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federal register

Wednesday
January 16, 1985

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Patent and Trademark Office

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Aviation Safety
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Questions and requests for specific information may be directed to the telephone numbers listed under INFORMATION AND ASSISTANCE in the READER AIDS section of this issue.

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

7 CFR Part 800

Supervision, Monitoring, and Equipment Testing

AGENCY: Federal Grain Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Federal Grain Inspection Service (FGIS or Service) is finalizing a proposed rule published in the **Federal Register** on September 27, 1984 (49 FR 38142), in which certain changes were made to the regulations under the United States Grain Standards Act (Act), as amended, concerning Supervision, Monitoring, and Equipment Testing. This action amends the regulations by revising the requirements for the monitoring of grain transfers by the Service into export elevators and by deleting the requirements for monitoring inventories at export elevators so as to update and clarify these sections.

EFFECTIVE DATE: February 15, 1985.

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Jr., Information Resources Management Branch (RM), FGIS, USDA, Room 0667 South Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250, telephone (202) 382-1738.

SUPPLEMENTARY INFORMATION: .

Executive Order 12291

This final rule has been issued in conformance with Executive Order 12291 and Departmental Regulation 1512-1. The action has been classified as nonmajor because it does not meet the criteria for a major regulation established in the Order.

Regulatory Flexibility Act Certification

Dr. Kenneth A. Gilles, Administrator, FGIS, has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because most users of the official inspection and weighing services and those entities that perform these services do not meet the requirements for small entities.

Final Action

The review of the regulations concerning Supervision, Monitoring, and Equipment Testing (7 CFR 800.215-.219) included a determination of the continued need for and consequences of the regulations. An objective of the review was to ensure that the regulations are serving their intended purpose, the language was clear, and the regulations were consistent with FGIS policy and authority. FGIS has determined that, in general, these regulations are serving their intended purpose, are consistent with FGIS policy and authority, and should remain in effect. However, in the September 27, 1984, **Federal Register** (49 FR 38142), FGIS proposed certain revisions to the regulations.

FGIS received one comment to the proposed rule which allowed 60 days for public comment. The one commentor supported the proposal in its entirety. Based upon the comment received and all other information available, FGIS is publishing as the final rule the text of the proposed rule without change.

On October 13, 1980, section 5 of the Act was amended by Pub. L. 96-437 (the Dole-Ashley Bill) which exempted from mandatory official weighing the transfer of grain into or out of export elevators at export locations for the following type shipments: (1) Intracompany shipments of grain into an export elevator by any mode of transportation, (2) intercompany shipments of grain transferred into an export elevator by transportation modes other than barges, and (3) grain transferred out of an export elevator by any mode of transportation to destinations within the United States.

By interim final rule dated June 5, 1981 (46 FR 30322) and final rule dated January 14, 1982 (47 FR 2254), § 800.15(b)(2) was revised to limit export elevator operators responsibility for complying with Class X weighing requirements for all grain, other than export grain, transferred into and transferred out of the export elevator to intercompany grain shipments received by barge. Additionally, having been made impracticable by the 1980 amendment to section 5 of the Act, the Grain Inventory Monitoring Program was ended in the October, 1981 FGIS reoganization.

This final rule amends § 800.216(c)(2) by changing the scope of grain transfer activities to be monitored by the Service to intercompany barge shipments into an export elevator at export and § 800.216(e) by deleting the provision for monitoring export inventory and by redesignating the subsequent subparagraph as appropriate. These changes will not in anyway adversely affect the overall monitoring program for compliance with the Act.

List of Subjects in 7 CFR Part 800

Administrative practice and procedure, Export, Grain.

PART 800—GENERAL REGULATIONS

Supervision, Monitoring, and Equipment Testing

Accordingly, 7 CFR Part 800 of the regulations is amended as follows:

1. Section 800.216(c)(2) is amended to read:

§ 800.216 [Amended]

* * * * *

(c) *Grain Handling activities.* * * *

(2) transferring grain from intercompany barges into an export elevator at an export port location without Class X weighing; * * *

2. Section 800.216(e) is amended by removing paragraph (e), and redesignating paragraph (f) as paragraph (e).

Authority: Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: January 2, 1985.

Kenneth A. Gilles,
Administrator.

[FR Doc. 85-1228 Filed 1-15-85; 8:45 am]

BILLING CODE 3410-EN-M

Agricultural Marketing Service

7 CFR Part 907

[Navel Orange Regs. 611, Amdt. and 610 Amdt.]

Navel Oranges Grown in Arizona and Designated Part of California; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 611, Amendment 1, increases the quantity of such oranges that may be shipped during the period January 11–17, 1985, and Regulation 610, Amendment 1, increases the quantity of such oranges that may be shipped during the period January 4–10, 1985. Such action is needed to provide for the orderly marketing of fresh navel oranges for the periods specified due to the marketing situation confronting the orange industry.

DATES: Amended Regulation 610 (§ 907.910) is effective for the period January 4–10, 1985. Amended Regulation 611 (§ 907.911) becomes effective on January 11, 1985.

FOR FURTHER INFORMATION CONTACT: William J. Doyle, 202–447–5975.

SUPPLEMENTARY INFORMATION:

Findings

This rule has been reviewed under USDA procedures and Executive Order 12291 and has been designated a "non-major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that these actions will not have a significant economic impact on a substantial number of small entities.

These amendments are issued under the marketing agreement, as amended, and Order No. 907, as amended (7 CFR Part 907), regulating the handling of navel oranges grown in Arizona and designated part of California. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). These actions are based upon the recommendation and information submitted by the Navel Orange Administrative Committee and upon other available information. It is hereby found that these actions will tend to effectuate the declared policy of the act.

These actions are consistent with the marketing policy for 1984–85. The marketing policy was recommended by the committee following discussion at a public meeting on September 25, 1984. The committee held a telephone meeting on January 7, 1985 and met again publicly on January 8, 1985, at Exeter, California, to consider the current and prospective conditions of supply and demand and recommended a quantity of navel oranges deemed advisabe to be handled during the specified weeks. The committee reports the demand for navel oranges is improving.

It is further found that is is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553), because of insufficient time between the date when information became available upon which these amendments are based and the effective date necessary to effectuate the declared policy of the act. It is necessary to effectuate the declared policy of the act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 907

Marketing agreements and orders, California, Arizona, Oranges (Navel).

PART 907—[AMENDED]

1. Section 907.911 Navel Orange Regulation 611 is hereby revised to read:

§ 907.911 Navel Orange Regulation 611.

(a) *District 1:* 1,200,000 cartons;
(b) *District 2:* Unlimited cartons;
(c) *District 3:* Unlimited cartons;
(d) *District 4:* Unlimited cartons.

2. Section 907.910 Navel Orange Regulation 610 (50 FR 5) paragrpahs (a) through (d) are hereby revised to read:

§907.910 Navel orange Regulation 610.

(a) *District 1:* 1,000,000 cartons;
(b) *District 2:* Unlimited cartons;
(c) *District 3:* Unlimited cartons;
(d) *District 4:* Unlimited cartons.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: January 10, 1985.

Thomas R. Clark,

Deputy Director, Fruit and Vegetable Division, Agricultural Maketing Service.

[FR Doc. 85–1227 Filed 1–15–85; 8:45 am]

BILLING CODE 3410-02-M

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 337

Unsafe and Unsound Banking Practices

Correction

In FR Doc. 84–31144, beginning on page 46709, in the issue of Wednesday, November 28, 1984, on page 46725, in the second column, in § 337.4(h), "[insert effective date of regulation]" appears twice; it should read "December 28 1984".

