DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 25

[Docket No. 96N–0057]

National Environmental Policy Act; Proposed Revision of Policies and Procedures

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its regulations governing compliance with the National Environmental Policy Act of 1969 (NEPA) as implemented by the regulations of the Council on Environmental Quality (CEQ). The primary purpose of this proposed rule is to increase the efficiency of FDA's implementation of NEPA and reduce the number of NEPA evaluations by providing for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental impact statement (EIS) nor an environmental assessment (EA) is required. FDA is also proposing to amend its regulations to make its NEPA procedures more concise and understandable to the public and to reflect current FDA policy with respect to environmental considerations. This proposed rule is in response to initiatives announced in the President's National Performance Reports, ''Reinventing Drug and Medical Device Regulations,'' April 1995, and ''Reinventing Food Regulations,'' January 1996.

DATES: Submit written comments on the proposed rule by July 2, 1996. Submit written comments on the information collection requirements by May 3, 1996.

ADDRESSES: Submit written comments on the proposed rule to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857. Submit written comments on the information collection requirements to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th St. NW., rm. 10235, Washington, DC 20503, Attn.: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: For information regarding human drugs: Nancy Sager, Center for Drug Evaluation and Research (HFD–357),Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–6740.

For information regarding biologics: Nancy Roscioli, Center for Biologics Evaluation and Research (HFM–205), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–3031.

For information regarding veterinary medicines: Charles E. Eirkson, Center for Veterinary Medicine (HFV–150), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1683.

For information regarding foods: Buzz L. Hoffmann, Center for Food Safety and Applied Nutrition (HFS–246), Food and Drug Administration, 200 C St. SW.,Washington, DC 20204, 202–418–3005.

For information regarding medical devices and radiological health: Mervin Parker,Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186.

SUPPLEMENTARY INFORMATION:

I. Background

NEPA requires all Federal agencies to assess the environmental impact of their actions and to ensure that the interested and affected public is informed of environmental analyses. CEQ is responsible for overseeing Federal efforts to comply with NEPA. Both CEQ and FDA have issued regulations governing agency obligations and responsibilities under NEPA. In the Federal Register of March 15, 1973 (38 FR 7001), FDA issued its first regulations to implement NEPA. FDA amended these regulations in the Federal Register of April 15, 1977 (42 FR 19986), based on consideration of revised guidelines for preparing EIS's issued by CEQ. In 1978, CEQ replaced its guidelines with regulations implementing the procedural requirements of NEPA (40 CFR parts 1500 to 1508). To comply with CEQ regulations, in the Federal Register of April 26, 1985 (50 FR 16636), FDA revised its NEPA policies and procedures in part 25 (21 CFR part 25).

The CEQ regulations, which are binding on all Federal executive agencies, establish formal guidance on the requirements of NEPA. Agencies must adopt procedures to supplement them. In adopting NEPA-implementing procedures, Federal agencies are directed by CEQ to reduce paperwork (40 CFR 1500.4 and 1500.2(b)) and to reduce delay (40 CFR 1500.5) by using several means including the use of categorical exclusions. CEQ defines categorical exclusions as categories of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an EA nor an EIS is required (40 CFR 1508.4). The CEQ regulations also state that agencies shall continue to review their policies and procedures and, in consultation with CEQ, revise them as necessary to ensure full compliance with the purpose and provisions of NEPA (40 CFR 1507.3).

II. Overview of the Proposed Rule

Since FDA's NEPA policies and supplemental procedures were published in 1985, the agency has prepared EA's for many agency-initiated actions and has reviewed hundreds of EA's for a variety of industry requests for agency action. Based on FDA's experience reviewing EA's and on its evaluation and knowledge of other relevant environmental science, FDA has determined that certain classes of actions normally do not cause significant environmental effects, and therefore, should be added to the list of actions that are excluded from the requirement to prepare an EA or an EIS. Some of these actions had already been identified by FDA as unlikely to cause significant environmental effects, as evidenced by the fact that the agency has been requiring less information to support these actions, i.e., an abbreviated EA rather than a full EA (see § 25.31a(b)).

Thus, in response to the President's reinventing Government initiatives announced in the President's National Performance Reports, ''Reinventing Drug and Medical Device Regulations,'' April 1995, and ''Reinventing Food Regulations,'' January 1996, FDA, in consultation with CEQ, is now proposing to increase the efficiency of FDA's implementation of NEPA and to substantially reduce the number of NEPA evaluations by providing for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant impact on the human environment and for which, therefore, neither an EA nor an EIS is required. This proposal would substantially reduce the number of EA's required to be submitted by industry and reviewed by FDA and, consequently, reduce the number of findings of no significant impact (FONSI's) the agency would be required to prepare. Furthermore, the proposal will not compromise the environment because the excluded actions have been found not to have a significant effect on the environment, and the proposed rule would continue

to provide for the preparation of an EA under extraordinary circumstances in which a categorically excluded action may have a significant environmental impact. This proposal would enable FDA to focus its resources in the environmental area on situations likely to have an effect on the environment.

The agency is also proposing to revise its environmental regulations to make them more concise and useful to the public and regulated industry by reorganizing, simplifying, and eliminating unnecessary and duplicative language. The proposed rule would reorganize and renumber various sections so that information on certain topics is grouped together. The agency solicits comments on and suggestions for further improvement in these regulations.

III. Specific Proposed Changes

A. General Provisions

The proposed rule would eliminate unnecessary language in current subpart A of part 25 by deleting the reference to the environmental statutes listed in current § 25.5 *Policies*, amending § 25.15 Terminology (proposed § 25.5), and making other minor revisions, including combining § 25.5 Policies and § 25.10 NEPA planning into proposed § 25.10 *Policies* and *NEPA planning*.

In proposed § 25.5 *Terminology*, FDA is proposing to remove definitions listed in current § 25.15 that are not used in part 25, and add new definitions for ''active moiety'' and ''increased use'' of a drug. ''Increased use'' of a drug will occur if the drug will be administered at higher dosage levels, for longer duration, or for different indications than were previously in effect, or if the drug is a new molecular entity. ''Increased use'' encompasses consideration of FDA-regulated articles that are disposed of by consumers.Eric Flamm suggests wording: ''Increased use'' encompasses consideration of disposal of FDA regulated articles by consumers. ''Active moiety'' has been previously defined in FDA regulations (21 CFR 314.108(a)).

B. Agency Actions Requiring Environmental Consideration

Proposed § 25.15 would contain the general procedural information now found in current §§ 25.20 and 25.22.

The proposed rule would create new § 25.l6 *Public health and safety emergencies* using revised language now contained in current § 25.40(b).

Actions requiring preparation of an EA (proposed § 25.20) would remain essentially the same as current § 25.22, except that: (1) Current § 25.22(a)(13), promulgation and enforcement of FDA regulations relating to the control of communicable disease and to interstate conveyance sanitation, has been deleted and is covered by proposed § 25.20(g); and (2) actions relating to approval of new drug applications (NDA's) and abbreviated applications, actions on investigational new drug applications (IND's) (current § 25.22(a)(14)), issuance of licenses for biologic products (current § 25.22(a)(16)), and approval of supplements to existing approvals of FDA-regulated articles (§ 25.22(a)(8)) have been combined into one provision (proposed § 25.20(l)) and revised to reflect current terminology.

The proposed regulations include new § 25.21 Extraordinary circumstances, which addresses circumstances under which categories of actions that would ordinarily be categorically excluded would require preparation of environmental documents. Proposed § 25.21 incorporates current § 25.23(b) and includes two examples of circumstances under which an action would require the preparation of environmental documents because it might have the potential to significantly affect the environment. The examples of circumstances that will cause an action not to qualify for categorical exclusion are: (1) Actions for which data available establish that, at the expected level of exposure, there is the potential for serious harm to the environment (proposed § 25.21(a)); and (2) actions that adversely affect a species or the critical habitat of a species determined under the Endangered Species Act or the Convention on International Trade in Endangered Species of Wild Flora and Fauna to be endangered or threatened, or wild flora or fauna that are entitled to special protection under some other Federal law (proposed § 25.21(b)). In addition, the proposed rule references the CEQ regulations at 40 CFR 1508.27, which provide examples of circumstances in which significant effects may occur. Extraordinary circumstances may be shown by either data available to the agency or data available to the applicant or petitioner and may be based on production, use, or disposal from use.

The two examples of extraordinary circumstances in proposed § 25.21 reflect Are they really disqualification criteria? If the criteria are met, the exclusion is warranted. See 25.24(c)(1). Gail concurs with this.criteria that appear in some of the categorical exclusions listed in current § 25.24. The language in the first example, proposed § 25.21(a), is derived from but differs slightly from current § 25.24 language relating to toxicity (see, e.g., § 25.24(a)(10), (b)(2), and (c)(6)). The extraordinary circumstance example in proposed § 25.21(a) would revise the language in current § 25.24, ''the substance may be toxic to organisms in the environment'' to read ''there may be harm to the environment.'' FDA is revising this language to reflect that possible adverse environmental effects other than toxicity should be considered. For example, some biological agents that may be released may not be toxic to indigenous organisms, but could have lasting effects on ecological community dynamics.

FDA considers a substance to be toxic if it is harmful to some biological mechanism or system. Although FDA recognizes that any substance may produce damage to biological mechanisms or systems under specific conditions, for the purposes of these regulations, FDA considers a substance to be toxic if it is harmful to appropriate test organisms at the expected level of exposure even though it may be without effect in humans or other organisms at these concentrations, and may even be used by humans because of its toxic properties.

As a result of the new language in proposed § 25.21(a), the words ''toxic'' and ''toxic substance'' are no longer used in the proposed regulation. Therefore, FDA is proposing to remove the definition of ''toxic substance'' at current § 25.15(b)(6). Furthermore, FDA no longer believes that the second part of the current definition relating to toxicity of a substance is appropriate for the following reasons: (1) Evaluation of the toxicity of a substance based only on the concentration at the point of entry or point of highest concentration ignores factors such as instantaneous dispersion that typically takes place as a result of processes such as river flow and wind, and that not all substances bioaccumulate. Consideration of such dilution processes may be reasonable and scientifically sound in estimating environmental concentrations for certain purposes; and (2) the use of a factor of 1/100 of the concentration that causes 50-percent mortality in a test organism to assess the toxicity of a substance is not appropriate in all cases. The factors used to assess toxicity should be directly related to the amount of valid ecotoxicity data available. Although a factor of 1/100 may be appropriate in some instances, it may be too much or too little in others. In evaluating whether extraordinary circumstances exist, FDA will take into account any ecotoxicity data relevant to the issue.

The second example of extraordinary circumstances relates to instances in which the proposed action could adversely affect an endangered or threatened species, or a species entitled to protection under some other Federal law. FDA intends to closely examine proposed actions that involve FDA-regulated articles obtained from wild flora and fauna and will use the extraordinary circumstances provision to require at least an EA in any instance in which it appears from an examination of the proposed action that the action may cause a species to become endangered or threatened.

In addition, the agency notes that the language in proposed § 25.21(a) includes the indirect effects as well as direct effects of agency actions. For example, when the agency takes action to prohibit or restrict the use of an FDA-regulated product, the agency may consider whether the increased use of substitutes for the prohibited or restricted product might, at the expected level of exposure, result in harm to the environment.

FDA is proposing to remove current § 25.25 (Retroactive environmental consideration), because any request by FDA to an applicant to submit additional information to an existing FDA approval will be made under authority granted to FDA by the Federal Food, Drug, and Cosmetic Act (the act) or the Public Health Service Act (the PHS Act).

C. Categorical Exclusions

1. General

The proposed rule would increase the number of categorical exclusions and reorganize the categorical exclusions into the following five sections in proposed subpart C of part 25: Section 25.30 *General*; § 25.31 *Human drugs and biologics*; § 25.32 *Foods, food additives, and color additives*; § 25.33 *Animal drugs*, and § 25.34 *Devices and electronic products*. The agency is also proposing to delete the general introductory language from current § 25.24 because it is unnecessary to include this information in the regulation.

The agency is proposing to retain most of the general categorical exclusions listed in current § 25.24(a) (proposed § 25.30) and to make certain revisions described below:

Current § 25.24(a)(4) categorically excludes destruction or disposition of any FDA-regulated article condemned after seizure, following detention or recall at agency request, or the distribution or use of which has been enjoined. In proposed § 25.30(d), FDA is proposing to revise the criteria for the categorical exclusion from ''if the method of destruction or disposition of the article, including packaging material, will not result in the release of a toxic substance into the environment'' to ''if the waste is disposed of in compliance with all Federal, State, and local requirements.'' The agency is proposing this revision to reflect current agency practice and because the previous criterion is covered under paragraph (a) of proposed § 25.21 Extraordinary circumstances.

The agency is proposing to revise the categorical exclusion for current good manufacturing practice (CGMP) regulations (§ 25.24(a)(10), proposed § 25.30(j)) to include regulations based on the hazard analysis critical control points (HACCP) principles. The HACCP concept is a systematic approach to the identification, assessment of risk, and control of the biological, chemical, and physical food safety hazards associated with a particular food production process. The HACCP system is based upon the implementation of a control plan developed by a food producer that analyzes significant food safety hazards, identifies the points in the production process where a hazard can be prevented, and determines the preventive measures that are necessary for proper control.

The agency has recently issued regulations (60 FR 65096, December 18, 1995) that use HACCP principles to ensure the safe processing and importing of seafood. The agency is also considering developing HACCP regulations for other regulated food industries (59 FR 39888, August 4, 1994). FDA has found that the environmental considerations based on HACCP principles are essentially identical to the environmental considerations of regulations based on CGMP's. Neither type of regulation is likely to have significant environmental impacts. Therefore, the agency believes that it is appropriate to incorporate into the categorical exclusion for CGMP regulations an exclusion of the HACCP regulations.

