season may be split without penalty in the Kodiak Zone. Exceptions: The season is closed on Canada geese from Unimak Pass westward in the Aleutian Island chain. Throughout the State, there is no open hunting season for Aleutian Canada geese, cackling Canada geese, and emperor geese.

Snipe and sandhill cranes—An open season must be concurrent with the duck season.

Daily Bag and Possession Limits:

Ducks—Except as noted, a basic daily bag limit of not more than 5 and a possession limit of 15 ducks. Daily bag and possession limits in the North Zone are 8 and 24, and in the Gulf Coast Zone they are 6 and 18, respectively. These basic limits may not include more than 2 pintails daily and 6 in possession, and 2 canvasback daily and 6 in possession. In addition to the basic limit, there is a daily bag limit of 15 and a possession limit of 30 scoter, eider, oldsquaw, harlequin, and common and red-breasted mergansers, singly or in the aggregate of these species.

Geese—A basic daily bag limit of 6 and a possession limit of 12, of which not more than 4 daily and 8 in possession may be greater white-fronted or Canada geese, singly or in the aggregate of these species.

Brant—A daily bag limit of 2 and a possession limit of 4.

Common snipe—A daily bag limit of 8 and a possession limit of 16.

Sandhill cranes—A daily bag limit of 3 and a possession limit of 6.

Tundra swan—In Game Management Unit 22, an experimental open season for tundra swans may be selected subject to the following conditions:

A. No more than 300 permits may be issued, authorizing each permittee to take 1 tundra swan.

B. The season must be concurrent with the duck season.

C. The appropriate State agency must issue permits, obtain harvest and hunter-participation data, and report the results of this hunt to the Service by June 1, 1991.

19. *Hawaii mourning doves.* (No change.) The mourning dove is the only migratory game bird occurring in Hawaii in numbers to permit hunting. It is proposed that mourning doves may be taken in Hawaii in accordance with shooting hours and other regulations set by the State of Hawaii, as has been done in the past, and subject to the applicable provisions of Part 20 of Title 50 CFR. Such a season must be within the constraints of applicable migratory bird treaties and annual regulatory frameworks. These constraints provide that the season must be within the period of September 1, 1991, and January 15, 1992; the length may not exceed 60 (or 70 under the alternative) days; and the daily bag limits may not exceed 15 (or 12 under the alternative) doves. Other applicable Federal regulations relating to migratory game birds shall also apply.

20. *Puerto Rico and the Virgin Islands.* (No change.)

Proposed Frameworks for Selecting Open Season Dates for Hunting Migratory Birds in Puerto Rico, 1991–92

Ducks, Coots, Moorhens, Gallinules, and Snipe

Outside Dates: Between October 1, 1991, and January 31, 1992, Puerto Rico may select hunting seasons as follows.

Hunting Seasons: Not more than 55 days may be selected for hunting ducks, common moorhens, and common snipe. The season may be split into 2 segments.

Daily Bag Limits:

Ducks—Not to exceed 3 daily, except that the season is closed on the ruddy duck (*Oxyura jamaicensis*); the White-cheeked pintail (*Anas bahamensis*); West Indian whistling (tree) duck

(*Dendrocygna arborea*); fulvous whistling (tree) duck (*Dendrocygna bicolor*), and the masked duck (*Oxyura dominica*), which are protected by the Commonwealth of Puerto Rico.

Coots—There is no open season on coots, i.e., common coots (*Fulica americana*) and Caribbean coots (*Fulica carabaea*).

Common Moorehens—Not to exceed 6 daily, except that the season is closed on purple gallinules (*Porphyrula martinica*).

Common snipe—Not to exceed 6 daily.

Closed Areas: There is no open season for ducks, common moorhens, or snipe in the Municipality of Culebra and on Desecheo Island.

Doves and Pigeons

Outside Dates: Puerto Rico may select hunting seasons between September 1, 1991, and January 15, 1992, as follows:

Hunting Seasons: Not more than 60 days for Zenaida, mourning, and white-winged doves, and scaly-naped pigeons.

Daily Bag and Possession Limits: Not to exceed 10 doves of the species named herein, singly or in the aggregate, and not to exceed 5 scaly-naped pigeons.

Closed Areas: No open season for doves and pigeons is prescribed in the following areas:

Vieques Island—closed due to habitat destruction caused by hurricane Hugo.

Municipality of Culebra and Desecheo Island—closed under Commonwealth regulations.

Mona Island—closed to protect the reduced population of white-crowned pigeon (*Columba leucocephala*), known locally as "Paloma cabeciblanca."

El Verde Closure Area—consisting of those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for one (1) kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public. The purpose of this closure is to afford protection to the Puerto Rican parrot (Amazona vittata), presently listed as an endangered species under the Endangered Species Act.

Cidra municipality and Adjacent Closure Areas consisting of all of Cidra Municipality and portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the Municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality, and westerly, northerly, and easterly along the Cidra Municipality boundary to the point of beginning. The purpose of this closure is to protect the Plain (Puerto Rican plain) pigeon (*Columba inornata wetmorei*), locally known as "Paloma Sabanera," which is present in the above locale in small numbers and is presently listed as an endangered species under the Endangered Species Act of 1973.

Proposed Frameworks for Selecting Open Season Dates for Hunting Migratory Birds in the Virgin Islands, 1991–92

Ducks

Outside Dates: Between December 1, 1991, and January 31, 1992, the Virgin Islands may select a duck hunting season as follows.

Hunting Seasons: Not more than 55 consecutive days may be selected for hunting ducks.

Daily Bag Limits: Not to exceed 3 daily, except that the season is closed on the ruddy duck (*Oxyura jamaicensis*); White-cheeked pintail (*Anas bahamensis*); West Indian whistling (tree) duck (*Dendrocygna arborea*); fulvous whistling (tree) duck (*Dendrocygna bicolor*), and the masked duck (*Oxyrua dominica*).

Doves and Pigeons

Outside Dates: The Virgin Islands may select hunting seasons between September 1, 1991, and January 15, 1992, as follows.

Hunting Seasons: Not more than 60 days for Zenaida doves and scaly-naped pigeons throughout the Virgin Islands.

Daily Bag and Possession Limits: Not to exceed 10 Zenaida doves and 5 scaly-naped pigeons.

Closed Seasons: No open season is prescribed for common ground-doves or quail doves, or other pigeons in the Virgin Islands.

Local Names for Certain Birds.

Zenaida dove (*Zenaida aurita*)—mountain dove.

Bridled quail dove (*Geotrygon mystacea*)—Barbary dove, partridge (protected).

Common Ground-dove (*Columbina passerina*)—stone dove, tobacco dove, rola, tortolita (protected).

Scaly-naped pigeon (*Columba squamose*)—red-necked pigeon, scaled pigeon.

21. *Migratory game bird seasons for falconers.* (No change.)

Proposed Special Falconry Frameworks

Falconry is a permitted means of taking migratory game birds in any State meeting Federal falconry standards in 50 CFR 21.29(k). These States may select an extended season for taking migratory game birds in accordance with the following:

Extended Seasons: For all hunting methods, the combined length for the extended season, regular season, and any special or experimental seasons shall not exceed 107 days for any species or group of species in a geographical area. Each extended season may be divided into a maximum of 3 segments.

Framework Dates: Seasons must fall between September 1, 1991 and March 10, 1992.

Daily Bag and Possession Limits: Falconry daily bag and possession limits for all permitted migratory game birds shall not exceed 3 and 6 birds, respectively, singly or in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in all States, including those that do not select an extended season.

Regular Seasons: General hunting regulations, including seasons and hours, apply to falconry in each State listed in 50 CFR 21.29(k). Regular season bag and possession limits do not apply to falconry. The falconry bag limit is not in addition to gun limits.

Note: The extension of this framework to include the period September 1, 1990-March 10, 1991, and the option to split the extended falconry season into a maximum of 3 segments are considered tentative, and may be evaluated in cooperation with States offering such extensions after a period of several years.

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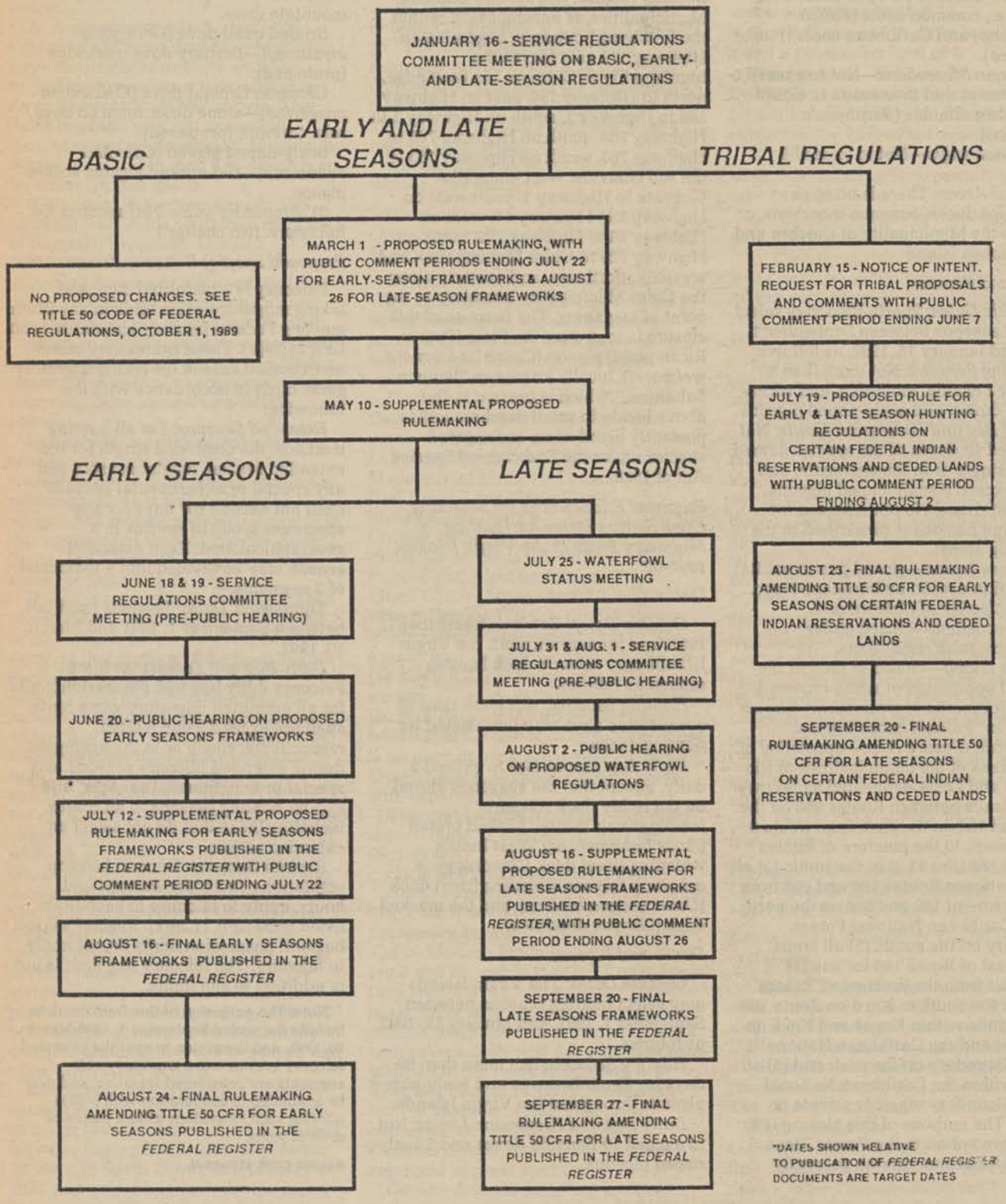
1991 SCHEDULE OF REGULATIONS MEETINGS AND *FEDERAL REGISTER* PUBLICATIONS*



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March 6, 1991

Part VI

Department of Housing and Urban Development

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Chapter I

Final Fair Housing Accessibility Guidelines

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Ch. I

[Docket No. N-91-2011; FR 2665-N-06]

Final Fair Housing Accessibility Guidelines

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice of Final Fair Housing Accessibility Guidelines.

SUMMARY: This document presents guidelines adopted by the Department of Housing and Urban Development to provide builders and developers with technical guidance on how to comply with the specific accessibility requirements of the Fair Housing Amendments Act of 1988. Issuance of this document follows consideration of public comment received on proposed accessibility guidelines published in the **Federal Register** on June 15, 1990. The guidelines presented in this document are intended to provide technical guidance only, and are not mandatory. The guidelines will be codified in the 1991 edition of the Code of Federal Regulations as Appendix II to the Fair Housing regulations (24 CFR Ch. I, Subch. A, App. II). The preamble to the guidelines will be codified in the 1991 edition of the Code of Federal Regulations as Appendix III to the Fair Housing regulations (24 CFR Ch. I, Subch. A, App. III).

EFFECTIVE DATE: March 6, 1991.

FOR FURTHER INFORMATION CONTACT: Merle Morrow, Office of HUD Program Compliance, room 5204, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC. 20410-0500, telephone (202) 708-2618 (voice) or (202) 708-0015 (TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Adoption of Final Guidelines

The Department of Housing and Urban Development (Department) is adopting as its Fair Housing Accessibility Guidelines, the design and construction guidelines set forth in this notice (Guidelines). Issuance of this document follows consideration of public comments received in response to an advance notice of intention to develop and publish Fair Housing Accessibility Guidelines, published in the **Federal Register** on August 2, 1989 (54 FR 31856), and in response to proposed accessibility guidelines published in the **Federal Register** on June 15, 1990 (55 FR 24730).

The Department is adopting as final Guidelines, the guidelines designated as Option One in the proposed guidelines published on June 15, 1990, with modifications to certain of the Option One design specifications. In developing the final Guidelines, the Department was cognizant of the need to provide technical guidance that appropriately implements the specific accessibility requirements of the Fair Housing Amendments Act of 1988, while avoiding design specifications that would impose an unreasonable burden on builders, and significantly increase the cost of new multifamily construction. The Department believes that the final Guidelines adopted by this notice (1) are consistent with the level of accessibility envisioned by Congress; (2) simplify compliance with the Fair Housing Amendments Act by providing guidance concerning what constitutes acceptable compliance with the Act; and (3) maintain the affordability of new multifamily construction by specifying reasonable design and construction methods.

The Option One design specifications substantially revised in the final Guidelines include the following:

(1) Site impracticality. The final Guidelines provide that covered multifamily dwellings with elevators shall be designed and constructed to provide at least one accessible entrance on an accessible route regardless of terrain or unusual characteristics of the site. Every dwelling unit on a floor served by an elevator must be on an accessible route, and must be made accessible in accordance with the Act's requirements for covered dwelling units.

For covered multifamily dwellings without elevators, the final Guidelines provide two alternative tests for determining site impracticality due to terrain. The first test is an individual building test which involves a two-step process: measurement of the slope of the undisturbed site between the planned entrance and all vehicular or pedestrian arrival points; and measurement of the slope of the planned finished grade between the entrance and all vehicular or pedestrian arrival points. The second test is a site analysis test which involves an analysis of the existing natural terrain (before grading) by topographic survey with 2 foot contour intervals, with slope determination made between each successive contour interval.

A site with a single building (without an elevator), having a common entrance for all units, may be analyzed only under the first test—the individual building test. All other sites, including a site with a single building having multiple entrances serving either individual dwelling units or clusters of dwelling units, may be analyzed either under the first test or the second test. For sites for which either test is applicable (that is, all sites other than a site with a single nonelevator building having a common entrance for all units), the final Guidelines provide that regardless of which test is utilized by a builder or developer, at least 20% of the total ground floor units in nonelevator buildings, on any site, must comply with the Act's accessibility requirements.

(2) An accessible route into and through covered dwelling units. The final Guidelines distinguish between (i) single-story dwelling units, and (ii) multistory dwelling units in elevator buildings, and provide guidance on designing an accessible entrance into and through each of these two types of dwelling units.

(a) Single-story dwelling units. For single-story dwelling units, the final Guidelines specify the same design specification as presented in the proposed Option One guidelines, except that design features within the single-story dwelling units, such as a loft or a sunken living room, are exempt from the access specifications, subject to certain requirements. Lofts are exempt provided that all other space within the units is on an accessible route. Sunken or raised functional areas, such as a sunken living room, are also exempt from access specifications, provided that such areas do not interrupt the accessible route through the remainder of the unit. However, split-level entries or areas will need ramps or other means of providing an accessible route.

(b) Multistory dwelling units in buildings with elevators. For multistory dwelling units in buildings with elevators, the final Guidelines specify that only the story served by the building elevator must comply with the accessible features for dwelling units required by the Fair Housing Act. The other stories of the multistory dwelling units are exempt from access specifications, provided that the story of the unit that is served by the building elevator (1) is the primary entry to the unit; (2) complies with Requirements 2 through 7 with respect to the rooms located on the entry/accessible level; and (3) contains a bathroom or powder room which complies with Requirement 7.

(c) Thresholds at patio, deck or balcony doors. The final Guidelines provide that exterior deck, patio, or balcony surfaces should be not more

than ½ inch below the floor level of the interior of the dwelling unit, unless they are constructed of impervious materials such as concrete, brick or flagstone, in which case the surface should be no more than 4 inches below the floor level of the interior dwelling units, unless the local building code requires a lower drop. This provision and the following provision were included in order to minimize the possibility of interior water damage when exterior surfaces are constructed of impervious materials.

(d) Outside surface at entry door. The final Guidelines also provide that at the primary entry door to dwelling units with direct exterior access, outside landing surfaces constructed of impervious materials such as concrete, brick, or flagstone should be no more than ½ inch below the interior of the dwelling unit. The Guidelines further provide that the finished surface of this area, located immediately outside the entry door, may be sloped for drainage, but the sloping may be no more than ⅛ inch per foot.

(3) Usable bathrooms. The final Guidelines provide two alternative sets of specifications for making bathrooms accessible in accordance with the Act's requirements. The Act requires that an accessible or "usable" bathroom is one which provides sufficient space for an individual in a wheelchair to maneuver about. The two sets of specifications provide different approaches as to how compliance with this maneuvering space requirement may be achieved. The final Guidelines for usable bathrooms also provide that the usable bathroom specifications (either set of specifications) are applicable to powder rooms (i.e., a room with only a toilet and a sink) when the powder room is the only toilet facility on the accessible level of a covered multistory dwelling unit.

The details about, and the reasons for these modifications, and additional minor technical modifications made to certain design specifications of the Option One guidelines, are discussed more fully in the section-by-section analysis which appear later in this preamble.

Principal features of the Option One guidelines that were not changed in the final Guidelines include the following:

(1) Accessible entrance and an accessible route. The Option One guidelines for these two requirements remain unchanged in the final Guidelines.

(2) Accessible and usable public and common use areas. The Option One guidelines for public and common use areas remain unchanged in the final Guidelines.

(3) Door within individual dwelling units. The final Guidelines recommend that doors intended for user passage within individual dwelling units have a clear opening of at least 32 inches nominal width when the door is open 90 degrees.

(4) Doors to public and common use areas. The final Guidelines continued to provide that on accessible routes in public and common use areas, and for primary entry doors to covered units doors that comply with ANSI 4.13 meet the Act's requirement for "usable" doors.

(4) Thresholds at exterior doors. Subject to the exceptions for thresholds and changes in level at exterior areas constructed of impervious materials, the final Guidelines continue to specify that thresholds at exterior doors, including sliding door tracks, be no higher than ¾ inch.

(5) Reinforced walls for grab bars. The final Guidelines for bathroom wall reinforcement remains essentially unchanged from the Option One guidelines. The only change made to these guidelines has been to subject powder rooms to the reinforced wall requirement when the powder room is the only toilet facility on the accessible floor of a covered multistory dwelling unit.

The text of the final Guidelines follows the Preamble, which includes a discussion of the public comments received on the proposed guidelines, and the section-by-section analysis referenced above.

The design specification presented in the Fair Housing Accessibility Guidelines provide technical guidance to builders and developers in complying with the specific accessibility requirements of the Fair Housing Amendments Act of 1988. The Guidelines are intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Amendments Act, as implemented by 24 CFR 100.205 of the Department's Fair Housing regulations. The Guidelines are not mandatory. Additionally, the Guidelines do not prescribe specific requirements which must be met, and which, if not met, would constitute unlawful discrimination under the Fair Housing Amendments Act. Builders and developers may choose to depart from the Guidelines, and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act.

II. Statutory and Regulatory Background

Title VIII of the Civil Rights Act of 1968 makes it unlawful to discriminate in any aspect relating to the sale, rental or financing of dwellings, or in the provision of brokerage services or facilities in connection with the sale or rental of a dwelling, because of race, color, religion, sex or national origin. The Fair Housing Amendments Act of 1988 (Pub. L. 100–430, approved September 13, 1988) (Fair Housing Act or the Act) expanded coverage of title VIII (42 U.S.C. 3601–3620) to prohibit discriminatory housing practices based on handicap and familial status. As amended, section 804(f)(3)(C) of the Act provides that unlawful discrimination includes a failure to design and construct covered multifamily dwellings for first occupancy after March 13, 1991 (30 months after the date of enactment in accordance with certain accessibility requirements. The Act defines "covered multifamily dwellings" as "(a) buildings consisting of 4 or more units if such buildings have one or more elevators; and (b) ground floor units in other buildings consisting of 4 or more units" (42 U.S.C. 3604).

The Act makes it unlawful to fail to design and construct covered multifamily dwellings so that:

(1) Public use and common use portions of the dwellings are readily accessible to and usable by persons with handicaps;

(2) All doors within such dwellings which are designed to allow passage into and within the premises are sufficiently wide to allow passage by persons in wheelchairs; and

(3) All premises within such dwellings contain the following features of adaptive design:

(a) An accessible route into and through the dwelling;

(b) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations.

(c) Reinforcements in bathroom walls to allow later installation of grab bars; and

(d) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

The Act provides that compliance with (1) the appropriate requirements of the American National Standard for Buildings and Facilities—Providing Accessibility and Usability for Physically Handicapped People (commonly cited as "ANSI A117.1"), or (2) with the laws of a State or unit of general local government, that has incorporated into such laws the accessibility requirements of the Act, shall be deemed to satisfy the accessibility requirements of the Act. (See section 804(f)(4) and (5)(A).) The Act also provides that the Secretary of the Department of Housing and Urban

Development shall provide technical assistance to States and units of local government and other persons to implement the accessibility requirements of the Act. (See section 804(f)(5)(C).)

Congress believed that the accessibility provisions of the Act would (1) facilitate the ability of persons with handicaps to enjoy full use of their homes without imposing unreasonable requirements on homebuilders, landlords and non-handicapped tenants; (2) be essential for equal access and to avoid future *de facto* exclusion of persons with handicaps; and (3) be easy to incorporate in housing design and construction. Congress predicted that compliance with these minimal accessibility design and construction standards would eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities. (See H.R. Rep. No. 711, 100th Cong. 2d Sess. 27–28 (1988) ("House Report").)

The Fair Housing Act became effective on March 12, 1989. The Department implemented the Act by a final rule published January 23, 1989 (54 FR 3232), and which became effective on March 12, 1989. Section 100.205 of that rule incorporates the Act's design and construction requirements, including the requirement that multifamily dwellings for first occupancy after March 13, 1991 be designed and constructed in accordance with the Act's accessibility requirements. The final rule clarified which multifamily dwellings are subject to the Act's requirements. Section 100.205 provides, in paragraph (a), that covered multifamily dwellings shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991, if they are occupied by that date, or if the last building permit or renewal thereof for the covered multifamily dwellings is issued by a State, County or local government on or before January 13, 1990. The Department selected the date of January 13, 1990 because it is fourteen months before March 13, 1991. Based on data contained in the Marshall Valuation Service, the Department found that fourteen months represented a reasonable median construction time for multifamily housing projects of all sizes. The Department chose the issuance of a building permit as the appropriate point in the building process because such permits are issued in writing by governmental authorities. The issuance of a building permit has the advantage of being a clear and objective standard. In addition, any project that actually achieves first occupancy before March 13, 1991 will be judged to have met this standard even if the last building permit or renewal thereof was issued after January 13, 1990 (55 FR 3251).

Section 110.205 of the final rule also incorporates the Act's provisions that compliance with the appropriate requirements of ANSI A117.1, or with State or local laws that have incorporated the Act's accessibility requirements, suffices to satisfy the accessibility requirements of the Act as codified in § 100.205. In the preamble to the final rule, the Department stated that it would provide more specific guidance on the Act's accessibility requirements in a notice of proposed guidelines that would provide a reasonable period for public comment on the guidelines.