BILLING CODE 1505-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 84-NM-41-AD; Amdt. 39-4981]

Airworthiness Directives; Cessna Model 650 series airplanes.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: On April 17, 1984, the FAA issued by airmail letter Airworthiness Directive (AD) T84–08–02, effective upon receipt, to all known operators of Cessna Model 650 series airplanes, Serial Numbers 650–0001 thru 650–0033, certified in all categories. This AD requires installation of a placard stating "INDICATED FUEL LESS THAN 200 POUNDS PER WING FUEL TANK IS UNUSABLE," insertion of the AD in the Airplane Flight Manual, and a determination that the trapped and unusable fuel weight is 85 pounds or less. This action was prompted by a report from the manufacturer that migration of fuel from the main wing fuel tank to the forward fairing fuel tank in certain airplanes may result in an excess of unusable fuel and consequent engine flameout. This AD is hereby published in the **Federal Register** to make it effective to all persons.

DATES: Effective January 28, 1985.

This AD was effective earlier to all recipients of airmail letter distribution of AD 84–08–02, dated April 17, 1984. Compliance schedule as prescribed in the body of the AD, unless already accomplished.

ADDRESSES: The applicable service information may be obtained from Citation Marketing Division, Cessna Aircraft Company, P. O. Box 7706, Wichita, Kansas 67277. This information also may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 1801 Airport Road, Room 100, Mid-Continent Airport Wichita, Kansas.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Pearson, Aerospace Engineer, Propulsion Branch, ACE–140W, FAA, Central Region, Wichita Aircraft Certification Office, 1801 Airport Road,

Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone number (316) 946-4427.

SUPPLEMENTARY INFORMATION: On April 17, 1984, the FAA issued by airmail letter Airworthiness Directive (AD) T84-08-02, applicable to Cessna Model 650 airplanes, Serial Numbers 650-0001 thru 650-0033, which requires installation of a placard adjacent to the fuel quantity indicator stating, "INDICATED FUEL LESS THAN 200 POUNDS PER WING FUEL TANK IS UNUSABLE," and insertion of a copy of the AD in the Airplane Flight Manual Section II. An alternate means of compliance also was incorporated, which provides to operators of Model 650 airplanes the option of accomplishing Cessna Service Bulletin SB650-28-8 (fuel tank inspection); upon determination that total trapped and unusable fuel weight is 85 pounds or less, removal of the placard and Flight Manual Insertion is permitted. Subsequent to the issuance of AD 84-08-02, the manufacturer advised that two additional Model 650 airplanes, Serial Numbers 650-0034 and 650-0035, had also been placed in service without accomplishment of the total trapped and unusable fuel weight check. Both operators were notified of the need to comply with the requirements of SB 650-28-8 and have done so. Therefore, this AD differs from airmail letter AD 84-08-02 by incorporating the applicability of Serial Numbers 650-0034 and 650-0035 airplanes. Since a situation existed and still exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended by adding the following new airworthiness directive:

Cessna: Applies to Cessna Model 650 airplanes S/N 650-0001 thru 650-0035 certificated in all categories. To prevent possible engine flameout, accomplish the following unless already accomplished.

A. Prior to the next flight fabricate a placard which reads as follows:

"INDICATED FUEL LESS THAN 200 POUNDS PER WING FUEL TANK IS UNUSABLE"

and operate the airplane in accordance with this limitation. This placard should be fabricated of .032-inch minimum thickness aluminum or plastic material with minimum ⅛-inch high stamped or engraved letters. Install the placard on the instrument panel immediately above the engine instruments centered above the fuel quantity indicator.

B. Insert a copy of this airworthiness directive (AD) in the Airplane Flight Manual Section II adjacent to page 2-9. Retain this Ad in the Flight Manual until superseded.

C. Upon accomplishment of Cessna Service Bulletin SB 650-28-8 (fuel tank inspection) and determination that total trapped and unusable fuel weight is 85 pounds or less, the above required placard and flight manual insertion may be removed and an airplane log book entry denoting AD compliance made.

D. Alternate means of compliance which provide an equivalent level of safety may be used when approved by the Manager, FAA Aircraft Certification Office, Wichita, Kansas.

This Amendment becomes effective January 28, 1985. It was effective earlier to all recipients of air mail letter AD T84-08-02, dated April 17, 1984.

All persons affected by this directive who have not already received these documents from the manufacturer may obtain copies upon request to Citation Marketing Division, Cessna Aircraft Company, P.O. Box 7706, Wichita, Kansas 67277. These documents also may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas.

(Secs. 313(a), 314(a), 601 thru 610, and 1102 of the Federal Aviation Act of 1958 (49 U.S.C. 1354(a), 1421 thru 1430, and 1502); 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89)

Note.—The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required). A copy of it, when filed, may be obtained by contacting the person identified under the caption "**FOR FURTHER INFORMATION CONTACT.**"

Issued in Seattle, Washington, on January 7, 1985.

Charles R. Foster,

Director, Northwest Mountain Region.

[FR Doc. 85-1180 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 84-ASO-23]

Alteration of Transition Area, Sanford, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the Sanford, North Carolina, transition area to accommodate Instrument Flight Rule (IFR) operations at Sanford-Lee County Brick Field Airport. This action lowers the base of controlled airspace from 1200 to 700 feet above the surface in the vicinity of the airport. An instrument approach procedure, based on the Leeco non-directional radio beacon (NDB) has been developed to serve the airport and the controlled airspace is required for protection of IFR aeronautical operations.

EFFECTIVE DATE: 0901 GMT, February 14, 1985.

FOR FURTHER INFORMATION CONTACT: Walter H. Wulff, Airspace and Procedures Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone: (404) 763-7646.

SUPPLEMENTARY INFORMATION:

History

On Friday, November 2, 1984, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by lowering the base of controlled airspace from 1200 feet to 700 feet above the surface in the vicinity of the Sanford-Lee County Brick Field Airport, Sanford, North Carolina. This action will provide controlled airspace for aircraft executing the new NDB Runway 3 instrument approach procedure at the Sanford-Lee County Brick Field Airport (49 FR 44104). A non-directional radio beacon, which will support the approach procedure, will be established in conjunction with alteration of the transition area. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. This amendment is the same as that proposed in the notice. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in FAA Order 7400.6 dated January 3, 1984.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the Sanford, North Carolina, transition area

to accommodate IFR aeronautical operations in the vicinity of the Sanford-Lee County Brick Field Airport.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Airspace, Transition areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Sanford, North Carolina, transition area under § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) (as amended) is further amended, as follows:

Sanford, NC—[Revised]

The airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Sanford-Lee County Brick Field Airport (lat. 35°26'01" N., long. 79°10'58" W.); within 4.5 miles southeast and 6.5 miles northwest of the 209° bearing from Leeco RBN (lat. 35°22'23" N., long. 79°13'24" W.) extending from the 6.5-mile radius area to 11.5 miles southwest of the RBN; excluding that portion which coincides with the Southern Pines transition area.

((Secs. 307(a) and 313(a), Federal Aviation Act of 1958 (49 U.S.C. 1348(a) and 1354(a)); 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983)); and 14 CFR 11.69))

Issued in East Point, Georgia, on January 7, 1985.

Jonathan Howe,

Director, Southern Region.