FDA also is proposing to add a categorical exclusion (proposed § 25.30(m)) for actions relating to the disposal of the hazardous laboratory waste materials generated in FDA laboratories (low-level radioactive waste and chemical waste). Today, all of this hazardous waste is disposed of under contract with a hazardous waste management firm.We don't mention what the waste is—even though it is in the codified part. The contractor is responsible for the collection, handling, storage, packing, and ultimate disposal of the waste materials at facilities permitted by the U.S. Environmental Protection Agency (EPA) and/or facilities licensed by the Nuclear Regulatory Commission (NRC). In awarding contracts, FDA takes into consideration whether a prospective contractor has all applicable licenses, permits, and insurance necessary to perform the work and transport the waste as required under the contract. The contractor and all disposal facilities must certify that they are in full compliance with all applicable Federal, State, and local requirements, before FDA will award the contract. Further, FDA requires the contractor to present a comprehensive operational plan. FDA reviews this plan to determine if the contractor's approach is complete, safe, appropriate, and responsive to, among other things, FDA's requirements for waste disposal. Further, the contractor must operate in full compliance with appropriate regulations issued by EPA (Title 40), the Department of Transportation (Title 49), the Department of Labor (Title 29), NRC (Title 10), and with relevant State and local regulations governing the disposal of hazardous and nonhazardous waste. Therefore, FDA is proposing in § 25.30(m) to categorically exclude disposal of low-level radioactive waste materials and chemical waste materials generated in laboratories serviced by FDA-administered contracts.

2. Human Drugs and Biologics

In the National Performance Report, ''Reinventing Drug and Medical Device Regulations,'' April 1995, the President announced FDA's proposal to reduce the number of EA's submitted by industry under NEPA by increasing the number of categorical exclusions for those actions relating to drugs and biologics that, as a class, have no individual or cumulative significant effect on the environment. As described below, in fulfillment of this commitment, FDA is proposing additional categorical exclusions for classes of actions on drugs and biologic products that, based on experience in reviewing these types of actions, the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER) have concluded do not have significant effects on the human environment. All of the environmental reviews of these categories of actions performed under the current regulations have resulted in FONSI's.

The proposed new categorical exclusions in § 25.31(a) and (b) apply to actions on an NDA, abbreviated application or a supplement to such

applications, or action on an over-the-counter (OTC) monograph. They are divided into two sections: (1) Proposed § 25.31(a), which applies if FDA's action does not increase the use and disposal of the drug; and (2) proposed § 25.31(b), which applies if FDA's action does increase the use and disposal of the drug. This is similar to the distinction drawn in the existing regulations between actions that increase use and actions that do not. Proposed § 25.31(a) and (b) use the term ''active moiety'' rather than substance, drug product, or other terminology to clarify the exact focus of the environmental review.

The categorical exclusion in proposed § 25.31(a) is based on the categorical exclusions in current § 25.24(c)(1) and (c)(2) and the fact that, if the action does not increase the use of a drug, there is no change in the level of the substance in the environment. FDA has defined ''increased use'' of a drug to include those circumstances currently listed in § 25.24(c)(1) and (c)(2). Because the environmental effects, if any, associated with the use and disposal of the drug were incurred when it was first approved, actions to approve additional products may be categorically excluded if they do not increase the use of the drug. Among the actions covered under this categorical exclusion may be approvals of new dosage forms, prodrugs, generic drug products, and manufacturing supplements that may change the method or site of manufacture of a drug but not its use.

Actions under proposed § 25.31(b) that may increase the use or disposal of a drug product may be categorically excluded if the concentration of the substance in the environment will be below 1 part per billion (ppb), the level that FDA has found, based on past experience, will not significantly affect the aquatic environment. This reflects a change from current regulations that require an environmental assessment in any case in which an action may increase the use of a drug. The basis for this change is described below.

CDER performed a retrospective review of available toxicity information from EA's that were previously submitted in support of NDA's and NDA supplements. This information, which includes data from each review division that are representative of pharmacological drug classifications, has routinely demonstrated that there are no significant observed effects on relevant standard test organisms in the aquatic environment at concentrations below 1 ppb.

Based on the method of entry into the environment from use and their physical and chemical characteristics (e.g., water solubility), human drugs would be expected predominantly to enter the aquatic environment, and the data submitted in EA's reviewed by CDER have routinely supported this hypothesis. Human drugs and their metabolites enter the environment from use by excretion from patients. The majority of hospitals, clinics, and homes in the United States are serviced by a wastewater treatment facility where compounds are subjected to some form of aerobic and anaerobic decomposition. Drug and/or metabolites that are not degraded in the wastewater treatment facility may be discharged into surface water or removed from the wastewater treatment plant in sludge.

The data also have routinely shown that in those cases in which an applicant has provided toxicity results for terrestrial organisms in addition to acute toxicity results for aquatic organisms, the drugs are toxic to aquatic organisms at lower levels than they are to terrestrial organisms, suggesting that the use of aquatic organisms is a conservative approach.

CDER evaluates the potential for significant environmental effects by relating the concentrations determined to have toxic effects on relevant standard test organisms to the level of the substance expected in the environment. CDER's retrospective review shows that drugs at concentrations less than 1 ppb in the aquatic environment have no significant effect on relevant standard test organisms and, therefore, are unlikely to have a significant effect on the environment. The vast majority of actions taken by CDER result in the substance being in the aquatic environment at concentrations less than 1 ppb because the majority of drugs are produced and used at low levels, and the use of drugs is not typically localized but rather is spread throughout the United States.

One of the criteria for determining that a drug is safe for human use is consideration of its potential to bioaccumulate. The vast majority of drugs do not have the physical or chemical characteristics that would allow them to bioaccumulate in tissue because this would raise safety concerns for use in humans. If a drug does have the physical or chemical characteristics that would allow it to bioaccumulate, there has to be a mechanism for the human body to metabolize the compound to a substance that has lower bioaccumulation potential so that it is cleared from the body. In the environmental assessments that CDER reviewed, bioaccumulation has not been an issue.

Thus, FDA has determined that actions that may increase the use or disposal of a drug should be categorically excluded if the concentration of the substance in the environment from use will be less than 1 ppb and no extraordinary circumstances exist. For example, even under conditions in which an action would increase the use of a drug, such as an efficacy supplement adding a new indication, the proposed action may be categorically excluded under this proposal if the substance in the environment will be below 1 ppb. CDER has provided guidance on appropriate calculations for estimating environmental concentrations (Guidance for Industry for the Submission of an Environmental Assessment in Human Drug Applications and Supplements, November 1995).

CDER will continue to critically review the environmental toxicity information submitted for those actions requiring an EA. As additional data become available to CDER, the agency may propose to modify the 1 ppb environmental concentration cut-off through notice and comment rulemaking.

Proposed § 25.31(a) and (b) include actions on NDA's. Under the current regulations (§ 25.24(c)(1) and (c)(2)), abbreviated new drug applications (ANDA's) and supplements may be categorically excluded, but NDA's for the same type of action may not. Sometimes an applicant has a choice whether to submit a proposed action as an NDA or ANDA (e.g., a new dosage form may be submitted as an ANDA with a suitability petition or as an NDA). Thus, the applicant's choice of submission would determine whether an EA would need to be submitted. Proposed § 25.31(a) and (b) would permit FDA to treat NDA's, abbreviated applications, and supplements alike based on the type of action being affected by the application.

Current § 25.24(c)(6) categorically excludes actions on OTC monographs if the product is already marketed for the proposed use. FDA is proposing to add OTC monographs to proposed § 25.31(a) and (b) because, by action on an OTC monograph, FDA permits the manufacture and marketing of OTC drugs that meet the monograph. It should be noted that actions to switch drugs from prescription to OTC use that are submitted in an NDA or supplement would also be covered under these provisions.

Proposed § 25.31(a) and (b) would also delete any reference to ''actions on amendments'' to clarify that the agency

does not take actions on amendments. Amendments are merely changes to a pending application that are incorporated into the application. The action the agency takes is on the application as a whole, not on the amendment.

Proposed § 25.31(a) and (b) applies to drugs regulated by CDER. FDA is proposing a new categorical exclusion in § 25.31(c) for substances that occur naturally in the environment, that would apply to both drugs and biologics. Proposed § 25.31(b) would apply to actions on an NDA, abbreviated application, application for marketing approval of a biologic product, a supplement to such applications, or action on an OTC monograph when the action is not expected to alter significantly the concentration or distribution of the substance, its metabolites, or degradation products in the environment. Under the current regulations, FDA requires an abbreviated EA for a drug that occurs naturally in the environment. These abbreviated EA's require information about the production site and about whether the use of the product will significantly alter the concentration, distribution, and effect of the natural substance in the environment.

Since the publication of the NEPA regulations in 1985, FDA has reviewed abbreviated EA's for substances that are naturally occurring. FDA has found that actions on submissions for these substances will not affect the environment if the action will not significantly alter the concentration or distribution of the natural substance in the environment. Under these circumstances, the agency has prepared FONSI's. Both CDER and CBER routinely include in safety evaluations evidence that a product and/or living system used to produce the product are inactivated following production and prior to release into the environment, if there is a reasonable possibility that the product or living system may be harmful to the environment. Therefore, there are not likely to be any environmental effects. The proposed regulations would categorically exclude an action for a substance that occurs naturally in the environment when the action will not alter significantly the concentration or distribution of the substance in the environment. FDA has access to information regarding metabolites and degradation products to aid in determining if the categorical exclusion request is appropriate.

When an action does alter significantly the concentration or distribution of a naturally occurring substance, its metabolites, or degradation products in the environment, e.g., when the use and disposal will occur in a geographic area where the substance is not naturally occurring, an EA may be required.

FDA is proposing in § 25.31(d) to expand the categorical exclusion provision for the withdrawal of approval of an NDA or abbreviated application. The agency is proposing that all types of withdrawals of approval, whether requested by industry or initiated by the agency, be categorically excluded because, based on CDER's experience, these types of actions will not result in the production or distribution of any substances and, therefore, will not result in the introduction of any substance into the environment.There would be no increase in use of substitutes? See line 21 on page 38 (of 1/26 draft). EIS considered increase of hydrocarbon propellants in anti-perspirant aerosols.

Proposed § 25.31(e) would revise the categorical exclusions for actions on an IND. Current § 25.24(c)(4) categorically excludes actions on IND's if the drug shipped under such notice is intended to be used for clinical studies or research in which waste will be controlled or the amount of waste expected to enter the environment may reasonably be expected to be nontoxic. Under proposed § 25.31(e), FDA would categorically exclude all IND's. In many cases, FDA's actions on IND's do not significantly increase the use of the drug or the amount of drug introduced into the environment because the drug is being tested in few patients or is already being marketed for another use. Therefore, no changes in environmental effects will occur. In those cases in which an increase in the use of the drug may occur as a result of an investigation under an IND, CDER's experience in reviewing actions on IND's indicates that significant environmental effects will not occur because the use of such drugs is limited and controlled.

The agency is proposing to delete the language ''if the drug shipped * * * may reasonably be expected to be nontoxic'' because an action that results in waste that is expected to be toxic would require an EA under proposed § 25.21 Extraordinary circumstances.Is that what 25.21(a) means—that if waste is toxic, there may be harm and an EA will be required?

Proposed § 25.31(g) would add a categorical exclusion for the testing and release by CBER of lots or batches of a licensed biologic product. The effects on the environment of licensed biologic products are evaluated during the safety evaluation and approval of the license application. Therefore, conducting a separate NEPA review for the testing and release by CBER of individual lots or batches is unnecessary.

Proposed § 25.31(i) would permit a categorical exclusion for the establishment of a comparability determination for a biologic product subject to licensing. Establishment of a comparability determination does not result in introduction of a substance into the environment. A substance will be introduced into the environment only when CBER has made a comparability determination and subsequently approves a license application for a specific biologic product. The environmental considerations will be made in connection with the review of individual license applications that meet the comparability criteria.

Proposed § 25.31(j) incorporates current § 25.24(c)(10), the categorical exclusion for promulgation, amendment, or revocation of a standard for a licensed biologic product, and would eliminate the current requirement that there be no increased use of the product. The standards normally explain how the product is to be manufactured and any additional requirements for approval and marketing. Therefore, the increased use criterion is unnecessary.

Proposed § 25.31(k), regarding revocation of a biologic product, would eliminate the current criteria in § 25.24(c)(9) that the biological product ''is no longer being marketed'' or that the action is ''at the request of the license holder. The agency is proposing to delete these criteria as unnecessary because revocation of a license for a biologic product means that the product can no longer be marketed. Marketing of the product after license revocation must cease regardless of whether the revocation was at the request of the license holder or initiated by the agency. Revocation of a license for a biologic product under any circumstances will not result in the introduction of any substance into the environment and, therefore, will not significantly affect the environment.

The agency is also proposing other minor, nonsubstantive amendments to delete unnecessary language, improve the accuracy and clarity of the categorical exclusions, and reflect current terminology.

3. Foods, Food Additives, and Color Additives

In the President's National Performance Report, ''Reinventing Food Regulations,'' January 1996, the President announced that FDA proposed to reduce the number of EA's

submitted by industry under NEPA by increasing the number of categorical exclusions for food and color additives and generally recognized as safe (GRAS) substances based on little or no impact on the environment from the use and disposal of these products. As described below, in fulfillment of this commitment, FDA is proposing additional categorical exclusions for actions on foods, food additives, color additives, and GRAS substances which, based on experience in reviewing these types of actions, the Center for Food Safety and Applied Nutrition (CFSAN) has concluded will not significantly affect the human environment.