III. Proposed Accessibility Guidelines

On August 2, 1989, the Department published in the **Federal Register** an advance notice of intention to develop and publish Fair Housing Accessibility Guidelines (54 FR 31856). The purpose of this document was to solicit early comment from the public concerning the content of the Accessibility Guidelines, and to outline the Department's procedures for their development. To the extent practicable, the Department considered all public comments submitted in response to the August 2, 1989 advance notice in its preparation of the proposed accessibility guidelines.

On June 15, 1990, the Department published proposed Fair Housing Accessibility guidelines (55 FR 24370). The proposed guidelines presented, and requested public comment on, three options for accessible design:

(1) Option one (Option One) provided guidelines developed by the Department with the assistance of the Southern Building Code Congress International (SBCCI), and incorporated suggestions received in response to the August 2, 1989 advance notice;

(2) Option two (Option Two) offered guidelines developed by the National Association of Home Builders (NAHB) and the National Coordinating Council on Spinal Cord Injuries (NCCSCI); and

(3) Option three (Option Three) offered "adaptable accommodations" guidelines, an approach that provides for identification of certain features in dwelling units that could be made accessible to people with handicaps on a case-by-case basis.

In the June 15, 1990 notice of proposed guidelines, the Department recognized that projects then being designed, in advance of publication of the final Guidelines may not become available for occupancy until after March 13, 1991. The Department advised that efforts to comply with the proposed guidelines, Option One, in the design of projects which would be completed before issuance of the final Guidelines, would be considered as evidence of compliance with the Act in connection with the Department's investigation of any complaints. Following publication of the June 15, 1990 notice, the Department received a number of inquiries concerning whether certain design and construction activities in connection with projects likely to be completed before issuance of final Guidelines would be considered by the Department to be in compliance with the Act.

In order to resolve these questions, the Department, on August 1, 1990, published in the **Federal Register** a supplementary notice to the proposed guidelines (55 FR 31191). In the supplementary notice, the Department advised that it only would consider efforts to comply with the proposed guidelines, Option One, as evidence of compliance with the Act. The Department stated that evidence of compliance with the Option One guidelines, under the circumstances described in the supplementary notice, would be a basis for determination that there is no reasonable cause to believe that a discriminatory housing practice under section 804(f)(3) has occurred, or is about to occur in connection with the investigation of complaints filed with the Department relating to covered multifamily dwellings. The circumstances described in the August 1, 1990 supplementary notice that the Department found would be in compliance with the Act, were limited to:

(1) Any covered multifamily dwellings which are designed in accordance with the Option One guidelines, and for which construction is completed before publication of the final Fair Housing Accessibility Guidelines; and

(2) Any covered multifamily dwellings which have been designed in accordance with the Option One guidelines, but for which construction is not completed by the date of publication of the final Guidelines provided:

(a) Construction begins before the final Guidelines are published; or

(b) A building permit is issued less than 60 days after the final Guidelines are published.

On September 7, 1990, the Department published for public comment a Preliminary Regulatory Impact Analysis on the Department's assessment of the economic impact of the Guidelines, as implemented by each of the three design options then under consideration (55 FR 37072–37129).

IV. Public Comments and Commenters

The proposed guidelines provided a 90-day period for the submission of comments by the public, ending September 13, 1990. The Department received 562 timely comments. In addition, a substantial number of comments were received by the Department after the September 13, 1990 deadline. Although those comments were not timely filed, they were reviewed to assure that any major issues raised had been adequately addressed in comments that were received by the deadline. Each of the timely comments was read, and a list of all significant issues raised by those comments was compiled. All these issues were considered in the development of the final Guidelines.

Of the 562 comments received, approximately 200 were from disability advocacy organizations, or units of State or local government concerned with disability issues. Sixty-eight (68) additional commenters identified themselves as members of the disability community; 61 commenters identified themselves as individuals who work with members of the disability community (e.g., vocational or physical therapists or counselors), or who have family members with disabilities; and 96 commenters were members of the building industry, including architects, developers, designers, design consultants, manufacturers of home building products, and rental managers. Approximately 292 commenters supported Option One without any recommendation for change An additional 155 commenters supported Option One, but recommended changes to certain Option One design standards. Twenty-six (26) commenters supported Option Two, and 10 commenters supported Option Three. The remaining commenters submitted questions, comments and recommendations for changes on certain design features of one or more of the three options, but expressed no preference for any particular option, or, alternatively, recommended final guidelines that combine features from two or all three of the options.

The Commenters

The commenters included several national, State and local organizations and agencies, private firms, and individuals that have been involved in the development of State and local accessibility codes. These commenters offered valuable information, including copies of State and local accessibility codes, on accesibility design standards. These commenters included: the Southern Building Code Congress International (SBCCI); the U.S. Architectural and Transportation Barriers Compliances Board (ATBCB); the Building Officials & Code Administrators International, Inc. (BOCA); the State of Washington Building Code Council; the Seattle Department of Construction and Land Use; the Barrier-free Subcode Committee of the New Jersey Uniform Construction Code Advisory Board; the Department of Community Planning, Housing and Department of Arlington County, Virginia; the City of Atlanta Department of Community Development, Bureau of Buildings; and members of the Department of Architecture, the State of University of New York at Buffalo. In addition to the foregoing organizations, a number of the commenters from the building industry submitted detailed comments on the proposed guidelines.

The commenters also included a number of disability organizations, several of which prepared detailed comments on the proposed guidelines. The comments of two disability organizations also were submitted as concurring comments by many individuals and other disability advocacy organizations. These two organizations are the Disability Rights Education & Defense Fund, and the Consortium for Citizens with Disabilities (CCD). The CCD represents the following organizations: the Association for Education and Rehabilitation of the Blind and Visually Impaired, Association for Retarded Citizens of the United States, International Association of Psychological Rehabilitation Facilities, National Alliance for the Mentally Ill, National Association of Protection and Advocacy Systems, National Association of Developmental Disabilities Councils, National Association of State Mental Health Program Directors, National Council of Community Mental Health Centers, National Head Injury Foundation, National Mental Health Association, United Cerebral Palsy Associations, Inc. Both the Disability Rights Education and Defense Fund and the CCD were strongly supportive of Option One.

A coalition of 20 organizations (Coalition), representing both the building industry and the disability community, also submitted detailed comments on the proposed guidelines. The members of the Coalition include: American Institute of Architects, American Paralysis Association, American Resort and Residential Development Association, American Society of Landscape Architects, Apartment and Office Building Association, Association of Home Appliance Manufacturers, Bridge Housing Corporation, Marriott Corporation, Mortgage Bankers Association, National Apartment Association, National Assisted Housing Management Association, National Association of Home Builders (NAHB), National Association of Realtors, National Association of Senior Living Industries, National Conference of States on Building Codes and Standards, National Coordinating Council on Spinal Cord Injury (NCCSCI), National Leased Housing Association, National Multi Housing Council, National Organization on Disability, and the Paralyzed Veterans of America.

The commenters also included U.S. Representatives Don Edwards, Barney Frank and Hamilton Fish, Jr., who advised that they were the primary sponsors of the Fair Housing Act, and who expressed their support of Option One.

Comments on the Three Options

In addition to specific issues and questions raised about the design standards recommended by the proposed guidelines, a number of commenters simply submitted comments on their overall opinion of one or more of the options. Following is a summary of the opinions typically expressed on each of the options.

Option One. The Option One guidelines drew a strong reaction from commenters. Supporters stated that the Option One guidelines provided a faithful and clearly stated interpretation of the Act's intent. Opponents of Option One stated that its design standards would increase housing costs significantly—for everyone. Several commenters who supported some features of Option One were concerned that adoption of Option One in its entirety would escalate housing costs. Another frequent criticism was that Option One's design guidelines were to complex and cumbersome.

Option Two. Supporters of Option Two state that this option presented a reasonable compromise between Option One and Option Three. Supporters stated that the Option Two guidelines provided more design flexibility than the Option One guidelines, and that this flexibility would allow builders to deliver the required accessibility features at a lower cost. Opponents of Option Two stated that this option allowed builders to circumvent the Act's intent with respect to several essential accessibility features.

Option Three. Supporters of Option Three stated that Option Three presented the best method of achieving the accessibility objectives of the Act, at the lowest possible cost. Supporters stated that Option Three would contain housing costs, because design adaptation only would be made to those units which actually would be occupied by a disabled resident, and the adaptation would be tailored to the specific accessibility needs of the individual tenant. Opponents of Option Three stated that this option, with its "add-on" approach to accessibilty, was contrary to the Act's intent, which, the commenter claimed, mandates accessible features at the time of construction.

Comments on the Costs of Implementation

In addition to the comments on the specific features of the three design options, one of the issues most widely commented upon was the cost of compliance with the Act's accessibility requirements, as implemented by the Guidelines. Several commenters disputed the Department's estimate of the cost of compliance, as presented in the Initial Regulatory Flexibility Analysis, published with the proposed guidelines on June 15, 1990 (55 FR 24384–24385), and in the Preliminary Regulatory Impact Analysis published on September 7, 1990 (55 FR 37072–37129). The Department's response to these comments is discussed in the Final Regulatory Impact Analysis, which is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

V. Discussion of Principal Public Comment Issues, and Section-by-Section Analysis of the Final Guidelines.

The following presents a discussion of the principal issues raised by the commenters, and the Department's response to each issue. This discussion includes a section-by-section analysis of the final Guidelines that addresses many of the specific concerns raised by the commenter, and highlights the differences between the proposed Option One guidelines and the final Guidelines. Comments related to issues outside the purview of the Guidelines, but related to the Act (e.g., enforcement procedures, statutory effective date), are discussed in the final section of the preamble under the preamble heading "Discussion of Comments on Related Fair Housing Issues".

1. Discussion of General Comments on the Guidelines

ANSI Standard

Comment. Many commenters expressed their support for the ANSI Standard as the basis for the Act's Guidelines, because ANSI is a familiar and accepted accessibility standard.

Response. In developing the proposed and final Guidelines, the Department was cognizant of the need for uniformity, and of the widespread application of the ANSI Standard. The original ANSI A117.1, adopted in 1961, formed the technical basis for the first accessibility standards adopted by the Federal Government, and most State governments. The 1980 edition of that standard was based on research funded by the Department, and became the basis for the Uniform Federal Accessibility Standards (UFAS), published in the **Federal Register** on August 4, 1984 (47 FR 33862). The 1980 edition also was generally accepted by the private sector, and was recommended for use in State and local building codes by the Council of American Building Officials. Additionally, Congress, in the Fair Housing Act, specifically referenced the ANSI Standard, thereby encouraging utilization of the ANSI Standard as guidance for compliance with the Act's accessibility requirements. Accordingly, in using the ANSI Standard as a reference point for the Fair Housing Act Accessibility Guidelines, the Department is issuing Guidelines based on existing and familiar design standards, and is promoting uniformity between Federal accessibility standards, and those commonly used in the private sector. However, the ANSI Standard and the final Guidelines have differing purposes and goals, and they are by no means identical. The purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act.

Comment. Two commenters suggested that the Department adopt the ANSI Standard as the guidelines for the Fair Housing Act's accessibility requirements, and not issue new guidelines.

Response. The Department has incorporated in the Guidelines those technical provisions of the ANSI Standard that are consistent with the Act's accessibility requirements. However, with respect to certain of the Act's requirements, the applicable ANSI provisions impose more stringent design standards than required by the Act. (In the preamble to the proposed rule (55 FR 3251), and again in the preamble to the proposed guidelines (55 FR 24370), the Department advised that a dwelling unit that complies fully with the ANSI Standard goes beyond what is required by the Fair Housing Act.) The Department has developed Guidelines for those requirements of the Act where departures from ANSI were appropriate.

Comment. A few commenters questioned whether the Department would revise the Guidelines to correspond to ANSI's periodic update of its standard.

Response. The ANSI Standard is reviewed at five-year intervals. As the ANSI Standard is revised in the future, the Department intends to review each version, and, if appropriate to make revisions to the Guidelines in accordance with any revisions made to the ANSI Standard. Modifications of the Guidelines, whether or not reflective of changes to the ANSI Standard, will be subject to notice and prior public comment.

Comment. A few commenters requested that the Department republish the ANSI Standard in its entirety in the final Guidelines.

Response. The American National Standards Institute (ANSI) is a private, national organization, and is not connected with the Federal Government. The Department received permission from ANSI to print the ANSI Standard in its entirety, as the time of publication of the proposed guidelines (55 FR 24404–24487), specifically for the purpose of assisting readers of the proposed guidelines in developing timely comments. In the preamble to the proposed guidelines, the Department stated that since it was printing the entire ANSI Standard, as an appendix to the proposed guidelines, the final notice of the Accessibility Guidelines would not include the complete text of the ANSI Standard (55 FR 24371). Copies of the ANSI Standard may be purchased from the American National Standards Institute, 1430 Broadway, New York, NY 10018.

Comment. Another commenter requested that the Department confirm that any ANSI provision not cited in the final Guidelines is not necessary for compliance with the Act.

Response. In the proposed guidelines, the Department stated that: "Where the guidelines rely on sections of the ANSI Standard, the ANSI sections are cited. * * * For those guidelines that differ from the ANSI Standard, recommended specifications are provided" (55 FR 24385). The final Guidelines include this statement, and further state that the ANSI sections not cited in the Guidelines have been determined by the

Department not to be necessary for compliance with the Act's requirements.

Bias Toward Wheelchair Users

Comment. Two commenters stated that the proposed guidelines were biased toward wheelchair users, and that the Department has erroneously assumed that the elderly and the physically disabled have similar needs. The commenters stated that the physical problems suffered by the elderly often involve arthritic and back problems, which make bending and stooping difficult.

Response. The proposed guidelines, and the final Guidelines, reflect the accessibility requirements contained in the Fair Housing Act. These requirements largely are directed toward individuals with mobility impairments, particularly those who require mobility aids, such as wheelchairs, walkers, or crutches. In two of the Act's accessibility requirements, specific reference is made to wheelchair users. The emphasis of the law and the Guidelines on design and construction standards that are compatible with the needs of wheelchair users is realistic because the requirements for wheelchair access (e.g., wider doorways) are met more easily at the construction stage. (See House Report at 27.) Individuals with nonmobility impairments more easily can be accommodated by later nonstructural adaptations to dwelling units. The Fair Housing Act and the Fair Housing regulations assure the right of these individuals to make such later adaptations. (See section 804(f)(3)(A) of the Act and 24 CFR 100.203 of the regulations. See also discussion of adaptations made to units in this preamble under the heading "Costs of Adaptation" in the section entitled "Discussion of Comments on Related Fair Housing Issues".)

Compliance Problems Due to Lack of Accessibility Guidelines

Comment. A number of commenters from the building industry attributed difficulty in meeting the Act's March 13, 1991 compliance deadline, in part, to the lack of accessibility guidelines. The commenters complained about the time that it has taken the Department to publish proposed guidelines, and the additional time it has taken to publish final Guidelines.

Response. The Department acknowledges that the development and issuance of final Fair Housing Accessibility Guidelines has been a time-consuming process. However, the building industry has not been without guidance on compliance with the Act's accessibility requirements. The Fair Housing Act identifies the ANSI Standard as providing design standards that would achieve compliance with the Act's accessibility requirements. Additionally, in the preamble to both the proposed and final Fair Housing rule, and in the text of §100.205, the Department provided examples of how certain of the Act's accessibility requirements may be met. (See 53 FR 45004–45005, 54 FR 3249–3252 (24 CFR Ch. I, Subch. A, App. I, at 583–586 (1990)), 24 CFR 100.205.)

The delay in publication of the final Guidelines has resulted, in part, because of the Department's pledge, at the time of publication of the final Fair Housing regulations, that the public would be provided an opportunity to comment on the Guidelines (54 FR 3251, 24 CFR Ch. I, Subch. A, at 585–586 (1990)). The delay in publication of the final Guidelines also is attributable in part to the Department's effort to develop Guidelines that would (1) ensure that persons with disabilities are afforded the degree of accessibility provided for in the Fair Housing Act, and (2) avoid the imposition of unreasonable requirements on builders.

Comment. Two commenters requested that interim accessibility guidelines should be adopted for projects "caught in the middle", i.e. those projects started before publication of the final Guidelines.

Response. The preamble to the June 15, 1990 proposed guidelines and the August 1, 1990 supplementary notice directly addressed this issue. In both documents, the Department recognized that projects being designed in advance of publication of the Guidelines may not become available for occupancy until after March 13, 1991. The Department advised that efforts to comply with the Option One guidelines, in the design of projects that would be completed before issuance of the final Guidelines, would be considered as evidence of compliance with the Act in connection with the Department's investigation of any complaints. The August 1, 1990 supplementary notice restated the Department's position on compliance with the Act's requirements prior to publication of the final Guidelines, and addressed what "evidence of compliance" will mean in a complaint situation.

Conflict with Historic Preservation Design Codes

Comment. Two commenters expressed concern about a possible conflict between the Act's accessibility requirements and local historic preservation codes (including compatible design requirements). The commenters stated that their particular concerns are: (1) The conversion of warehouse and commercial space to dwelling units; and (2) new housing construction on vacant lots in historically designated neighborhoods.

Response. Existing facilities that are converted to dwelling units are not subject to the Act's accessibility requirements. Additionally, alteration, rehabilitation or repair of covered multifamily dwellings are not subject to the Act's accessibility requirements. The Act's accessibility requirements only apply to new construction. With respect to new construction in neighborhoods subject to historic codes, the Department believes that the Act's accessibility requirements should not conflict with, or preclude building designs compatible with historic preservation codes.

Conflict with Local Accessibility Codes

Comment. Several commenters inquired about the appropriate course of action to follow when confronted with a conflict between the Act's accessibility requirements and local accessibility requirements.

Response. Section 100.205(i) of the Fair Housing regulations implements section 804(f)(8) of the Act, which provides that the Act's accessibility requirements do not supplant or replace State or local laws that impose higher accessibility standards (53 FR 45005). For accessibility standards, as for other code requirements, the governing principle to follow when Federal and State (or local) codes differ is that the more stringent requirement applies.

This principle is equally applicable when multifamily dwellings are subject to more than one Federal law requiring accessibility for persons with physical disabilities. For example, a multifamily dwelling may be subject both to the Fair Housing Amendments Act and to section 504 of the Rehabilitation Act of 1973. Section 504 requires that 5% of units in a covered multifamily dwelling be fully accessible—thus imposing a stricter accessibility standard for those units than would be imposed by the Fair Housing Act. However, compliance only with the section 504 requirements would not satisfy the requirements of the Fair Housing Act. The remaining units in the covered multifamily dwelling would be required to meet the specific accessibility requirements of the Fair Housing Act.

Comment. One commenter, the Seattle Department of Construction and Land Use, presented an example of how a local accessibility code that is more

stringent with respect to some accessibility provisions may interact with the Act's accessibility requirements, where they are more stringent with respect to other provisions. The commenter pointed out that the State of Washington is very hilly, and that the State of Washington's accessibility code requires accessible buildings on sites that would be deemed impractical under the Option One guidelines. The commenter stated that the State of Washington's accessibility code may require installation of a ramp, and that the ramp may then create an accessible entrance for the ground floor, making it subject to the Act's accessibility requirements. The commenter asked that, since the project was not initially subject to the Act's requirements, whether the creation of an accessible ground floor in accordance with the State code provisions would require all units on the ground floor to be made accessible in accordance with the Fair Housing Act. (The State of Washington's accessibility code would require only a percentage of the units to be accessible.)

Response. The answer to the commenter's question is that a nonelevator building with an accessible entrance on an accessible route is required to have the ground floor units designed and constructed in compliance with the Act's accessibility requirements. This response is consistent with the principle that the stricter accessibility requirement applies.

Design Guidelines for Environmental Illness

Comment. Twenty-three (23) commenters advised the Department that many individuals are disabled because of severe allergic reactions to certain chemicals used in construction, and in construction materials. These commenters requested that the Department develop guidelines for constructing or renovating housing that are sensitive to the problems of individuals who suffer from these allergic reactions (commonly referred to as environmental illnesses). These commenters further advised that, as of February 1988, the Social Security Administration lists as a disability "Environmental Illness" (P.O.M.S. Manual No. 24515.065).

Response. The Guidelines developed by the Department are limited to providing guidance relating to the specific accessibility requirements of the Fair Housing Act. As discussed above, under the preamble heading "Bias Toward Wheelchair Users," the Act's requirements primarily are directed to providing housing that is accessible to individuals with mobility impairments. There is no statutory authority for the Department to create the type of design and construction standards suggested by the commenters.

Design Guidelines for the Hearing and Visually-Impaired

Comment. Several commenters stated that the proposed guidelines failed to provide design features for people with hearing and visual impairments. These commenters stated that visual and auditory design features must be included in the final Guidelines.

Response. As noted in the response to the preceding comment, the Department is limited to providing Guidlines for the specific accessibility requirements of the Act. The Act does not require fully accessible individual dwelling units. For individual dwelling units, the Act requires the following: Doors sufficiently wide to allow passage by handicapped persons in wheelchairs; accessible route into and through the dwelling unit; light switches; electrical outlets, thermostats, and other environmental controls in accessible locations; reinforcements in bathroom walls to allow later installation of grab bars; and usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space. To specify visual and auditory design features for individual dwelling units would be to recommend standards beyond those necessary for compliance with the Act. Such features were among those identified in Congressional statements discussing modifications that would be made by occupants.

The Act, however, requires public and common use portions of covered multifamily dwellings to be "readily accessible to and usable by handicapped persons." The more comprehensive accessibility requirement for public and common use areas of dwellings necessitates a more comprehensive accessibility standard for these areas. Accordingly, for public and common use areas, the final Guidelines recommend compliance with the appropriate provisions of the ANSI Standard. The ANSI Standard for public and common use areas specifies certain design features to accommodate people with hearing and visual impairments.

Guidelines as Minimum Requirements

Comment. A number of commenters requested that the Department categorize the final Guidelines as minimum requirements, and not as performance standards, because "recommended" guidelines are less effective in achieving the objectives of the Act. Another commenter noted that a safe harbor provision becomes a *de facto* minimum requirement, and that it should therefore be referred to as a minimum requirement.

Response. The Department has not categorized the final Guidelines as either performance standards or minimum requirements. The minimum accessibility requirements are contained in the Act. The Guidelines adopted by the Department provide one way in which a builder or developer may achieve compliance with the Act's accessibility requirements. There are other ways to achieve compliance with the Act's accessibility requirements, as for example, full compliance with ANSI A117.1. Given this fact, it would be inappropriate on the part of the Department to constrain designers by presenting the Fair Housing Accessibility Guidelines as minimum requirements. Builders and developers should be free to use any reasonable design that obtains a result consistent with the Act's requirements. Accordingly, the design specifications presented in the final Guidelines are appropriately referred to as "recommended guidelines".

It is true, however, that compliance with the Fair Housing Accessibility Guidelines will provide builders with a safe harbor. Evidence of compliance with the Fair Housing Accessibility Guidelines adopted by this notice shall be a basis for a determination that there is no reasonable cause to believe that a discriminatory housing practice under section 804(f)(3) has occurred or is about to occur in connection with the investigation of complaints filed with the Department relating to covered multifamily dwellings.

National Accessibility Code

Comment. Several commenters stated that there are too many accessibility codes—ANSI, UFAS, and State and local accessibility codes. These commenters requested that the Department work with the individual States to arrive at one national uniform set of accessibility guidelines.

Response. There is no statutory authority to establish one nationally uniform set of accessibility standards. The Department is in agreement with the commenters' basic theme that increased uniformity in accessibility standards is desirable. In furtherance of this objective, the Department has relied upon the ANSI Standard as the design basis for the Fair Housing Accessibility Guidelines. The Department notes that the ANSI Standard also serves as the design basis for the Uniform Federal

Accessibility Standards (UFAS), the Minimum Guidelines and Requirements for Accessible Design (MGRAD) issued by the U.S. Architectural and Transportation Barriers Compliance Board, and many State and local government accessibility codes.

One Set of Design Standards

Comment. A number of commenters objected to the fact that the proposed guidelines included more than one set of design standards. The commenters stated that the final Guidelines should present only one set of design standards so as not to weaken the Act's accessibility requirements.