[FR Doc. 85-1178 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

15 CFR Part 0

[Docket No. 50105-5005]

Conflict-of-Interest Amendments

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: Appendix C to Part 0 of Subtitle A of Title 15, Code of Federal Regulations, is revised to eliminate the listing of positions in the Maritime Administration. This regulation is further revised to state that National Marine Fisheries Service (NMFS) Special Agents (Fish and Wildlife), Series GS-1812, grades 5 through 12, and Fishery Products Inspectors, Series GS-1863, grades 5 through 12, are required to submit statements of outside employment and financial interests. This action is being taken to avoid any possible conflict-of-interest situations that may arise from the Special Agents' and Fishery Products Inspectors' involvement in regulating non-Federal enterprise.

EFFECTIVE DATE: February 15, 1985.

FOR FURTHER INFORMATION CONTACT: Marilyn G. Wagner, Assistant General Counsel for Administration, Office of the General Counsel, U.S. Department of Commerce, Washington, D.C. 20230, (202) 377-5387.

SUPPLEMENTARY INFORMATION: This revision of Appendix C was approved pursuant to 5 CFR 735.403 by the Office of Personnel Management, Office of Government Ethics, on September 29, 1984.

The Regulatory Flexibility Act does not apply to this rule because the rule was not required to be promulgated as a proposed rule before issuance as a final rule by section 553 of the Administrative Procedure Act of any other law. Neither an initial nor final Regulatory Flexibility Analysis was prepared.

Since this rule is related to agency personnel, it is not a rule or regulation within the meaning of Section 1(a) of Executive Order 12291 and, accordingly, is not subject to the requirements of that Order.

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act.

The Department has determined that this regulation will not significantly affect the quality of the human environment. Therefore, no draft or final Environmental Impact Statement was or will be prepared.

The Department determined that this rule does not directly affect the coastal zone of any state with an approved coastal zone management program.

Appendix C to Part 0 of Subtitle A of Title 15, Code of Federal Regulations, is revised to specify that National Marine Fisheries Service (NMFS) Special Agents (Fish and Wildlife), Series GS-1812, grades 5 through 12, and Fishery Products Inspectors, Series GS-1863, grades 5 through 12, are required to submit statements of financial interests, and to eliminate the listing of positions in the Maritime Administration.

List of Subjects in 15 CFR Part 0

Government employees, Conflict of interest.

PART 0—EMPLOYEE RESPONSIBILITIES AND CONDUCT

15 CFR Part 0, Appendix C is revised to read as follows:

Appendix C—Position Categories Below GS-13 Requiring Statements of Employment and Financial Interests by Incumbents

(1) Employees in the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, who are in the following categories of positions:

(a) Special Agents (Fish and Wildlife), Series GS-1812, grades 5 through 12.

(b) Fishery Products Inspectors, Series GS-1863, grades 5 through 12.

(5 CFR 735.104, 735.403)

Kay Bulow,

Assistant Secretary for Administration, U.S. Department of Commerce.

[FR Doc. 85-1130 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-BS-M

International Trade Administration

15 CFR Part 399

[Docket No. 41159-4159]

COCOM Review of the Commodity Control List; Electronics and Precision Instruments

Correction

In FR Doc. 84-33718 beginning on page 50608 in the issue of Monday, December 31, 1984, make the following corrections:

§ 399.1 [Corrected]

1. On page 50611, third column, paragraph designation "(iii)" should read "(ii)".

2. On page 50616, third column, lines twelve, thirteen, and fourteen should be removed; and paragraph designation "(B)" line fifteen should be designated as "(C)".

3. On page 50617, second column, line twenty-one should read:

Thus:

$$t_{sa} = t_{smax} + \frac{2 \times t_{smin}}{3}.$$

4. On page 50621, first column, lines eleven and twelve should read "(t stands for any of the values t_{ax}, t_{af}, t_{mx} or t_{mf})".

5. On the same page, second column, tenth line from the bottom should read "Thus: $R_{tt}=C\times R_{ttmaxmax}$".

6. On page 50624, first column, line twenty-four, "bit; million" should read "million bit;".

7. On page 50628, second column, line seventeen should read "(a) Domestic civil use; or".

8. On the same page, second column, line fourteen from the bottom, "27,000" should read "27,500".

9. On page 50629, third column, line twenty-five, "(l)" should read "(k)"; and line twenty-six, "(1)" should read "(l)".

10. On page 50630, first column, line thirty-four, "telephone;" should read "telephone system;".

BILLING CODE 1505-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. 9135]

B.A.T Industries, Ltd., et al.; Prohibited Trade Practices, and Affirmative Corrective Action

AGENCY: Federal Trade Commission.

ACTION: Final Order.

SUMMARY: This Order affirms the initial decision of the Administrative Law Judge and dismisses the FTC complaint alleging that acquisition of Appleton Papers, Inc., the leading U.S. producer of chemical carbonless paper (CCP) by B.A.T Industries, Ltd. ("B.A.T") had violated Sec. 7 of the Clayton Act and Sec. 5 of the FTCA, by eliminating the potential for competition between the two companies in the U.S. CCP market. For reasons set forth in the accompanying Opinion, the Commission held that the record showed no "clear proof" that B.A.T would have entered the U.S. CCP market independently had it not acquired Appleton.

DATES: Complaint issued on May 13, 1980; Final Order issued on Dec. 17, 1984.[1]

FOR FURTHER INFORMATION CONTACT: Steven R. Newborn, FTC/L 501-2, Washington, D.C. 20580. (202) 254-8577.

SUPPLEMENTARY INFORMATION: In the Matter of B.A.T Industries, Ltd., a corporation, and Appleton Papers, Inc., a corporation.

[1] Copies of the Complaint, Initial Decision and Opinion of the Commission filed with the original documents.

List of Subjects in 16 CFR Part 13

Chemical carbonless paper, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

Before the Federal Trade Commission

Commissioners: James C. Miller III, Chairman, Patricia P. Bailey, George W. Douglas, Terry Calvani, Mary L. Azcuenaga.

[Docket No. 9135]

Final Order

In the Matter of B.A.T INDUSTRIES, LTD., a corporation, and APPLETON PAPERS, INC. a corporation.

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission as determined to affirm the initial decision. Complaint counsel's appeal is denied. Accordingly,

It is ordered, that the complaint be, and it hereby is, dismissed.

By the Commission, Commissioner Azcuenaga not participating.

Issued: December 17, 1984.

Emily H. Rock,
Secretary.

Commissioner Patricia P. Bailey, Concurring in B.A.T Industries, Ltd. and Appleton Papers, Inc., Docket No. 9135

December 17, 1984.

Is there the opposite of a Pyrrhic victory? If so, it would describe this case, where the Commission's litigation unit has lost the battle but won the war—for the business community as well as themselves. *B.A.T* was intended as a test case to see if purely objective evidence could establish liability under the actual potential entrant theory. The answer today is that it cannot. Despite a well-litigated case which presented us with as extensive and in-depth an economic record as we are likely to see, the inherent limitations of economic evidence mean that, standing alone, it cannot meet a "clear proof" (or, in my opinion, even a "reasonable probability") standard. Financial models of expected profitability are a complicated web of interrelated assumptions. They can be a useful business planning tool but were never designed to withstand the scrutiny of normal judicial process, which is concerned with demonstrable facts. Models are highly vulnerable to litigation challenge where doubts raised about even one part can invalidate the whole. The clear trend among the courts, which this Commission today joins, is reluctance to undo business transactions on the basis of speculation.

In practice this means that, at the Commission at least, actual potential competition theory is dead. Only "concrete plans" will carry the day, but the more anticompetivie an acquisition is, the less a company is likely to create—or preserve—documents assessing expected returns on other, more legitimate, means of entry. Thus, only those entities who ignore the wisdom of some well known sages [1] need fear the toils of the actual potential competition net. But on the whole this is preferable to wasting resources trying to prove chalkboard speculations. Both our staff and the business community should welcome the certainty this opinion brings.