As was explained previously, FDA is proposing to remove criteria from certain exclusions in current § 25.24. For actions involving foods, food additives, color additives, and GRAS substances, the criteria for the exclusions in current § 25.24(a)(10), (b)(2), (b)(3), (b)(7), (b)(8), and (b)(9) have been removed. These exclusions can be located in proposed §§ 25.30(j), and 25.32(b), (c), (f), (g), and (h). This change is being made because the provisions in proposed § 25.21 Extraordinary circumstances could apply to any of the agency's exclusions, making certain criteria for individual exclusions unnecessary.

In addition, to reflect current FDA policy, the agency is removing from part 25 the environmental review requirements for the establishment of action levels for unavoidable poisonous or deleterious substances in food or food packaging, and for natural or unavoidable defects in food that present no health hazard. This change is discussed below.

For the classes of actions proposed for categorical exclusion in § 25.32(i), (j), (k), (l), (o), (q), and (r), FDA has traditionally required certain information to assess the potential environmental impact of the production of the food additive, color additive, or GRAS substance. In all cases, FDA has found in its reviews that the production of these substances did not significantly affect the environment. The agency has determined that FDA ordinarily will not consider potential impacts at sites of production of FDA-regulated products, as discussed in section III.D of this document.

a. *Proposed § 25.32(f).* Currently, FDA's NEPA procedures in § 25.24(b)(7) provide for a categorical exclusion for actions relating to the affirmation of a food substance as GRAS if the substance is already marketed for the use for which affirmation is sought. FDA is proposing to expand this categorical exclusion in proposed § 25.32(f) to include actions to establish and amend regulations under part 181 (21 CFR part 181) for prior-sanctioned ingredients that are already marketed in the United States. Actions involving prior-sanctioned ingredients are similar to certain GRAS affirmation actions in that the food substance is likely to be already marketed in the United States for the proposed use at the time the action is being considered and will continue to be marketed after the regulation is published. As defined in § 170.3(l) (21 CFR 170.3(l)) and § 181.5(a), a prior sanction shall exist only for a specific use of a substance for which there was explicit approval by FDA or the U.S. Department of Agriculture (USDA) before September 6, 1958. Actions to affirm substances as GRAS or prior-sanctioned for the specific uses for which they were already marketed in the United States create little or no change in the introduction of the substance into the environment. Therefore, such actions have no significant effect on the environment.

b. *Proposed § 25.32(i).* FDA is proposing to amend its NEPA procedures to categorically exclude from the requirement to prepare an EA actions to approve a food additive petition or grant a request for exemption from regulation as a food additive under § 170.39 (21 CFR 170.39) (threshold of regulation) when a food additive is a functional component of finished food-packaging materials present at not greater than 5 percent-by-weight. FDA based this proposed exclusion on its review of 95 petitions for food additives in this class, all of which resulted in FONSI's, and on the evaluation of the potential for future petitions in this class to have significant environmental effects. FDA has had limited experience in considering the environmental impact of threshold of regulation submissions because the regulations establishing a threshold of regulation policy were recently issued (60 FR 36582, July 17, 1995). However, because the information currently required for such submissions is identical to the information required for the food-packaging class of indirect food additives discussed in this section, the agency believes that its experience with the 95 food additive petitions is relevant to these threshold of regulation submissions and that these submissions also warrant a categorical exclusion.

The agency's evaluation of functional components of food-packaging materials present at not greater than 5 percent-by-weight has traditionally included consideration of potential impacts relating to the disposal of food-packaging materials containing the additive and the use of natural resources and energy.

To determine the potential for significant introductions of substances into the environment at the site of disposal of food-packaging materials, i.e., municipal solid waste landfill or combustion sites, the agency currently requires an estimate of the maximum yearly market volume for the proposed use of the food additive and the percent of that amount that will become a component of the finished food-packaging material. To determine the potential for significant introductions at landfill sites, FDA estimated the concentration of the additive that could be present in landfill leachate for each of the 95 petitions it reviewed for additives used as functional components of food-packaging materials. FDA found that in virtually all cases, the concentration of the additives in landfill leachate was less than 50 ppb. The concentration of the additives in surface or ground water receiving landfill leachate was expected to be substantially less, taking into consideration the mobility and degradation of the additives in landfills and their dilution in receiving waters.

Consequently, FDA determined in all cases that these extremely low levels would not have significant environmental impacts at landfill sites. The agency believes that approvals of future petitions in this class are even less likely to result in significant introductions of substances at landfill sites because EPA published new landfill regulations in the Federal Register of October 9, 1991 (56 FR 50978), that require new and expanded landfills to have leachate collection systems and liners to prevent leachate from entering surface or groundwater. Although operators of existing landfills are not required to retrofit liner systems, they are required to monitor groundwater adjacent to existing landfills and to take corrective action as appropriate.

The agency's evaluation of petitions for additives used as functional components of food-packaging materials has also shown that there is little potential for significant introductions from the combustion of packaging materials containing the additives. These types of additives are used at low levels in the packaging materials, <5 percent by weight, and, therefore, the additional amounts of combustion products emitted were found to be insignificant compared to the levels already being generated during municipal solid waste combustion. Because FDA's experience shows that the use levels for additives used as

functional components of food-packaging materials are low, the agency believes that future approvals will also result in insignificant introductions into the environment at municipal solid waste combustor sites.

Under current part 25, FDA requires no documentation to assess potential impact on energy and resource use if the proposed additive is intended for the same use as another additive already in use and will not materially change the potential uses of the packaging materials to which it is added. The agency has required sponsors to provide information in an abbreviated EA showing that these criteria are met. Based on FDA's experience in reviewing petitions for functional components of food-packaging materials, the agency has found that petitioners generally were able to demonstrate that a proposed additive would compete with and replace other, already regulated additives and that approval would not change the uses of the packaging materials to which they were added. In cases where a proposed additive did not compete with and replace an already regulated additive, the agency was still able to conclude that there would not be a significant impact on energy and natural resource use largely because use of the additive in food-contact articles represented a very small fraction of total usage.

Thus, based on the low levels of use of these functional components of food-packaging materials and on FDA's experience reviewing abbreviated EA's for these functional components, the agency believes that approvals of future submissions for such additives are highly unlikely to have significant effects on the environment. Therefore, under proposed § 25.32(i) a requestor need not ordinarily submit an EA.

c. *Proposed § 25.32(j).* FDA is proposing to categorically exclude actions to approve a food additive and to grant a request for exemption from regulation as a food additive under § 170.39 when the additive is a component of food-contact surfaces of permanent or semipermanent equipment or of other food-contact articles intended for repeated use (proposed § 25.32(j)). This proposed exclusion is based on FDA's experience with 43 petitions for additives used as components of repeat-use food-contact articles, all of which resulted in a FONSI. FDA has had limited experience in considering the environmental impact of threshold of regulation submissions for components of repeat-use, food-contact articles because the regulations establishing a threshold of regulation policy were recently issued. However, because the information currently required for such submissions is identical to the information required for food additive petitions for these types of indirect food additives used in repeat-use, food-contact articles, the agency believes that its experience with the 43 food additive petitions is relevant to these threshold of regulation submissions and that approval of these submissions warrants a categorical exclusion.

In reviewing the petitions for components of repeat-use, food-contact articles, the agency's evaluation of environmental impact has traditionally included consideration of potential impacts relating to the disposal of the food-contact articles containing the additive. To determine the potential for significant introductions of substances into the environment at the sites of disposal of food additives that are used as components of the food-contact surfaces of permanent or semipermanent equipment, or of other repeat-use articles, the agency currently requires an estimate of the maximum yearly market volume for the proposed use of the additive. In reviewing abbreviated EA's for these additives, FDA found that these additives ordinarily have limited potential for causing significant environmental effects as a result of their use and disposal. The potential for significant introductions of substances to the environment due to disposal is, in fact, very low because of the long service life of the food-contact equipment or other repeat-use articles, of which additives in this class are components, and the limited market volumes of the additives as estimated by the petitioners. Because its actions on these petitions and requests will not significantly affect the environment, FDA will not ordinarily require the preparation of an EA.

d. *Proposed § 25.32(k).* FDA is proposing to categorically exclude actions to approve food additive, color additive, and GRAS affirmation petitions for substances added directly to food that are intended to remain in food through ingestion by consumers and that are not intended to replace macronutrients in food. This proposed exclusion is based on FDA's experience reviewing 21 petitions in this class, all of which resulted in a FONSI. Examples of the types of additives and GRAS substances that belong to this class are the color additives added to foods listed in 21 CFR parts 73 and 74, most of the direct food additives listed in part 172 (21 CFR part 172), and certain GRAS substances listed in part 184 (21 CFR part 184). Examples of substances that are not included in the class for which this categorical exclusion is being proposed are the substances intended to replace macronutrients in food (such as sweetening agents intended to replace sugar, e.g., see §§ 172.800 and 172.804, and fat substitutes, e.g., § 184.1498).

The agency's evaluation of the environmental effects of substances added directly to food has included consideration of the potential for impacts from the disposal of human waste products containing the petitioned substance and/or its products of digestion and metabolism, and from the use of natural resources and energy.

The substances added directly to food considered here will be ingested by consumers as components of food containing these substances. After ingestion, these substances are either digested and/or metabolized to other substances or excreted largely intact. In all cases, the agency's review of past actions on substances added directly to food resulted in decisions to issue FONSI's. To address the potential for environmental impacts from disposal of this class of substances, the agency's FONSI's relied on one or more of the following scenarios: (1) The agency's approval of the petition resulted in very low levels (in the low ppb range or lower) of the substances in either effluents and/or sewage sludge from publicly owned wastewater treatment plants and these levels were determined not to be toxic to organisms in the environment; (2) the petitioned substance was digested and/or metabolized by¶humans such that only products of digestion and metabolism were expected to be excreted and these products were the same as (or very similar to) the products of digestion and metabolism resulting from human food; such products should have no potential for significant environmental effects because wastewater treatment facilities are already designed to handle them; or (3) the petitioned substance was excreted largely intact but was rapidly degraded into nontoxic products either in wastewater treatment plants or in the environment.

FDA's experience shows that substances added directly to food and intended to remain with food through ingestion that are the subject of new petitions will have use and disposal patterns similar to those described above and will not be toxic to organisms in the environment at the expected levels of exposure. Thus, use and disposal of such substances are not expected to result in significant environmental effects.

The agency has also found, as a result of its review of petitions for substances in the class being considered here, that

in no case was there potential for significant impacts on energy and natural resources. These findings relied on one or more of the following scenarios: (1) The substances were expected to compete with and replace other already regulated substances with no significant change in the overall use of natural resources or energy, (2) the substances are also used in nonfood contact situations and the food-contact usage represented a small increase in the overall production and usage of the substance such that the small increase in the uses of natural resources and energy was not significant, or (3) the predicted market volumes for the petitioned substances were very small so that the use of natural resources and energy for the petitioned substances was very limited. In no case did the agency find that there would be any effects on threatened or endangered species. Because the use and disposal of substances added directly to foods and intended to remain with foods through ingestion has no significant effect on the environment and has very limited potential for significant effects on energy and natural resources, EA's for these substances will not ordinarily be required.

e. *Proposed § 25.32(l).* FDA is proposing to categorically exclude actions to approve color additives used in contact lenses, sutures, polymethylmethacrylate filaments used in supporting haptics for intraocular lenses, bone cement, and in other FDA-regulated products that involve similar low levels of use. The agency reviewed EA's for 20 color additive petitions for these types of uses and found that all proposed uses involve small amounts of color additives. Because of the nature of these uses, the highest annual market volume encountered for any of these color additives was 12 kilograms (kg), while most of the petitioned uses involved considerably less than 5 kg. Consequently, the environmental introduction levels of the color additives from manufacture, use, and disposal would be exceedingly small. FDA's experience shows that petitions for color additives in these types of applications will have very low market volumes such that only extremely low levels of substances will be introduced into the environment and will not cause significant environmental effects. Therefore, FDA is proposing to categorically exclude actions on such petitions from the requirement to prepare an EA.

f. *Proposed § 25.32(m).* FDA is proposing to categorically exclude actions to prohibit or otherwise restrict or reduce the use of a substance in food, food packaging, or cosmetics, e.g., the withdrawal of approval for the use of a food or color additive, removal of the use of a substance from a GRAS list (21 CFR parts 182, 184, and 186), or prohibition of the use of a prior-sanctioned substance (defined under §§ 170.3(l) and 181.5(a)). The agency has prepared EA's for 12 actions to withdraw approval for the use of a food or color additive or to prohibit the use of a substance in food. The agency has prepared only one EIS for the withdrawal of approval of a food additive. In 1978, the agency prepared an EIS for its action to prohibit the use of certain chlorofluorocarbons in food, food additive, drug, animal food, animal drug, cosmetic, and medical device products as propellants in self-pressurized containers (43 FR 11301, March 17, 1978). The specified chlorofluorocarbons were prohibited because their continued use was predicted to result in the depletion of the stratospheric ozone layer. FDA prepared the EIS as part of an interagency effort to address this problem. CEQ determined that an EIS was necessary for this particular action because of the controversy surrounding the scientific issues associated with the potential effects of these chemicals on stratospheric ozone. The agency considers its action on chlorofluorocarbons to be an exception. It is the only action of this type that involved potentially significant effects on the environment.