Response. The inclusion of options for accessibility design in the proposed guidelines was both to encourage a maximum range of public comment, and to illustrate that there may be several ways to achieve compliance with the Act's accessibility requirements. Congress made clear that compliance with the Act's accessibility standards did not require adherence to a single set of design specifications. In section 804(f)(4) of the Act, the Congress stated that compliance with the appropriate requirements of the ANSI Standard suffices to satisfy the accessibility requirements of the Act. In House Report No. 711, the Congress further stated as follows:

> However this section (section 804(f)(4)) is not intended to require that designers follow this standard exclusively, for there may be other local or State standards with which compliance is required or there may be other creative methods of meeting these standards. (House Report at 27)

Similarly, the Department's Guidelines are not the exclusive standard for compliance with the Act's accessibility requirements. Since the Department's Guidelines are a safe harbor, and not minimum requirements, builders and developers may follow alternative standards that achieve compliance with the Act's accessibility requirements. This policy is consistent with the intent of Congress, which was to encourage creativity and flexibility in meeting the requirements of the Act.

Reliance on Preamble to Guidelines

Comment. One commenter asked whether the explanatory information in the background section of the final Guidelines may be relied upon, and deemed to have the same force and effect as the Guidelines themselves.

Response. The Fair Housing Accessibility Guidelines are—as the name indicates—only guidelines, not regulations or minimum requirements. The Guidelines consist of recommended design specifications for compliance with the specific accessibility requirements of the Fair Housing Act. The final Guidelines provide builders with a safe harbor that, short of specifying all of the provisions of the ANSI Standard, illustrate acceptable methods of compliance with the Act. To the extent that the preamble to the Guidelines provide clarification on certain provisions of the Guidelines, or illustrates additional acceptable methods of compliance with the Act's requirements, the preamble may be relied upon as additional guidance. As noted in the "Summary" portion of this document, the preamble to the Guidelines will be codified in the 1991 edition of the Code of Federal Regulations as Appendix III to the Fair Housing regulations (24 CFR Ch. I, Subch. A, App. III.).

"User Friendly" Guidelines

Comment. A number of commenters criticized the proposed guidelines for being too complicated, too ambiguous, and for requiring reference to a number of different sources. These commenters requested that the final Guidelines be clear, concise and "user friendly". One commenter requested that the final Guidelines use terms that conform to terms used by each of the three major building code organizations: the Building Officials and Code Administrators International, Inc. (BOCA); the International Conference of Building Officials (ICBO), and the Southern Building Code Congress International (SBCCI).

Response. The Department recognizes that the Accessibility Guidelines include several highly technical provisions. In drafting the final Guidelines, the Department has made every effort to explain these provisions as clearly as possible, to use technical and building terms consistent with the terms used by the major building code organizations, to define terms clearly, and to provide additional explanatory information on certain of the provisions of the Guidelines.

2. Section-by-Section Analysis of Final Guidelines

The following presents a section-by-section analysis of the final Guidelines. The text of the final Guidelines is organized into five sections. The first four sections of the Guidelines provide background and explanatory information on the Guidelines. Section 1, the Introduction, describes the purpose, scope and organization of the Guidelines. Section 2 defines relevant terms used. Section 3 reprints the text of 24 CFR 100.205, which implements the Fair Housing Act's accessibility requirements, and Section 4 describes the application of the Guidelines. Section 5, the final section, presents the design specifications recommended by the Department for meeting the Act's accessibility requirements, as codified in 24 CFR 100.205. Section 5 is subdivided into seven areas, to address each of the seven areas of accessible design required by the Act.

The following section-by-section analysis discusses the comments received on each of the sections of the proposed Option One Guidelines, and the Department's response to these comments. Where no discussion of comments is provided under a section heading, no comments were received on this section.

Section 1. Introduction

Section 1, the Introduction, describes the purpose, scope and organization of the Fair Housing Accessibility Guidelines. This section also clarifies that the accessibility guidelines apply only to the design and construction requirements of 24 CFR 100.205, and do not relieve persons participating in a federal or federally-assisted program or activity from other requirements, such as those required by section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Architectural Barriers Act of 1968 (42 U.S.C. 4151–4157). (The design provisions for those laws are found at 24 CFR Part 8 and 24 CFR Part 40, respectively.) Additionally, section 1 explains that only those sections of the ANSI Standard cited in the Guidelines are required for compliance with the accessibility requirements of the Fair Housing Act. Revisions to section 1 reflect the Department's response to the request of several commenters for further clarification on the purpose and scope of the Guidelines.

Section 2. Definitions

This section incorporates appropriate definitions from § 100.201 of the Department's Fair Housing regulations, and provides additional definitions for terms used in the Guidelines. A number of comments were received on the definitions. Clarifications were made to certain definitions, and additional terms were defined. New terms defined in the final Guidelines include: *adaptable, assistive device, ground floor, loft, multistory dwelling unit, single-story dwelling unit,* and *story.* The inclusion of new definitions reflects the comments received, and also reflects new terms introduced by changes to certain of the Option One design specifications. In several instances, the clarifications of existing definitions, or the new terms

defined, were derived from definitions of certain terms used by one or more of the major building code organizations. Comments on specific definitions are discussed either below or in that portion of the preamble under the particular section heading of the Guidelines in which these terms appear.

Accessible

Comment. A number of commenters stated that the Department used the terms "accessible" and "adaptable" interchangeably, and requested clarification of the meaning of each. The commenters noted that, under several State building codes, these terms denote different standards for compliance. The commenters requested that if the Department intends these two terms to have the same meaning, this should be clearly stated in the final Guidelines, and, if the terms have different meanings, "adaptable" should also be defined.

Response. The Department's use of the terms "adaptable" and "accessible" in the preamble to the proposed guidelines generally reflected Congress' use of the terms in the text of the Act, and in the House and Senate conference reports. However, to respond to commenters' concerns about the distinctions between these terms, the Department has included a definition of "adaptable dwelling units" to clarify the meaning of this term, within the context of the Fair Housing Act. In the final Guidelines, "adaptable dwelling units", when used with respect to covered multifamily dwellings, means dwelling units that include features of adaptable design specified in 24 CFR 100.205(c)(2)–(3).

The Fair Housing Act refers to design features that include both the minimal "accessibility" features required to be built into the unit, and the "adaptable" feature of reinforcement for bathroom walls for the future installation of grab bars. Accordingly, under the Fair Housing Act, an "adaptable dwelling unit" is one that meets the minimal accessibility requirements specified in the Act (i.e., usable doors, an accessible route, accessible environmental controls, and usable kitchens and bathrooms) and the "adaptable" structural feature of reinforced bathroom walls for later installation of grab bars.

Assistive Device

Comment. Several commenters requested that we define the phrase "assistive device."

Response. "Assistive device" means an aid, tool, or instrument used by a person with disabilities to assist in activities of daily living. Examples of assistive devices include tongs, knob turners, and oven rack pusher/pullers. A definition for "assistive device" has been included in the final Guidelines.

Bathroom

In response to the concern of several commenters, the Department has revised the definition of "bathroom" in the final Guidelines to clarify that a bathroom includes a "compartmented" bathroom. A compartmented bathroom is one in which the bathroom fixtures are distributed among interconnected rooms. The fact that bathroom facilities may be located in interconnecting rooms does not exempt this type of bathroom from the Act's accessibility requirements. This clarification, and minor editorial changes, were the only revisions made to the definition of "bathroom". Other comments on this term were as follows:

Comment. Several commenters requested that the Department reconsider its definition of "bathroom", to include powder rooms, i.e., rooms with only a toilet and sink. These commenters stated that persons with disabilities should have access to all bathrooms in their homes, not only full bathrooms. One commenter believed that, unless bathroom was redefined to include single- or two-fixture facilities, some developers will remove a bathtub or shower from a proposed second full bathroom to avoid having to make the second bathroom accessible. The commenter suggested that bathroom be redefined to include any room containing at least two of the possible bathroom fixtures (toilet, sink, bathtub or shower).

Response. In defining "bathroom" to include a water closet (toilet), lavatory (sink), and bathtub or shower, the Department has followed standard dictionary usage, as well as Congressional intent. Congressional statements emphasized that the Act's accessibility requirements were expected to have a minimal effect on the size and design of dwelling units. In a full-size bathroom, this can be achieved. To specify space for wheelchair maneuvering in a powder room would, in most cases, require enlarging the room significantly. However, a powder room would be subject to the Act's accessibility requirements if the powder room is the only toilet facility on the accessible level of a covered multistory dwelling unit. Additionally, it should be noted that doors to powder rooms (regardless of the location of the powder room), like all doors within dwelling units, are required by the Act to be wide enough for wheelchair passage. Some powder rooms may, in fact, be usable by persons in wheelchairs.

Comment. One commenter requested that the final Guidelines provide that a three-quarters bathroom (water closet, lavatory and shower) would not be subject to the accessibility requirements—specifically, the requirement for grab bar reinforcement.

Response. The Fair Housing Act requires reinforcements in bathroom walls to allow for later installation of grab bars at toilet, bathtub or shower, if provided. Accordingly, the Fair Housing regulations specifically require reinforcement in bathroom walls to allow later installation of grab bars around the shower, where showers are provided. (See 24 CFR 100.205(c)(3)(iii).)

Building

Comment. One commenter suggested that the Department use the term "structure" in lieu of "building". The commenter stated that, in the building industry, "building" is defined by exterior walls and fire walls, and that an apartment structure of four units could be subdivided into two separate buildings of two units each by inexpensive construction of a firewall. The commenter suggested that the final definition of "building" include the following language: "For the purpose of the Act, firewall separation does not define buildings."

Response. The term "building" is the term used in the Fair Housing Act. The Department uses this term in the Guidelines to be consistent with the Act. With respect to the comment on firewall separation, the Department believes that, within the context of the Fair Housing Act, the more appropriate place for the language on firewall separation is in the definition of "covered multifamily dwellings". Since many building codes in fact define "building" by exterior walls and firewalls, a definition of "building" in the Fair Housing Accessibility Guidelines that explicitly excludes firewalls as a means of identifying a building would place the Guidelines in conflict with local building codes. Accordingly, to avoid this conflict, the Department has clarified the definition of "covered multifamily dwelling" (which is discussed below) to address the issue of firewall separation.

Covered Multifamily Dwellings

The Department has revised the definition of "covered multifamily dwellings" to clarify that dwelling units within a single structure separated by firewalls do not, for purposes of these Guidelines, constitute separate buildings.

A number of questions and comments were received on what should, or should not, be considered a covered multifamily dwelling. Several of these comments requested clarification concerning "ground floor dwelling units". These comments generally concluded with a request that the Department define "ground floor" and "ground floor unit". The Department has included a definition of "ground floor" in the final Guidelines. The Department believes that this definition is sufficiently clear to identify ground floor units, and that therefore a separate definition for "ground floor unit" is unnecessary. Specific questions concerning ground floor units are discussed below under the heading "Ground Floor". Comments on other covered multifamily dwellings are as follows:

Comment. (Garden apartments) One commenter requested that the Department clarify whether single family attached dwelling units with all living space on one level (i.e. garden units) fall within the definition of covered multifamily dwellings.

Response. The Fair Housing Act and its regulations clearly define "covered multifamily dwellings" as buildings consisting of four or more dwelling units, if such buildings have one or more elevators, and ground floor dwelling units in other buildings consisting of four or more dwelling units. Garden apartments located in an elevator building of four or more units are subject to the Act's requirements. If the garden apartment is on the ground floor of a nonelevator building consisting of four or more apartments, and if all living space is on one level, then the apartment is subject to the Act's requirements (unless the building is exempt on the basis of site impracticality).

Comment. (Townhouses) Several commenters requested clarification concerning whether townhouses are covered multifamily dwellings.

Response. In the preamble to the Fair Housing regulations, the Department addressed this issue. Using an example of a single structure consisting of five two-story townhouses, the Department stated that such a structure is *not* a covered multifamily dwelling if the building does not have an elevator, because the entire dwelling unit is not on the ground floor. Thus, the first floor of a two-story townhouse in the example is not a ground floor unit, because the entire unit is not on the ground floor. In contrast, a structure consisting of five single-story townhouses would be a covered multifamily dwelling. (See 54 FR 3244; 24 CFR Ch. I, Subch. A, App. I at 575–576 (1990).)

Comment. (Units with basements) One commenter asked whether a unit that contains a basement, which provides additional living space, would be viewed as a townhouse, and therefore exempt from the Act's accessibility requirements. The commenter stated that basements are generally designed with the top of the basement, including the basement entrance, above finished grade, and that basement space cannot be made accessible without installation of an elevator or a lengthy ramp.

Response. If the basement is part of the finished living space of a dwelling unit, then the dwelling unit will be treated as a multistory unit, and application of the Act's accessibility requirements will be determined as provided in the Guidelines for Requirement 4. If the basement space is unfinished, then it would not be considered part of the living space of the unit, and the basement would not be subject to the Act's requirements. Attic space would be treated in the same manner.

Dwelling Unit

"Dwelling unit" is defined as a single unit of residence for a household of one or more persons. The definition provides a list of examples of dwelling units in order to clarify the types of units that may be covered by the Fair Housing Act. The examples include condominiums and apartment units in apartment buildings. Several commenters submitted questions on condominiums, and one commenter requested clarification on whether vacation time-sharing units are subject to the Act's requirements. Their specific comments are as follows:

Comment. (Condominiums) A few commenters requested that condominiums be excluded from covered dwelling units because condominiums are comparable to single family homes. The commenter stated that condominiums do not compete in the rental market, but compete in the sale market with single family homes, which are exempt from the Act's requirements.

Response. The Fair Housing Act requires all covered multifamily dwellings for first occupancy after March 13, 1991 to be designed and constructed in accordance with the Act's accessibility requirements. The Act does not distinguish between dwelling units in covered multifamily dwellings that are for sale, and dwelling units that are for rent. Condominium units in covered multifamily dwellings must comply with the Act's accessibility requirements.

Comment. (Custom-designed condominium units) Two commenters stated that purchasers of condominium units often request their units to be custom designed. The commenters questioned whether custom-designed units must comply with the Act's accessibility requirements. Another commenter stated that the Department should exempt from compliance those condominium units which are pre-sold, but not yet constructed, and for which owners have expressly requested designs that are incompatible with the Act's accessibility requirements.

Response. The fact that a condominium unit is sold before the completion of construction does not exempt a developer from compliance with the Act's accessibility requirements. The Act imposes affirmative duties on builders and developers to design and construct covered multifamily dwellings for first occupancy after March 13, 1991 in accordance with the Act's accessibility requirements. These requirements are mandatory for covered multifamily dwellings for first occupancy after March 13, 1991, regardless of the ownership status of covered individual dwelling units. Thus, to the extent that the pre-sale *or* post-sale construction included features that are covered by the Act (such as framing for doors in pre-sale "shell" construction), they should be built accordingly.

Comment. (Vacation timeshare units) One commenter questioned whether vacation timeshare units were subject to the Act's requirements. The commenter stated that a timeshare unit may be owned by 2 to 51 individuals, each of whom owns, or has the right to use, the unit for a proportionate period of time equal to his or her ownership.

Response. Vacation timeshare units are subject to the Act's accessibility requirements, when the units are otherwise subject to the accessibility requirements. "Dwelling" is defined in 24 CFR 100.20 as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof". The preamble to the final Fair Housing rule states that the definition of "dwelling" is "broad enough to cover each of the types of dwellings enumerated in the proposed rule: mobile home parks, trailer courts, condominiums, cooperatives, *and time-*

sharing properties." (Emphasis added.) (See 54 FR 3238, 24 CFR Ch. I, Subch. A, App. I, at 567 (1990).) Accordingly, the fact of vacation timeshare ownership of units in a building does not affect whether the structure is subject to the Act's accessibility requirements.

Entrance

Comment. One commenter requested clarification on whether "entrance" refers to an entry door to a dwelling unit, or an entry door to the building.

Response. As used in the Guidelines, "entrance" refers to an exerior entry door. The definition of "entrance" has been revised in the final Guidelines to clarify this point, and the term "entry" is used instead of "entrance" when referring to the entry into a unit when it is interior to the building.

Ground Floor

As noted above, under the discussion of covered multifamily dwellings, several commenters requested clarification concerning "ground floor" and "ground floor dwelling unit". In response to these comments, the Department has included a definition for "ground floor" in the final Guidelines. The Department has incorporated the definition of "ground floor" found in the Fair Housing regulations (24 CFR 100.201), and has expanded this definition to address specific concerns related to implementation of the Guidelines. In the final Guidelines, "ground floor" is defined as follows:

"Ground floor" means a floor of a building with a building entrance on an accessible route. A building may have one or more ground floors. Where the first floor containing dwelling units in a building is above grade, all units on that floor must be served by a building entrance on an accessible route. This floor will be considered to be a ground floor.

Specific comments concerning ground floor units are as follows:

Comment. (Nonresidential ground floor units) Two commenters advised that, in many urban areas, buildings are constructed without an elevator and with no dwelling units on the ground floor. The ground floor contains either parking, retail shops, restaurants or offices. To bring these buildings into compliance with the Act, one of the commenters recommended that the Department adopt a proposal under consideration by the International Conference of Building Officials (ICBO). The commenter stated that the proposal provides that, in buildings with ground floors occupied by parking and other nonresidential uses, the lowest story containing residential units is considered the ground floor. Another commenter recommended that a building should be exempt from compliance with the Act's requirements if the ground floor is occupied by a non-residential use (including parking). The commenter stated that if an elevator is to be provided to serve the upper residential floors, then the elevator should also serve the ground floor, and access be provided to all the dwelling units.

Response. The Department believes that the definition of "ground floor unit" incorporated in the final Guidelines addresses the concerns of the commenters.

Comment. (More than one ground floor) One commenter requested guidance on treatment of nonelevator garden apartments (i.e., apartment buildings that generally are built on slopes and contain two stories in the front of the building and three stories in the back). The commenter stated that these buildings arguably may be said to have two ground floors. The commenter requested that the Department clarify that, if a building has more than one ground floor, the developer must make one ground floor accessible—but not both—and the developer may choose which floor to make accessible. Another commenter suggested that, in a garden-type apartment building, the floor served by the primary entrance, and which is located at the parking lot level, is the floor which must be made accessible.

Response. In the preamble to the final Fair Housing rule, the Department addressed the issue of buildings with more than one ground floor. (See 54 3244, 24 CFR Ch. I, Subch. A, App. I at 576 (1990).) The Department stated that if a covered building has more than one floor with a building entrance on an accessible route, then the units on each floor with an accessible building entrance must satisfy the Act's accessibility requirements. (See the discussion of townhouses in nonelevator buildings above.)

Handicap

Comment. Several commenters requested that the Department avoid use of the terms "handicap" and "handicapped persons", and replace them with the terms "disability" and "persons with disabilities".

Response. "Handicap" and "handicapped persons" are the terms used by the Fair Housing Act. These terms are used in Guidelines and regulations to be consistent with the statute.

Principle of Reasonableness and Cost

Comment. Four commenters noted that, in the preamble to the proposed guidelines, the Department indicated that the Fair Housing Accessibility Guidelines were limited by a "principle of reasonableness and cost". The commenters requested that the Department define this phrase.

Response. In the preamble to the proposed guidelines, the Department stated in relevant part as follows: "These guidelines are intended to provide a safe harbor for compliance with respect to those issues they cover. * * * Where the ANSI Standard is not applicable, the language of the statute itself is the safest guide. The degree of scoping, accessibility, and the like are of course limited by a principle of reasonableness and cost." (55 FR 24371)

In House Report No. 711, the accessibility requirements of the Fair Housing Act were referred to by the Congress as "modest" (House Report at 25), "minimal" and "basic features of adaptability" (House Report at 25). In developing the Fair Housing Accessibility Guidelines, the Department was attentive to the fact that Congress viewed the Act's accessibility requirements as reasonable, and that the Guidelines for these requirements should conform to this "reasonableness" principle—that is, that the Guidelines should provide the level of reasonable accessibility envisioned by Congress, while maintaining the affordability of new multifamily construction. The Department believes that the final Guidelines conform to this principle of reasonableness and cost.

Slope

Comment. One commenter, the Building Officials & Code Administrators International, Inc. (BOCA), requested clarification of the term, "slope". The commenter stated the definition indicates that slope is calculated based on the distance and elevation between two points. The commenter stated that this is adequate when there is a uniform and reasonably consistent change in elevation between point (i.e., one point is at the top of a hill and the other is at the bottom), but the definition does not adequately address land where a valley, gorge, or swale occurs between two points. The commenter stated that the definition also does not adequately address conditions where there is an abrupt change in the rate of slope between the points (i.e. a sharp drop off within a short distance, with the remaining distance being flat or sloped much more gradually).

Response. Slope is measured from ground level at the entrance to all arrival points within 50 feet, and is

considered impractical only when it exceeds 10 percent between the entrance and all these points. Since multifamily dwellings typically have an arrival point fairly close to the building, a significant change such as a sharp drop would likely result in an impractical slope. Minor variations, such as a swale, if more than 5 percent, would be easily graded or ramped; a gorge would be bridged or filled, in any event, if it was on an entrance route.

Usable Door

Comment. One commenter stated that a clear definition of "usable door" is required.

Response. The Guidelines for Requirement 3 (usable doors) fully describe what is meant by "usable door" within the meaning of the Act.

Section 3. Fair Housing Act Design and Construction Requirements

This section reprints § 100.205 (Design and Construction Requirements) from the Department's final rule implementing the Fair Housing Act. A reprint of § 100.205 was included to provide easy reference to (1) the Act's accessibility requirements, as codified by § 100.205; and (2) the additional examples of methods of compliance with the Act's requirements that are presented in this regulation.

Section 4. Application of the Guidelines

This section states that the design specifications that comprise the final Guidelines apply to all "covered multifamily dwellings" as defined in Section 2 of the Guidelines. Section 4 also clarifies that the Guidelines, are "recommended" for designing dwellings that comply with the requirements of the Fair Housing Amendments Act of 1988.

Under the discussion of Section 4 in the proposed guidelines, the Department requested comment on the Act's application to dwelling units with design features such as a loft or sunken living room (55 FR 24377). A number of comments were received on this issue. Since the Act's application to units with such features is relevant within the context of an accessible route into and through a dwelling unit, the comments and the Department's response to these comments are discussed in section 5, under the subheading, "Guidelines for Requirement 4".

Section 5. Guidelines

The Guidelines contained in this Section 5 are organized to follow the sequence of requirements as they are presented in the Fair Housing Act and in the regulation implementing these requirements, 24 CFR 100.205. There are Guidelines for seven requirements: (1) An accessible entrance on an accessible route; (2) accessible and usable public common use areas; (3) doors usable by a person in a wheelchair; (4) accessible route into and through the covered dwelling unit; (5) light switches, electrical outlets and environmental controls in accessible locations; (6) bathroom walls reinforced for grab bars; and (7) usable kitchens and bathrooms.

For each of these seven requirements, the Department adopted the corresponding Option One guidelines, but changes were made to certain of the Option One design specifications. The following discussion describes the Guidelines for each of the seven requirements, and highlights the changes that have been made.

Guidelines for Requirement 1

The Guidelines for Requirement 1 present guidance on designing an accessible entrance on an accessible route, as required by § 100.205(a), and on determining when an accessible entrance is impractical because of terrain or unusual characteristics of the site.

The Department has adopted the Option One guidelines for Requirement 1, with substantial changes to the specifications for determining site impracticality. These changes, and the guidelines that remain unchanged for Requirement 1 are discussed below.

Site Impracticality Determinations. The Guidelines for Requirement 1 begin by presenting criteria for determining when terrain or unusual site characteristics would make an accessible entrance impractical. Section 100.205(a) recognizes that certain sites may have characteristics that make it impractical to provide an accessible route to a multifamily dwelling. This section states that all covered multifamily dwellings shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site.

Comments. The Department received many comments on the site impracticality specifications presented in the proposed guidelines (55 FR 24377–24378). The majority of the members of the disability community who commented on this issue supported the Option One guidelines, and recommended no change. However, other commenters, including a few disability organizations, members of the building industry, State and local government agencies involved in the development and enforcement of accessibility codes, and some of the major building code organizations, criticized one or more aspects of the Option One and Option Two guidelines for Requirement 1. Specific comments are noted below.