[FR Doc. 85-1223 Filed 1-15-85; 8:45 am]

BILLING Code 6750-01-M

16 CFR Part 13

[Docket 9147]

International Harvester Company; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Final order.

SUMMARY: This order affirms in part and reverses in part the 1982 Initial Decision of the Administrative Law Judge ("ALJ") and orders that it be adopted as the "Findings of Fact and Conclusions of Law of the Commission, except as is inconsistent with the accompanying Opinion." the ALJ had ruled that a manufacturer of farm machinery had violated section 5 of the FTCA by failing to adequately disclose to consumers that its gasoline-powered tractors were subject to a safety hazard known as "fuel geysering," even though the company knew of the potential danger. While the Commission agreed that the company's failure to disclose the safety risk constituted an unfair trade practice, it ruled that, contrary to the ALJ's finding, the practice could not, as a matter of law, be considered deceptive since there was no representation, practice or omission likely to mislead consumers found in this case. Although the Commission ruled that the manufacturer had violated the FTCA, it

[1] See no Evil, Hear no Evil, and especially Speak and Write no Evil.

upheld the ALJ's decision not to order further remedial action because the company no longer manufactures gasoline-powered tractors and because the company's voluntary notification program conducted in 1980 had already provided as much relief as could be expected from a Commission order.

DATES: Complaint issued on October 10, 1980; Final Order issued on December 21, 1984.*

FOR FURTHER INFORMATION CONTACT: Rosemary Rosso, FTC, H-457, Washington, D.C. 20580. (202) 523-3275.

SUPPLEMENTARY INFORMATION: In the Matter of International Harvester Company, a corporation.

List of Subjects in 16 CFR Part 13

Gasoline-powered tractors, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Before the Federal Trade Commission

Commissioners: James C. Miller III, Chairman, Patricia P. Bailey, George W. Douglas, Terry Calvani, Mary L. Azcuenaga.

[Docket No. 9147]

Final Order

In the Matter of INTERNATIONAL HARVESTER COMPANY, a corporation.

This matter has been heard by the Commission upon the appeal of counsel supporting the complaint, and of counsel for the respondent, and upon briefs and oral argument in support of and in opposition to these appeals. For the reasons stated in the accompanying opinion the Commission has determined to affirm in part and reverse in part the Initial Decision. Therefore,

It is ordered, that the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except as is inconsistent with the accompanying opinion. Other Findings of Fact and Conclusions of Law are contained in the accompanying opinion.

By the Commission, Commissioner Bailey concurring in the result and as to the finding of liability on unfairness grounds and dissenting as to the remainder of the Commission's opinion; and Commissioner Azcuenaga not participating.

Issued: December 21, 1984.

Emily H. Rock,
Secretary.

Commissioner Patricia P. Bailey Concurring in Part and Dissenting in Part:

International Harvester manufactured and sold gasoline-powered tractors from 1939 to 1978. By at least 1963, the company had become aware that those tractors were subject to the phenomenon of fuel geysering. That highly dangerous phenomenon is described in the Commission's opinion. Because of this hidden safety hazard, some tractor owners or operators have been badly injured or killed. The question presented here is whether, given Harvester's growing knowledge of the problem, its failure to warn owners and potential buyers constituted an unfair and deceptive practice under Section 5 of the FTC Act.

The Commission has determined that International Harvester had a duty to warn operators of its gasoline-powered tractors of possible fuel geysering and that it failed to do so. I agree. I also concur in the Commission's finding that the company's conduct constitutes an unfair act or practice under Section 5 of the FTC Act, according to the standards set forth in the FTC's 1980 policy statement on unfairness.[1] In addition, while the matter is not free from doubt, I agree, on balance, that the Commission need not issue an order in this matter.

I dissent because the Commission has concluded that Harvester's conduct, while unfair, was not deceptive. In order to reach that conclusion, the Commission has adopted an entirely novel and nearly incomprehensible theory of the law of deception. This is not a complicated case. It is a straightforward example of a manufacturer's duty to warn customers of a latent safety hazard in its product. But the Commission today decides that that failure was not deceptive because it involved a "pure omission" of material fact, which according to this opinion, is *not* a deceptive act or practice.

"Pure omissions" of material fact are characterized in this opinion as seller omissions which involve neither half-truths nor implied misrepresentations, but, rather, stem solely from the seller's failure to correct preexisting erroneous assumptions held by consumers. In such circumstances, according to the opinion, the Commission will look only to its unfairness authority to assess the legality of a particular respondent's conduct. For reasons which I discuss below, I cannot accept this rejection of a well-established and vital component of the FTC's jurisdiction over deceptive acts and practices.

By at least 1963 and thereafter, as the ALJ found, Harvester was aware that its gasoline-powered tractors were subject to geysering; that many tractor operators were unaware of this hidden hazard; and that some operators had been seriously injured, and even killed, as a result.[2] Looking to prior FTC case law, the ALJ concluded that "[e]ven where no explicit safety claim has been made, as in this case, the Commission has found that the failure to disclose such a hidden, or unknown, hazard is a deceptive practice."[3] He also determined, in accord with Commission precedent, that "[i]n selling its tractors, respondent gives an implied warranty that it is safe to use for its intended use, save any obvious or well-known defects or hazards."[4] Applying these basic deception principles to Harvester's conduct, the ALJ held that the company has a continuing duty from at least 1963 until 1980 to disclose adequately to purchasers and operators that fuel geysering constituted a safety hazard, and that the failure to discharge this duty was a deceptive practice in violation of Section 5.[5]

By this opinion, the Commission reverses the ALJ's conclusion that Harvester's conduct constitutes a deceptive practice under Section 5. In order to reach this conclusion, the Commission rejects the ALJ's finding that Harvester's sale of its gasoline-powered tractors without an adequate warning constituted an implied, but false, representation that the product is safe for its intended use. The Commission resolves this threshhold obstacle by asserting that no implied warranty of fitness for normal use attaches where the statistical risk of incident from an undisclosed hazard is too remote to find that the use of a product is inherently unwise.[6] Because

* Copies of the Complaint, Initial Decision, and Opinion of the Commission filed with the original document

[1] Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980) (hereinafter cited as "Unfairness Statement").

[2] Id. at 98.

[3] Id. at 100, citing *Stupell Enterprises, Inc.*, 67 F.T.C. 173, 187, 188 (1965).

[4] Id. at 100, citing *Stupell Enterprises, Inc.*, 67 F.T.C. 173, 187, 188 (1965); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278, 1282 (1953); *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697, 701 (1952).

[5] Id. at 100, citing *Stupell Enterprises, Inc.*, 67 F.T.C. 173, 187, 188 (1965); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). The ALJ also determined that Harvester's conduct constituted an unfair practice under Section 5. Id. at 100.