The effect of withdrawing approval or prohibiting the use of a substance is to reduce or eliminate environmental exposure to that substance. Thus, no potential exists for direct adverse environmental effects from the agency's prohibition of the use of a substance. It may sometimes be necessary, however, to consider the potential indirect environmental effects that would result from increased use of substitutes for the prohibited substance. Since the agency began considering the environmental impact of its actions under NEPA, it has not found that significant adverse environmental effects would result from the increased use of a substitute for a food or color additive or other food substance that was being restricted. In the agency's evaluation of past actions in this class, the agency has found that there are frequently a number of substitutes for the prohibited substance. Thus, the increase in production, use, or disposal of substitutes is spread among a number of substances. Further, environmental exposure to any one substitute is minimal. In some cases, the agency has found that substitutes have been previously subjected to environmental review under NEPA by the agency, and that this review encompassed the use of the substitute as a replacement for the prohibited substance and resulted in an EA and FONSI being prepared. Any new food or color additive that may be developed to replace a prohibited one would undergo environmental review during the premarket approval process.

g. *Proposed § 25.32(n).* FDA is proposing to categorically exclude actions to issue, amend, or revoke regulations pertaining to infant formulas. FDA is proposing to exclude actions on infant formulas because they have little or no potential for adverse environmental effects. The preparation, distribution, and directions for use of infant formulas are carefully controlled by regulations in 21 CFR parts 106 and 107 and, along with other foods, by the CGMP regulations in 21 CFR part 110. In addition, the nature of this product, a food designed for infants, means that the product itself is very unlikely to cause adverse environmental impacts. Infant formulas are expected to be used and disposed of in a manner similar to other human food, but infant formulas form only a small fraction of the total human food supply since they are used only in the first year or 2 of human life. Therefore, it is unlikely that future actions on infant formulas will have potential for significant environmental effects, and thus, FDA is proposing to exclude them from the requirement to prepare an EA.

h. Proposed § 25.32(o). FDA is proposing to exclude actions to approve a food additive petition when an additive is the intended expression product(s) present in food derived from new plant varieties. The proposed exclusion is based on our determination that the USDA Animal and Plant Health Inspection Service (APHIS) has lead responsibility, under the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*), to prevent the movement and dissemination in the United States of plant pests. Under that authority, USDA APHIS addresses the potential of new plant varieties to pose a plant pest risk in accordance with the requirements mandated under NEPA. USDA considers the potential for risk in a very broad context, so that not only is direct disease or damage to plants and plant materials considered as a component of plant pest risk, but indirect effects on beneficial or other organisms in the agronomic context are also addressed. Before issuing a determination of nonregulated status for an organism that has been subject to USDA oversight because it was considered to present a

potential risk of being a plant pest, USDA conducts an environmental analysis in compliance with its NEPA requirements that addresses plant pest risk characteristics, disease and pest susceptibilities, expression of any introduced gene products and effects thereof, new enzymes, or changes to plant metabolism, weediness of the plant, impact on the weediness of any other plant with which it can interbreed, agricultural or cultivation practices, effects of the plant on nontarget organisms, indirect plant pest effects on other agricultural products, transfer of genetic information to organisms with which it cannot interbreed, and any other information believed to be relevant to a determination. The issues considered by FDA are the same or a subset of the issues that USDA addresses as part of its NEPA review. Therefore, a NEPA review by FDA would be redundant.

i. *Proposed § 25.32(p).* FDA is proposing to categorically exclude actions under part 101 (21 CFR part 101) to issue, amend, or revoke a regulation in response to a reference amount petition (§ 101.12(h)), a nutrient content claim petition (§ 101.69), a health claim petition (§ 101.70), or a petition pertaining to the label declaration of ingredients (§ 101.103). The agency has regulations pertaining to various aspects of food labeling in part 101. These regulations include provisions that enable interested persons to petition the agency to issue regulations on several subjects related to labeling, listed above. These petitions must include, under current regulations, either a claim for categorical exclusion under current § 25.24 or an EA under current § 25.31.

Current § 25.24(a)(11) contains an exclusion for the establishment or repeal by regulation of labeling requirements for marketing articles, ''if there will be no increase in the existing levels of use or change in the intended uses of the product or its substitutes.'' The criteria are intended to ensure that the excluded labeling actions will not cause significant environmental effects. This exclusion can be used with petitions of the type listed above, if petitioners demonstrate that the criteria are met. For those actions that would not qualify for exclusion under current § 25.24(a)(11) because there will be an increase in the use of the product, FDA now believes that this increased use will not have significant environmental effects. Thus, the agency has determined that a specific unqualified categorical exclusion for petitions related to food labeling is appropriate.

When changes in the labeling on food products are allowed, there is a potential for changes in the levels of use, and in the intended uses, of such products or their substitutes. In fact, nutrient content claims and health claims are generally intended to increase the use of the labeled product. However, the changes that will result from FDA's actions on the types of petitions listed above will be modifications of the purchasing and consumption habits of consumers. A food labeled in the newly allowed manner will be purchased and consumed instead of another food that, for a variety of reasons, will not be labeled in this new manner. The net result will be the substitution of one food for a similar food. Thus, no significant adverse effects on the environment will result. Therefore, the agency is proposing that its future actions on petitions for the issuance, amendment, or revocation of regulations on reference amounts customarily consumed per eating occasion (§ 101.12(h)), on nutrient content claims (§ 101.69), on health claims (§ 101.70), and on the label declaration of ingredients (§ 101.103) be categorically excluded from the preparation of an environmental assessment.

j. *Proposed § 25.32(q).* FDA is proposing in § 25.32(q) to categorically exclude from the requirement to submit an EA actions to approve food additive petitions for substances registered by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 et seq.) for the same use requested in the petition. FDA has had limited experience in considering the environmental impact of threshold of regulation submissions for substances registered by EPA under FIFRA because the regulations establishing threshold of regulation policy were recently issued. However, because the information currently required for such submissions is identical to the information required for food additive petitions for these types of substances, the agency believes that its experience with food additive petitions is revelant. This proposed exclusion is based on FDA's experience reviewing 12 petitions in this class, all of which resulted in a FONSI. All of these petitions were for antimicrobial substances used either in the processing of food or in food-packaging materials.

FDA's evaluation of the potential environmental effects of antimicrobial substances has included consideration of potential impacts at the site of use and disposal of the antimicrobial substance, and from the use of natural resources and energy. Currently, for the use sites of antimicrobial substances, petitioners are directed to rely on information in studies submitted to EPA for registration of the product under FIFRA, and to describe any potential adverse environmental effects determined by EPA. Petitioners may submit a brief description and summary of results of EPA studies in lieu of the complete test reports. For use sites, FDA has based its environmental decision on a prediction of exposure levels, using introduction and fate information, that is compared with relevant toxicological data to determine the potential for significant environmental effects.

The agency's experience with antimicrobial petitions has been that, before an antimicrobial product can be used in food-contact situations, EPA will have already examined the environmental risks and benefits of registering the product under FIFRA. The parallel between EPA's review and FDA's environmental review is illustrated by FDA's finding that it has not had to require environmental testing for antimicrobial products because such tests were already conducted as part of EPA's review. In addition, antimicrobial substances that are used and discharged at point sources within the United States are subject to the requirements of National Pollution Discharge Elimination System (NPDES) permits under the Clean Water Act (33 U.S.C. 1251 et seq.). In registering a product under FIFRA, EPA requires the label to state that: (1) The product is not to be discharged into lakes, streams, ponds, estuaries, oceans, or other waters unless in accordance with the requirements of an NPDES permit and unless the permitting authority has been notified in writing prior to discharge; and (2) the product is not to be discharged to sewer systems without previously notifying the local sewage treatment plant authority. EPA also requires, if necessary, that labels contain information such as a warning of toxicity to fish and/or wildlife, as specified in 40 CFR 156.10(h)(2)(ii). Thus, FDA has found that its assessment of the fate and effects of antimicrobial substances essentially duplicates the review by EPA under FIFRA and, to some extent, the review by NPDES permitting authorities under the Clean Water Act.

Currently, petitioners must address the potential for impact on the use of natural resources and energy as required in an EA by specifying the natural resources and energy required to produce, transport, use, and/or dispose of a given amount of the product that is the subject of the action. FDA's experience with this area of potential impacts is that these types of substances almost always compete with and replace other similar substances so that there is

little or no change in the use of natural resources and energy. Thus, FDA believes that future food additive petitions for the same use as pesticides approved by EPA under FIFRA will have little or no potential for significant environmental impacts and that FDA's actions on these petitions warrant exclusion from the requirement to prepare an EA.

k. *Removal of action levels.* At the time the current environmental regulations were issued, the agency believed that the establishment of an action level required environmental review. Thus, the agency included a paragraph for the establishment of action levels in current § 25.22(a)(11) and specified an EA format in current § 25.31d. FDA also provided a categorical exclusion in current § 25.24(b)(6) for action levels for natural or unavoidable defects in food for humans or animals if these defects presented no health hazard.

In 1987, in a limited holding, the Court of Appeals for the D.C. Circuit in *Community Nutrition Institute* v. *Young*, 818 F.2d 943 (D.C. Cir. 1987), found that FDA was treating its action levels as substantive, legislative rules and, thus, action levels were subject to the notice-and-comment requirements of the Administrative Procedure Act (5 U.S.C. 551 et seq.). The court recognized, however, that FDA could proceed by action levels that are not binding rules. Since the court's holding, FDA has followed this approach. Under its statutory authority under 21 U.S.C. 342(a)(1), (a)(2)(A), and 346 to limit the amount of poisonous or deleterious substances in food, FDA establishes ''action levels'' to inform food producers of the level of contaminants in food that may result in regulatory action. Action levels are not intended to bind the public, or FDA, or to create or confer any rights, privileges, immunities, or benefits on or for any private person, but are intended merely for internal FDA guidance for deciding whether to bring an enforcement action. The establishment of an action level is not agency action and is not subject to NEPA.

Moreover, under CEQ regulations (40 CFR 1508.18(a)), bringing judicial, administrative, civil, or criminal enforcement actions is not major Federal action. Because establishment of action levels is intended merely for internal guidance for deciding whether to bring an enforcement action, establishment of an action level is not major Federal action.

Therefore, FDA is proposing to remove all references to action levels from part 25. The agency will continue to apply these regulations to the establishment of tolerances for poisonous or deleterious substances in food for human or animal consumption or in packaging materials intended for use with human food and animal feeds.

l. *Proposed § 25.32(r).* FDA is proposing to categorically exclude actions to approve a food additive, a color additive, or a GRAS affirmation petition for a substance that occurs naturally in the environment, when the action is not expected to alter significantly the concentration or distribution of the substance, its metabolites, or degradation products. This proposed exclusion is based on FDA's review of 19 petitions for substances in this class, all of which resulted in a finding of no significant impact.

The agency currently requires limited information for substances that occur naturally in the environment, as specified in the abbreviated EA format in current § 25.31a(b)(5). This format focuses on whether the use of the substance can reasonably be expected, on the basis of all available evidence, to alter significantly the concentration and distribution of the substance, its metabolites, or degradation products in the environment and on information about the environmental effects of substances expected to be emitted into the environment. From its review of 19 petitions, the agency has found that the use of naturally occurring substances as food additives, color additives, or GRAS substances did not alter significantly the concentration and distribution of the substance, its metabolites or degradation products in the environment, and therefore, substances emitted into the environment did not have adverse environmental effects.

Among the 19 petitions for naturally occurring substances reviewed by the agency were several petitions for substances intended to replace macronutrients in food. In § 25.32(k), FDA is not proposing to exclude from the requirement to prepare an EA petitions for substances intended to replace macronutrients. However, when a macronutrient replacement is also a substance that occurs naturally in the environment, the categorical exclusion proposed here will apply, unless the agency finds that extraordinary circumstances exist, as delineated in proposed § 25.21.

4. Veterinary Drugs and Feed Additives

The National Performance Report, ''Reinventing Food Regulations,'' January 1996, announced FDA's proposal to reduce the number of EA's submitted by industry under NEPA by increasing the number of categorical exclusions for actions relating to animal drugs, animal feeds, and food and color additives, which as a class have no individual or cumulative significant effects on the environment. As described below, in fulfillment of this commitment, FDA is proposing additional categorical exclusions for actions on animal drugs and feed additives that, based upon its experience in reviewing these types of actions, the Center for Veterinary Medicine (CVM) has concluded will not significantly affect the human environment.

Under proposed § 25.33(a), actions relating to new animal drug applications (NADA's), abbreviated applications, and supplements to such applications that do not increase the use and disposal of the substances are categorically excluded.

Proposed § 25.33(a) includes the categorical exclusions listed in current § 25.24(d)(1) and (d)(2), and broadens the categorical exclusion to allow FDA to categorically exclude other actions that do not result in increased use of a drug and, consequently, do not result in an increase in the expected level of environmental exposure. For example, the approval of a supplement for a new manufacturing site is not specifically listed but may be categorically excluded if it is not expected to result in increased use of the substance for which the supplement was submitted. Proposed § 25.33(a)(7) for animal drugs used in feeds is the same as current § 25.24(d)(2) but has been revised for clarity because FDA approves animal drugs for use in animal feeds.What about 512(m) and proposed 25.24(e)?