A few commenters suggested that the 10% slope criterion was too low, and easily will be met by a project site having a hilly terrain which could (and typically would) be made more level. These commenters recommended a higher slope criterion ranging anywhere from 12% to 30%. Other commenters stated that the slope criterion for the planned finished grade should not exceed 8.33%. The Congressional sponsors of the Act (U.S. Representatives Edwards, Fish, and Frank) stated that a limited exemption for slopes greater than 10% "was not contemplated by the Act"; but that they believed the Department has the discretion to develop such an exemption if it is "carefully crafted and narrowly tailored".

Several commenters stated that any evaluation of the undisturbed site should be done only on the percentage of land that is buildable. Several commenters stated that the final Guidelines should not require an evaluation of the undisturbed site between the planned entrance and the arrival points—that the only evaluation of the undisturbed site should be the initial threshold slope analysis.

There were a number of questions on arrival points, and requests that these points be more clearly defined. Several commenters presented specific examples of possible problems with the use of arrival points, as specified in the Option One guidelines. A few commenters stated that the individual building analysis should involve a measurement between the entrance and only one designated vehicular or pedestrian arrival point.

Other commenters stated that single buildings on a site should be subject to the same analysis as multiple buildings on a site.

A number of commenters criticized the Option One site impracticality analysis as being too cumbersome and confusing. A number of commenters objected to Option Two's requirement that covered multifamily dwellings with elevators must comply with the Act's accessibility requirements, regardless of site conditions or terrain.

Response. Following careful consideration of these comments, the Department has revised significantly the procedure for determining site impracticality, and its application to covered multifamily dwellings.

For covered multifamily dwellings with elevators, the final Guidelines would not exempt these dwellings from the Act's accessibility requirements. The final Guidelines provide that covered multifamily dwellings with elevators shall be designed and constructed to provide at least one accessible entrance on an accessible route regardless of terrain or unusual characteristics of the site. Every dwelling unit on a floor served by an elevator must be on an accessible route, and must be made accessible in accordance with the Act's requirements for covered dwelling units. The Department has excluded elevator buildings from any exemption from the Act's accessibility requirements because the Department believes that the type of site work that is performed in connection with the construction of a high rise elevator building generally results in a finished grade that would make the building accessible. The Department also notes that the majority of elevator buildings are designed with a primary building entrance and a passenger drop-off area which are easily made accessible to individuals with handicaps. Additionally, many elevator buildings have large, relatively level areas adjacent to the building entrances, which are normally provided for moving vans. These factors lead the Department to conclude that site impracticality considerations should not apply to multifamily elevator buildings.

For covered multifamily dwellings without elevators, the final Guidelines provide two alternative tests for determining site impracticality due to terrain. The first test is an individual building test which involves a two-step process: measurement of the slope of the undisturbed site between the planned entrance and all vehicular or pedestrian arrival points; and measurement of the slope of the planned finished grade between the entrance and all vehicular or pedestrian arrival points. The second test is a site analysis test which involves an analysis of the topography of the existing natural terrain.

A site with a single building, having a common entrance for all units, may be analyzed only under the first test—the individual building test.

All other sites, including a site with a single building having multiple entrances serving either individual dwelling units or clusters of dwelling units, may be analyzed either under the first test or the second test. For these sites for which either test is applicable, the final Guidelines provide that regardless of which test is utilized by a builder or developer, at least 20% of the total ground floor units in nonelevator buildings, on any site, must comply with the Act's accessibility requirements.

The distinctive features of the two tests for determining site impracticality due to terrain, for nonelevator multifamily dwellings, are as follows:

1. *The individual building test.*

a. This test is applicable to all sites.

b. This test eliminates the slope analysis of the entire undisturbed site that was applicable only to multiple building sites, and, concomitantly, the table that specifies the minimum percentage of adaptable units required for every multiple building site. The only analysis for site impracticality will be the individual building analysis. This analysis will be applied to each building regardless of the number of buildings on the site.

c. The individual building analysis has been modified to provide for measurement of the slopes between the planned entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance. The analysis further provides that if there are no vehicular or pedestrian arrival points within 50 feet of the planned entrance, then measurement will be made of the slope between the planned entrance and the closest vehicular or pedestrian arrival point. Additionally, the final Guidelines clarify how to measure the slope between the planned entrance and an arrival point.

d. The individual building analysis retains the evaluation of both the undisturbed site and the planned finished grade. Buildings would be exempt only if the slopes of both the original undisturbed site and the planned finished grade exceed 10 percent (1) as measured between the planned entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance; or (2) if there are no vehicular or pedestrian arrival points within that 50 foot area, as measured between the planned entrance and the closest vehicular or pedestrian arrival point.

2. *The site analysis test.*

a. This test is only applicable to sites with multiple buildings, or to sites with a single building with multiple entrances.

b. This test involves an analysis of the existing natural terrain (before grading) of the buildable area of the site by topographic survey with 2 foot contour intervals, with slope determination made between each successive contour interval. The accuracy of the slope analysis is to be certified by a professional licensed engineer, landscape architect, architect or surveyor.

c. This test provides that the minimum number of ground floor units to be made accessible on a site must equal the percentage of the total buildable area (excluding floodplains, wetlands, or other restricted use areas) of the undisturbed site that has an existing natural grade of less than 10% slope.

The Department believes that both tests for determining site impracticality due to terrain present enforceable criteria for determining when terrain makes accessibility, as required by the Act, impractical. The Department also believes that by offering a choice of tests, the Department is providing builders and developers with greater flexibility in selecting the approach that is most appropriate, or least burdensome, for their development project, while assuring that accessible units are provided on every site. As noted earlier in this preamble, this policy is consistent with the intent of Congress which was to encourage creativity and flexibility in meeting the Act's requirements, and thus minimize the impact of these requirements on housing affordability.

With respect to determining site impracticality due to unusual characteristics of the site, the test in the final Guidelines is essentially the same as that provided in the Option One guidelines. This test has been modified to limit measurement of the finished grade elevation to that between the entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance.

Finally, the final Guidelines for Requirement 1 contemplate that the site tests recommended by the Guidelines will be performed, generally, on "normal" soil. The Department solicits additional public comment only on the issue of the feasibility of the site tests on areas that have difficult soil, such as areas where expansive clay or hard granite is prevalent.

Additional specific comments on the site impracticality determination are as follows:

Comment. One commenter stated that the site impracticality determination seems to suggest that only the most direct path from the pedestrian or vehicular arrival points will be used to evaluate the ability to create an accessible route of travel to the building. The commenter stated that it may be possible to use natural or finished contours of the site to provide an accessible route other than a straight-line route.

Response. To be enforceable, the Guidelines must specify where the line is drawn; otherwise it is not possible to

specify what is "practical". Generally, developers provide relatively direct access from the entrance to the pedestrian and vehicular arrival points. If, in fact, the route as built was accessible, then the building would be expected to have an accessible entrance and otherwise comply with the Act.

Comment. Another commenter stated that the site impracticality determination does not take into account the many building types and unit arrangements. The commenter stated that some buildings have a common entrance with unit entrances off a common corridor, while others have individual, exterior entrances to the units. The commenter stated that if the Department is going to permit exemptions from the Act's requirements caused by terrain, the commenter did not understand why every entrance in a building containing individually-accessed apartments must comply with the Act's requirements, simply because they are in one building.

Response. The final Guidelines recognize (as did the proposed guidelines) the difference in building types. If there is a single entry point serving the entire building (or portions thereof), that entry point is considered the "entrance". If each unit has a separate exterior entrance, then each entrance is to be evaluated for the conditions at that entrance. Thus, a building with four entrances, each serving one of four units, might have only one accessible entrance, depending upon site conditions, or it might have any combination up to four.

Comment. Another commenter stated that the evaluation for unusual characteristics of the site only takes into account floodplains or high hazard coastal areas, and excludes other possible unique and unusual site characteristics.

Response. The provision for unusual characteristics of the site clearly provides that floodplains or high hazard coastal areas are only two examples of unusual site characteristics. The provision states that "unusual site characteristics" includes "sites subject to similar requirements of law or code."

Comment. A number of commenters expressed concern that the site impracticality determination of the Guidelines may conflict with local health, safety, environmental or zoning codes. A principal concern of one of the commenters was that the final Guidelines may require "massive grading" of a site in order to achieve compliance with the Act. The commenter was concerned that such grading may conflict with local laws directed at minimizing environmental damage, or with zoning codes that severely limit substantial fill activities at a site.

Response. The Department believes that the site impracticality determination adopted in these final Guidelines will not conflict with local safety, health, environmental or zoning codes. The final Guidelines provide, as did the proposed guidelines, that the site planning involves consideration of all State and local requirements to which a site is subject, such as "density constraints, tree-save or wetlands ordinances and other factors impacting development choices" (55 FR 24378), and explicitly accept the site plan that results from balancing these and other factors affecting the development. The Guidelines would not require, for example, that a site be graded in violation of a tree-save ordinance. If, however, access is required based on the final site plan, then installation of a ramp for access, rather than grading, could be necessary in some cases so as not to disturb the trees. Where access is required, the method of providing access, whether grading or a ramp, will be decided by the developer, based on local ordinances and codes, and on business or aesthetic factors. It should be noted that these nonmandatory Guidelines do not purport to preempt conflicting State or local laws. However, where a State or local law contradicts a specification in the Guidelines, a builder must seek other reasonable cost-effective means, consistent with local law, to assure the accessibility of his or her units. The accessibility requirements of the Fair Housing Act remain applicable, and State and local laws must be in accord with those requirements.

Additional Design Specifications for Requirement 1. In addition to the site impracticality determinations, the final Guidelines for Requirement 1 specify that an accessible entrance on an accessible route is practical when (1) there is an elevator connecting the parking area with any floor on which dwelling units are located, and (2) an elevated walkway is planned between a building entrance and a vehicular or pedestrian arrival point, and the planned walkway has a slope no greater than 10 percent. The Guidelines also provide that (i) an accessible entrance that complies with ANSI 4.14, and (2) an accessible route that complies with ANSI 4.3, meets with the accessibility requirements of § 100.205(a). Finally, the Guidelines provide that if the slope of the finished grade between covered multifamily dwellings and a public or common use facility exceeds 8.33%, or where other physical barriers, or legal restrictions, outside the control of the owner, prevent the installation of an accessible pedestrian route, an acceptable alternative is to provide access via a vehicular route. (These design specifications are unchanged from the proposed Option One guidelines for Requirement 1.)

Comment. Several comments were received on the additional design specifications for Requirement 1. The majority of commenters supported 8.33% as the slope criterion for the finished grade between covered multifamily dwellings and a public or common use facility. A few commenters stated that vehicular access was not an acceptable alternative to pedestrian access. Other commenters stated that the 10% slope criterion for the planned walkway was inconsistent with accessibility requirements that prohibit ramps from having a slope in excess of 8.33%.

Response. With respect to access via a vehicular route, the Department's expectation is that public and common use facilities generally will be on an accessible pedestrian route. The Department, however, recognizes that there may be situations in which an accessible pedestrian route simply is not practical, because of factors beyond the control of the owner. In those situations, vehicular access may be provided. With respect to the 10% slope criterion for planned elevated walkways, this is the criterion for determining whether it is practical to provide an accessible entrance. If the site is determined to be practical, then the slope of the walkway must be reduced to 8.33%.

Guidelines for Requirement 2

The Guidelines for Requirement 2 present design standards that will make public and common use areas readily accessible to and usable by handicapped persons, as required by § 100.205(c)(1).

The Department has adopted the Option One guidelines for Requirement 2, without change. The Guidelines for Requirement 2 identify components of public and common use areas that should be made accessible, reference the section or sections of the ANSI Standard which apply in each case, and describe the appropriate application of the design specifications. In some cases, the Guidelines for Requirement 2 describe variations from the basic ANSI provision that is referenced.

The basic components of public and common use areas covered by the Guidelines include, for example: accessible route(s); protruding objects; ground and floor surface treatments; parking and passenger loading zones;

curb ramps; ramps; stairs; elevator; platform lifts; drinking fountains and water coolers; toilet rooms and bathing facilities, including water closets, toilet rooms and stalls, urinals, lavatories and mirrors, bathtubs, shower stalls, and sinks; seating, tables or work surfaces; places of assembly; common-use spaces and facilities, including swimming pools, playgrounds, entrances, rental offices, lobbies, elevators, mailbox areas, lounges, halls and corridors and the like; and laundry rooms.

Specific comments on the Guidelines for Requirement 2 are as follows:

Comment. A number of comments were received on the various components listed in the Guidelines for Requirement 2, and the accessibility specifications for these components provided by both options One and Two. A few commenters, including the Granite State Independent Living Foundation, submitted detailed comments on the design standards for the listed components of public and common use areas, and, in many cases, recommended specifications different than those provided by either Option One or Option Two.

Response. Following careful consideration of the comments submitted on the design specifications of Requirement 2, the Department has decided not to adopt any of the commenters' proposals for change. The Department believes that application of the appropriate ANSI provisions to each of the basic components of public and common use areas, in the manner specified on the Option One chart, and with the limitations and modifications noted, remains the best approach to meeting the requirements of § 100.205(c)(1) for accessible and usable public and common use areas, both because Congress clearly intended that the ANSI Standard be used where appropriate, and because it is consistent with the Department's support for uniform standards to the greatest degree possible.

Comment. Other commenters requested that the ANSI provisions applicable to certain components in public and common use areas also should be applied to these components when they are part of individual dwelling units (for example, floor surface treatments, carpeting, and work surfaces).

Response. To require such application in individual dwelling units would exceed the requirements imposed by the Fair Housing Act. The Fair Housing Act does not require individual dwelling units to be fully accessible and usable by individuals with handicaps. For individual dwelling units, the Act limits its requirements to specific features of accessible design.

Comment. A number of commenters indicated confusion concerning when the ANSI standard was applicable to stairs.

Response. Stairs are subject to the ANSI Standard only when they are located along an accessible route not served by an elevator. (Accessibility between the levels served by the stairs or steps would, under such circumstances, be provided by some other means such as a ramp or lift located with the stairs or steps.) For example, a ground floor entry might have three steps up to an elevator lobby, with a ramp located besides the steps. The steps in this case should meet the ANSI specification since they will be used by people with particular disabilities for whom steps are more usable than ramps.

In nonelevator buildings, stairs serving levels above or below the ground floor are not required to meet the ANSI standard, unless they are a part of an accessible route providing access to public or common use areas located on these levels. For example, mailboxes serving a covered multifamily dwelling in a nonelevator building might be located down three steps from the ground floor level, with a ramp located beside the steps. The steps in this case would be required to meet the ANSI specifications.

Comment. Other commenters indicated confusion concerning when handrails are required. A few commenters stated that the installation of handrails limits access to lawn areas.

Response. Handrails are required only on ramps that are on routes required to be accessible. Handrails are not required on any on-grade walks with slopes no greater than 5%. Only on those walks that exceed 5% slope, and that are parts of the required accessible route, would handrails be required. Accordingly, walks from one building containing dwelling units to another, would not be affected even if slopes exceeded 5%, because the Guidelines do not require such walks as part of the accessible route. The Department believes that the benefits provided to persons with mobility-impairments by the installation of handrails on required assessible routes outweigh any limitations on access to lawn areas.

Comment. A number of proposals for revisions were submitted on the final Guidelines for parking and passenger loading zones.

Response. The Department has not adopted any of these proposals. The Department has retained the applicable provisions of the ANSI Standard for parking space. As noted previously in the preamble, the ANSI Standard is a familiar and widely accepted standard. The Department is reluctant to introduce a new or unfamiliar standard, or to specify parking specifications that exceed the minimal accessibility standards of the Act. However, if a local parking code requires greater accessibility features (e.g. wider aisles) with respect to parking and passenger loading zones, the appropriate provisions of the local code would prevail.

Comment. A number of commenters requested that the final Guidelines for parking specify minimum vertical clearance for garage parking. other commenters suggested that the Department adopt ANSI's vertical height requirement at passenger loading zones as the minimal vertical clearance for garage parking.

Response. No national accessibility standards, including UFAS, require particular vertical clearances in parking garages. The Department did not consider it appropriate to exceed commonly accepted standards by including a minimum vertical clearance in the Fair Housing Accessibility Guidelines, in view of the minimal accessibility requirements of the Fair Housing Act.

Comment. Two commenters stated that parking spaces for condominiums is problematic because the parking spaces are typically deeded in ownership to the unit owner at the time of purchase, and it becomes extremely difficult to arrange for the subsequent provision of accessible parking. one of the commenters recommended that the Guidelines specify that a condominium development have two percent accessible visitor parking, and that these visitor accessible spaces be reassigned to residents with disabilities as needed.

Response. Condominiums subject to the requirements of the Act must provide accessible spaces for two percent of covered units. One approach to the particular situation presented by the commenters would be for condominium documents to include a provision that accessible spaces may be reassigned to residents with disabilities, in exchange for nonaccessible spaces that were initially assigned to units that were later purchased by persons with disabilities.

Comment. Several commenters stated that Option One's requirement of "sufficient accessible facilities" of each type of recreational facility is too vague. The commenters preferred option Two's guidelines on recreational facilities,

which provides that a minimum of 25% (or at 1east one of each type) of recreational facilities must be accessible.

Response. The Department decided to retain its more flexible approach to recreational facilities. The final Guidelines specify that where multiple recreational facilities are provided, accessibility is met under § 100.205(c)(1) if sufficient accessible facilities of each type are provided.

Comment. Several commenters suggested that all recreational facilities should be made accessible.

Response. To specify that all recreational facilities should be accessible would exceed the requirements of the Act. Congress stated that the Act did not require every feature and aspect of covered multifamily housing to be made accessible to individuals with handicaps. (See House Report at 26.)

Comment. Several commenters submitted detailed specifications on how various recreational facilities could be made accessible. These comments were submitted in response to the Department's request, in the proposed guidelines, for more specific guidance on making recreational facilities accessible to persons with handicaps (55 FR 24376). The Department specifically requested information about ways to provide access into pools.

Response. The Department appreciates all suggestions on recommended specifications for recreational facilities, and, in particular, for swimming pools. For the present, the Department has decided not to change the specifications for recreational facilities, including swimming pools, as provided by the Option One guidelines, since there are no generally accepted standards covering such facilities. Thus, access to the pool area of a swimming facility is expected, but not specialized features for access into the pool (e.g., hoists, or ramps into the water).

Comment. Several commenters criticized the chart in the Option One guidelines, stating that it was confusing and difficult to follow.

Response. The chart is adapted from ANSI's Table 2 pertaining to basic components for accessible sites, facilities and buildings. The ANSI chart is familiar to persons in the building industry. Accordingly, the Option One chart (and now part of the final Guidelines), which is a more limited version of ANSI's Table 2, is not a novel approach.

Guidelines for Requirement 3

The Guidelines for Requirement 3 present design standards for providing doors that will be sufficiently wide to allow passage into and within all premises by handicapped persons in wheelchairs (usable doors) as required by § 100.20(c)(2).

The Department has adopted the Option One guidelines for Requirement 3 with minor editorial changes. No changes were made to the design specifications for "usable doors".

The Guidelines provide separate guidance for (1) doors that are part of an accessible route in the public and common use areas of multifamily dwellings, including entry doors to individual dwelling units; and (2) doors within individual dwelling units.

(1) For public and common use areas and entry doors to dwelling units, doors that comply with ANSI 4.13 would meet the requirements of § 100.205(c)(2).

(2) For doors within individual dwelling units, the Department has retained, in the final Guidelines, the design specification that a door with a clear opening of at least 32 inches nominal width when the door is open 90 degrees, as measured between the face of the door and the stop, would meet the requirements of § 100.205(c)(2).

Specific comments on the design specifications presented in the Guidelines for Requirement 3 are as follows:

Minimum Clear Opening

Comment. The issue of minimum clear opening for doors was one of the most widely commented-upon design features of the guidelines. The majority of commenters representing the disability community supported the Option One specification of a minimum clear opening of 32 inches. A few commenters advocated a wider clear opening. U.S. Representatives Edwards, Frank, and Fish expressed their support for the Option One specification on minimum clearance which is consistent with the ANSI Standard.

Commenters from the building industry were almost unanimous in their opposition to a minimum clear opening of 32 inches. Several builders noted that a 32-inch clear opening requires use of 36-inch doors. These commenters stated that a standard 2'10" door (34") provides only a 31¾ inch clear opening. The commenters therefore recommended amending the Guidelines to permit a "nominal" 32 inch clear space, allowing the use of a 2'10" door, which provides a 31¾ inch clear opening. Other commenters stated that, generally, door width should provide a 32-inch clear opening, but that this width can be reduced if sufficient maneuvering space is provided at the door. These commenters supported Option Two's approach, which provided for clear width to be determined by the clear floor space available for maneuvering on both sides of the door, with the minimum width set at 29¼ inches. (See Option 2 chart and accompanying text at 55 FR 24382.)

Response. The Department considered the recommendations for both wider clear openings, and more narrow clear openings, and decided to maintain the design specification proposed in the Option One guidelines (a clear opening of at least 32 inches nominal width). The clear opening of at least 32 inches nominal width has been the accepted standard for accessibility since the issuance of the original ANSI Standard in 1961. While the Department recognizes that it may be possible to maneuver most wheelchairs through a doorway with a slightly more narrow opening, such doors do not permit ready access on the constant-use basis that is the reality of daily living within a home environment. The Department also recognizes that wider doorways may ensure easier passage for wheelchair users. However, by assuring that the minimum 36-inch hallway and 32-inch clear openings are provided, the Department believes that its recommended opening for doors should accommodate most people with disabilities. In the preamble to the proposed guidelines, the Department stated that the clear width provided by a standard 34-inch door would be acceptable under the Guidelines.

Maneuvering Space at Doors

Comment. Several commenters requested that the final Guidelines incorporate minimum maneuvering clearances at doors, as provided by the ANSI Standard. These commenters stated that maneuvering space on the latch side of the door is as important a feature as mininum door width. Other commenters stated that the maneuvering space was necessary to ensure safe egress in cases of emergency.

Response. The Department has carefully considered these comments, and has declined to adopt this approach. The Department believes that, by adhering to the standard 32-inch clear opening, it is possible to forego other accessibility requirements related to doors (e.g. door closing forces, maneuvering clearances, and hardware) without compromising the Congressional directive requiring doors to be "sufficiently wide to allow passage by handicapped persons in wheelchairs." However, as the Department noted in the preamble to the proposed guidelines, approaches to, and

maneuvering spaces at, the exterior side of the entrance door to an individual dwelling unit would be considered part of the public spaces, and therefore would be subject to the appropriate ANSI provisions. (See 55 FR 24380.)

Doors in a Series

Comment. A few commenters expressed concern that the Guidelines did not provide design specification for an entrance that consists of a series of more than one door. The commenters were concerned that, without adequate guidance, a disabled resident or tenant could be trapped between doors.

Response. Doors in a series are not typically part of an individual dwelling unit. Doors in a series generally are used in the entries to buildings, and are therefore part of public spaces. Section 4.13 of the ANSI Standard, which is applicable to doors in public and common use areas, provides design specifications for doors in a series. However, where doors in a series *are* provided as part of a dwelling unit, the Department notes that the requirements of an accessible route into and through the dwelling unit would apply.

Door Hardware

Comment. A few commenters requested that lever hardware be required on doors throughout dwelling units, not only at the entry door to the dwelling unit.

Response. For doors within individual dwelling units, the Fair Housing Act only requires that the doors be sufficiently wide to allow passage by handicapped persons in wheelchairs. Lever hardware is required for entry doors to the building and to individual dwelling units because these doors are part of the public and common use areas, and are, therefore, subject to the ANSI provisions for public and common use areas, which specify lever hardware. Installing lever hardware on doors is the type of adaptation that individual residents can make easily. The ANSI standard also recognizes this point. Under the ANSI Standard, only the entry door into an accessible dwelling unit is required to comply with the requirements for door hardware. (See ANSI section 4.13.9.)

Multiple Usable Entrances

Comment. Several commenters noted that the Guidelines do not provide more than one accessible entrance/exit, and that without a second means of egress, wheelchair users may find themselves in danger in an emergency situation.

Response. As stated previously, the Department is limited to providing Guidelines that are consistent with the accessibility requirements of the Act. The Act requires "an accessible entrance", rather than requiring all entrances to be accessible. However, the requirements for usable doors and an accessible route to exterior spaces such as balconies and decks does respond to this concern.