[6] Slip op. at 27-28.

the rate of actual injury from fuel geysering in Harvester tractors was small in relation to the number of tractors sold, the Commission concludes that the respondent made no misrepresentation of safety concerning what it believes was a relatively improbable phenomenon and, therefore, that the first element of the Commission's deception standard, the existence of a representation which is likely to mislead, is not present.[7]

Having found no implied misrepresentation of safety, the Commission concludes that Harvester is guilty of complete silence only. The Commission further concludes that the seller's mere failure to dispel incorrect operator notions about the possible but unlikely consequences of removing or failing to secure the gas cap does not, without more, lead to an assessment of liability under a deception theory. Rather, according to this opinion, if Harvester is to be found liable at all for its silence, then it must be because the injury which ensued outweighed the costs to the company of providing an adequate warning, since only an unfairness theory affords the proper formula for determining whether the benefits to the public of mandating disclosure under such circumstances are greater than the costs of providing it.[8]

I believe the Commission's conclusions are wrong, both as to the existence of an implied representation of safety in this case and as to the broader determination that certain "pure omissions," such as Harvester's, are not deceptive practices. The failure to disclose material facts, whether in the context of a truthful representation that, without more, has the capacity to mislead, an implied misrepresentation, or a completely omitted fact, has long been acknowledged by the Commission and the courts to be an integral part of the law of deception.[9] Specifically, deception may occur when important information is omitted from the sales presentation or from other aspects of a commercial transaction.[10] While in order to be material a misleading omission must generally pertain to a consumer's purchasing decision,[11] it may also concern the use or care of a product.[12]

Significantly, because deception will be found only if consumers could actually be misled by a seller's silence, it is axiomatic that not every material fact about a product must be revealed. Rather, in order to be considered deceptive, the undisclosed facts must be both material and necessary to correct a reasonable false expectation held by a substantial body of consumers, whether that incorrect belief is created by the seller's representations or results from consumers' own expectations in the circumstances of the transaction.[13] Thus, the Commission must first find that consumers have beliefs that are contrary to an undisclosed material fact.[14]

In accordance with these principles, the Commission has found in the past that the nondisclosure of safety risks is deceptive because such warnings are necessary to controvert the consumer's justifiably held assumption of product's safety.[15] In addition to what may be generally termed "hazardous commodities" cases, several other categories of FTC matters have at times acquired a "pure omissions" label. These include the failure to disclose the true properties of a product where the appearance of the product, absent disclosure, would mislead the public [16] and silence concerning the foreign origin of a product.[17]

In a number of matters involving seller omissions, the Commission has found that the deception actually derives from or is promoted by implied representations or other actions by the seller.[18] Thus, the Commission had determined that the sale of a product carries with it the implication that the product is safe for the use for which it is sold.[19] As is true under a pure omission analysis, in such instances it is deceptive to market the product absent adequate disclosure of latent safety hazards.[20]

In my judgment, the facts of this matter place it squarely within the ambit of prior Commission decisions involving the deceptive nondisclosure of safety hazards, whether the case is analyzed from an implied representation or pure omission perspective. The evidence

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[7] *Id.* The current Commission majority's views on deception are set forth in a letter from the FTC to Congressman Dingell (Oct. 14, 1983) (hereinafter cited as "Deception Statement"), which is reproduced as an appendix to the Commission's opinion in *Cliffdale Associates, Inc.*, Docket No. 9156 (FTC, March 23, 1984). I dissented from the issuance of the Deception Statement, and subsequently forwarded a separate analysis to Congressman Dingell (February 28, 1984) (hereinafter cited as "Deception Analysis"), stating the longstanding Commission formulation for finding deception. My views on the law of deception are also contained in a separate opinion in *Cliffdale Associates, Inc., supra.*

[8] Slip op. at 20–22.

[9] *See generally* Deception Analysis, *supra* note 7, at 28–30, 57–61. This principle is codified in Section 15 of the Federal Trade Commission Act, which expressly provides that in determining whether an advertisement for a food, drug, device or cosmetic is misleading in a material respect, the Commission shall take into account "the extent to which the advertisement fails to reveal facts material in light of such representations *or material with respect to consequences which may result from the use of the commodity* . . ." 15 U.S.C. § 55 (1982) (emphasis added).

[10] *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303–04 (7th Cir. 1979, *cert. denied*, 445 U.S. 950 (1980); *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1144–45 (9th Cir. 1978); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967).

[11] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965); *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982).

[12] Care Labeling of Textile Wearing Apparel Rule, 16 C.F.R. § 423 (1983) (requiring the disclosure of proper instructions for the laundering and cleaning of clothing).

Also, in the last several years the Commission has alleged in numerous settled cases that information pertaining to the use or care of a product is material to consumers. *E.g., American Motors Corp.*, 100 F.T.C. 229 (1982) (safe use of Jeeps in on-pavement driving); *Chrysler Corp.*, 99 F.T.C. 347 (1982) (use and care information pertaining to the replacement of oil filters in vehicles).

[13] The Commission has stated that "[t]he principle crystallized in [the caselaw] is that Section 5 forbids sellers to exploit the normal expectations of consumers in order to deceive just as it forbids sellers to create false expectations by affirmative acts." *Statement of Basis and Purpose for the Cigarette Rule*, 29 FR 8324, 8352 (July 2, 1964).

Also, in promulgating the Home Insulation Rule the Commission asserted, "[i]t is an established principle of Section 5 that when a consumer's normal expectations concerning a product are at odds with actual information about the product, this disparity must be corrected through disclosure." *Statement of Basis and Purpose for the Labeling and Advertising of Home Insulation Rule*, 44 FR 50218, 50223 (Aug. 27, 1979).

[14] *See FTC v. Simeon Management Corp.*, 532 F.2d 708, 716 (9th Cir. 1976). In this case, the Commission's request for a preliminary injunction was denied because the courts were unpersuaded that consumers would assume that the drug used in a weight reduction program had been appproved for that use by FDA. Ultimately, the Commission's finding that consumers would make such an assumption was upheld. *Simeon Management Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978). *See also, Leonard F. Porter, Inc.*, 88 F.T.C. 546 (1976) (Commission declined to find deception in company's failure to disclose origin of products in the absence of evidence showing consumers would assume products were made by Alaskan natives).

[15] *See Stupell Enterprises, Inc.*, 67 F.T.C. 173 (1965); *Fisher & Deritis*, 49 F.T.C. 77 (1972); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953); *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952).

[16] *E.g., Haskelite Mfg. Corp.*, 33 F.T.C. 1212 (1941). *aff'd*, 127 F.2d 765 (7th Cir. 1942).

[17] *E.g., Manco Strap Co., Inc.*, 60 F.T.C. 495 (1962).

[18] For instance, in some cases it has been determined that the normal appearance of a product impliedly represents that it is new or that it is made from a certain material. *See, e.g., Peacock Buick, Inc.*, 86 F.T.C. 1532, 1557–58 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977) (opinion unpublished); *Haskelite Mfg. Corp.*, 33 F.T.C. 1212 (1941), *aff'd*, 127 F.2d 765 (7th Cir. 1942).

[19] *See, e.g., Stupell Enterprises, Inc.*, 67 F.T.C. 173, 194 (1965) (offering a product for sale may impliedly represent that it will perform its intended function and do so without posing an unusual risk of harm).

From my review of Commission caselaw, it appears that most if not all of the hazardous commodities cases brought by the FTC under what has been called a "pure omission" theory were also found to involve an implied representation of safety. *See Fisher & Deritis*, 49 F.T.C. 77 (1952); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953); *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952).

[20] *Stupell Enterprises, Inc.*, 67 F.T.C. 173 (1965).

demonstrates that geysering is caused by excessive heat and pressure build-up in the fuel tanks of Harvester's gasoline-powered tractors, accompanied by the sudden release of pressure through the removal or loosening of the fuel cap. I.D.F. 19–22. The ALJ found that there was a reasonable likelihood of the gas cap being removed or dislodged in the normal employment of the tractor (I.D.F. 34), but that tractor operators were not aware that such circumstances could lead to a geysering incident. I.D.F. 36.