The categorical exclusions in proposed § 25.33(a) include actions relating to abbreviated new animal drug applications (ANADA's) in recognition of the creation of ANADA's under the 1988 Generic Animal Drug and Patent Term Restoration Act (GADPTRA) (21 U.S.C. 301 note). An ANADA is merely an abbreviated form of an NADA and seeks to effectuate the same action, approval of an animal drug. Therefore, the nature of environmental considerations is similar. For animal drugs not otherwise excluded in § 25.33(a), the agency is reserving § 25.33(b) to provide for a categorical exclusion analogous to that contained in proposed § 25.31(b) for human drugs. The categorical exclusion would be for actions that increase the use of an animal drug in the instance that the agency determines a level at or below which the concentration of the substance in the environment does not significantly affect the environment.

FDA recognizes that proposed § 25.31(b) for human drugs allows for a categorical exclusion for increased uses of human drugs if the concentration of the substance in the aquatic environment will be at or below 1 ppb. At this time, FDA is not adopting a specific environmental concentration from use of animal drugs because the agency is still conducting a retrospective review of environmental assessments for these products and a review of revelant environmental science. The Animal Health Institute and FDA/CVM held an Environmental Risk Assessment Workshop on February 20 and 21, 1996, to establish a comprehensive ecological risk assessment process for the evaluation of animal health products. Following this opportunity for public debate, and for drugs not otherwise excluded, FDA will adopt a risk assessment paradigm for determining environmental introductions for animal drugs and an environmental concentration at or below which no meaningful environmental effects are expected to occur.

Proposed 25.33(c) would categorically exclude any action on an NADA, abbreviated application, or a supplement to such actions for substances that occur naturally in the environment, when the action is not expected to alter significantly the concentration or distribution of the substance, its metabolites, or degradation products in the environment. Currently, FDA's regulations require an abbreviated EA for an animal drug substance that occurs naturally in the environment. These abbreviated EA's require information about the production site and about whether the use of the product will significantly alter the concentration, distribution, and effect of the natural substance in the environment.

Since the publication of the NEPA regulations in 1985, FDA has reviewed abbreviated EA's for substances that are naturally occurring. FDA has found that actions on submissions for these substances will not affect the environment if the action will not significantly alter the concentration or distribution of the natural substance in the environment. Under these circumstances, the agency has prepared FONSI's.

Therefore, the proposed regulations would categorically exclude actions on an NADA, abbreviated application, or a supplement to such applications for substances that occur naturally in the environment when the action is not expected to alter significantly the concentration or distribution of the substance, its metabolites, or degradation products in the environment. FDA has access to information regarding metabolites and degradation products to aid in determining if the categorical exclusion request is appropriate. Neither an EA nor an EIS would be required for such actions. When an action does alter significantly the concentration or distribution of the products, its metabolites, or degradation products in the environment, e.g., when the use and disposal will occur in a geographic area where the substance is not naturally occurring, an environmental assessment may be required.

Proposed § 25.33(d) includes categorical exclusions for actions relating to approval of applications for animal drugs intended for use in nonfood animals, for local or general anesthesia, for ophthalmic or topical applications, for the treatment of a disease occurring in minor species animals, as defined in § 514.1(d)(1)(i) (21 CFR 514.1(d)(1)(i)), and for use under prescription or veterinarian's order. Under current § 25.31a(b)(4), FDA requires abbreviated EA's to be submitted as part of any request for such approvals. These abbreviated EA's require environmental information for production sites. Since the publication of the NEPA regulation in 1985, CVM has reviewed many abbreviated EA's for these types of products. In every instance, the agency has prepared a FONSI because the manufacturing was determined to be in compliance and would remain in compliance with the Federal, State, and local environmental requirements that apply to the site of manufacturing, and the market volume for such products was so low that FDA found, based on its experience, the drugs would not significantly affect the environment. Furthermore, as the agency explains in section III.D. of this document, the agency has determined that ordinarily FDA will not consider potential impacts at the site of production.

The categorical exclusion for local and general anesthetic products applies only to those products that are administered individually. Some anesthetic products may be intended to be administered to many animals or in significant quantities. In these instances, potential environmental effects exist that require environmental analysis. The exclusion for ophthalmic and topical products is limited to those products intended for nonsystemic use. Products used systemically could result in greater environmental introductions that could potentially affect the environment and, therefore, require further environmental analysis. Furthermore, FDA is clarifying that the categorical exclusion for drugs for minor species applies only to those animal drugs that have been previously approved for use in another or the same species when similar animal management practices are used. When management practices are different, environmental introductions and impacts may also be different and require environmental analyses. Minor species include wildlife and endangered species (§ 514.1(d)(1)(ii)).

The categorial exclusion for animal drugs used under prescription or veterinarian's order applies only to animal drugs for therapeutic uses as defined in section 201(g)(1)(B) of the act (21 U.S.C. 321(g)(1)(B)). Based on its experience in reviewing EA's for these products, FDA has found that prescription products are generally administered individually to a limited number of animals for a limited amount of time. Therefore, there are no significant environmental effects. However, FDA may require an EA if the agency determines that there are extraordinary circumstances associated with the use of such a product.

Current § 25.24(d)(4) categorically excludes actions on an investigational new animal drug application (INAD) if the drug to be shipped under such notice is intended to be used for clinical studies or research in which wastes will be controlled or the amount of wastes expected to enter the environment may reasonably be expected to be nontoxic. Under proposed § 25.33(e), FDA would categorically exclude all actions on INAD's. In many cases, FDA's actions on INAD's do not significantly increase the use of the drug and, thus, the amount of drug introduced into the environment. Therefore, no changes in environmental effects will occur. In those cases where an increase in use of a drug may occur as a result of an investigation under an INAD, FDA's experience from reviewing many actions on INAD's shows that significant environmental effects will not occur because the use of such drugs is limited and controlled.

Proposed § 25.33(f) would categorically exclude actions on applications submitted under section 512(m) of the act (21 U.S.C. 360b(m)). FDA is proposing to exclude actions on such applications because they permit feed manufacturers to manufacture animal feed bearing or containing new animal drugs previously approved for use in feeds. The potential for environmental effects to occur is considered at the time the new animal drug is approved for use in feed. Therefore, there is no need to require an

additional EA each time the agency considers approval of an application submitted under section 512(m) of the act.

Current § 25.24(d)(3) categorically excludes withdrawals of approval of NADA's when the drug is no longer marketed or at the request of the application holder. Under proposed § 25.33(g), FDA would categorically exclude withdrawals of approval of ANADA's, as well as withdrawals of approval of NADA's, without conditions. FDA has determined that withdrawal of an NADA or ANADA approval does not significantly affect the environment because any change in introduction of the drug will generally be a decrease.

Under proposed § 25.33(h), FDA would categorically exclude actions to withdraw the approval for uses of food additives in animal feeds or to remove substances for use in animal feeds from the GRAS list or to remove substances from the GRAS list (parts 182, 184, or 186). Withdrawal or removal of a food additive substance that reduces or eliminates animal feed use will not significantly affect the environment because any change in introduction of the substance to the environment will generally be a decrease.

In those cases where the withdrawal of the NADA, ANADA, or FAP, or GRAS substance has resulted in the use of a substitute product, the agency has found in all instances that the increased use of the substitutes will not significantly affect the environment.

FDA is proposing to eliminate the categorical exclusions under current § 25.24(d)(5) and (d)(6) because FDA does not do testing and certification of batches of antibiotics for animal use, and FDA does not use monographs for animal drugs. FDA is proposing to eliminate current § 25.24(d)(7). This action takes place under an INAD, and its effect is to set the standard for approving ANADA's. FDA will determine whether it needs to consider environmental effects when it approves individual ANADA's.

5. Devices and Electronic Products

The agency is proposing to redesignate current § 25.24(e) as proposed § 25.34 and to remove criteria in § 25.24(e)(4) and (e)(7), now incorporated in proposed § 25.21 *Extraordinary circumstances.*

D. Subpart D—Preparation of Environmental Documents

The proposed rule would reorganize current subpart C of part 25 to improve the usefulness and readability of the current regulations.

Proposed § 25.40(b) would eliminate the EA and abbreviated EA formats and delete any reference to formats. After consultation with CEQ, the agency has decided to remove the standard formats from part 25, and to provide appropriate formats in guidance documents. Guidance documents, which do not bind the agency or the public, are more easily revised. Use of such documents will give FDA greater flexibility to tailor environmental documents to reflect state-of-the-art developments in environmental analysis and to assist companies in focusing on important environmental issues. Information/guidance concerning the nature and scope of information that an applicant or petitioner should submit in an EA may be obtained from the center responsible for the action subject to environmental evaluation (proposed § 25.40(c)).

In the Federal Register of January 11, 1996, FDA announced the availability of a guidance document entitled, ''Guidance for Industry for the Submission of an Environmental Assessment in Human Drug Applications and Supplements'' (61 FR 1031). The guidance, prepared by CDER, is intended to assist industry by providing guidance on how to prepare EA's for submission to CDER as part of NDA's, antibiotic applications, ANDA's, abbreviated antibiotic applications, and IND's. This guidance will be amended to reflect the final regulations and categorical exclusions and to include biologic products subject to licensure under the PHS Act. The guidance document employs a tiered approach to testing and accepts the use of test methods recognized and recommended by competent authorities such as FDA (see e.g., FDA's EA Technical Assistance Handbook), EPA (see 40 CFR parts 796 and 797) and the Organization for Economic Co-operation and Development. Under the proposed rule, this approach will continue to be acceptable.

The current formats in part 25 focus the environmental analysis on the use and disposal from use of FDA-regulated articles but also address production impacts. FDA proposes to maintain this focus in the proposed revised regulations, but, for the following reasons, is proposing to change the way it addresses production impacts. To address the potential environmental impacts from production of FDA-regulated articles, FDA currently requires a limited amount of information to make sure that the article will be produced in compliance with applicable emissions requirements. Specifically, the agency requires that the following information be included in an EA: A list of the substances expected to be emitted, the controls exercised, a citation of applicable emissions requirements and statement of compliance with these requirements, and a discussion of the effect the approval of the petition will have on compliance with these requirements.

FDA recognizes, however, that Federal, State, and local environmental protection agencies have the responsibility for issuing regulations, permitting and licensing facilities, and enforcing compliance with the requirements that these agencies have determined are necessary to ensure adequate protection of the environment from emissions from production operations. Regulating emissions from production sites requires balancing between air, water, and solid waste emissions for all production operations carried out at a production site and in the region with consideration of the costs of compliance and available technology that requires expertise found primarily in Federal, State, and local environmental agencies. As required by environmental regulations and/or as conditions of retaining licenses and permits, manufacturers must obtain or modify permits and provide information to these agencies when production operations are initiated or changed. The information required to be provided to FDA regarding production impacts and compliance with emission requirements is information that is generally required to be provided to or is known by other agencies whose responsibility is to monitor compliance.

FDA has reviewed hundreds of EA's in which information regarding the manufacturing site, such as emitted substances and emission controls, was provided. As a result of this review, FDA has found that FDA-regulated articles produced in compliance with all applicable emission requirements (e.g., Clean Air Act, Clean Water Act, Occupational Safety and Health Act) will not significantly affect the environment. Based on these findings, FDA has determined that it is no longer necessary to review a company's compliance with Federal, State, and local environmental laws and FDA is proposing to delete the requirements for the submission of emission information for production sites. Accordingly, under the proposed regulations, FDA will continue to focus its environmental reviews on the use and disposal from use of FDA-regulated articles, and FDA will no longer routinely require submission of information regarding manufacturing sites or a certification of compliance with Federal, State, and

local emission requirements. However, if information available to the agency or the applicant establishes that the general or specific emission requirements promulgated by Federal, State, or local environmental protection agencies do not address unique emission circumstances and the emissions may harm the environment, this would be sufficient grounds for requesting manufacturing information in an EA. FDA generally requires manufacturing information to be submitted as part of applications or petitions for FDA-regulated articles. This information will aid FDA in determining if a categorical exclusion request is appropriate.

Proposed § 25.40(a) includes additional information found in the CEQ regulations to clarify that the EA shall include brief discussions of the need for the proposal, alternatives, environmental impacts of the proposed action, and a listing of agencies and persons consulted, and include additional information to clarify the scope and focus of an EA. Environmental documents shall concentrate on timely and significant issues, not amass needless detail. To that end, the agency has included some general information regarding the acceptability of using a tiered testing scheme. A tiered testing scheme results in test termination when sufficient data are available to assess the potential environmental fate and effects of an FDA-regulated article in the environment. Specific information regarding tiered testing will be provided in guidance documents. Although the number of pages for any EA may vary in relation to the complexity of the issues, generally they should not exceed 30 pages, not including test reports and data.

The agency is proposing to add § 25.40(b) to clarify that CEQ regulations (40 CFR 1506.5(b)) place ultimate responsibility on FDA for the scope and content of environmental analyses. Thus, FDA may require additional information from applicants or may itself include additional information in environmental documents (EA's, FONSI's, or EIS's) when warranted. Proposed § 25.40(c) would include information found in current § 25.30(a) and encourages applicants or petitioners who submit EA's to FDA to consult with FDA regarding the appropriate scope and content for EA's for the requested action. Proposed § 25.40(d) discusses incorporation of information in an EA by reference.

Proposed § 25.41 would include information on FONSI's that is found in current § 25.32(a) and (c). The agency is proposing to delete the language on notices of intent and draft, final, and supplemental EIS's, found in current §§ 25.33 and 25.34, because the CEQ regulations describe the process for determining the scope of an EIS and provide detailed requirements for the preparation of draft and final EIS's. Thus, this information is duplicative and unnecessary in FDA regulations (40 CFR 1501.7 and part 1502).