Guidelines for Requirement 4

The Guidelines for Requirement 4 present design specifications for providing an accessible route into and through the covered dwelling unit, as required by § 100.205(c)(3)(i).

The Department has adopted the Option One guidelines for Requirement 4 with the following changes:

First, the Department has eliminated the specification for maneuvering space if a person in a wheelchair must make a T-turn.

Second, the Department has eliminated the specification for a minimum clear headroom of 80 inches.

Third, and most significantly, the Department has revised the design specifications for "changes in level" within a dwelling unit to include separate design specifications for: (a) single-story dwelling units, including single-story dwelling units with design features such as a loft or a sunken living room; and (b) multistory dwelling units in buildings with elevators.

Fourth, the Department has revised the specifications for changes in level at exterior patios, decks or balconies in certain circumstances, to minimize water damage. For the same reason, the final Guidelines also include separate specifications for changes in level at the primary entry doors of dwelling units in certain circumstances.

Specific comments on the Guidelines for Requirement 4, and the rationale for the changes made, are discussed below.

Minimum Clear Corridor Width

A few commenters from the disability community advocated a minimum clear corridor width of 48 inches. However, the majority of commenters on this issue had no objection to the minimum clear corridor width of 36 inches. The 36-inch minimum clear corridor width, which has been retained, is consistent with the ANSI Standard.

T-turn Maneuvering Space

Comment. Several commenters stated that this design specification was unclear in two respects. First, they stated that it was unclear when it is necessary for a designer to provide space for a T-turn. The commenters stated that it was difficult to envision circumstances where a wheelchair could be pulled into a position traveling forward and then not be capable of backing out. Second, the commenters stated that the two descriptions of the T-turn provided by the Department were contradictory. The commenters stated that the preamble to the proposed guidelines provided one description of the T-turn (55 FR 24380), while Figure 2 of the guideline 4 (55 FR 24392), presented a different description of the T-turn.

Response. The Department has decided to delete the reference to the T-turn dimensions in the Guidelines for Requirement 4. The Guidelines adequately address the accessible route into and through the dwelling unit by the minimum corridor width and door width specifications, given typical apartment layouts. Should a designer find that a unique layout in a particular unit made a T-turn necessary for a wheelchair user, the specifications provided in the ANSI Standard sections referenced for public and common use areas could be used.

Minimum Clear Headroom

Comment. Several commenters from the building industry objected to the specification for a minimum clear headroom of 80 inches. The commenters stated that standard doors provide a height range from 75 to 79 inches, and that an 80-inch specification would considerably increase the cost of each door installed.

Response. The specification for minimum clear headroom of 80 inches was included in the proposed guidelines because it is a specification included in the major accessibility codes. This design specification was not expected to conflict with typical door heights. However, since the principal purpose of the requirement is to restrict obstructions such as overhanging signs in public walkways, the Department has determined that this specification is not needed for accessible routes within individual dwellings units, and has therefore deleted this standard from the final Guidelines for such routes. (The requirement, however, still applies in public and common use spaces.)

Changes in Level within a Dwelling Unit

In the preamble to the proposed guidelines, the Department advised that the Act appears to require that dwelling units with design features such as lofts or with more than one floor in elevator buildings be equipped with internal elevators, chair lifts, or other means of access to the upper levels (55 FR 24377). The Department stated that, although it is not clear that Congress intended this result, the Department's preliminary assessment was that the statute appears

to offer little flexibility in this regard. The Department noted that several commenters, including the NAHB and the NCCSCI, suggested that units with more than one floor in elevator buildings should be required to comply with the Act's accessibility requirements only on the floor that is served by the building elevator. (This was the position taken by Option Two.) The Department solicited comments on this issue, and received a number of responses opposing the Department's interpretation.

Comment. The commenters opposing the Department's interpretation stated that the Department's interpretation would place an undue burden on developers and needlessly increase housing costs for everyone; defeat the purpose of having multilevel units, which is to provide additional space at a lower cost; eliminate multilevel designs which may be desirable to disabled residents (e.g., to provide living accommodations for live-in attendants); and "create a backlash" against the Accessibility Guidelines.

Response. Following careful consideration of these comments, and a reexamination of the Act and its legislative history, the Department has determined that its previous interpretation ot the Act's application to units with changes in level (whether lofts, or additional stories in elevator buildings), which would have required installation of chair lifts or internal elevatore in such units, runs contrary to the purpose and intent of the Fair Housing Act, which is to place "modest accessibility requirements on covered multifamily dwellings." (See House Report at 25.)

In House Report No. 711, the Congress repeatedly emphasized that the accessibility requirements of the Fair Housing Act were minimal basic requirements of accessibility.

> These modest requirements will be incorporated into the design of new buildings, resulting in features which do not look unusual and will not add significant additional costs. The bill does not require the installation of elevators or 'hospital-like' features, or the renovation of existing units." (House Report at 18)
>
> Accessibility requirements can vary across a wide range. A standard of total accessibility would require that every entrance, doorway, bathroom, parking space, and portion of buildings and grounds be accessible. Many designers and builders have interpreted the term 'accessible' to mean this type of standard. The committee does not intend to impose such a standard. Rather, the committee intends to use a standard of 'adaptable' design, a standard developed in recent years by the building industry and by advocates for handicapped individuals to provide usable housing for handicapped persons without necessarily being significantly different from conventional housing." (House Report at 26)

The Department has determined that a requirement that units with lofts or multiple stories in elevator buildings be equipped with internal elevators, chair lifts, or other means of access to lofts or upper stories would make accessible housing under the Fair Housing Act significantly different from conventional housing, and would be inconsistent with the Act's "modest accessibility requirements". (See House Report at 25.)

The Department also has determined that a requirement that dwelling units with design features, such as sunken living rooms, must provide some means of access, such as ramps or lifts, as submitted in the proposed guidelines (55 FR 24380) is inconsistent with the Act's modest accessibility requirements. Sunken living rooms are not an uncommon design feature. To require a ramp or other means of access to such an area, at the time of construction, would reduce, perhaps significantly, the space provided by the area. The reduced space might interfere with the use and enjoyment of this area by a resident who is not disabled, or whose disability does not require access by means of a ramp or lift. The Department believes that had it maintained in the final Guidelines the access specifications for design features, such as sunken living rooms, as set forth in the proposed guidelines, the final Guidelines would have interfered unduly with a developer's choice of design, or would have eliminated a popular design choice. Accordingly, the final Guidelines provide that access is not required to design features, such as a sunken living room, provided that the area does not have the effect of interrupting the accessible route through the remainder of the unit.

The Department believes that the installation of a ramp or deck in order to make a sunken room accessible is the type of later adaptation that easily can be made by a tenant. The Department, however, does require that design features, such as a split-level entry, which is critical to providing an accessible route into and through the unit, must provide a ramp or other means of access to the accessible route.

In order to comply with the Act's requirement of an accessible route into and through covered dwelling units, the Department has revised the Guidelines for Requirement 4 to provide separate technical guidance for two types of dwelling units: (1) Single-story dwelling units, including single-story dwelling units with design features such as a loft or a sunken living room; and (2) multistory dwelling units in elevator buildings. (Definitions for "single-story dwelling unit," "loft," "multistory dwelling unit" and "story" have been included in section 2 of the final Guidelines.)

"Single-story dwelling unit" is defined as a dwelling unit with all finished living space located on one floor.

"Loft" is defined as an intermediate level between the floor and ceiling of any story, located within a room or rooms of a dwelling.

"Multistory dwelling unit" is defined as a dwelling unit with finished living space located on one floor and the floor or floors immediately above or below it.

"Story" is defined as that portion of a dwelling unit between the upper surface of any floor and the upper surface of the floor next above, or the roof of the unit. Within the context of dwelling units, the terms "story" and "floor" are synonymous.

For single-story dwelling units and multistory dwelling units, the Guidelines for Requirement 4 are as follows:

(1) For single-story dwelling units, the design specifications for changes in level, are the same as proposed in the Option One guidelines. Changes in level within the dwelling unit with heights between ¼ inch and ½ inch are beveled with a slope no greater than 1:2. Changes in level greater than ½ inch (excluding changes in level resulting from design features such as a loft or a sunken living room) must be ramped or must provide other means of access. For example, split-level entries must be ramped or use other means of providing and accessible route into and through the dwelling unit.

For single-story dwelling units with design features such as a loft or a raised or sunken functional area, such as a sunken living room, the Guidelines specify that: (a) access to lofts is not required, provided that all spaces other than the loft are on an accessible route; and (b) design features such as a sunken living room are also exempt from the access specifications, provided that the sunken area does not interrupt the accessible route through the remainder of the unit.

(2) In multistory dwelling units in buildings with elevators, access to the additional story, or stories, is not required, provided that the story of the unit that is served by the building elevator (a) is the primary entry to the unit; (b) complies with Requirements 2 through 7 with respect to the rooms located on the entry/accessible level; and (3) contains a bathroom or powder room which complies with Requirement

7. (As previously noted, multistory units in buildings without elevators are not considered ground floor units, and therefore are exempt.)

The Department believes that the foregoing revisions to the Guidelines for Requirement 4 will provide individuals with handicaps the degree of accessibility intended by the Fair Housing Act, without increasing significantly the cost of multifamily housing.

Comment. Two commenters suggested that the same adaptability requirement that is applied to bathrooms should be applied to dwelling units with more than one story, or with lofts, i.e. that stairs, and the wall along the stairs, contain the appropriate reinforcement to provide for later installation of a wheelchair lift by a disabled resident, if so desired.

Response. The only blocking or wall reinforcement required by the Fair Housing Act is the reinforcement in bathroom walls for later installation of grab bars. As noted earlier in this preamble, the Fair Housing Act does not actually require that features in covered units be "adaptable", except for bathrooms. The adaptable feature is the reinforcement in bathroom walls which allows later installation of grab bars. Accordingly, the Department believes that a specification for reinforcement of the walls along stairs would exceed the Act's requirements, because the necessary reinforcement could vary by type of lift chosen, and more appropriately would be specified and installed as part of the installation of the lift.

Thresholds at Exterior Doors/ Thresholds to Balconies or Decks

Comment. A number of commenters from the building industry objected to the provision of the Option One guidelines that specified that an exterior deck, balcony, patio, or similar surface may be no more than ¾ inch below the adjacent threshold. Several commenters stated that, in many situations, this height is unworkable for balconies and decks because of waterproofing and safety concerns. This was a particular concern among commenters from the South Florida building industry, who stated that the ¾" height is ineffective for upper floors of high rise buildings in a coastal environment and invites water control problems. Others noted that the suggestion of a wooden decking insert, or the specification of a ¾ inch maximum change in level, in general, might conflict with fire codes.

Response. In response to these concerns, and mindful that Congress did not intend the accessibility requirements of the Act to override the need to protect the physical integrity of multifamily housing, the Department has included two additional provisions for changes in level at thresholds leading to certain exterior surfaces, as a protective measure against possible water damage. The final Guidelines provide that exterior deck, patio or balcony surfaces should be no more than ½ inch below the floor level of the interior of the dwelling unit, unless they are constructed of impervious material such as concrete, brick or flagstone. In such case, the surface should be no more than 4 inches below the floor level of the interior dwelling unit, unless the local code requires a lower drop. Additionally, the final Guidelines provide that at the primary entry doors to dwelling units with direct exterior access, outside landing surfaces constructed of impervious materials such as concrete, brick, or flagstone should be no more than ½ inch below the floor level of the interior of the dwelling unit. The Guidelines further provide that the finished surface of this area, located immediately outside the entry door, may be sloped for drainage, but the sloping may be no more than ⅛ inch per foot.

In response to commenters' concern that the Guidelines for an accessible route to balconies and decks may conflict with certain building codes that require higher thresholds, or balconies or decks lower than the ¾ inch specified by the Guidelines, the Department notes that the Guidelines are "recommended" design specifications, not building code "requirements". Accordingly, the Guidelines cannot preempt State or local law. However, the builder confronted with local requirements that thwart the particular means of providing accessibility suggested by the Guidelines is under a duty to take reasonable steps to provide for accessibility by other means consistent with local law constraints and considerations of cost-effectiveness, in order to provide dwelling units that meet the specific accessibility requirements of the Fair Housing Act.

Guidelines for Requirement 5

The Guidelines for Requirement 5 present design specifications for providing dwelling units that contain light switches, electrical outlets, thermostats, and other environmental controls in accessible locations, as required by § 100.205(c)(2)(ii).

The Department has adopted the Option One guidelines for Requirement 5 with minor technical changes. The final Guidelines clarify that to be in an accessible location within the meaning of the Act, the maximum height for an environmental control, for which reach is over an obstruction, is 44 inches for forward approach (as was proposed in the Option One guidelines), or 46 inches for side approach, provided that the obstruction is no more than 24 inches in depth. The inclusion of this additional specification for side approach is consistent with the comparable provisions in the ANSI standard.

Specific comments on the Guidelines for Requirement 5 are as follows:

Comments. Three comments stated that lowered thermostats could pose a safety hazard for children. However, the majority of comments requested clarification as to what is meant by "other environmental controls". Several commenters from the disability community requested that circuit breakers be categorized as environmental controls. Other commenters asked whether light and fan switches on range hoods fall within the category of light switches and environmental controls.

Response. With regard to concerns about lowered thermostats, the Act specifically identifies "thermostats" as one of the controls that must be in accessible locations, and the mounting heights specified in the Guidelines are necessary for an accessible location. The only other environmental controls covered by the Guidelines for Requirement 5 would be heating, air conditioning or ventilation controls (e.g., ceiling fan controls). The Department interprets the Act's requirement of placing environmental controls in accessible locations as referring to those environmental controls that are used by residents or tenants on a daily or regular basis. Circuit breakers do not fall into this category, and therefore are not subject to accessible location specifications. Light and fan switches on range hoods are appliance controls and therefore are not covered by the Act.

Comment. Other commenters asked whether light switches and electrical outlets in the inside corners of kitchen counter areas, and floor outlets are permissible.

Response. Light switches and electrical outlets in the inside corners of kitchen counters, and floor outlets, are permissible, if they are not the only light switches and electrical outlets provided for the area.

Comment. Another commenter pointed out that some electrical outlets that are installed specifically to serve individual appliances, such as refrigerators or microwave ovens, cannot realistically be mounted in an accessible location.

Response. Electrical outlets installed to serve individual appliances, such as refrigerators or built-in microwave ovens, may be mounted in non-accessible locations. These are not the type of electrical outlets which a disabled resident or tenant would need access to on a regular or frequent basis.

Comment. One commenter stated that Figure 3 in the proposed guidelines (Figure 2 in the final Guidelines) specifies a reach requirement more stringent than the ANSI Standard.

Response. The ANSI Standard presents reach ranges for both forward and side approaches for two situations: (1) unobstructed; and (2) over an obstruction. The proposed guidelines specified only the heights for forward reach, because those heights also are usable in side approach. The diagram in Figure 2 (formerly Figure 3) showing forward reach is identical to that of Figure 5 in the ANSI Standard. The ANSI Standard also includes a figure (Figure 6) for side reach that permits higher placement. The reach range for forward approach was the only one referenced in the proposed guidelines for use in the dwelling unit, because it was considered simpler and easier to use a single specification that would work in all situations. The reach range for forward approach has been retained in the final Guidelines for situations where there is no built-in obstruction in order to assure usability when the unit was furnished. However, the final Guidelines have added the specification for side reach over a built-in obstruction that is consistent with the ANSI requirement, and that permits placement two inches higher than forward reach.

Guidelines for Requirement 6

The Guidelines for Requirement 6 present design standards for installation of reinforcement in bathroom walls to allow for later installation of grab bars around the toilet, tub, shower stall and shower seat where such facilities are provided, as required by § 100.205(c)(3)(iii).

The Department adopted the Option One guidelines for Requirement 6 with two modifications. First, the final Guidelines provide that a powder room is subject to the requirement for reinforced walls for grab bars when the powder room is the only toilet facility located on the accessible level of a covered multistory dwelling unit. Second, the final Guidelines further clarify that reinforced bathroom walls will meet the accessibility requirement of § 100.205(c)(3)(iii), if reinforced areas are provided at least at those points where grab bars will be mounted.

Specific comments on this guideline were as follows:

Comment. A number of commenters requested that the Department specify the dimensions for grab bar reinforcement, and suggested that grab bar reinforcing material run horizontally throughout the entire length of the space given for grab bars, as provided by the ANSI Standard. These commenters stated that if this type of reinforcement was required, residents could locate more easily the studs for future grab bar installation, and have flexibility in the placement of grab bars for optimal use, and safety in bathrooms. One commenter noted that many grab bars are of such a length that they require an intermediate fastener, but the proposed standard does not permit intermediate fastening. Two commenters recommended that the final Guidelines follow ANSI and UFAS Standards for requirements for mounting grab bars. One commenter recommended the installation of panels of plywood behind bathroom walls because this would provide greater flexibility in the installation of grab bars.

Response. The illustrations of grab bar wall reinforcement accompanying the Guidelines for Requirement 6 are intended only to show where reinforcement for grab bars is needed. The illustrations are not intended to prescribe how the reinforcing should be provided, or that the bathtub or shower is required to be surrounded by three walls of reinforcement. The additional language added to the Guidelines is to clarify that the Act's accessibility requirement for grab bar reinforcement is met if reinforced areas are provided, at a minimum, at those points where grab bars will be mounted. The Department recognizes that reinforcing for grab bars may be accomplished in a variety of ways, such as by providing plywood panels in the areas illustrated, or by installing vertical reinforcement (in the form of double studs, for example) at the points noted on the figures accompanying the Guidelines.

Comment. Several commenters stated that the final Guidelines should incorporate Option Two's specification of reinforcement for shower seats when shower stalls are provided.

Response. The Fair Housing Act only requires reinforcement for later installation of grab bars. The Act does not cover reinforcement for shower seats; rather, it mentions shower seats (if provided) as an area where grab bar reinforcement would be needed. However, as will be discussed more fully in the following section concerning the Guidelines for Requirement 7 (Usable Bathrooms), reinforcement for shower seats would provide adaptability to increase usability of shower stalls, and is a design option available to builders and developers in designing "usable" bathrooms.

Comment. One commenter recommended that the final Guidelines incorporate Option Two's specification that prefabricated tub/shower enclosures would have to be fabricated with reinforcement for grab bar enclosures.

Response. The Department did not incorporate this specification in the final Guidelines. The Department believes that it is inappropriate to specify product design. A builder should have the flexibility to choose how reinforcement for grab bars will be provided.

Comment. Two commenters stated that half-baths should also contain grab-bar reinforcements.

Response. Half-baths are not considered "bathrooms", as this term is commonly used, and, therefore are not subject to the bathroom wall reinforcement requirement, unless a half-bath facility is the only restroom facility on the accessible level of a covered multistory dwelling unit.

Comment. One commenter requested that the final Guidelines incorporate language clearly to specify that the builder's responsibility is limited solely to wall reinforcement, and later installation is the responsibility of the resident or tenant.

Response. It is unnecessary to incorporate the suggested language in the final Guidelines. The Guidelines for Requirement 6 are solely directed to reinforcement. No guidelines are provided for the actual installation of grab bars. Accordingly, there should be no confusion on this issue.

Guidelines for Requirement 7

The Guidelines for Requirement 7 present design specifications for providing usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, as required by § 100.205(c)(3)(iv).

For usable kitchens, the Department adopted the Option One guidelines with one change. The Department has eliminated the specification that controls for ranges and cooktops be placed so that reaching across burners is not required.

For usable bathrooms, the final Guidelines provide two alternative sets of design specifications. The Fair Housing Act requires that an accessible or "usable" bathroom is one which provides sufficient space for an

individual in a wheelchair to maneuver about. The two sets of specifications provide different approaches as to how compliance with this maneuvering space requirement may be accomplished. The first set of specifications also includes size dimensions for shower stalls, but only when a shower stall is the only bathing facility provided in a dwelling unit. Additionally, either set of specifications is applicable to powder rooms, when a powder room is the only restroom facility on the accessible level of a covered multistory dwelling unit.

With the exception of the inclusion of shower stall dimensions, the first set of "usable bathroom" specifications remain the same as the Option One guidelines for usable bathrooms. The second set of "usable bathroom" specifications provide somewhat greater accessibility than the first set, but would be applicable only to one bathroom in a dwelling unit that has two or more bathrooms. The second set of specifications include clear space specifications for bathrooms with in-swinging doors and for bathrooms with outswinging doors. This second set of specifications also provides that toilets must be located in a manner that permits a grab bar to be installed on one side of the fixture, and provides specifications on the installation of vanities and lavatories.

To meet the Act's requirements for usable bathrooms, the final Guidelines provide that (1) in a dwelling unit with a single bathroom, either set of specifications may be used; and (2) in a dwelling unit with more than one bathroom, all bathrooms in the unit must comply with the first set of specifications, or, alternatively, at least one bathroom must comply with the second set of specifications, and all other bathrooms must be on an accessible route, and must have a usable entry door in accordance with the guidelines for Requirements 3 and 4. However, in multistory dwelling units, only those bathrooms on the accessible level are subject to the Act's requirements for usable bathrooms. Where a powder room is the only restroom facility provided on the accessible level of a multistory dwelling unit, the powder room must meet either the first set of specifications or the second set of specifications. All bathrooms and powder rooms that are subject to Requirement 7, must have reinforcements for grab bars as provided in the Guideline for Requirement 6.

In developing the final Guidelines for the usable bathroom requirement, the Department recognized that the Option One guidelines for usable bathrooms presented the minimum specifications necessary to meet the Act's requirements. Accordingly, the Department believes that it is appropriate to provide a second set of specifications which provide somewhat different accessibility accommodations than the Option One guidelines. The Department believes that by offering two sets of specifications for usable bathrooms, the Department is providing builders and developers with more development choices in designing dwelling units that contain more than one bathroom; and it is providing individuals and families with more housing options. Builders and developers may design all bathrooms to meet the minimal specifications of the first set of specifications, or they may design only one bathroom to meet the somewhat greater accessibility specifications of the second set. Regardless of which set of usable bathroom specifications is selected by a builder or developer, all doors to bathrooms and powder rooms must meet the minimum door width specifications of Requirement 3.

The following presents a discussion of the specific comments received on usable kitchens and usable bathrooms.

Controls for Ranges and Cooktops

Comment. A few commenters stated that the Department lacks authority under the Fair Housing Act to impose design standards on appliances. The commenter stated that standards that specify certain design features for appliances in individual dwelling units exceed the scope of the Department's statutory authority. Other commenters objected to front range controls as a safety hazard for children. Commenters from the disability community were strongly supportive of this design specification.

Response. With respect to usable kitchens, the Act solely requires that kitchens have sufficient space such that an individual in a wheelchair can maneuver about. Accordingly, a specification that controls for ranges and cooktops be placed so that they can be used without reaching across burners is not consistent with the Act's requirement for usable kitchens.

In the proposed guidelines, the Option One guidelines for usable kitchens specified that controls should be located so as to be usable without reaching across burners. As the preamble to the proposed guidelines noted, many standard styles of ranges and cooktops meeting this specification (other than those with front controls) are available on the market. However, in reviewing the entire rulemaking history on the design and constructions requirements, the Department has concluded that the requirements of the Fair Housing Act did not cover any appliance controls. Accordingly, this specification was not included in the final Guidelines.

Maneuverinq Space, Adjustable Cabinetry, Fixtures and Plumbing

Comment. A number of commenters from the disability community stated that it was important that the Guidelines for both kitchens and bathrooms specify a five-foot turning radius; adjustable cabinetry, fixtures and plumbing; and fixture controls that comply with the appropriate provisions of the ANSI Standard.

Response. The legislative history of the Fair Housing Act clearly indicates that Congress did not envision usable kitchens and bathrooms to be designed in accordance with the specifications suggested by the commenters. In House Report No. 711, the Congress stated as follows:

> The fourth feature is that kitchens and bathrooms be usable such that an individual in a wheelchair can maneuver about the space. This provision is carefully worded to provide a living environment usable by all. Design of standard sized kitchens and bathrooms can be done in such a way as to assure usability by persons with disabilities without necessarily increasing the size of space. The Committee intends that such space be usable by handicapped persons, but this does not necessarily require that a turning radius be provided in every situation. This provision also does not require that fixtures, cabinetry or plumbing be of such design as to be adjustable. (House Report at 27)

Accordingly, the Department is unable to adopt any of the proposals suggested by the commenters. The Act's requirement for usable kitchens and bathrooms only specifies maneuverability for wheelchair users, and this maneuverability does not require the specification advocated by the commenters. (See previous discussion of this issue in the preamble to the proposed Fair Housing regulations at 53 FR 45005.)