At the same time, this record reveals beyond doubt that at least as early as 1963, the company was on notice from numerous reported field incidents, as well as from its own in-house tests, that the design of its tractors was a contributing factor to pressure build-up which could lead, under a combination of normal circumstances, to accidents resulting in serious injury or death. I.D.F. 276. This awareness is evidenced by numerous company documents placed on the record in this matter, including a 1964 written report from the company's own engineers that characterized the vaporization of fuel and accompanying rises in fuel tank pressure in Harvester's gasoline-powered tractors as "* * * constituting a definite safety hazard." I.D.F. 98–100.

On the basis of this and other information, the ALJ found that Harvester knew or should have known that geysering accidents would continue in the absence of an effective warning. I.D.F. 276. Yet from 1963 through 1976, Harvester made no changes in its basic fuel warning instructions, and in fact did not provide an appropriately instructive warning to existing tractor owners until the summer of 1980. I.D.F. 164–166, 277. At the same time, the ALJ determined that information concerning geysering and the steps which should be taken to avoid it might well have affected the purchasing decisions of tractor owners, as well as their methods of maintaining and using Harvester gasoline-powered tractors.[21]

Commission Law holds that a manufacturer impliedly warrants the safety of its product in normal use and that the manufacturer must disclose specific safety hazards which are not obvious to the users of its products.[22]

Given Harvester's own in-plant characterization of fuel geysering as a safety hazard, as well as other information in this record documenting the company's burgeoning awareness over the course of many years of the risks and possibly injurious results of geysering, I do not see how it is possible to conclude, as the Commission does here, that Harvester's overall implied representation of product safety did not encompass this particular safety hazard.

Putting aside for the moment Harvester's implied representation of safety, I believe that these same facts define a basis for finding that the company's silence about geysering in the face of reasonable consumer beliefs about the safety of its product was a deceptive practice under Section 5. Since consumers' normal expectations are that, in the absence of a warning to the contrary, products can be used safely, they are likely to be deceived if a product is dangerous and the warning is omitted.[23]

Here, the ALJ properly concluded that farmers and farm experts alike reasonably believed that removing or improperly fastening the fuel cap on a gasoline-powered tractor was not an especially dangerous practice, even though it was unadvised, and that Harvester was aware of this common procedure. I.D.F. 36, 52. (Indeed, some of Harvester's own employees removed gas caps during tests at company facilities while tractors were still hot or running. I.D.F. 34.) In view of the cumulative knowledge Harvester possessed concerning the circumstances which could lead to geysering and the substantial risk of injury if it occurred, as well as the almost complete lack of information available to tractor operators about this possibility, I believe it is patent that Harvester's unwillingness or delay in disclosing this potential hazard has the tendency to deceive numerous tractor operators in a highly material respect. Such conduct is, by definition, deceptive under Section 5.[24]

My strong disagreement in the instant matter does not end with the Commission's rejection of FTC precedent to find that there was no element of deceit in Harvester's conduct. Rather, I find it necessary to address several aspects of the Commission's underlying reasoning and policy assumptions as well.

First, I am frankly dismayed by the Commission's reliance on the statistical probability of physical harm to find that Harvester's general implied representation of safety did not extend to fuel geysering. There is simply no basis in Commission law for requiring that the rate of injury from a latent hazard reach some threshold level before the Commission will infer a misrepresentation of an implied warranty of safety from a seller's silence.[25] To the contrary, an implied representation of safety, like any representation the Commission might consider, conveys a message that can be ascertained when it is made; the message does not change its meaning under varying circumstances nor depend for its interpretation on *ex post facto* analyses of later developments. The Commission's suggestion that an implied representation of safety, made at the time a product is sold, is somehow limited after the fact when the product proves to be unsafe (but not so unsafe as to kill more than a few people) cannot be sustained legally or logically.

If the Commission does not contend—as it cannot possibly—that *no* representation of safety from fuel geysering was made, then the opinion must mean that the representation was made but, because of the low incidence of injury, was not likely to mislead. Rather than focusing on a product's actual accident rate to determine whether an implied representation of safety is misleading, however, I believe the Commission should instead determine whether the existence of factors giving rise to a particular type of incident can reasonably be expected to occur, thereby placing substantial numbers of consumers at risk. The frequency of accidents merely helps to substantiate the presence of a substantial risk, the existence of which may already be known or foreseeable to the seller.

Here, the ALJ concluded that there was the potential for heat and pressure build-up in *all* Harvester tractors of a particular type. I.D.F. 8, 22. As I have noted, he also found that it was reasonably likely that tractor operators

[21] I.D.F. 37. While there is express evidence of materiality in this case, safety-related information has been found by the Commission to be presumptively material to consumers. *See Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

[22] *See Stupell Enterprises, Inc.*, 67 F.T.C. 173 (1965); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953); *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952); *Fisher & Doritis*, 49 F.T.C. 77 (1952).

[23] *See Cigarette Statement, supra* note 13, 29 FR 8352; *see also Stupell Enterprises, Inc.*, 67 F.T.C. 173 (1965).

[24] *See Stupell Enterprises, Inc.*, 67 F.T.C. 173 (1965); *Fisher & Doritis*, 49 F.T.C. 77 (1952); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953); *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952).

[25] Commission law holds, of course, that materiality does not require a demonstration of actual injury to consumers in deception cases. (*E.g. Simeon Management Corp.*, 87 F.T.C. 1184, 1229 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978).) I am concerned, however, that the Commission's reliance on a finding of injury here in order to infer the existance of a misrepresentation of safety by the seller may create a *de facto* injury requirement for certain categories of deception cases, such as those involving hazardous products.

would remove or fail adequately to secure the gas cap during the normal operation of their vehicles. I.D.F. 34.[26] The combination of these factors introduced a substantial risk of an accident which could lead to injury or death, the existence of which was further confirmed by numerous reports to Harvester of geysering incidents. Thus, while the *rate* of actual physical injury from geysering may have been only .001 percent, the *risk* of a fuel geysering incident, and the accompanying possibility of harm, was present each and every time the operator used his Harvester machinery in the field. It is the foreseeability of this substantial risk of injury, coupled here with Harvester's actual notice of the problem—and not some arbitrary number of injuries or deaths—which gives rise to a duty to warn consumers about the hazards of fuel geysering and leads to a finding of deception in the absence of such a disclosure.[27]

Second, I cannot accept the Commission's conclusory finding that only a cost-benefit analysis can prevent a conceptually open-ended category of "pure omissions" from requiring the correction of literally all product-related misconceptions consumers may have.[28] While the FTC's deception authority clearly encompasses deception by silence, the Commission has actually exercised its powers judiciously against such conduct. In large measure, this reflects the Commission's understanding that sellers are held legally accountable for correcting a disparity between normal consumer expectations that the sellers may have had little direct role in creating and truthful information about a product. In recognition of this additional responsibility, the Commission has held, for example, that silence can be deceptive only where erroneous consumer expectations about a product are normal and reasonable [29] and where danger is not readily observable to the user of a product.[30]

There is an even more fundamental safeguard against unwarranted results, however, and that is the deception standard itself, evolved by the Commission and the courts over a fifty year period to analyze potentially misleading conduct. Contrary to the Commission's implication that there is a virtual "per se standard for deceptive conduct, a finding of deception actually requires specific and well-developed findings by the Commission based on the facts of each case, as to each of the three principal components of deception. Thus, the Commission must determine in all cases that there is (1) a representation or omission capable of misleading (2) a substantial number of consumers (3) as to a material product purchasing or use decision before liability may be found.[31] Most "omissions" of product or use information could not be ruled deceptive under this standard.