Proposed § 25.42 would describe the subject matter that needs to be discussed in an EIS and references the CEQ regulations governing the requirements for preparation of an EIS. Proposed § 25.42(c) fulfills the CEQ requirement under 40 CFR 1502.9(c) that FDA adopt procedures for introducing a supplement into its administrative record.

The agency is proposing to add new § 25.43 to clarify the agency's existing responsibility under the CEQ regulations to prepare a concise public record of decision for cases requiring EIS's (40 CFR 1505.2).

Proposed § 25.44 would include information found in current § 25.10(b), describing the responsibilities of lead and cooperating agencies. The agency is proposing to delete duplicative and unnecessary information on lead and cooperating agencies that is already found in the CEQ regulations, and to delete the first sentence in current § 25.10(b) because it is self-evident that FDA will be the lead agency for programs administered by FDA.

Proposed § 25.45 would include information from current § 25.42, describing who the responsible agency official will be and his or her responsibilities. The agency is proposing to remove information in current § 25.42 that is duplicative of requirements already found in CEQ regulations.

E. Subpart E—Public Participation and Notification of Environmental Documents

The proposed rule would improve the usefulness and readability of the regulations by reorganizing current subpart D of part 25, ''agency decisionmaking'' (now proposed ''Public Participation and Notification of Environmental Documents'') by deleting unnecessary information that is duplicative of requirements found in the CEQ regulations, and, as discussed above, moving information to other relevant sections. Proposed subpart E would now address public participation in the NEPA process and clarify circumstances under which environmental documents will publicly be disclosed. These revisions are consistent with our responsibilities under the CEQ regulations and under Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, February 11, 1994.

CEQ regulations require that agency procedures ensure full compliance with NEPA to the extent possible, unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible (40 CFR 1500.6). Proposed § 25.50 clarifies that laws governing public disclosure may limit FDA's ability to comply with NEPA and CEQ regulations.

Proposed § 25.51(a) and (b), public disclosure of FONSI's and EA's, would include the public disclosure information found in current § 25.30(b) and 25.41(b). The proposed rule would move the information relating to statutory time frames from current § 25.40(c) to proposed § 25.51(b)(1).

Proposed § 25.52 would add new information relating to the public disclosure of EIS's.

F. Subpart F—Other Requirements

Current subpart E will be renumbered as subpart F. The agency is not proposing to amend this subpart.

IV. Environmental Impact Considerations

The agency has determined under current 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an EA nor an EIS is required.

V. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866, under the Regulatory Flexibility Act (Pub. L. 96–354), and under the Unfunded Mandates Reform Act (Pub. L. 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts and equity). The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The Unfunded Mandates Reform Act requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by State, local, and tribal governments, in

the aggregate, or by the private sector, of $100,000,000 (adjusted annually for inflation). That act also requires (in section 205) that the agency identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost effective, or least burdensome alternative that achieves the objective of the rule. The following analysis demonstrates that this proposed rule is consistent with the principles set forth in the Executive Order and in these two statutes. The proposed rule is not an economically significant regulatory action under Executive Order 12866.

Based on the approximate number of EA's that FDA currently receives each year and the resources needed to prepare them, the agency estimates that the proposed reduced requirements for submitting EA's will result in an annual cost savings to industry of approximately $15.7 million. The basis for this estimate is as follows:

Human pharmaceuticals: Approximately 125 EA's related to human pharmaceuticals would be eliminated annually under the proposal. About one-half of these are abbreviated EA's; the remainder are full assessments. FDA assumes that the average cost of preparing an abbreviated assessment was approximately $40,000, while the average cost of a full assessment was approximately $200,000. These assumptions yield a cost savings of about $2.5 million for abbreviated EA's and $12.5 million for full EA's, for a total savings to industry from the reduced requirements of EA's relating to human pharmaceuticals of approximately $15 million per year.

Veterinary products: The proposed changes would eliminate approximately 37 abbreviated EA's for veterinary products each year, at an average cost of approximately $5,000 each. About 77 brief submissions, which currently require categorical exclusion criteria review, would also be eliminated; these cost an estimated $300 each to prepare. Total cost savings to the veterinary products industry under the proposal would thus be approximately $208,000 per year.

Food products: About 36 EA's per year received by CFSAN would be eliminated under the proposal. Approximately 28 of these would have been abbreviated EA's and 8 would have been full assessments under current rules. FDA estimates that the cost of producing most abbreviated EA's for CFSAN is approximately $2,500 and the average cost of producing a full EA is approximately $50,000. These assumptions imply an annual cost savings of approximately $70,000 for abbreviated EA's and $400,000 for full EA's, for a total annual savings to the foods industry of approximately $470,000.

In addition to these savings to industry, the proposed changes would improve FDA efficiency by eliminating agency review costs of approximately $1 million per year.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule of small entities. Because these regulations will not impose significant new costs on any firms, the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

VI. Paperwork Reduction Act of 1995

This proposed rule contains reporting requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 and 3507). Therefore, in accordance with 5 CFR part 1320, a description of reporting requirements with an estimate of the annual collection of information burden is given below by cross reference to existing FDA clearance submissions previously approved by OMB which this proposed rule affects.

FDA is soliciting comments to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the proposed collection of information; (3) evaluate the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond.

Title: National Environmental Policy Act; Policies and Procedures.

Description: FDA has previously issued regulations that implement NEPA (part 25). The proposed rule would reduce the number of NEPA evaluations by providing for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an EIS nor an EA is required. FDA is also proposing to amend these regulations to ensure that the NEPA procedures are more concise and understandable to the public and to reflect current FDA policy with respect to environmental considerations. This proposed rule is in response to initiatives announced in the President's National Performance Reports, ''Reinventing Drug and Medical Device Regulations,'' April 1995, and ''Reinventing Food Regulations,'' January 1996.

Description of Respondents: Persons and businesses, including small businesses.

Estimated Annual Reporting and Recordkeeping Burden. The estimated burden associated with the information collection requirements for this proposed rule will be recognized in the individual FDA clearances where NEPA considerations apply. Listed below are those clearances affected by this regulation, including the section of title 21 CFR, the title, and the OMB approval number:

Section 10.30, Citizen Petitions, 0910–0183; § 71.1, Color Additive Petitions, 0910–0185; § 170.35, Affirmation of Generally Recognized As Safe (GRAS) Status, 0910–0132; § 101.12, Reference amounts customarily consumed per eating occasion, 0910–0286; § 101.69, Petitions for nutrient content claims, 0910–0288; § 101.70, Petitions for health claims, 0910–0287; § 170.39, Threshold of regulation for substances used in food-contact articles, 0910–0298; § 171.1, Food Additive Petitions, 0910–0016; § 312.23, Conditions for Exemption of New Drugs for Investigational Use, 0910–0014; § 511.1, New Animal Drugs for Investigational Use Exempt From Section 512(a) of the Act, 0910–0117; § 514.1, New Animal Drug Applications, 0910–0032; § 514.8, Supplemental New Animal Drug Applications, 0910–0032; § 571.1, Food Additive Petitions, 0910–0016; § 601.2 Product Licenses-Procedures for Filing, 0910–0124; § 812.20, Investigational Device Exemptions Application, 0910–0078.

The proposed rule would reduce these information collections that have already been reviewed and approved by the OMB.Reporting burdens imposed by current part 25 are approved by OMB through December 31, 1997 (see OMB control number 0910–0190, ''National Environmental Policy Act; Policy and Procedures—21 CFR Part 25'').

The agency has submitted copies of the proposed rule to OMB for its review of these reporting requirements. Interested persons are requested to send comments regarding information collection by May 3, 1996, to the Office of Information and Regulatory Affairs, OMB (address above).

List of Subjects in 21 CFR Part 25

Environmental impact statements, Foreign relations, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 25 be revised to read as follows:

PART 25—ENVIRONMENTAL IMPACT CONSIDERATIONS

Subpart A—General Provisions

Sec.
25.1 Purpose.
25.5 Terminology.
25.10 Policies and NEPA planning.

Subpart B—Agency Actions Requiring Environmental Consideration

25.15 General procedures.
25.16 Public health and safety emergencies.
25.20 Actions requiring preparation of an environmental assessment.
25.21 Extraordinary circumstances.
25.22 Actions requiring preparation of an environmental impact statement.

Subpart C—Categorical Exclusions

25.30 General.
25.31 Human drugs and biologics.
25.32 Foods, food additives, and color additives.
25.33 Animal drugs.
25.34 Devices and electronic products.

Subpart D—Preparation of Environmental Documents

25.40 Environmental assessments.
25.41 Findings of no significant impact.
25.42 Environmental impact statements.
25.43 Records of decision.
25.44 Lead and cooperating agencies.
25.45 Responsible agency official

Subpart E—Public Participation and Notification of Environmental Documents

25.50 General information.
25.51 Environmental assessments and findings of no significant impact.
25.52 Environmental impact statements.

Subpart F—Other Requirements

25.60 Environmental effects abroad of major agency actions.

Authority: Secs. 201–903 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321–393); secs. 351, 354–361 of the Public Health Service Act (42 U.S.C. 262, 263b–264); 42 U.S.C. 4321, 4332; 40 CFR parts 1500–1508; E.O. 11514, 3 CFR, 1966-1970 Comp., p. 902, as amended by E.O. 11991, 3 CFR, 1977 Comp., p. 123; E.O. 12114, 3 CFR, 1979 Comp., p. 356.

Subpart A—General Provisions

§ 25.1 Purpose.

The National Environmental Policy Act of 1969 (NEPA), as amended, directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in NEPA. All agencies of the Federal Government shall comply with the procedures in section 102(2) of NEPA except where compliance would be inconsistent with other statutory requirements. The regulations in this part implement section 102(2) of NEPA in a manner that is consistent with FDA's authority under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act. This part also supplements the regulations for implementing the procedural provisions of NEPA that were published by the Council on Environmental Quality (CEQ) in 40 CFR Parts 1500 through 1508 and the procedures included in the ''HHS General Administration Manual, Part 30: Environmental Protection'' (45 FR 76519 to 76534, November 19, 1980).§ 25.5 *Terminology*.

(a) Definitions that apply to the terms used in this part are set forth in the CEQ regulations under 40 CFR part 1508. The terms and the sections of 40 CFR part 1508 in which they are defined follow:

(1) Categorical exclusion (40 CFR 1508.4).

(2) Cooperating agency (40 CFR 1508.5).

(3) Cumulative impact (40 CFR 1508.7).

(4) Effects (40 CFR 1508.8).

(5) Environmental assessment (EA) (40 CFR 1508.9).

(6) Environmental document (40 CFR 1508.10).

(7) Environmental impact statement (EIS) (40 CFR 1508.11).

(8) Federal agency (40 CFR 1508.12).

(9) Finding of no significant impact (40 CFR 1508.13).

(10) Human environment (40 CFR 1508.14).

(11) Lead agency (40 CFR 1508.16).

(12) Legislation (40 CFR 1508.17).

(13) Major Federal action (40 CFR 1508.18).

(14) Mitigation (40 CFR 1508.20).

(15) NEPA process (40 CFR 1508.21).

(16) Notice of intent (40 CFR 1508.22).

(17) Proposal (40 CFR 1508.23).

(18) Scope (40 CFR 1508.25).

(19) Significantly (40 CFR 1508.27).

(b) The following terms are defined solely for the purpose of implementing the supplemental procedures provided by this part and are not necessarily applicable to any other statutory or regulatory requirements:

(1) *Abbreviated application* applies to an abbreviated new drug application, an abbreviated antibiotic application, and an abbreviated new animal drug application.

(2) *Active moiety* means the molecule or ion, excluding those appended portions of the molecule that cause the drug to be an ester, salt (including a salt with hydrogen or coordination bonds), or other noncovalent derivative (such as a complex chelate or clathrate) of the molecule responsible for the physiological or pharmacological action of the drug substance.

(3) *Agency* means the Food and Drug Administration (FDA).

(4) *Increased use* of a drug or biologic product may occur if the drug will be administered at higher dosage levels, for longer duration or for different indications than were previously in effect, or if the drug is a new molecular entity. New molecular entity means a drug for which the active moiety (present as the unmodified (parent) compound, or an ester or a salt, clathrate, or other noncovalent derivative of the base (parent) compound) has not been previously approved or marketed in the United States for use in a drug product, either as a single ingredient or as part of a combination product or as part of a mixture of stereoisomers. The term ''use'' also encompasses disposal of FDA-regulated articles by consumers.

(5) *Responsible agency official* means the agency decisionmaker designated in part 5 of this chapter.

(c) The following acronyms are used in this part:

(1) CEQ—Council on Environmental Quality.

(2) CGMP—Current good manufacturing practice.

(3) EA—Environmental assessment.

(4) EIS—Environmental impact statement.

(5) The act—Federal Food, Drug, and Cosmetic Act.

(6) FIFRA—Federal Insecticide, Fungicide, and Rodenticide Act.

(7) FONSI—Finding of no significant impact.

(8) GLP—Good laboratory practice.

(9) GRAS—Generally recognized as safe.

(10) HACCP—Hazard analysis critical control point.

(11) IDE—Investigational device exemption.

(12) IND—Investigational new drug application.

(13) INAD—Investigational new animal drug application.

(14) NADA—New animal drug application.

(15) NDA—New drug application.

(16) NEPA—National Environmental Policy Act of 1969.

(17) PDP—Product development protocol.

(18) PMA—Premarket approval application.

§ 25.10 Policies and NEPA planning.

(a) All FDA's policies and programs will be planned, developed, and implemented to achieve the policies declared by NEPA and required by CEQ's regulations to ensure responsible stewardship of the environment for present and future generations.