Comment. Two commenters requested clarification concerning what is meant by "sufficient maneuvering space". One of the commenters recommended that this term be defined to include "such space as shall permit a person in a wheelchair to use the features and appliances of a room without having to leave the room to obtain an approach to an appliance, work surface, or cabinet".

Response. The Guidelines for Requirement 7 (usable kitchens and bathrooms) describe what constitutes sufficient maneuvering space in the

kitchen and the bathroom. Additionally, the preamble to the proposed guidelines explicitly states that sufficient maneuvering space for kitchens does not require a wheelchair turning radius (55 FR 24381). As noted in response to the preceding comment, a wheelchair turning radius also is not required for either usable kitchens or usable bathrooms. The Guidelines for usable bathroom state that sufficient maneuvering space is provided within the bathroom for a person using a wheelchair or other assistive device to enter and close the door, use the fixtures, reopen the door and exit. This specification was not changed in the final Guidelines.

Kitchen Work Surfaces

Comment. One commenter stated that "Element 12" in the chart accompanying the Guidelines for Requirement 2 (public and common use areas) seems to require a portion of the kitchen counters to be accessible since they are work surfaces. This commenter stated that if this interpretation is correct then it should be made clear in the Guidelines.

Response. The commenter's interpretation is not correct. The chart accompanying the Guidelines for Requirement 2 is only applicable to the public and common use areas, not to individual dwelling units.

Showers

Comments. Several commenters requested that the final Guidelines provide dimensions on the appropriate width and height of showers and shower doors. Another commenter asked whether showers were required to comply with dimensions specified by the ANSI Standard.

Response. The final Guidelines for usable bathrooms (the first set of specifications) specify size dimensions for shower stalls in only one situation—when the shower stall is the only bathing facility provided in a covered dwelling unit. The Department believes that, where a shower stall is the only bathing facility provided, size specification for the shower stall is consistent with the Act's requirement for usable bathrooms. However, if a shower stall is not the only bathing facility provided in the dwelling unit, then the only specification for showers, appropriate under the Act, concerns reinforced walls in showers. (The titles under the illustrations (figures) related to showers in the final Guidelines for Requirement 6 have been revised to make it clear that the figures are specifying only the different areas required to be reinforced in showers of different sizes, not the required sizes of the shower stalls.)

In-swinging Bathroom Doors

Comment. One commenter stated that in-swinging bathroom doors generally are problematic, unless the bathroom is unusually large. The commenter noted that an in-swinging door makes it extremely difficult to enter and exit. The commenter recommended that in-swinging doors be prohibited unless there is sufficient internal bathroom space, exclusive of the swing of the door, which allows either a five foot turning radius or two mutually exclusive 30" x 48" wheelchair spaces. Another commenter stated that in-swinging bathroom doors create a serious obstacle for the wheelchair user.

Response. The Department declines to prohibit in-swinging bathroom doors. Adjusting an in-swinging door to swing out is the type of later adaptation that can be made fairly easily by a resident or tenant. Once a minimum door width is provided, a tenant who finds a bathroom not readily usable can have the door rehung as an outswinging door. Note, however, that the second set of guidelines for usable bathrooms specifies clear space for bathrooms with in-swinging doors.

Bathroom Design Illustrations

Comment. A number of commenters from the disability community stated that two of the six bathroom drawings in the preamble to the proposed guidelines (numbers 4 and 6 at 55 FR 24374–24375) did not allow for a parallel approach to the tub. These commenters requested that these drawings be removed from the final Guidelines. Other commenters stated that the Department's bathroom design illustrations at 55 FR 24374–24375 are not consistent with the Figure 8 bathroom design illustrations at 55 FR 24401.

Response. While a parallel approach to the tub would provide somewhat greater accessibility, the Department believes that to indicate, through the Guidelines, that a parallel approach to the tub is necessary to meet the Act's requirements, exceeds the Fair Housing Act's minimal design expectations for bathrooms. Accordingly, the first set of specifications for usable bathrooms does not specify a parallel approach to the tub. However, the second set of specifications provides for a clear access aisle adjacent to the tub that would permit a parallel approach to the tub. Either method would meet the Act's requirements. With respect to the comments on the bathroom design illustrations, these illustrations have been revised to make the clear floor space requirements more readily understood. The illustrations are adapted from ANSI A117.1.

Number of Accessible Bathrooms

Comment. A number of comments were received on how many bathrooms in a dwelling unit should be subject to the Act's "usable" bathroom requirement. Many commenters recommended that all full bathrooms be made accessible. Other commenters recommended that only one full bathroom be required to be made accessible. A few commenters recommended that half-baths/powder rooms also be subject to the Act's requirement.

Response. In House Report No. 711, the Congress distinguished between "total accessibility" and the level of accessibility required by the Fair Housing Act. The report referred to standards requiring every aspect or portion of buildings to be totally accessible, and pointed out that this was not the level of accessibility required by the Act. The final Guidelines for bathrooms are consistent with the Act's usable bathroom requirement, and provide the level of accessibility intended by Congress. As discussed previously in this preamble, the final Guidelines for usable bathrooms provide two sets of specifications. The second set of specifications provides somewhat greater accessibility than the first set of specifications. In view of this fact, the final Guidelines provide that in a dwelling unit with a single bathroom, the bathroom may be designed in accordance with either set of specifications—the first set or the second set. However, in a dwelling unit with more than one bathroom, all bathrooms in the unit must comply with the first set of specifications, or a minimum of one bathroom must comply with the second set of specifications, and all other bathrooms must be on an accessible route, and must have a usable entry door in accordance with the guidelines for Requirements 3 and 4. Additionally, the final Guidelines provide that a powder room must comply with the Act's usable bathroom requirements when the powder room is the only restroom facility provided on the accessible level of a multistory dwelling unit.

3. Discussion of Comments on Related Fair Housing Issues Compliance Deadline

Section 100.205 of the Fair Housing regulations incorporates the Act's design and construction requirements, including the requirement that

multifamily dwellings for first occupancy after March 13, 1991 be designed and constructed in accordance with the Act's accessibility requirements. Section 100.205(a) provides that covered multifamily dwellings shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991 (and, therefore, exempt from Act's accessibility requirements), if they are occupied by that date, or if the last building permit or renewal thereof for the covered multifamily dwellings is issued by a State, County, or local government on or before January 13, 1990.

Comment. The Department received a number of comments on the March 13, 1991 compliance deadline, and on methods of achieving compliance. Many commenters objected to the March 13, 1991 compliance deadline on the basis that this deadline was unreasonable. Several commenters from the building industry stated that, in many cases, design plans for buildings now under construction were submitted over two years ago, and it would be very expensive to make changes to buildings near completion. Other commenters stated that it is unreasonable to impose additional requirements on a substantially completed project that unexpectedly has been delayed for occupancy beyond the March 13, 1991 effective date.

Response. Section 804(f)(3)(C) of the Fair Housing Act states that the design and construction standards will be applied to covered multifamily dwelling units for first occupancy after the date that is 30 months after the date of enactment of the Fair Housing Amendments Act. The Fair Housing Act was enacted on September 13, 1988. The date that is 30 months from that date is March 13, 1991. Accordingly, the inclusion of a March 13, 1991 compliance date in § 100.205 is a codification of the Act's compliance deadline. The Department has no authority to change that date. Only Congress may extend the March 13, 1991 deadline.

The Department, however, has been attentive to the concerns of the building industry, and has addressed these concerns, to the extent that it could, in prior published documents. In the preamble to the final Fair Housing rule, the Department addressed the objections of the building industry to the Department's reliance on "actual occupancy" as the sole basis for determining "first occupancy". (See 54 FR 3251; 24 CFR Ch. I, Subch. A, App. I at 585 (1990).) Commenters to the proposed Fair Housing rule, like the commenters to the proposed guidelines, argued that coverage of the design and construction requirements must be determinable at the beginning of planning and development, and that projects delayed by unplanned and uncontrollable events (labor strikes, Acts of God, etc.) should not be subject to the Act.

In order to accommodate the "legitimate concerns on the part of the building industry" the Department expanded § 100.205 of the final rule to provide that covered multifamily dwellings would be deemed to be for first occupancy if the last building permit or renewal thereof was issued on or before January 13, 1990. A date of fourteen months before the March 13, 1991 deadline was selected because the median construction time for multifamily housing projects of all sizes was determined to be fourteen months, based on data provided by the Marshall Valuation Service.

More recently, the Department addressed similar concerns of the building industry in the preamble to the proposed accessibility guidelines. In the June 15, 1990 publication, the Department recognized that projects designed in advance of the publication of the final Guidelines, may not become available for first occupancy until after March 13, 1991. To provide some guidance, the Department stated in the June 15, 1990 notice that compliance with the Option One guidelines would be considered as evidence of compliance with the Act, in projects designed before the issuance of the final Guidelines. The Department restated its position on this issue in a supplementary notice published in the Federal Register on August 1, 1990 (55 FR 31131). The specific circumstances under which the Department would consider compliance with the Option One guidelines as compliance with the accessibility requirements of the Act were more fully addressed in the August 1, 1990 notice.

Comment. A number of commenters requested extending the date of issuance of the last building permit from January 13, 1990 to some other date, such as June 15, 1990, the date of publication of the proposed guidelines; August 1, 1990, the date of publication of the supplementary notice; or today's date, the date publication of the final Guidelines.

Response. The date of January 13, 1990 was not randomly selected by the Department. This date was selected because it was fourteen months before the compliance deadline of March 13, 1991. As previously noted in this preamble, fourteen months was found to represent a reasonable median construction time for multifamily housing projects of all sizes, based on data contained in the Marshall Valuation Service. Builders have been on notice since January 23, 1989—the publication date of the final Fair Housing rule, that undertaking construction after January 13, 1990 without adequate attention to accessibility considerations would be at the builder's risk.

Comment. One commenter requested that the applicable building permit be the "primary" building permit for a particular building. Other commenters inquired about the status of building permits that are issued in stages, or about small modifications to building plans during construction which necessitate a reissued building permit.

Response. Following publication of the proposed Fair Housing regulation, and the many comments received at that time from the building industry expressing concern that "actual occupancy" was the only standard for determining "first occupancy", the Department gave careful consideration to the steps and stages involved in the building process. On the basis of this study, the Department determined that an appropriate standard to determine "first occupancy", other than actual occupancy, would be issuance of the last building permit on or before January 13, 1990. This additional standard was added to the final Fair Housing Act regulation. The Department believes that, aside from actual occupancy, issuance of the last building permit remains the appropriate standard.

Compliance Determinations by State and Local Jurisdictions

Comment. A few commenters questioned the role of States and units of local government in determining compliance with the Act's accessibility requirements. The commenters noted that (1) § 100.205(g) encourages States and units of general local government to include, in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with the Act's accessibility requirements; but (2) § 100.205(h) provides that determinations of compliance or noncompliance by a State or a unit of general local government are not conclusive in enforcement proceedings under the Fair Housing Act. These commenters stated that, unless determinations of compliance or

noncompliance by a State or unit of general local government are deemed to be conclusive, local jurisdictions will be discouraged from performing compliance reviews because they will not be able to provide a building permit applicant with a sense of finality that proposed design plans are in compliance with the Act.

Response. Sections 100.205 (g) and (h) of the Fair Housing regulations implement sections 804(f)(5) (B) and (C), and section 804(f)(6)(b) of the Fair Housing Act. The language of §§ 100.205 (g) and (h) is taken directly from these statutory provisions. The Congress, not the Department, made the decision that determinations of compliance or noncompliance with the Act by a State or unit of general local government shall not be conclusive in enforcement proceedings. The Department, however, agrees with the position taken in the statute. The Department believes that it would be inappropriate to accord particular "weight" to determinations made by a wide variety of State and local government agencies involving a new civil rights law, without first having the benefit of some experience reviewing the accuracy of the determinations made by State and local authorities under the Fair Housing Act.

Comment. Two commenters stated that local building departments, especially those in smaller urban areas and in rural areas, do not have the manpower or expert knowledge to assure a proper determination of compliance, particularly in "close call" situations. The commenters recommended that liability for any infractions exclude local building departments unless the Department is willing to provide qualified personnel from its local field office to attend staff reviews of every building permit request.

Response. The Department is reluctant to assume that State and local jurisdictions, by performing compliance reviews, will subject themselves to liability under the Fair Housing Act, particularly in light of section 804(f)(5)(C) of the Act, which encourages States and localities to make reviews for compliance with the statute; and the implicit recognition, under Section 804(f)(6)(B), that these reviews may not be correct.

Comment. With reference to a violation of the Act's requirements, several commenters questioned how violations of the Act would be determined, and what the penalty would be for a violation. The commenters asked whether a builder would be cited, and fined, for each violation per building, or for each violation per unit.

Response. If it is determined that a violation of the Act has occurred, a Federal District Court or an administrative law judge (ALJ) has the authority to award actual damages, including damages for humiliation and emotional distress; punitive damages (in court) or civil penalties (in ALJ proceedings); injunctive relief; attorneys fees (except to the United States); and any other equitable relief that may be considered appropriate. Whether a violation will be found for each violation per building, for each violation per unit, or on any other basis, is properly left to the courts and the ALJs.

Enforcement Mechanisms

In the proposed guidelines, the Department solicited public comment on effective enforcement mechanisms (55 FR 24383–24384). Specifically, the Department requested comment on the effectiveness of: annual surveys to assess the number of projects developed with accessible buildings; recordkeeping requirements; and a "second opinion" by an independent, licensed architect or engineer on the site impracticality issue. The Department stated that comments on these proposals would be considered in connection with forthcoming amendments to the Fair Housing regulation.

The Department appreciates all comments submitted on the proposed enforcement mechanisms, and the suggestions offered on other possible enforcement mechanisms, such as a preconstruction review process, certification by a licensed architect, engineer or other building professional that a project is in compliance with the Act, and certification of local accessibility codes by the Department. All these comments will be considered in connection with future amendments to the Fair Housing Act regulation.

First Occupancy

Comment. A number of commenters requested clarification of the determination of "first occupancy" after March 13, 1991. A few commenters referred to the Act's first occupancy requirement as that of "ready for occupancy" by March 13, 1991.

Response. The phrase "ready for occupancy" does not correctly describe the standard contained in the Fair Housing Act. The Act states that covered multifamily dwellings subject to the Act's accessibility requirements are those that are "for first occupancy" after March 13, 1991. The standard, "first occupancy," is based on actual occupancy of the covered multifamily dwelling, or on issuance of the last building permit, or building permit renewal, on or before January 13, 1990. Where an individual is relying on a claim that a building was actually occupied on March 13, 1991, the Department, in making a determination of reasonable cause, will consider each situation on a case-by-case basis. As long as one dwelling unit in a covered multifamily dwelling is occupied, the one occupied dwelling unit is sufficient to meet the requirements for actual occupancy. However, the question of whether the occupancy was in compliance with State and local law (e.g., pursuant to a local occupancy permit, where one is required) will be a crucial factor in determining whether first occupancy has been achieved.

Comment. Several commenters requested clarification of "first occupancy", with respect to projects involving several buildings, or projects with extended build-out terms, such as planned communities with completion dates 5 to 10 years into the future.

Response. "First occupancy" is determined on a building-by-building basis, *not* on a project-by-project basis. For a project that involves several buildings, one building in the project could be built without reference to the accessibility requirements, while a building constructed next door might have to comply with the Act's requirements. The fact that one or more buildings in a multiple building project were occupied on March 13, 1991 will not be sufficient to afford an exemption from the Act's requirements for other buildings in the same project that are developed at a later time.

Costs of Adaptation

Comment. A few commenters requested clarification on who incurs the cost of making a unit adaptable for a disabled tenant.

Response. All costs associated with incorporating the new design and construction requirements of the Fair Housing Act are borne by the builder. There are, of course, situations where a tenant may need to make modifications to the dwelling unit which are necessary to make the unit accessible for that person's particular type of disability. The tenant would incur the cost of this type of modification—whether or not the dwelling unit is part of a multifamily dwelling exempt from the Act's accessibility requirements. For dwellings subject to the statute's accessibility requirements, the tenant's costs would be limited to those modifications that were not covered by the Act's design and construction requirements. (For example, the tenant would pay for the cost of purchasing

and installing grab bars.) For dwellings not subject to the accessibility requirements, the tenant would pay the cost of all modifications necessary to meet his or her needs. (Using the grab bar example, the tenant would pay both the cost of buying and installing the grab bars and the costs associated with adding bathroom wall reinforcement.)

Section 100.203 of the Fair Housing regulations provides that discrimination includes a refusal to permit, at the expense of a handicapped person, reasonable modifications of existing premises occupied or to be occupied by that person, if modifications are necessary to afford the person full enjoyment of the premises. In the case of a rental, the landlord may reasonably condition permission for a modification on the renter's agreeing to restore the interior of the unit to the condition that existed before its modification—reasonable wear and tear excepted. This regulatory section provides examples of reasonable modifications that a tenant may make to existing premises. The examples include bathroom wall reinforcement. In House Report No. 711, the Congress provided additional examples of reasonable modifications that could be made to existing premises by persons with disabilities:

> For example, persons who have a hearing disability could install a flashing light in order to 'see' that someone is ringing the doorbell. Elderly individuals with severe arthritis may need to replace the doorknobs with lever handles. A person in a wheelchair may need to install fold-back hinges in order to be able to go through a door or may need to build a ramp to enter the unit. Any modifications protected under this section [section 804(f)(3)(A)] must be reasonable and must be made at the expense of the individual with handicaps. (House Report at 25)

Reasonable Modification

Comment. One commenter requested clarification concerning what is meant by "reasonable modification".

Response. What constitutes "reasonable modification" is discussed to some extent in the preceding section, "Costs of Adaptation", and also was discussed extensively in the preambles to both the proposed and final Fair Housing rules. (See 53 FR 45002–45003, 54 FR 3247–3248; 24 CFR Ch. I, Subch. A, App. I at 580–583 (1990).) Additionally, examples of reasonable modifications are provided in 24 CFR 100.203(c).

Scope of Coverage

Comment. A number of comments were received on the issue of which types of dwelling units should be subject to the Act's accessibility requirements, and the number or percentage of dwelling units that must comply with the Act's requirements.

Response. The Department lacks the authority to adopt any of the proposals recommended by the commenters. The type of multifamily dwelling subject to the Fair Housing Act's accessibility requirements, and the number of individual dwelling units that must be made accessible were established by the Congress, not the Department. The Fair Housing Act defines "covered multifamily dwelling" to mean buildings consisting of four or more units if such buildings have one or more elevators; and ground floor units in other buildings consisting of four or more units." (See Section 804(f)(7) of the Act.) The Fair Housing Act requires that covered multifamily dwellings for first occupancy after March 13, 1991 be designed and constructed in accordance with the Act's accessibility requirements. The Act does not permit only a percentage of units in covered multifamily dwellings to be designed in accordance with the Act's requirements, nor does the Department have the authority so to provide by regulation.

VI. Other Matters

Codification of Guidelines. In order to assure the availability of the Guidelines, and the preamble to the Guidelines, to interested persons in the future, the Department has decided to codify both documents. The Guidelines will be codified in the 1991 edition of the Code of Federal Regulations as appendix II to the Fair Housing regulations (i.e., 24 CFR Ch. I, Subch. A, App. II), and the preamble to the Guidelines will be codified as appendix III (i.e., 24 CFR Ch. I, Subch. A, App. III).

Regulatory Impact Analysis. A Preliminary Impact Analysis was published in the **Federal Register** on September 7, 1990 (55 FR 37072–37129). A Final Regulatory Impact Analysis is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Environmental Impact. A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

Executive Order 12606, The Family. The General Counsel, as the Designated Official under Executive Order No. 12606, The Family, has determined that this notice will likely have a significant beneficial impact on family formation, maintenance or well-being. Housing designed in accordance with the Guidelines will offer more housing choices for families with members who have disabilities. Housing designed in accordance with the Guidelines also may be beneficial to families that do not have members with disabilities. For example, accessible building entrances, as required by the Act and implemented by the Guidelines, may benefit parents with children in strollers, and also allow residents and visitors the convenience of using luggage or shopping carts easily. Additionally, with the aging of the population, and the increase in incidence of disability that accompanies aging, significant numbers of people will be able to remain in units designed in accordance with the Guidelines as the aging process advances. Compliance with these Guidelines may also increase the costs of developing a multifamily building, and, thus, may increase the cost of renting or purchasing homes. Such costs could negatively affect families' ability to obtain housing. However, the Department believes that the benefits provided to families by housing that is in compliance with the Fair Housing Amendments Act outweigh the possible increased costs of housing.

Executive Order 12611, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order No. 12611, Federalism, has determined that this notice does not involve the preemption of State law by Federal statute or regulation and does not have federalism implications. The Guidelines only are recommended design specifications, not legal requirements. Accordingly, the Guidelines do not preempt State or local laws that address the same issues covered by the Guidelines.

Dated: February 27, 1991.

Gordon H. Mansfield,

Assistant Secretary for Fair Housing and Equal Opportunity.

Accordingly, the Department adds the Fair Housing Accessibility Guidelines as Appendix II and the text of the preamble to these final guidelines beginning at the heading "Adoption of Final Guidelines" and ending before "VI. Other Matters" as appendix III to 24 CFR, ch. I, subchapter A to read as follows:

Appendix II to Ch. I, subchapter A—Fair Housing Accessibility Guidelines

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U.S. Department of Housing and Urban Development
Office of Fair Housing and Urban Development

Fair Housing Accessibility Guidelines

Design Guidelines for Accessible/Adaptable Dwellings

Issued by the Department of Housing and Urban Development

Contents

Fair Housing Accessibility Guidelines

Section 1. Introduction

Authority

Section 804(f)(5)(C) of the Fair Housing Amendments Act of 1988 directs the Secretary of the Department of Housing and Urban Development to provide technical assistance to States, local governments, and other persons in implementing the accessibility requirements of the Fair Housing Act. These guidelines are issued under this statutory authority.

Purpose

The purpose of these guidelines is to provide technical guidance on designing dwelling units as required by the Fair Housing Amendments Act of 1988 (Fair Housing Act). These guidelines are not mandatory, nor do they prescribe specific requirements which must be met, and which, if not met, would constitute unlawful discrimination under the Fair Housing Act. Builders and developers may choose to depart from these guidelines and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act. These guidelines are intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act.

Scope

These guidelines apply only to the design and construction requirements of 24 CFR 100.205. Compliance with these guidelines do not relieve persons participating in a Federal or Federally-assisted program or activity from other requirements, such as those required by section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and the Architectural Barriers Act of 1968 (42 U.S.C. 4151-4157). Accessible design requirements for Section 504 are found at 24 CFR Part 8. Accessible design requirements for the Architectural Barriers Act are found at 24 CFR Part 40.

Organization of Guidelines

The design guidelines are incorporated in Section 5 of this document. Each guideline cites the appropriate paragraph of HUD's regulation at 24 CFR 100.205; quotes from the regulation to identify the required design features, and states recommended specifications for each design feature.

Generally, these guidelines rely on the American National Standards Institute (ANSI) A117.1-1986, American National Standard for Buildings and Facilities--Providing Accessibility and Usability for Physically Handicapped People (ANSI Standard). Where the guidelines rely on sections of the ANSI Standard, the ANSI sections are cited. Only those sections of the ANSI Standard cited in the guidelines are recommended for compliance with 24 CFR 100.205. For those guidelines that differ from the ANSI Standard, recommended specifications are provided. The texts of cited ANSI sections are not reproduced in the guidelines. The complete text of the 1986 version of the ANSI A117.1 Standard may be purchased from the American National Standards Institute, 1430 Broadway, New York, NY 10018.

Section 2. Definitions

As used in these Guidelines:

"Accessible", when used with respect to the public and common use areas of a building containing covered multifamily dwellings, means that the public or common use areas of the building can be approached, entered, and used by individuals with physical handicaps. The phrase "readily accessible to and usable by" is synonymous with accessible. A public or common use area that complies with the appropriate requirements of ANSI A117.1-1986, a comparable standard or these guidelines is "accessible" within the meaning of this paragraph.

