did not intend payments for technologies already on sound commercial footing. Comments suggesting elimination of this priority payment system cited diminished opportunities to encourage investment by the large number of utilities considering facilities based on second priority payment technologies. They also stated that the priority payment system reduces incentives for recovering value from otherwise non-revenue generating waste management facilities and for achieving climate change benefits through conversion to energy production of methane emitting landfills and agricultural waste sites. After carefully considering all comments, DOE elected to retain the priority payment system as originally proposed. In reaching this position, DOE was influenced by four considerations: (1) a major objective of the program is to assist commercialization of emerging renewable technologies; (2) with equal priorities for all technologies, the incentive value of the program for solar, wind, geothermal, and closed-looped biomass technologies is reduced due to uncertainty regarding the adequacy of annual funding to make full payment to all recipients; (3) the establishment of a priority payment category increases the incentive for investment in the priority technologies since the probability of adequate annual funding for payment to that category is higher; and (4) the establishment of a set of preferred renewable technologies that are consistent with those identified in the tax incentive sections 1914 and 1916 of the Energy Policy Act results in closer comparability of renewable energy incentives available to tax and non-tax paying entities.

Several commenters provided suggestions regarding payout procedures, including: (a) using available funds to establish an escrow account to cover 10-year payment to owners or operators to early on-line qualified facilities based on facility start-up date; and (b) establishment of a 10-year escrow system based on the date applications are received. Both of these approaches have the potential for providing full payout to a limited number of program participants, but they also result in a larger number of participants receiving no payments. In addition, they do not increase the incentive value of the program since the certainty of receiving payments would be known only after the facility became operational. For the foregoing reasons, DOE did not adopt these proposals in the final rule.

Several of the commenters who recommended a 10-year escrow account argued that potential investors in new renewable energy facilities are unlikely to take account of payments under this program in assessing an investment without assurances, at the time of investment, that the full schedule of payments would be made. DOE believes this argument has merit. However, additional work by DOE and its stakeholders is needed to develop a payout approach that will maximize the effectiveness of the program as an incentive for promoting incremental investment in new renewable energy facilities. DOE intends to publish a notice in the near future that invites suggestions from interested persons regarding possible program modifications, including possible statutory or regulatory changes, that can increase the incentive value of this effort.

Other Comments

In the preamble of the proposed rule, DOE stated that it had considered the inclusion of a requirement that to be considered qualified for receipt of incentive payments, a facility must be purchased and installed without assistance from other Federal programs. In consideration of the comments received and the absence of this restriction in this legislation, DOE did not include such a requirement in the final rule.

III. Regulatory Review

DOE, in consultation with the Office of Management and Budget (OMB) has concluded that this is not a significant regulatory action because it does not meet the criteria which define such actions under Executive Order 12866, 58 FR 51735, and is therefore exempt from regulatory review. Accordingly, no clearance of this rule under the provisions of Executive Order 12866 is required.

IV. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulation to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. DOE certifies that this rule meets the requirements of section 2 (a) and (b) of Executive Order 12778.

V. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the national Government and the States, or on the distribution of power among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating or implementing a policy action. This rule, which provides financial incentives to States and others, will not have a substantial direct adverse effect on the institutional interests or traditional functions of States.

VI. Review Under the Regulatory Flexibility Act

DOE published a determination in the Notice of Proposed Rulemaking (59 FR 24982, May 13, 1994) that the proposed rule will not have a significant impact on small entities. One comment was received addressing this determination. The Small Business Administration (SBA) stated that DOE's certification was incorrect because municipalities with a population of less than 50,000 are classified as small organizations under the Regulatory Flexibility Act and the Small Business Administration size standard for an electric utility is the disposition of four million megawatt-hours per year. DOE agrees with the SBA characterization of such entities. It is the Department's view that no regulatory flexibility analysis is warranted because there is no reason to conclude that the regulations will have a significant adverse economic impact. The commenter did not identify any such impacts, and DOE understands that the renewable energy production incentive is only one of many factors in determining whether a qualified facility is to be constructed.

The SBA requested that DOE examine alternatives that would widen the availability of the production incentives through revising the two-tier allocation process and by treating all biomass technologies equally when there are insufficient appropriations to fund each eligible project. DOE acknowledges that small municipalities may have