(b) Assessment of environmental factors continues throughout planning and is integrated with other program planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to avoid potential conflicts.

(c) For actions initiated by the agency, the NEPA process will begin when the agency action under consideration is first identified. For actions initiated by applicants or petitioners, NEPA planning begins when FDA receives a submission from an applicant or petitioner seeking action by FDA. FDA may issue a public call for environmental data or otherwise consult with affected individuals or groups when a contemplated action in which it is or may be involved poses potential significant environmental effects.

(d) Environmental documents shall concentrate on timely and significant issues, not amass needless detail.

(e) If a proposed action for which an EIS will be prepared involves possible environmental effects that are required to be considered under statutes or Executive Orders other than those referred to under ''AUTHORITY'' in this part, these effects shall be considered in the NEPA review, consistent with 40 CFR 1502.25 and the Department of Health and Human Services' General Administration Manual, part 30.

Subpart B—Agency Actions Requiring Environmental Consideration

§ 25.15 General procedures.

(a) All applications or petitions requesting agency action require the submission of an EA or a claim of categorical exclusion. A claim of categorical exclusion shall include a certification of compliance with the categorical exclusion criteria and shall certify that to the applicant's knowledge, no extraordinary circumstances exist. Failure to submit an adequate EA for an application or petition requesting action by the agency of a type specified in § 25.20, unless the agency can determine that the action qualifies for exclusion under §§ 25.30, 25.31, 25.32, 25.33, or 25.34, is sufficient grounds for FDA to refuse to file or approve the application or petition.

(b) The responsible agency officials will evaluate the information contained in the EA to determine whether it is accurate and objective, whether the proposed action may significantly affect the quality of the human environment, and whether an EIS will be prepared. If significant effects requiring the preparation of an EIS are identified, FDA will prepare an EIS for the action in accordance with the procedures in subparts D and E of this part. If significant effects requiring the preparation of an EIS are not identified, resulting in a decision not to prepare an EIS, the responsible agency official will prepare a FONSI in accordance with § 25.41.

(c) Classes of actions that individually or cumulatively do not significantly affect the quality of the human environment ordinarily are excluded from the requirement to prepare an EA or an EIS. The classes of actions that qualify as categorical exclusions are set forth in §§ 25.30, 25.31, 25.32, 25.33, or 25.34.

(d) A person submitting an application or petition of a type subject to categorical exclusion under §§ 25.30, 25.31, 25.32, 25.33, or 25.34, or proposing to dispose of an article as provided in §§ 25.30(d) or 25.32(h), is not required to submit an EA if the person certifies that the action requested qualifies for a categorical exclusion, citing the particular categorical exclusion that is claimed, and certifies that to the applicant's knowledge, no extraordinary circumstances exist.

§ 25.16 Public health and safety emergencies.

There are certain regulatory actions that, because of their immediate importance to the public health or safety, may make adherence to the procedural provisions of NEPA and CEQ's regulations impossible. For such actions, the responsible agency official shall consult with CEQ about alternative arrangements before the action is taken, or after the action is taken, if time does not permit prior consultation with CEQ.

§ 25.20 Actions requiring preparation of an environmental assessment.

Any proposed action of a type specified in this section ordinarily requires at least the preparation of an EA, unless it is an action in a specific class that qualifies for exclusion under §§ 25.30, 25.31, 25.32, 25.33, or 25.34:

(a) Major recommendations or reports made to Congress on proposals for legislation in instances where the agency has primary responsibility for the subject matter involved.

(b) Destruction or other disposition of articles condemned after seizure or whose distribution or use has been enjoined, unless categorically excluded in §§ 25.30(d) or 25.32(h).

(c) Destruction or other disposition of articles following detention or recall at agency request, unless categorically excluded in §§ 25.30(d) or 25.32(h).

(d) Disposition of FDA laboratory waste materials, unless categorically excluded in § 25.30(m).

(e) Intramural and extramural research supported in whole or in part through contracts, other agreements, or grants, unless categorically excluded in § 25.30(e) or (f).

(f) Establishment by regulation of labeling requirements, a standard, or a monograph, unless categorically excluded in §§ 25.30(k) or 25.31(a), (b), (c), (h), (i), or (j), or 25.32(a) or (p).

(g) Issuance, amendment, and enforcement of FDA regulations, or an exemption or variance from FDA regulations, unless categorically excluded in §§ 25.30(h), (i), or (j), or 25.32(e), (g), (n), or (p).

(h) Withdrawal of existing approvals of FDA-approved articles, unless categorically excluded in §§ 25.31(d) or (k), 25.32(m), or 25.33(g) or (h).

(i) Approval of food additive petitions and color additive petitions, approval of requests for exemptions for investigational use of food additives, and granting of requests for exemption from regulation as a food additive, unless categorically excluded in § 25.32(b), (c), (i), (j), (k), (l), (o), (q), or (r).

(j) Establishment of a tolerance for unavoidable poisonous or deleterious substances in food or in packaging materials to be used for food.

(k) Affirmation of a food substance as GRAS for humans or animals, on FDA's initiative or in response to a petition, under part 182, 184, 186, or 582 of this chapter and establishment or amendment of a regulation for a prior-sanctioned food ingredient, as defined in §§ 170.3(l) and 181.5(a) of this chapter, unless categorically excluded in § 25.32(f), (k), or (r).

(l) Approval of NDA's, abbreviated applications, applications for marketing approval for marketing of a biologic product, supplements to such applications, and actions on IND's, unless categorically excluded in § 25.31(a), (b), (c), (e), or (l).

(m) Approval of NADA's, abbreviated applications, supplements, and actions on INAD's, unless categorically excluded under § 25.33(a), (c), (d), or (e).

(n) Approval of PMA's for medical devices, notices of completion of PDP's for medical devices, authorizations to commence clinical investigation under an approved PDP, or applications for an

IDE, unless categorically excluded in § 25.34.

§ 25.21 Extraordinary circumstances.

As required under 40 CFR 1508.4, FDA will require at least an EA for any specific action that ordinarily would be excluded if extraordinary circumstances indicate that the specific proposed action may significantly affect the quality of the human environment (see 40 CFR 1508.27 for examples of significant impacts). Examples of such extraordinary circumstances include:

(a) Actions for which available data establish that, at the expected level of exposure, there is the potential for serious harm to the environment; and

(b) Actions that adversely affect a species or the critical habitat of a species determined under the Endangered Species Act or the Convention on International Trade in Endangered Species of Wild Flora and Fauna to be endangered or threatened or wild flora or fauna that are entitled to special protection under some other Federal law.

§ 25.22 Actions requiring the preparation of an environmental impact statement.

(a) There are no categories of agency actions that routinely significantly affect the quality of the human environment and that therefore ordinarily require the preparation of an EIS.

(b) EIS's are prepared for agency actions when evaluation of data or information in an EA or otherwise available to the agency leads to a finding by the responsible agency official that a proposed action may significantly affect the quality of the human environment.

Subpart C—Categorical Exclusions

§ 25.30 General.

The classes of actions listed in this section and §§ 25.31 through 25.34 are categorically excluded and, therefore, ordinarily do not require the preparation of an EA or an EIS:

(a) Routine administrative and management activities, including inspections, and issuance of field compliance programs, program circulars, or field investigative assignments.

(b) Recommendation for an enforcement action to be initiated in a Federal court.

(c) Agency requests for initiation of recalls.

(d) Destruction or disposition of any FDA-regulated article condemned after seizure or the distribution or use of which has been enjoined or following detention or recall at agency request if the method of destruction or disposition of the article, including packaging material, is in compliance with all Federal, State, and local requirements.

(e) Extramural contracts, other agreements, or grants for statistical and epidemiological studies, surveys and inventories, literature searches, and report and manual preparation, or any other studies that will not result in the production or distribution of any substance and, therefore, will not result in the introduction of any substance into the environment.

(f) Extramural contracts, other agreements, and grants for research for such purposes as to develop analytical methods or other test methodologies.

(g) Activities of voluntary Federal-State cooperative programs, including issuance of model regulations proposed for State adoption.

(h) Issuance, amendment, or revocation of procedural or administrative regulations and guidelines, including procedures for submission of applications for product development, testing and investigational use, and approval.

(i) Corrections and technical changes in regulations.

(j) Issuance of CGMP regulations, HACCP regulations, establishment standards, emergency permit control regulations, GLP regulations, and issuance or denial of permits, exemptions, variances, or stays under these regulations.

(k) Establishment or repeal by regulation of labeling requirements for marketed articles if there will be no increase in the existing levels of use or change in the intended uses of the product or its substitutes.

(l) Routine maintenance and minor construction activities such as:

(1) Repair to or replacement of equipment or structural components (e.g., door, roof, or window) of facilities controlled by FDA;

(2) Lease extensions, renewals, or succeeding leases;

(3) Construction or lease construction of 10,000 square feet or less of occupiable space;

(4) Relocation of employees into existing owned or currently leased space;

(5) Acquisition of 20,000 square feet or less of occupiable space in a structure that was substantially completed before the issuance of solicitation for offers; and

(6) Acquisition of between 20,000 square feet and 40,000 square feet of occupiable space if it constitutes less than 40 percent of the occupiable space in a structure that was substantially completed before the solicitation for offers.

(m) Disposal of low-level radioactive waste materials (as defined in the Nuclear Regulatory Commission regulations at 10 CFR 61.2) and chemical waste materials generated in the laboratories serviced by the contracts administered by FDA, if the waste is disposed of in compliance with all applicable Federal, State, and local requirements.

§ 25.31 Human drugs and biologics.

The classes of actions listed in this section are categorically excluded and, therefore, ordinarily do not require the preparation of an EA or an EIS:

(a) Action on an NDA, abbreviated application, or a supplement to such application, or action on an OTC monograph, if the action does not increase the use of the active moiety.

(b) Action on an NDA, abbreviated application, or a supplement to such application, or action on an OTC monograph, if the action increases the use of the active moiety, but the concentration of the substance in the environment will be below 1 part per billion.

(c) Action on an NDA, abbreviated application, application for marketing approval of a biologic product, or a supplement to such application, or action on an OTC monograph, for substances that occur naturally in the environment when the action does not alter significantly the concentration or distribution of the substance, its metabolites, or degradation products in the environment.

(d) Withdrawal of approval of an NDA or an abbreviated application.

(e) Action on an IND.

(f) Testing and certification of batches of an antibiotic or insulin.

(g) Testing and release by the Center for Biologics Evaluation and Research of lots or batches of a licensed biologic product.

(h) Issuance, revocation, or amendment of a monograph for an antibiotic drug.

(i) Establishment of bioequivalence requirements for a human drug or a comparability determination for a biologic product subject to licensing.

(j) Issuance, revocation, or amendment of a standard for a biologic product.

(k) Revocation of a license for a biologic product.

(l) Action on an application for marketing approval for marketing of a biologic product for transfusable human blood or blood components and plasma.

§ 25.32 Foods, food additives, and color additives.

The classes of actions listed in this section are categorically excluded and,

therefore, ordinarily do not require the preparation of an EA or an EIS:

(a) Issuance, amendment, or repeal of a food standard.

(b) Action on a request for exemption for investigational use of a food additive if the food additive to be shipped under the request is intended to be used for clinical studies or research.

(c) Approval of a color additive petition to change a provisionally listed color additive to permanent listing for use in food, drugs, devices, or cosmetics.

(d) Testing and certification of batches of a color additive.

(e) Issuance of an interim food additive regulation.

(f) Affirmation of a food substance as GRAS for humans or animals on FDA's initiative or in response to a petition, under parts 182, 184, 186, or 582 of this chapter, and establishment or amendment of a regulation for a prior-sanctioned food ingredient, as defined in §§ 170.3(l) and 181.5(a) of this chapter, if the substance or food ingredient is already marketed in the United States for the proposed use.

(g) Issuance and enforcement of regulations relating to the control of communicable diseases or to interstate conveyance sanitation under parts 1240 and 1250 of this chapter.

(h) Approval of a request for diversion of adulterated or misbranded food for humans or animals to use as animal feeds.

(i) Approval of a food additive petition or the granting of a request for exemption from regulation as a food additive under § 170.39 of this chapter when the additive is present in finished food-packaging material at not greater than 5 percent-by-weight and is also a functional component of the finished packaging material.

(j) Approval of a food additive petition or the granting of a request for exemption from regulation as a food additive under § 170.39 of this chapter when the additive is to be used as a component of a food-contact surface of permanent or semipermanent equipment or of another food-contact article intended for repeated use.

(k) Approval of a food additive, color additive, or GRAS petition for substances added directly to food that are intended to remain in food through ingestion by consumers and that are not intended to replace macronutrients in food.

(l) Approval of a petition for color additives used in contact lenses, sutures, filaments used as supporting haptics in intraocular lenses, bone cement, and in other FDA-regulated products having similarly low levels of use.

(m) Action to prohibit or otherwise restrict or reduce the use of a substance in food, food packaging, or cosmetics.

(n) Issuance, amendment, or revocation of a regulation pertaining to infant formulas.

(o) Approval of a food additive petition for the intended expression product(s) present in food derived from new plant varieties.

(p) Issuance, amendment, or revocation of a regulation in response to a reference amount petition as described in § 101.12(h) of this chapter, a nutrient content claim petition as described in § 101.69 of this chapter, a health claim petition as described in § 101.70 of this chapter, or a petition pertaining to the label declaration of ingredients as described in § 101.103 of this chapter.

(q) Approval of a food additive petition or the granting of a request for an exemption from regulation as a food additive under § 170.39 of this chapter for a substance registered by the Environmental Protection Agency under FIFRA for the same use requested in the petition.