"Accessible route" means a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair, and that is also safe for and usable by people with other disabilities. Interior accessible routes may include corridors, floors, ramps, elevators and lifts. Exterior accessible routes may include parking access aisles, curb ramps, walks, ramps and lifts. A route that complies with the appropriate requirements of ANSI A117.1-1986, a comparable standard, or Section 5, Requirement 1 of these guidelines is an "accessible route". In the circumstances described in Section 5, Requirements 1 and 2, "accessible route" may include access via a vehicular route.

"Adaptable dwelling units", when used with respect to covered multifamily dwellings, means dwelling units that include the features of adaptable design specified in 24 CFR 100.205(c)(2)-(3).

"ANSI A117.1-1986" means the 1986 edition of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people.

"Assistive device" means an aid, tool, or instrument used by a person with disabilities to assist in activities of daily living. Examples of assistive devices include tongs, knob-turners, and oven-rack pusher/pullers.

"Bathroom" means a bathroom which includes a water closet (toilet), lavatory (sink), and bathtub or shower. It does not include single-fixture facilities or those with only a water closet and lavatory. It does include a compartmented bathroom. A

compartmented bathroom is one in which the fixtures are distributed among interconnected rooms. A compartmented bathroom is considered a single unit and is subject to the Act's requirements for bathrooms.

"Building" means a structure, facility or portion thereof that contains or serves one or more dwelling units.

"Building entrance on an accessible route" means an accessible entrance to a building that is connected by an accessible route to public transportation stops, to parking or passenger loading zones, or to public streets or sidewalks, if available. A building entrance that complies with ANSI A117.1-1986 (see Section 5, Requirement 1 of these guidelines) or a comparable standard complies with the requirements of this paragraph.

"Clear" means unobstructed.

"Common use areas" means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings. See Section 5, Requirement 2 of these guidelines.

"Controlled substance" means any drug or other substance, or immediate precursor included in the definition in Section 102 of the Controlled Substances Act (21 U.S.C. 802).

"Covered multifamily dwellings" or "covered multifamily dwellings subject to the Fair Housing Amendments" means buildings consisting of four or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of four or more dwelling units. Dwelling units within a single structure separated by firewalls do not constitute separate buildings.

"Dwelling unit" means a single unit of residence for a household of one or more persons. Examples of dwelling units covered by these guidelines include: condominiums; an apartment unit within an apartment building; and other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling. Examples of the latter include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.

"Entrance" means any exterior access point to a building or portion of a building used by residents for the purpose of entering. For purposes of these guidelines, an "entrance" does not include a door to a loading dock or a door used primarily as a service entrance, even if nonhandicapped residents occasionally use that door to enter.

"Finished grade" means the ground surface of the site after all construction, levelling, grading, and development has been completed.

"Ground floor" means a floor of a building with a building entrance on an accessible route. A building may have one or more ground floors. Where the first floor containing dwelling units in a building is above grade, all units on that floor must be served by a building entrance on an accessible route. This floor will be considered to be a ground floor.

"Handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of these guidelines, an individual shall not be considered to have a handicap solely because that individual is a transvestite.

As used in this definition:

(a) "Physical or mental impairment" includes:
  (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
  (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism. These guidelines are designed to make units accessible or adaptable for people with physical handicaps.

(b) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(c) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) "Is regarded as having an impairment" means:
  (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;
  (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment; or
  (3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

"Loft" means an intermediate level between the floor and ceiling of any story, located within a room or rooms of a dwelling.

"Multistory dwelling unit" means a dwelling unit with finished living space located on one floor and the floor or floors immediately above or below it.

"Public use areas" means interior or exterior rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

"Single-story dwelling unit" means a dwelling unit with all finished living space located on one floor.

"Site" means a parcel of land bounded by a property line or a designated portion of a public right of way.

"Slope" means the relative steepness of the land between two points and is calculated as follows: The distance and elevation between the two points (e.g., an entrance and a passenger loading zone) are determined from a topographical map. The difference in elevation is divided by the distance and that fraction is multiplied by 100 to obtain a percentage slope figure. For example, if a principal entrance is ten feet from a passenger loading zone, and the principal entrance is raised one foot higher than the passenger loading zone, then the slope is $1/10 \times 100 = 10\%$.

"Story" means that portion of a dwelling unit between the upper surface of any floor and the upper surface of the floor next above, or the roof of the unit. Within the context of dwelling units, the terms "story" and "floor" are synonymous.

"Undisturbed site" means the site before any construction, levelling, grading, or development associated with the current project.

"Vehicular or pedestrian arrival points" means public or resident parking areas, public transportation stops, passenger loading zones, and public streets or sidewalks.

"Vehicular route" means a route intended for vehicular traffic, such as a street, driveway or parking lot.

Section 3. Fair Housing Act Design and Construction Requirements

The regulations issued by the Department at 24 CFR 100.205 state:

§ 100.205 Design and construction requirements.

(a) Covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. For purposes of this section, a covered multifamily dwelling shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991 if they are occupied by that date or if the last building permit or renewal thereof for the covered multifamily dwellings is issued by a State, County or local government on or before January 13, 1990. The burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A real estate developer plans to construct six covered multifamily dwelling units on a site with a hilly terrain. Because of the terrain, it will be necessary to climb a long and steep stairway in order to enter the dwellings. Since there is no practical way to provide an accessible route to any of the dwellings, one need not be provided.

Example (2): A real estate developer plans to construct a building consisting of 10 units of multifamily housing on a waterfront site that floods frequently. Because of this unusual characteristic of the site, the builder plans to construct the building on stilts. It is customary for housing in the geographic area where the site is located to be built on stilts. The housing may lawfully be constructed on the proposed site on stilts even though this means that there will be no practical way to provide an accessible route to the building entrance.

Example (3): A real estate developer plans to construct a multifamily housing facility on a particular site. The developer would like the facility to be built on the site to contain as many units as possible. Because of the configuration and terrain of the site, it is possible to construct a building with 105 units on the site provided the site does not have an accessible route leading to the building entrance. It is also possible to construct a building on the site with an accessible route leading to the building entrance. However, such a building would have no more than 100 dwelling units. The building to be constructed on the site must have a building entrance on an accessible route because it is not impractical to provide such an entrance because of the terrain or unusual characteristics of the site.

(c) All covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route shall be designed and constructed in such a manner that—

(1) The public and common use areas are readily accessible to and usable by handicapped persons;

(2) All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(3) All premises within covered multifamily dwelling units contain the following features of adaptable design:

(i) An accessible route into and through the covered dwelling unit;

(ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower, stall and shower seat, where such facilities are provided; and

(iv) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(d) The application of paragraph (c) of this section may be illustrated by the following examples:

Example (1): A developer plans to construct a 100 unit condominium apartment building with one elevator. In accordance with paragraph (a), the building has at least one accessible route leading to an accessible entrance. All 100 units are covered multifamily dwelling units and they all must be designed and constructed so that they comply with the accessibility requirements of paragraph (c) of this section.

Example (2): A developer plans to construct 30 garden apartments in a three story building. The building will not have an elevator. The building will have one accessible entrance which will be on the first floor. Since the building does not have an elevator, only the "ground floor" units are covered multifamily units. The "ground floor" is the first floor because that is the floor that has an accessible entrance. All of the dwelling units on the first floor must meet the accessibility requirements of paragraph (c) of this section and must have access to at least one of each type of public or common use area available for residents in the building.

(e) Compliance with the appropriate requirements of ANSI A117.1–1986 suffices to satisfy the requirements of paragraph (c)(3) of this section.

(f) Compliance with a duly enacted law of a State or unit of general local government that includes the requirements of paragraphs (a) and (c) of this section satisfies the requirements of paragraphs (a) and (c) of this section.

(g)(1) It is the policy of HUD to encourage States and units of general local government to include, in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraphs (a) and (c) of this section.

(2) A State or unit of general local government may review and approve newly constructed multifamily dwellings for the purpose of making determinations as to whether the requirements of paragraphs (a) and (c) of this section are met.

(h) Determinations of compliance or noncompliance by a State or a unit of general local government under paragraph (f) or (g) of this section are not conclusive in enforcement proceedings under the Fair Housing Amendments Act.

(i) This subpart does not invalidate or limit any law of a State or political subdivision of a State that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subpart.

Section 4. Application of the Guidelines

The design specifications (guidelines) presented in Section 5 apply to new construction of "covered multifamily dwellings", as defined in Section 2. These guidelines are recommended for designing dwellings that comply with the requirements of the Fair Housing Amendments Act of 1988.

Section 5. Guidelines

Requirement 1. Accessible building entrance on an accessible route.

Under section 100.205(a), covered multifamily dwellings shall be designed and constructed to have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual characteristics of the site.

Guideline

(1) Building entrance. Each building on a site shall have at least one building entrance on an accessible route unless prohibited by the terrain, as provided in paragraphs (2)(a)(i) or (2)(a)(ii), or unusual characteristics of the site, as provided in paragraph (2)(b). This guideline applies both to a single building on a site and to multiple buildings on a site.

(a) Separate ground floor unit entrances. When a ground floor unit of a building has a separate entrance, each such ground floor unit shall be served by an accessible route, except for any unit where the terrain or unusual characteristics of the site prohibit the provision of an accessible route to the entrance of that unit.

(b) Multiple entrances. Only one entrance is required to be accessible to any one ground floor of a building, except in cases where an individual dwelling unit has a separate exterior entrance, or where the building contains clusters of dwelling units, with each cluster sharing a different exterior entrance. In these cases, more than one entrance may be required to be accessible, as determined by analysis of the site. In every case, the accessible entrance should be on an accessible route to the covered dwelling units it serves.

(2) Site impracticality. Covered multifamily dwellings with elevators shall be designed and constructed to provide at least one accessible entrance on an accessible route, regardless of terrain or unusual characteristics of the site. Covered multifamily dwellings without elevators shall be designed and constructed to provide at least one accessible entrance on an accessible route unless terrain or unusual characteristics of the site are such that the following conditions are found to exist:

(a) Site impracticality due to terrain. There are two alternative tests for determining site impracticality due to terrain: the individual building test provided in paragraph (i), or the site analysis test provided in paragraph (ii). These tests may be used as follows.

A site with a single building having a common entrance for all units may be analyzed only as described in paragraph (i).

All other sites, including a site with a single building having multiple entrances serving either individual dwelling units or clusters of dwelling units, may be analyzed using the methodology in either paragraph (i) or paragraph (ii). For these sites for which either test is applicable, regardless of which test is selected, at least 20% of the total ground floor units in nonelevator buildings, on any site, must comply with the guidelines.

(i) Individual building test. It is impractical to provide an accessible entrance served by an accessible route when the terrain of the site is such that:

(A) the slopes of the undisturbed site measured between the planned entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance exceed 10 percent; and

(B) the slopes of the planned finished grade measured between the entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance also exceed 10 percent.

If there are no vehicular or pedestrian arrival points within 50 feet of the planned entrance, the slope for the purposes of this paragraph (i) will be measured to the closest vehicular or pedestrian arrival point.

For purposes of these guidelines, vehicular or pedestrian arrival points include public or resident parking areas; public transportation stops; passenger loading zones; and public streets or sidewalks. To determine site impracticality, the slope would be measured at ground level from the point of the planned entrance on a straight line to (i) each vehicular or pedestrian arrival point that is within 50 feet of the planned entrance, or (ii) if there are no vehicular or pedestrian arrival points within that specified area, the vehicular or pedestrian arrival point closest to the planned entrance. In the case of sidewalks, the closest point to the entrance will be where a public sidewalk entering the site intersects with the sidewalk to the entrance. In the case of resident parking areas, the closest point to the planned entrance will be measured from the entry point to the parking area that is located closest to the planned entrance.

(ii) Site analysis test. Alternatively, for a site having multiple buildings, or a site with a single building with multiple entrances, impracticality of providing

an accessible entrance served by an accessible route can be established by the following steps:

(A) The percentage of the total buildable area of the undisturbed site with a natural grade less than 10% slope shall be calculated. The analysis of the existing slope (before grading) shall be done on a topographic survey with two foot (2') contour intervals with slope determination made between each successive interval. The accuracy of the slope analysis shall be certified by a professional licensed engineer, landscape architect, architect or surveyor.

(B) To determine the practicality of providing accessibility to planned multifamily dwellings based on the topography of the existing natural terrain, the minimum percentage of ground floor units to be made accessible should equal the percentage of the total buildable area (not including floodplains, wetlands, or other restricted use areas) of the undisturbed site that has an existing natural grade of less than 10% slope.

(C) In addition to the percentage established in paragraph (B), all ground floor units in a building, or ground floor units served by a particular entrance, shall be made accessible if the entrance to the units is on an accessible route, defined as a walkway with a slope between the planned entrance and a pedestrian or vehicular arrival point that is no greater than 8.33%

(b) Site impracticality due to unusual characteristics. Unusual characteristics include sites located in a federally-designated floodplain or coastal high-hazard area and sites subject to other similar requirements of law or code that the lowest floor or the lowest structural member of the lowest floor must be raised to a specified level at or above the base flood elevation. An accessible route to a building entrance is impractical due to unusual characteristics of the site when:

(i) the unusual site characteristics result in a difference in finished grade elevation exceeding 30 inches and 10 percent measured between an entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance; or

(ii) if there are no vehicular or pedestrian arrival points within 50 feet of the planned entrance, the unusual characteristics result in a difference in finished grade elevation exceeding 30 inches and 10 percent measured between an entrance and the closest vehicular or pedestrian arrival point.

(3) Exceptions to site impracticality . Regardless of site considerations described in paragraphs (1) and (2), an accessible entrance on an accessible route is practical when:

(a) There is an elevator connecting the parking area with the dwelling units on a ground floor. (In this case, those dwelling units on the ground floor served by an elevator, and at least one of each type of public and common use areas, would be subject to these guidelines.) However:

(i) Where a building elevator is provided only as a means of creating an accessible route to dwelling units on a ground floor, the building is not considered an elevator building for purposes of these guidelines; hence, only the ground floor dwelling units would be covered.

(ii) If the building elevator is provided as a means of access to dwelling units other than dwelling units on a ground floor, then the building is an elevator building which is a covered multifamily dwelling, and the elevator in that building must provide accessibility to all dwelling units in the building, regardless of the slope of the natural terrain; or

(b) An elevated walkway is planned between a building entrance and a vehicular or pedestrian arrival point and the planned walkway has a slope no greater than 10 percent.

(4) Accessible entrance. An entrance that complies with ANSI 4.14 meets section 100.205(a).

(5) Accessible route. An accessible route that complies with ANSI 4.3 would meet section 100.205(a). If the slope of the finished grade between covered multifamily dwellings and a public or common use facility (including parking) exceeds 8.33%, or where other physical barriers (natural or manmade) or legal restrictions, all of which are outside the control of the owner, prevent the installation of an accessible pedestrian route, an acceptable alternative is to provide access via a vehicular route, so long as necessary site provisions such as parking spaces and curb ramps are provided at the public or common use facility.

Requirement 2. Accessible and usable public and common use areas.

Section 100.205(c)(1) provides that covered multifamily dwellings with a building entrance on an accessible route shall be designed in such a manner that the public and common use areas are readily accessible to and usable by handicapped persons.

Guideline

The following chart identifies the public and common use areas that should be made accessible, cites the appropriate section of the ANSI Standard, and describes the appropriate application of the specifications, including modifications to the referenced Standard.

BASIC COMPONENTS FOR ACCESSIBLE AND USABLE PUBLIC AND COMMON USE AREAS OR FACILITIES

Accessible element or space	ANSI A117.1 section	Application
1. Accessible route(s)	4.3	Within the boundary of the site: (a) From public transportation stops, accessible parking spaces, accessible passenger loading zones, and public streets or sidewalks to accessible building entrances (subject to site considerations described in section 5). (b) Connecting accessible buildings, facilities, elements and spaces that are on the same site. On-grade walks or paths between separate buildings with covered multifamily dwellings, while not required, should be accessible unless the slope of finish grade exceeds 8.33% at any point along the route. Handrails are not required on these accessible walks. (c) Connecting accessible building or facility entrances with accessible spaces and elements within the building or facility, including adaptable dwelling units. (d) Where site or legal constraints prevent a route accessible to wheelchair users between covered multifamily dwellings and public or common-use facilities elsewhere on the site, an acceptable alternative is the provision of access via a vehicular route so long as there is accessible parking on an accessible route to at least 2% of covered dwelling units, and necessary site provisions such as parking and curb cuts are available at the public or common use facility.
2. Protruding objects	4.4	Accessible routes or maneuvering space including, but not limited to halls, corridors, passageways, or aisles.
3. Ground and floor surface treatments	4.5	Accessible routes, rooms, and spaces, including floors, walks, ramps, stairs, and curb ramps.
4. Parking and passenger-loading zones	4.6	If provided at the site, designated accessible parking at the dwelling unit on request of residents with handicaps, on the same terms and with the full range of choices (e.g., surface parking or garage) that are provided for other residents of the project, with accessible parking on a route accessible to wheelchairs for at least 2% of the covered dwelling units, accessible visitor parking sufficient to provide access to grade-level entrances of covered multifamily dwellings, and accessible parking at facilities (e.g., swimming pools) that serve accessible buildings.
5. Curb ramps	4.7	Accessible routes crossing curbs.
6. Ramps	4.8	Accessible routes with slopes greater than 1:20.
7 Stairs	4.9	Stairs on accessible routes connecting levels not connected by an elevator
8. Elevator	4.10	If provided.
9. Platform lift	4.11	May be used in lieu of an elevator or ramp under certain conditions.
10 Drinking fountains and water coolers	4.15	Fifty percent of fountains and coolers on each floor, or at least one, if provided in the facility or at the site.
11 Toilet rooms and bathing facilities (including water closets, toilet rooms and stalls, urinals, lavatories and mirrors, bathtubs, shower stalls, and sinks.)	4.22	Where provided in public-use and common-use facilities, at least one of each fixture provided per room.
12 Seating, tables, or work surfaces	4.30	If provided in accessible spaces, at least one of each type provided.
13. Places of assembly	4.31	If provided in the facility or at the site.
14 Common-use spaces and facilities (including swimming pools, playgrounds, entrances, rental offices, lobbies, elevators, mailbox areas, lounges, halls and corridors, and the like.)	4.1 through 4.30	If provided in the facility or at the site: (a) Where multiple recreational facilities (e.g., tennis courts) are provided sufficient accessible facilities of each type to assure equitable opportunity for use by persons with handicaps. (b) Where practical, access to all or a portion of nature trails and jogging paths.
15. Laundry rooms	4.32.6	If provided in the facility or at the site, at least one of each type of appliance provided in each laundry area, except that laundry rooms serving covered multifamily dwellings would not be required to have front-loading washers in order to meet the requirements of § 100.205(c)(1). (Where front loading washers are not provided, management will be expected to provide assistive devices on request if necessary to permit a resident to use a top loading washer.)

Requirement 3. Usable doors.

Section 100.205(c)(2) provides that covered multifamily dwellings with a building entrance on an accessible route shall be designed in such a manner that all the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs.

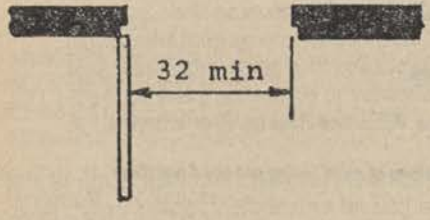
Guideline

Section 100.205(c)(2) would apply to doors that are a part of an accessible route in the public and common use areas of multifamily dwellings and to doors into and within individual dwelling units.

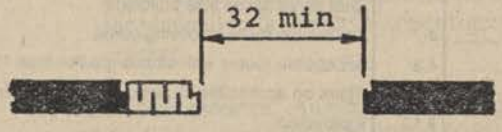
(1) On accessible routes in public and common use areas, and for primary entry doors to covered units, doors that comply with ANSI 4.13 would meet this requirement.

(2) Within individual dwelling units, doors intended for user passage through the unit which have a clear opening of at least 32 inches nominal width when the door is open 90 degrees, measured between the face of the door and the stop, would meet this requirement. (See Fig. 1 (a), (b), and (c).) Openings more than 24 inches in depth are not considered doorways. (See Fig. 1 (d).)

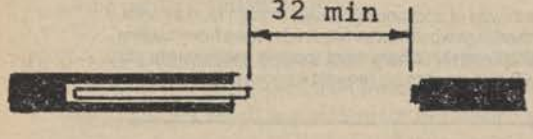
Note:
A 34-inch door, hung in the standard manner, provides an acceptable nominal 32-inch clear opening. This door can be adapted to provide a wider opening by using offset hinges, by removing lower portions of the door stop, or both. Pocket or sliding doors are acceptable doors in covered dwelling units and have the added advantage of not impinging on clear floor space in small rooms. The nominal 32-inch clear opening provided by a standard six-foot sliding patio door assembly is acceptable.



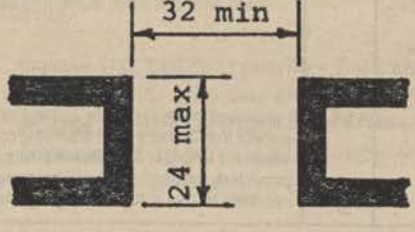
(a) Hinged Door



(b) Folding Door



(c) Sliding Door



(d) Maximum Doorway Depth

Fig. 1 Clear Doorway Width and Depth

Requirement 4. Accessible route into and through the covered dwelling unit.

Section 100.205(c)(3)(i) provides that all covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain an accessible route into and through the covered dwelling unit.

Guideline

Accessible routes into and through dwelling units would meet section 100.205(c)(3)(i) if:

(1) A minimum clear width of 36 inches is provided.

(2) In single-story dwelling units, changes in level within the dwelling unit with heights between 1/4 inch and 1/2 inch are beveled with a slope no greater than 1:2. Except for design features, such as a loft or an area on a different level within a room (e.g., a sunken living room), changes in level greater than 1/2 inch are ramped or have other means of access. Where a single story dwelling unit has special design features, all portions of the single-story unit, except the loft or the sunken or raised area, are on an accessible route; and

(a) In single-story dwelling units with lofts, all spaces other than the loft are on an accessible route.

(b) Design features such as sunken or raised functional areas do not interrupt the accessible route through the remainder of the dwelling unit.

(3) In multistory dwelling units in buildings with elevators, the story of the unit that is served by the building elevator (a) is the primary entry to the unit, (b) complies with Requirements 2 through 7 with respect to the rooms located on the entry/accessible floor; and (c) contains a bathroom or powder room which complies with Requirement 7. (Note: multistory dwelling units in non-elevator buildings are not covered dwelling units because, in such cases, there is no ground floor unit.)

(4) Except as provided in paragraphs (5) and (6) below, thresholds at exterior doors, including sliding door tracks, are no higher than 3/4 inch. Thresholds and changes in level at these locations are beveled with a slope no greater than 1:2.

(5) Exterior deck, patio, or balcony surfaces are no more than 1/2 inch below the floor level of the interior of the dwelling unit, unless they are constructed of impervious material such as concrete, brick or flagstone. In such case, the surface is no more than 4 inches below the floor level of the interior of the dwelling unit, or lower if required by local building code.

(6) At the primary entry door to dwelling units with direct exterior access, outside landing surfaces constructed of impervious materials such as concrete, brick or flagstone, are no more than 1/2 inch below the floor level of the interior of the dwelling unit. The finished surface of this area that is located immediately outside the entry may be sloped, up to 1/8 inch per foot (12 inches), for drainage.

Requirement 5. Light switches, electrical outlets, thermostats and other environmental controls in accessible locations.

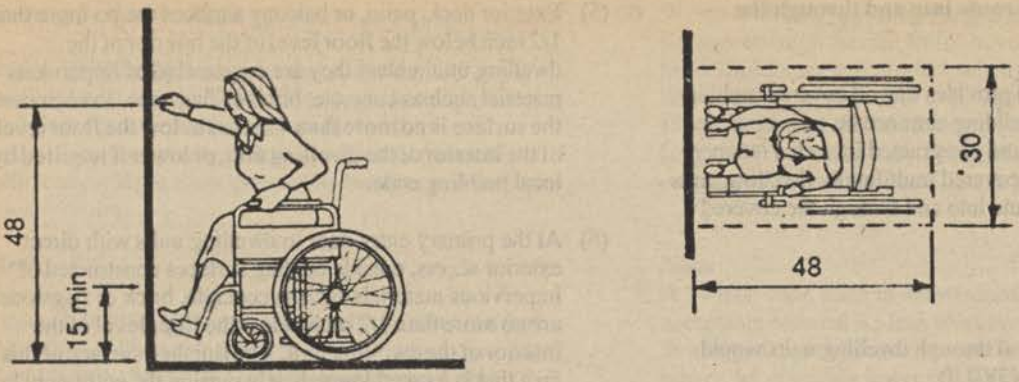
Section 100.205(c)(3)(ii) requires that all covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain light switches, electrical outlets, thermostats, and other environmental controls in accessible locations.