Additionally, where pure omissions have been found to be deceptive, the Commission has generally found an implied representation by the seller as well.[32] As a result of the care and caution with which the Commission approaches deception cases generally, and deception by omission matters in particular, the Commission has applied the doctrine of deception by nondisclosure to only a few narrow categories of particularly significant omissions, such as those involving safety matters where the potential for injury from a misleading omission would be greatest.[33]

Finally, I fail to see the relevance of the Commission's conclusion that the nature of pure omissions is such that they do not presumptively reflect deliberate conduct on the part of the seller. This conclusion is in the first place simply wrong, since the act of selling a product is itself a deliberate act that can create expectations on the part of consumers.

More importantly, this judgment incorrectly highlights the *form* conduct takes rather than the *result*. As set forth by the Commission in the *Cigarette Statement*, whether the offending conduct includes express or implied representations or nondisclosure of material information, "[t]he test is simple and pragmatic: Is it likely that, unless such disclosure is made a substantial body of consumers will be misled to their detriment?"[34] Thus, the Commission has found on numerous occasions that deception is actionable in whatever form it appears, including complete silence under certain circumstances.[35]

Moreover, because the Commission has traditionally focused on the effects of conduct in order to afford the most

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[26] The Commission readily admits that the potential for geysering was an inherent drawback of Harvester tractors (slip op. at 4), that the loosening of the gas cap was likely to occur pursuant to the normal use of its tractors (slip op. at 34), and that serious injury and death have resulted from fires started in connection with fuel geysering (slip op. at 6). Yet, for reasons which I do not fully comprehend, the Commission is ultimately able to conclude that the risk of geysering was not sufficiently foreseeable to be included in Harvester's implied representation of safety.

[27] *See generally Billiar v. Minnesota Mining & Manufacturing Co.*, 623 F.2d 240, 246 (2d Cir. 1980) (court found that if injury is reasonably foreseeable, "the seller cannot rely on its history of good fortune" to exempt itself from a duty to disclose.)

The inappropriateness of examining the rate rather than the risk of harm in determining whether the nondisclosure of health or safety information is deceptive is brought into even sharper relief by varying the facts slightly in the instant case. Assume, for example, that Harvester continued its policy of silence until one hundred and thirty farmers—ten times as many as this record shows—had been severely disfigured or killed. Would a .01 percent incidence of harm bring geysering within Harvester's implied representation of safety, such that the failure to disclose this hazard would be misleading, or would such conduct continue to be characterized as unfair only by the Commission? While tractor operators who continued to use the product would be justifiably alarmed to learn of a company's continued silence in the face of so many injuries and deaths, the fact remains that the overall *rate* of actual harm is still quite low, so that the Commission's analysis suggests such conduct might not be found to be deceptive. Such an anomalous result can best be avoided by focusing on traditional factors, such as the foreseeability to the seller that an accident will occur, to find an implied warranty of safety.

[28] It is particularly strained reasoning to suggest, as the Commission does here, that considering pure omissions to be deceptive could lead to television and print advertisements overflowing with required disclosures. Pure omissions have been challenged by the Commission for decades now without producing such dire results. Furthermore, there are numerous other vehicles for disclosing product information besides advertising, such as product warning stickers of instruction manuals.

[29] *See Cigarette Statement, supra* note 13, 29 FR 8352. Contrary to the Commission's assertion that the *Cigarette Statement* does not provide a basis for considering pure omissions to be deceptive, the statement specifically addresses pure omissions in its discussion of deceptive nondisclosures, citing to a number of cases which are generally characterized as examples of complete nondisclosures. *Id.* at 8352, 8356.

[30] *Stapell Enterprises, Inc.*; 173, 188 (1965). 67 F.T.C.

[31] *See* Deception Analysis at 17–18. While the deception standard has been interpreted through the years to permit a shorthand variant to be applied in some instances, such as where materiality may be inferred, this is certainly not always the case. As I have already noted, for example, evidence of consumer perceptions concerning a product may be required in certain cases of deception by omission. *See, e.g., FTC v. Simeon Management Corp.*, 579 F.2d 1137 (9th Cir. 1978).

[32] *See, e.g., Peacock Buick, Inc.*, 86 F.T.C. 1532 (1975), *aff'd.* 553 F.2d 97 (4th Cir. 1977) (opinion unpublished).

[33] *E.g., Fisher & Deritis*, 49 F.T.C. 77 (1952); *Stapell Enterprises, Inc.*, 67 F.T.C. 173 (1965).

[34] *Cigarette Statement, supra* note 13, 29 FR at 8352.

[35] *See Stapell Enterprises, Inc.*, 67 F.T.C. 173 (1965); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953); *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952).

Such a finding is also consonant with developments in the common law, including a growing willingness on the part of courts to permit an action in deceit for tacit nondisclosures, particularly in cases involving latent safety hazards where one party has special knowledge, or means of knowledge, which would be important to but is not known by another party. *See* Prosser, *Handbook of the Law of Torts*, section 106 at 697–98 (4th Ed 1971)

protection possible for the public, it is not necessary to examine whether a seller engaging in a potentially misleading practice intends to deceive or acts in bad faith. In fact, the Commission may prohibit conduct that is capable of misleading consumers even when it is unintentional or carried out in good faith.[36]

In view of the Commission's ultimate finding of liability under an unfairness theory in this case, I would like to believe that, at worst, this matter reflects injudicious but benign legal engineering by the Commission. Unfortunately, although I can only speculate as to the precedential value of this opinion, it appears that one practical effect may be to limit the types of hazardous commodities cases which may be brought under a deception theory in the future.[37] Indeed, the Commission specifically notes that a number of prior cases holding both that implied representations of safety were breached and that nondisclosures by sellers are deceptive would probably be brought exclusively under an unfairness theory today.[38] Though unfairness does provide an alternative ground for action, the Commission's apparent abandonment of applicable deception theory is nevertheless troubling for several reasons.

In addition to ignoring FTC precedent, the Commission's findings in this case are directly contrary to established Commission policy. In applying its deception analysis the Commission has traditionally required *higher* standards of candor and honesty in the area of what may be broadly termed "dangerous products."[39] Thus, whether a practice is found to be deceptive may in part actually depend upon whether the normal use of the product involves danger to health or safety, with the standard for honesty and full and fair disclosure highest where the degree of risk involves not only health or safety but possibly life itself.[40]

The reasons for this policy are apparent. While the effects of economic loss to consumers as a result of a seller's silence may be serious, they can never be of such consequence as potential injury to their persons. The Commission's novel conclusion that, despite what a seller should or may know about hidden product hazards, the FTC will employ some form of *ex post* statistical analysis to determine whether a seller's silence is misleading, followed by a cost-benefit examination to determine whether the seller's conduct is unfair, cannot be reconciled with these established policies.

Potentially more troubling, however, is that, while the Commission would continue to analyze "pure omissions" under an unfairness theory, such a policy offers far fewer guarantees that a seller's silence would be corrected in advance of rather than after injury has occurred, or if it would be redressed at all. In relying on unfairness to find liability here, the Commission correctly states that "unfairness cases usually involve actual and completed harms."[41] While the Unfairness Statement clarifies that unwarranted health and safety risks are also covered,[42] the clear focus of the Statement generally, as well as of the deception and unfairness inquiries conducted by the Commission in this case, is on substantial, completed injury.