(r) Approval of a food additive, color additive, or GRAS affirmation petition for a substance that occurs naturally in the environment, when the action does not alter significantly the concentration or distribution of the substance, its metabolites, or degradation products in the environment.

§ 25.33 Animal drugs.

The classes of actions listed in this section are categorically excluded and, therefore, ordinarily do not require the preparation of an EA or an EIS:

(a) Action on an NADA, abbreviated application, or supplement to such applications, if the action does not increase the use of the drug. Actions to which this categorical exclusion applies include:

(1) An animal drug to be marketed under the same conditions of approval as a previously approved animal drug;

(2) A combination of previously approved animal drugs;

(3) A new premix or other formulation of a previously approved animal drug;

(4) Changes specified in § 514.8(a)(5), (a)(6), or (d) of this chapter;

(5) A change of sponsor;

(6) A previously approved animal drug to be contained in medicated feed blocks under § 510.455 of this chapter or as a liquid feed supplement under § 558.5 of this chapter; or

(7) Approval of a drug for use in animal feeds if such drug has been approved under § 514.2 or 514.9 of this chapter for other uses.

(b) [Reserved]

(c) Action on an NADA, abbreviated application, or a supplement for substances that occur naturally in the environment when the action does not alter significantly the concentration or distribution of the substance, its metabolites, or degradation products in the environment.

(d) Action on an NADA, abbreviated application, or a supplement to such applications, for:

(1) Drugs intended for use in nonfood animals;

(2) Anesthetics, both local and general, that are individually administered;

(3) Nonsystemic topical and ophthalmic animal drugs;

(4) Drugs for minor species, including wildlife and endangered species, when the drug has been previously approved for use in another or the same species where similar animal management practices are used; and

(5) Drugs intended for use under prescription or veterinarian's order for therapeutic use.

(e) Action on an INAD.

(f) Action on an application submitted under section 512(m) of the act.

(g) Withdrawal of approval of an NADA or an abbreviated NADA.

(h) Withdrawal of approval of a food additive petition that reduces or eliminates animal feed uses of a food additive.

§ 25.34 Devices and electronic products.

The classes of actions listed in this section are categorically excluded and, therefore, ordinarily do not require the preparation of an EA or an EIS:

(a) Action on a device premarket notification submission under subpart E of part 807 of this chapter.

(b) Classification or reclassification of a device under part 860 of this chapter.

(c) Issuance, amendment, or repeal of a standard for a class II medical device or an electronic product, and issuance of exemptions or variances from such a standard.

(d) Approval of a PMA or a notice of completion of a PDP or amended or supplemental applications or notices for a class III medical device if the device is of the same type and for the same use as a previously approved device.

(e) Changes in the PMA or a notice of completion of a PDP for a class III medical device that do not require submission of an amended or supplemental application or notice.

(f) Issuance of a restricted device regulation if it will not result in increases in the existing levels of use or changes in the intended uses of the product or its substitutes.

(g) Action on an application for an IDE or an authorization to commence a clinical investigation under an approved PDP.

(h) Issuance of a regulation exempting from preemption a requirement of a State or political subdivision concerning a device, or a denial of an application for such exemption.

Subpart D—Preparation of Environmental Documents

§ 25.40 Environmental assessments.

(a) As defined by CEQ in 40 CFR 1508.9, an EA is a concise public document that serves to provide sufficient evidence and analysis for an agency to determine whether to prepare an EIS or a FONSI. The EA shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. An EA shall be prepared for each action not categorically excluded in §§ 25.30, 25.31, 25.32, 25.33, or 25.34. The EA shall focus on relevant environmental issues and shall be a concise, objective, and well-balanced document that allows the public to understand the agency's decision. If potentially adverse environmental impacts are identified for an action or group of related actions, the EA shall discuss any reasonable alternative course of action that offers less environmental risk or that is environmentally preferable to the proposed action. The use of a scientifically justified tiered testing approach, in which testing may be stopped when the results suggest that no significant impact will occur, is an acceptable approach.

(b) Generally, FDA requires an applicant to prepare an EA and make necessary corrections to it. Ultimately, FDA is responsible for the scope and content of EA's and may include additional information in environmental documents when warranted.

(c) Information concerning the nature and scope of information that an applicant or petitioner shall submit in an EA may be obtained from the center or other office of the agency having responsibility for the action that is the subject of the environmental evaluation. Applicants and petitioners are encouraged to submit proposed protocols for environmental studies for technical review by agency staff. Applicants and petitioners also are encouraged to consult applicable FDA EA guidance documents, which provide additional advice on how to comply with FDA regulations.

(d) Consistent with 40 CFR 1500.4(j) and 1502.21, EA's may incorporate by reference information presented in other documents that are available to FDA and to the public.

(e) The agency evaluates the information contained in an EA and any public input to determine whether it is accurate and objective, whether the proposed action may significantly affect the quality of the human environment, and whether an EIS or FONSI will be prepared. The responsible agency official designated in part 5 of this chapter as responsible for the underlying action examines the environmental risks of the proposed action and the alternative courses of action, selects a course of action, and ensures that any necessary mitigating measures are implemented as a condition for approving the selected course of action.

§ 25.41 Findings of no significant impact.

(a) As defined by the CEQ regulations (40 CFR 1508.13), a FONSI is a document prepared by a Federal agency stating briefly why an action, not otherwise excluded, will not significantly affect the human environment and for which, therefore, an EIS will not be prepared. A FONSI includes the EA or a summary of it and a reference to any other related environmental documents.

(b) The agency official(s) responsible for approving the FONSI will sign the document, thereby establishing that the official(s) approve(s) the conclusion not to prepare an EIS for the action under consideration.

§ 25.42 Environmental impact statements.

(a) As defined by CEQ regulations (40 CFR 1508.11) and section 102(2)(C) of NEPA, an EIS should be a clear, concise, and detailed written statement describing:

(1) The environmental impacts of a proposed action;

(2) Any adverse effects that cannot be avoided if the action is implemented;

(3) Alternatives to the action;

(4) The relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

(5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

(b) The CEQ regulations (40 CFR 1501.7 and part 1502) describe the process for determining the scope of an EIS and provide detailed requirements for the preparation of draft and final EIS's. CEQ format and procedures for preparing EIS shall be followed.

(c) Under the conditions prescribed in 40 CFR 1502.9, the agency will prepare a supplement for a draft or final EIS and introduce the supplement into the administrative record.

§ 25.43 Records of decisions.

(a) In cases requiring environmental impact statements, at the time of its decision, the agency shall prepare a concise public record of decision.

(b) The record of decision shall:

(1) State what the decision was;

(2) Identify and discuss alternatives considered by the agency in reaching its decision;

(3) State whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why not; and

(4) Discuss and implement any monitoring and enforcement program necessary to affect mitigation.

§ 25.44 Lead and cooperating agencies.

For actions requiring the preparation of an EIS, FDA and other affected Federal agencies will agree which will be the lead agency and which will be the cooperating agencies. The responsibilities of lead agencies and cooperating agencies are described in the CEQ regulations (40 CFR 1501.5 and 1501.6, respectively). If an action affects more than one center within FDA, the Commissioner of Food and Drugs will designate one of these units to be responsible for coordinating the preparation of any required environmental documentation.

§ 25.45 Responsible agency official.

(a) The person designated in part 5 of this chapter as the responsible agency official for the underlying action is responsible for preparing environmental documents or ensuring that they are prepared.

(b) The responsible agency official will weigh any environmental impacts of each alternative course of action, including possible mitigation measures, and will balance environmental impacts with the agency's objectives in choosing an appropriate course of action. The weighing of any environmental impacts of alternatives in selecting a final course of action will be reflected in the agency's record of formal decisionmaking as required by 40 CFR 1505.2.

Subpart E—Public Participation and Notification of Environmental Documents

§ 25.50 General information.

(a) To the extent actions are not protected from disclosure by existing law applicable to the agency's operation, FDA will involve the public

in preparing and implementing its NEPA procedures and will provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents.

(b) Many FDA actions involving investigations, review, and approval of applications, and premarket notifications for human drugs, animal drugs, biologic products, and devices are protected from disclosure under the Trade Secret Act, 18 U.S.C. 1905, and 301(j) of the act. These actions are also protected from disclosure under FDA's regulations including part 20, §§ 312.130(a), 314.430(b), 514.11(b), 514.12(a), 601.50(a), 601.51(a), 807.95(b), 812.38(a), and 814.9(b) of this chapter. Even the existence of applications for human drugs, animal drugs, biologic products, and devices is protected from disclosure under these regulations. Therefore, unless the existence of applications for human drugs, animal drugs, biologic products, or premarket notification for devices has been made publicly available, the release of the environmental document before approval of human drugs, animal drugs, biologic products, and devices is inconsistent with statutory requirements imposed on FDA. Appropriate environmental documents, comments, and responses will be included in the administrative record to the extent allowed by applicable laws.

§ 25.51 Environmental assessments and findings of no significant impact.

(a) Data and information that are protected from disclosure by 18 U.S.C. 1905 or 21 U.S.C. 331(j) or 360j(c) shall not be included in the portion of environmental documents that is made public. When such data and information are pertinent to the environmental review of a proposed action, an applicant or petitioner shall submit such data and information separately in a confidential section We have spend 20 years trying to keep confidential information out of Eas. I suggest the preceding revision. Gail said she prefers confidential appendix to the EA.and shall summarize the confidential data and information in the EA to the extent possible.

(b) FONSI's and EA's will be available to the public in accordance with 40 CFR 1506.6 as follows:

(1) When the proposed action is the subject of a notice of proposed rulemaking or a notice of filing published in the Federal Register, the notice shall state that no EIS is necessary and that the FONSI and the EA are available for public inspection at FDA's Dockets Management Branch. If the responsible agency official is unable to complete environmental consideration of the proposed action before a notice of filing of a food or color additive petition is required to be published under the act, and if the subsequent environmental analysis leads to the conclusion that no EIS is necessary, the Federal Register document publishing the final regulation rather than the notice of filing shall state that no EIS is necessary and that the FONSI and the EA are available upon request and filed in FDA's Dockets Management Branch.

(2) For actions for which notice is not published in the Federal Register, the FONSI and the EA shall be made available to the public upon request according to the procedures in 40 CFR 1506.6.

(3) For a limited number of actions, the agency may make the FONSI and EA available for public review (including review by State and areawide information clearinghouses) for 30 days before the agency makes its final determination whether to prepare an EIS and before the action may begin, as described in 40 CFR 1501.4(e). This procedure will be followed when the proposed action is, or is closely similar to, one that normally requires an EIS or when the proposed action is one without precedent.

§ 25.52 Environmental impact statements.

(a) If FDA determines that an EIS is necessary for an action involving investigations or approvals for drugs, animal drugs, biologic products, or devices, an EIS will be prepared but will become available only at the time of the approval of the product. Disclosure will be made in accordance with 40 CFR 1506.6 and part 20 of this chapter. The EIS will in all other respects conform to the requirements for EIS's as specified in 40 CFR part 1502 and 1506.6(f).

(b) Comments on the EIS may be submitted after the approvalof the drug, animal drug, biologic product, and device. Those comments can form the basis for the agency to consider beginning an action to withdraw the approval of applications for a drug, animal drug, biologic product, or to withdraw premarket notifications or premarket approval applications for devices.

(c) In those cases where the existence of applications and premarket notifications for drugs, animal drugs, biologic products, or devices has already been disclosed before the agency approves the action, the agency will make diligent effort (40 CFR 1506.6) to involve the public in preparing and implementing the NEPA procedures for EIS's while following its own disclosure requirements including those listed in part 20, §§ 312.130(b), 314.430(d), 514.11(d), 514.12(b), 601.51(d), 807.95(e), 812.38(b), and 814.9(d) of this chapter.

(d) Draft and final EIS's, comments, and responses will be included in the administrative record and will be available from the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

Subpart F—Other Requirements

§ 25.60 Environmental effects abroad of major agency actions.

(a) In accordance with Executive Order 12114, ''Environmental Effects Abroad of Major Federal Actions'' of January 4, 1979 (44 FR 1957, January 9, 1977), the responsible agency official, in analyzing actions under his or her program, shall consider the environmental effects abroad, including whether the actions involve:

(1) Potential environmental effects on the global commons and areas outside the jurisdiction of any nation, e.g., oceans and the upper atmosphere.

(2) Potential environmental effects on a foreign nation not participating with or otherwise involved in an FDA activity.

(3) The export of products (or emissions) that in the United States are prohibited or strictly regulated because their effects on the environment create a serious public health risk.

(4) Potential environmental effects on natural and ecological resources of global importance designated under the Executive Order.

(b) Before deciding on any action falling into the categories specified in paragraph (a) of this section, the responsible agency official shall determine in accordance with section 2–3 of the Executive Order whether such actions may have a significant environmental effect abroad.

(c) If the responsible agency official determines that an action may have a significant environmental effect abroad, the responsible agency official shall determine in accordance with section 2–4(a) and (b) of the Executive Order, whether the subject action calls for:

(1) An EIS;

(2) A bilateral or multilateral environmental study; or

(3) A concise environmental review.

(d) In preparing environmental documents under this subpart, the responsible official shall:

(1) Determine, as provided in section 2–5 of the Executive Order, whether proposed actions are subject to the exemptions, exclusions, and

modification in contents, timing, and availability of documents.

(2) Coordinate all communications with foreign governments concerning environmental agreements and other arrangements in implementing the Executive Order.

Dated: March 19, 1996.

William B. Schultz,

Deputy Commissioner for Policy.

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