Guideline

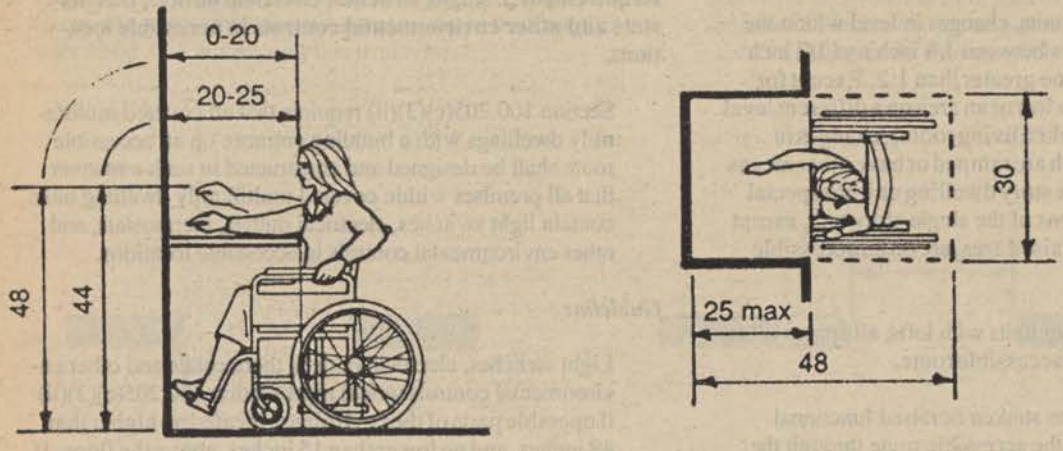
Light switches, electrical outlets, thermostats and other environmental controls would meet section 100.205(c)(3)(ii) if operable parts of the controls are located no higher than 48 inches, and no lower than 15 inches, above the floor. If the reach is over an obstruction (for example, an overhanging shelf) between 20 and 25 inches in depth, the maximum height is reduced to 44 inches for forward approach; or 46 inches for side approach, provided the obstruction (for example, a kitchen base cabinet) is no more than 24 inches in depth. Obstructions should not extend more than 25 inches from the wall beneath a control. (See Fig.2.)

Note

Controls or outlets that do not satisfy these specifications are acceptable provided that comparable controls or outlets (i.e., that perform the same functions) are provided within the same area and are accessible, in accordance with this guideline for Requirement 5.

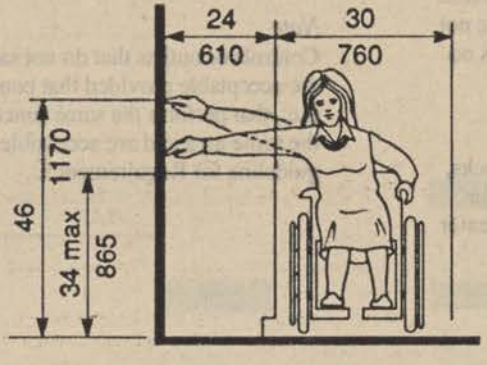


(a) Forward Reach Limit



NOTE: Clear knee space should be as deep as the reach distance.

(b) Maximum Forward Reach Over an Obstruction



(c) Maximum Side Reach Over Obstruction

Fig. 2 Reach Ranges

Requirement 6. Reinforced walls for grab bars.

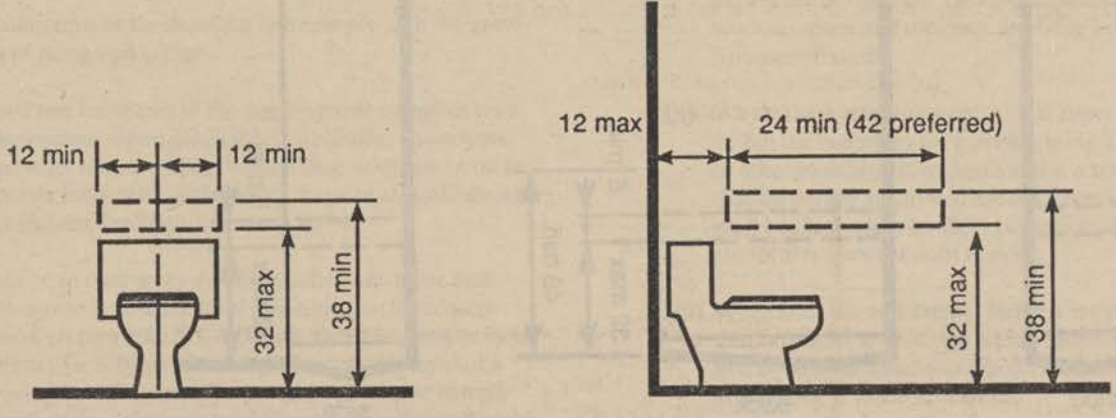
Section 100.205(c)(3)(iii) requires that covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain reinforcements in bathroom walls to allow later installation of grab bars around toilet, tub, shower stall and shower seat, where such facilities are provided.

Guideline

Reinforced bathroom walls to allow later installation of grab bars around the toilet, tub, shower stall and shower seat, where such facilities are provided, would meet section 100.205(c)(3)(iii) if reinforced areas are provided at least at those points where grab bars will be mounted. (For example, see Figs. 3, 4 and 5.) Where the toilet is not placed adjacent to a side wall, the bathroom would comply if provision was made for installation of floor mounted, foldaway or similar alternative grab bars. Where the powder room (a room with a toilet and sink) is the only toilet facility located on an accessible level of a multistory dwelling unit, it must comply with this requirement for reinforced walls for grab bars.

Note:
Installation of bathtubs is not limited by the illustrative figures; a tub may have shelves or benches at either end; or a tub may be installed without surrounding walls, if there is provision for alternative mounting of grab bars. For example, a sunken tub placed away from walls could have reinforced areas for installation of floor-mounted grab bars. The same principle applies to shower stalls -- e.g., glass-walled stalls could be planned to allow floor-mounted grab bars to be installed later.

Reinforcement for grab bars may be provided in a variety of ways (for example, by plywood or wood blocking) so long as the necessary reinforcement is placed so as to permit later installation of appropriate grab bars.



Reinforced Areas for Installation of Grab Bars

Fig. 3 Water Closets in Adaptable Bathrooms

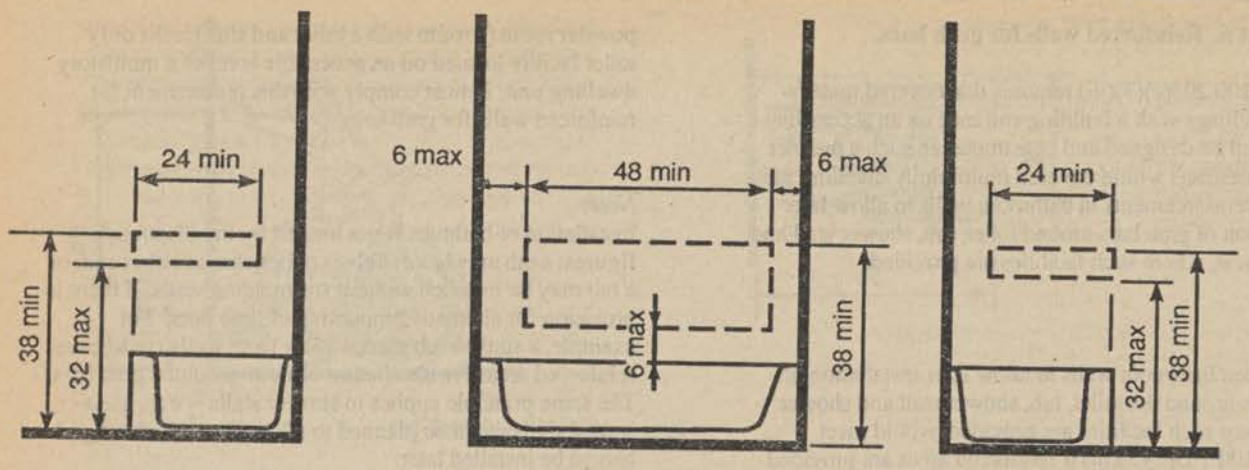


Fig. 4 Location of Grab Bar Reinforcements for Adaptable Bathtubs

NOTE: The areas outlined in dashed lines represent locations for future installation of grab bars for typical fixture configurations.

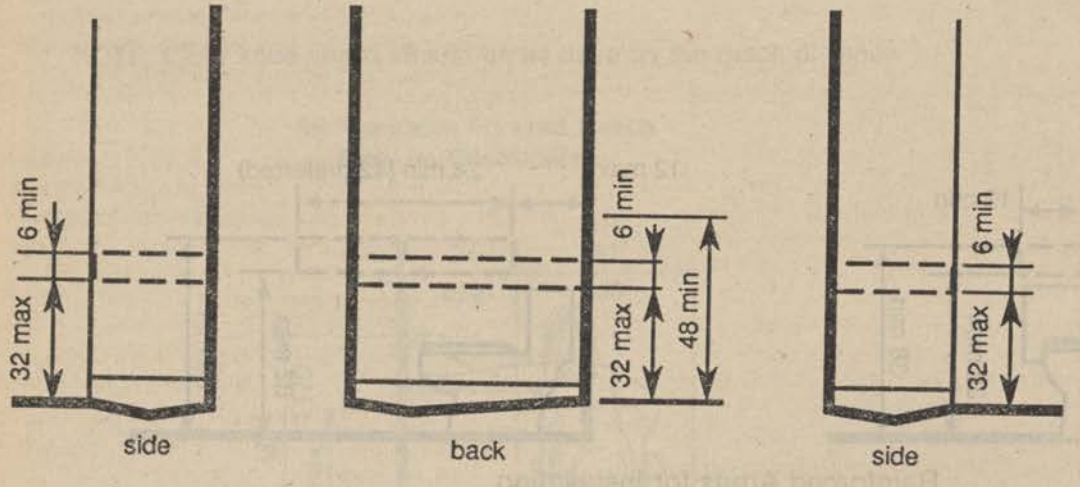


Fig. 5 Location of Grab Bar Reinforcements for Adaptable Showers

NOTE: The areas outlined in dashed lines represent locations for future installation of grab bars.

Requirement 7. Usable kitchens and bathrooms.

Section 100.205(c)(3)(iv) requires that covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Guideline

(1) Usable kitchens. Usable kitchens would meet section 100.205(c)(3)(iv) if:

(a) A clear floor space at least 30 inches by 48 inches that allows a parallel approach by a person in a wheelchair is provided at the range or cooktop and sink, and either a parallel or forward approach is provided at oven, dish washer, refrigerator/freezer or trash compactor. (See Fig. 6)

(b) Clearance between counters and all opposing base cabinets, countertops, appliances or walls is at least 40 inches.

(c) In U-shaped kitchens with sink or range or cooktop at the base of the "U", a 60-inch turning radius is provided to allow parallel approach, or base cabinets are removable at that location to allow knee space for a forward approach.

(2) Usable bathrooms. To meet the requirements of section 100.205(c)(3)(iv) either:

All bathrooms in the dwelling unit comply with the provisions of paragraph (a); or

At least one bathroom in the dwelling unit complies with the provisions of paragraph (b), and all other bathrooms and powder rooms within the dwelling unit must be on an accessible route with usable entry doors in accordance with the guidelines for Requirements 3 and 4.

However, in multistory dwelling units, only those bathrooms on the accessible level are subject to the requirements of section 100.205(c)(3)(iv). Where a powder room is the only facility provided on the accessible level of a multistory dwelling unit, the powder room must comply with provisions of paragraph (a) or paragraph (b). Powder rooms that are subject to the requirements of section 100.205(c)(3)(iv) must have reinforcements for grab bars as provided in the guideline for Requirement 6.

(a) Bathrooms that have reinforced walls for grab bars (see Requirement 6) would meet section 100.205(c)(3)(iv) if:

(i) Sufficient maneuvering space is provided within the bathroom for a person using a wheelchair or other mobility aid to enter and close the door, use the fixtures, reopen the door and exit. Doors may swing into the clear floor space provided at any fixture if the maneuvering space is provided. Maneuvering spaces may include any kneespace or toespace available below bathroom fixtures.

(ii) Clear floor space is provided at fixtures as shown in Fig. 7 (a), (b), (c) and (d). Clear floor space at fixtures may overlap.

(iii) If the shower stall is the only bathing facility provided in the covered dwelling unit, the shower stall measures at least 36 inches x 36 inches.

Note:
Cabinets under lavatories are acceptable provided the bathroom has space to allow a parallel approach by a person in a wheelchair; if parallel approach is not possible within the space, any cabinets provided would have to be removable to afford the necessary knee clearance for forward approach.

(b) Bathrooms that have reinforced walls for grab bars (see Requirement 6) would meet section 100.205(c)(3)(iv) if:

(i) Where the door swings into the bathroom, there is a clear space (approximately, 2' 6" by 4'0") within the room to position a wheelchair or other mobility aid clear of the path of the door as it is closed and to permit use of fixtures. This clear space can include any kneespace and toespace available below bathroom fixtures.

(ii) Where the door swings out, a clear space is provided within the bathroom for a person using a wheelchair or other mobility aid to position the wheelchair such that the person is allowed use of fixtures. There also shall be clear space to allow persons using wheelchairs to reopen the door to exit.

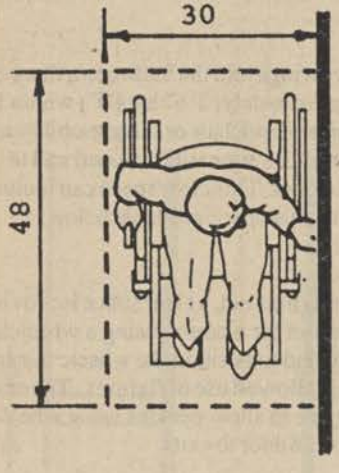
(iii) When both tub and shower fixtures are provided in the bathroom, at least one is made accessible. When two or more lavatories in a bathroom are provided, at least one is made accessible.

(iv) Toilets are located within bathrooms in a manner that permit a grab bar to be installed on one side of the fixture. In locations where toilets are adjacent to walls or bathtubs, the center line of the fixture is a minimum of 1'6" from the obstacle. The other (non-grab bar) side of the toilet fixture is a minimum of 1'3" from the finished surface of adjoining walls, vanities or from the edge of a lavatory. (See Figure 7(a).)

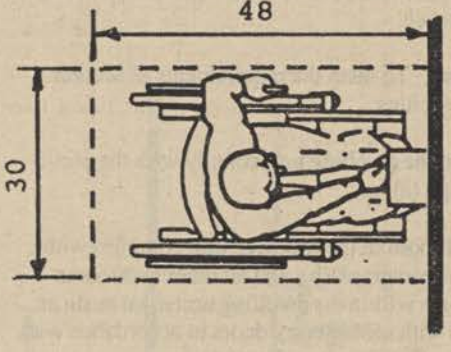
(v) Vanities and lavatories are installed with the centerline of the fixture a minimum of 1'3" horizontally from an adjoining wall or fixture. The top of the fixture rim is a maximum height of 2'10" above the finished floor. If kneespace is provided below the vanity, the bottom of the apron is at least 2'3" above the floor. If provided, full kneespace (for front approach) is at least 1'5" deep. (See Figure 7(c).)

(vi) Bathtubs and tub/showers located in the bathroom provide a clear access aisle adjacent to the lavatory that is at least 2'6" wide and extends for a length of 4'0" (measured from the head of the bathtub). (See Figure 8.)

(vii) Stall showers in the bathroom may be of any size or configuration. A minimum clear floor space 2'6" wide by 4'0" should be available outside the stall. (See Figure 7(d).) If the shower stall is the only bathing facility provided in the covered dwelling unit, or on the accessible level of a covered multistory unit, and measures a nominal 36 x 36 or smaller, the shower stall must have reinforcing to allow for installation of an optional wall hung bench seat.

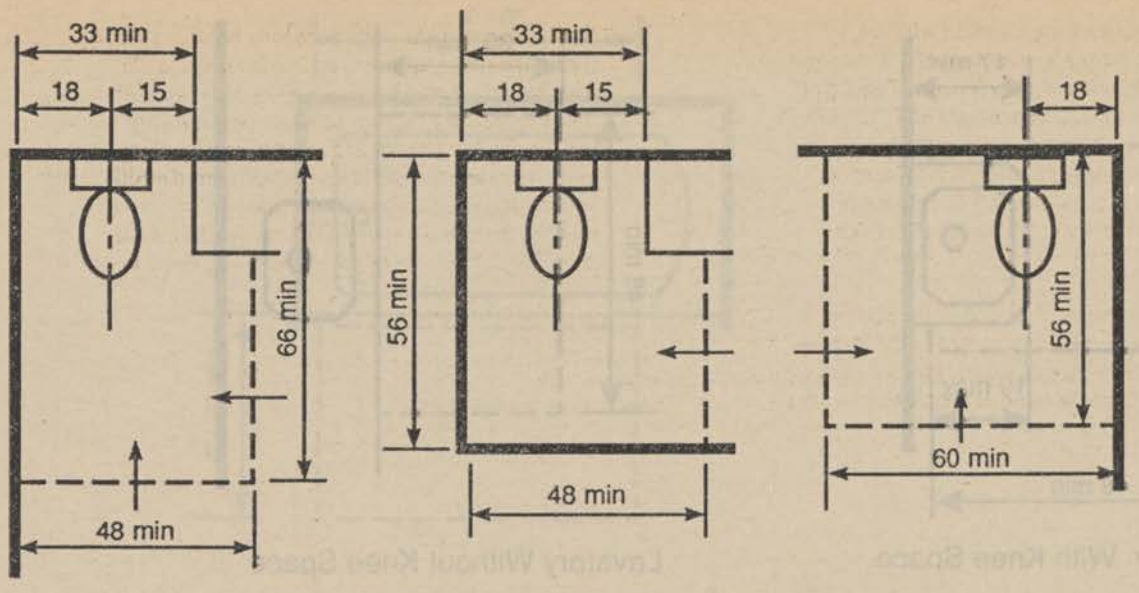


(a) Parallel Approach

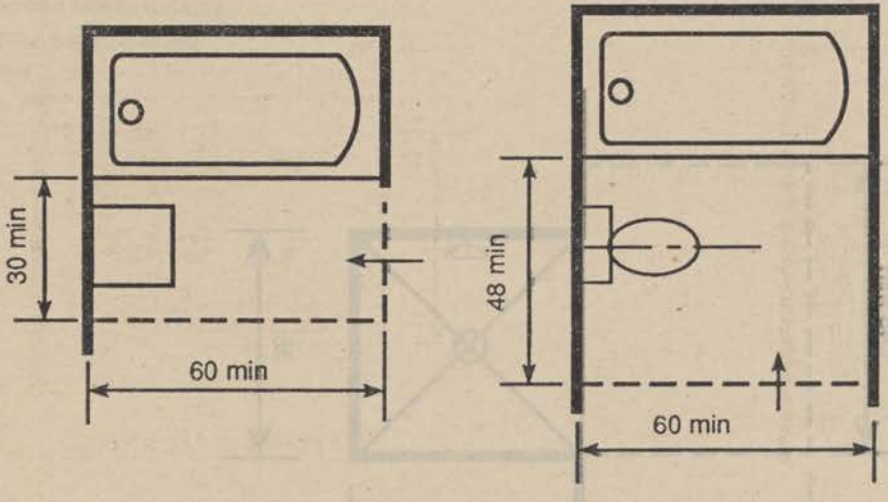


(b) Forward Approach

Fig. 6 Minimum Clear Floor Space for Wheelchairs

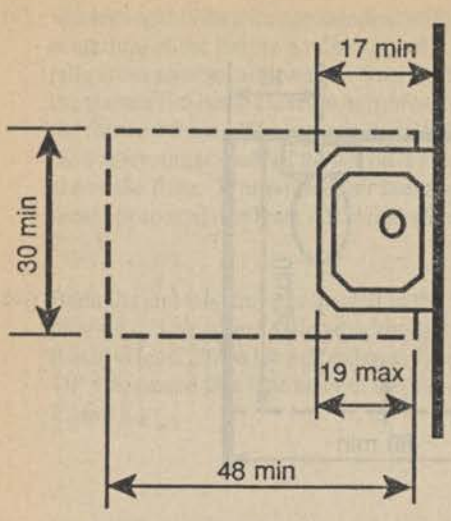


(a) Clear Floor Space for Water Closets

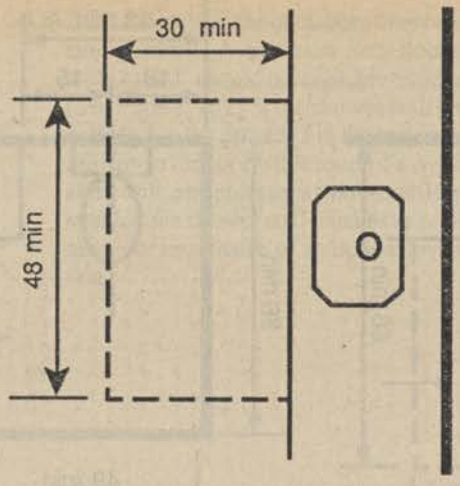


(b) Clear Floor Space at Bathtubs

Fig. 7 Clear Floor Space for Adaptable Bathrooms

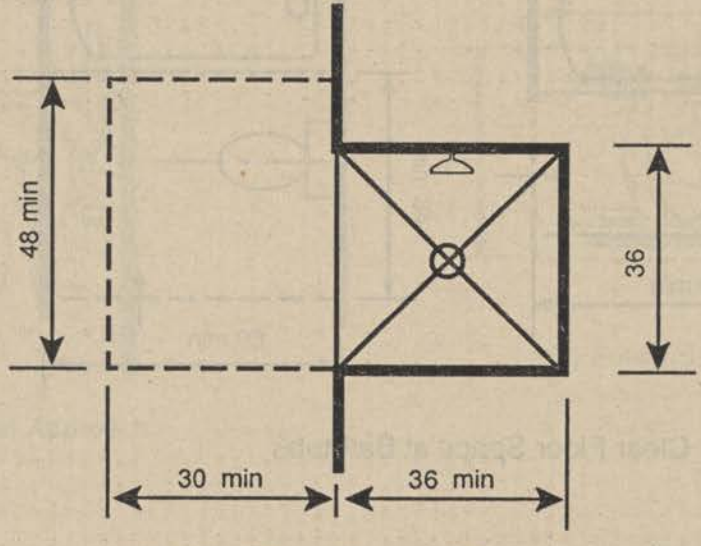


Lavatory With Knee Space



Lavatory Without Knee Space

(c) Clear Floor Space at Lavatories



(d) Clear Floor Space at Shower

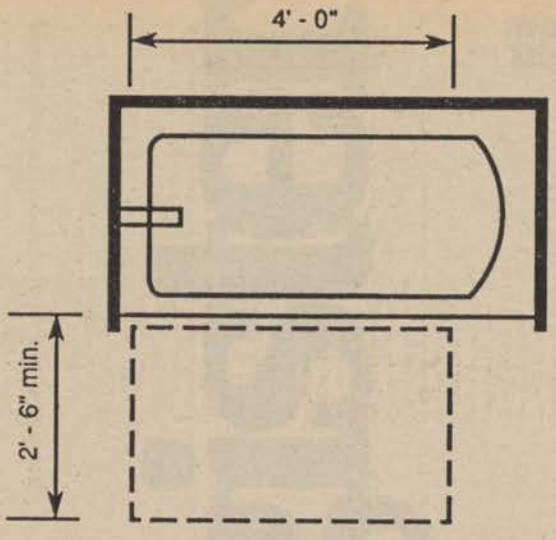


Fig. 8 Alternative Specification – Clear Floor Space at Bathtub

Appendix III to Ch. I, Subchapter A—Preamble to Final Housing Accessibility Guidelines (Published March 6, 1991).

[FR Doc. 91–5228 Filed 3–5–91; 8:45 am]

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