Deception analysis, of course, requires only that a representation or omission have a tendency or capacity to deceive. Actual harm, physical or economic, need not have occurred to find a practice deceptive.[43] Thus, while an after-the-fact unfairness approach may be necessary to address conduct which is clearly not deceptive,[44] I believe that the substantial public interest in stopping seller misconduct in its incipiency—well before it exposes consumers to serious risks or leads to actual physical harm—militates in favor of continued Commission reliance on *both* deception and unfairness bases for liability wherever possible. The Unfairness Statement clearly contemplates the need to employ both forms of analysis wherever necessary to protect the public interest.[45]

Contrary to the Commission's conclusory statements in this opinion, the FTC's cautious and consistent approach to pure omissions has provided substantial guidance both to the Commission in terms of following its own precedent and to sellers who seek to comply with the law by looking to such precedent. Changing the law at this juncture will only inject immediate confusion as to the status of the law of deception generally in cases of seller silence, without affording any additional longterm certainty.[46]

In light of the foregoing discussion, I must disassociate myself fully from the Commission's ill-advised departure from traditional analysis of a potentially deceptive form of behavior. The record in this matter is clear. International Harvester had reason to be aware for literally decades that fuel geysering presented a substantial risk of injury or death, yet the company failed to issue an effective warning to tractor operators until the initiation of its fire prevention program in 1980. The withholding of such vital product safety information, particularly where its value to consumers is as clearly foreseeable as the facts would suggest here, is, in accordance with established FTC precedent, *both* a deceptive and unfair practice under Section 5. In my view, the Commission presents no sound legal or policy reasons to justify its detour from the Commission's traditional law of deception.

[FR Doc. 85-1222 Filed 1-15-85; 8:45 am]

BILLING CODE 6750-01-M

[36] *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *Travel King, Inc.*, 88 F.T.C. 715, 773, (1975). Although intent to deceive is neither required by nor necessarily presumed by the Commission in deception cases, given the record evidence here of Harvester's longstanding awareness of the risks attendant to fuel geysering, I find it somewhat disingenuous for the Commission to suggest that seller silence *cannot* presumptively reflect the deliberate withholding of information. It can, but it simply isn't necessary to find or presume that intent exists in order to charge a seller with deception.

[37] It is uncertain from the Commission's opinion whether other traditional categories of actionable "pure omissions," such as those involving the foreign origin of a product, would find a safe harbor under an implied representation theory or would also be required to undergo a rigorous cost-benefit analysis to be found illegal under Section 5.

[38] Slip op. at 28-29.

[39] *See Cigarette Statement, supra* note 13, 29 FR 8353. Sellers are, of course, in a far better position than are purchasers to be aware of latent hazards connected with the normal use of their products, as well as to assess the potential effects of their failure to disclose the existence of product hazards, regardless of the source of consumer misperceptions about such dangers. *See also, Firestone Tire & Rubber Co. v. FTC*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

[40] *Cigarette Statement, supra* note 13, 29 FR 8354.

[41] Slip op. at 23.

[42] Unfairness Statement at 6.

[43] As the Third Circuit has stated, "[t]he purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer . . . and it is in the public interest to stop any deception at its incipiency." *Regina Corp. v. FTC*, 322 F.2d 765,768 (3rd Cir. 1963).

[44] *See, e.g., Statement of Basis and Purpose, Advertising of Ophthalmic Goods and Services*, 43 FR 23992 (1978).

[45] *See*, "Companion Statement on the Commission's Consumer Unfairness Jurisdiction" at 5. Cases often cited for the proposition that the Commission may stop undue health and safety risks under an unfairness theory, such as *Philip Morris, Inc.*, 82 F.T.C. 16 (1973), generally involve a finding of deception by the Commission as well.

[46] I fail to see, for example, how future Commissions or sellers will divine with any greater clarity than is true under a deception analysis what forms of seller silence will be considered "unfair" by the Commission or how the unfairness criteria will be applied to particular facts on the basis of this opinion. The law of deception involves well-settled principles which are seriously jeopardized by the sort of unnecessary judicial tinkering present in this case.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 31

Regulation of Certain Leverage Transactions

Correction

In FR Doc. 84-33999 beginning on page 22 in the issue of Wednesday, January 2, 1985, make the following corrections:

§ 31.6 [Corrected]

1. On page 28, in the middle column, in § 31.6(c), the third line, remove the word "be".

§ 31.14 [Corrected]

2. On page 33, in the first and second columns, in §31.14(d), introductory text, "age" should read "leverage" in three places.

§ 31.15 [Corrected]

3. On the same page, in the second column, in § 31.15(b)(2), in the second line, "for leverage" should read "for the leverage".

BILLING CODE 1505-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 154

[Docket Nos. RM84-6-015 through RM84-6-026]

Refunds Resulting from Btu Measurement Adjustments

Issued: January 11, 1985.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order granting rehearing for the purpose of further consideration.

SUMMARY: On September 20, 1984, the Federal Energy Regulatory Commission (Commission) issued Order No. 399-A, 49 FR 37735 (Sept. 26, 1984) (issued Sept. 20, 1984). Various parties to this proceeding have filed petitions for rehearing and stay of the order and requests to modify the refund procedure and extend the deadline for making refunds. In order to afford additional time for consideration of the issues raised, and to avoid denying petitions for rehearing by operation of law, the Commission is granting rehearing of Order No. 399-A for the limited purpose of further consideration.

DATE: This order is effective January 11, 1985.

FOR FURTHER INFORMATION CONTACT: Darrell Blakeway, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426 (202) 357-8696.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

Order No. 399 (the Btu refund rule) [1] implemented the decision of the United States Court of Appeals for the District of Columbia Circuit in *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission (INGAA)* [2] by requiring all first sellers to make refunds resulting from the court-ordered adjustment in the method used to measure the energy content of natural gas. Order No. 399-A amended Order No. 399 to require the offset of Btu refunds and production-related costs under section 110 of the Natural Gas Policy Act of 1978 (NGPA), to assert the authority of the Commission to waive refunds that are uncollectible from royalty interest owners, to extend the deadline for large first sellers to make the Btu refunds and to modify the reporting requirements.[3]

The Commission received nine timely requests for rehearing.[4] The Commission also received four requests for extension of the December 31, 1984, deadline for large first sellers to make the Btu refunds.[5] A motion was filed requesting a modification in the method of offsetting Btu refunds and section 110 billings.[6] Five of the petitioners for rehearing sought a stay of Order No. 399-A until after a ruling on their petitions.[7] The Commission grants rehearing solely for the purpose of further consideration, so that none of the requests is deemed denied by operation of law, and to afford ample opportunity to assess all of the issues raised. The Commission is not granting or denying any petitions on the merits;[8] nor is the Commission determining whether any of the petitions raise issues that are properly the subject of a petition for rehearing.

The Commission orders:

Rehearing of Order No. 399-A is granted for the limited purpose of further consideration. As provided in Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 CFR 385.713(d)(1984), no answers to the requests for rehearing will be entertained by the Commission.

By the Commission.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1213 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[1] Refund Resulting from Btu Measurement Adjustment, Final Rule, 49 FR 37735 (Sept. 26, 1984) (issued Sept. 20, 1984).

[2] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct 1616 (1984).

[3] Refunds Resulting from Btu Measurement Adjustment, Order Granting in part Rehearing, 49 FR 46353 (Nov. 26, 1984) (issued Nov. 20, 1984).

[4] American Paper Institute, Inc. (API), Industrial Users (*i.e.*, Process Gas Consumers Group and American Iron & Steel Institute), Florida Cities, Pitts Oil Company, *et al.*, Stauffer Chemical Company, Associated Gas Distributors (AGD), Memphis Light, Gas & Water Division, BTA Oil Producers, and a group of indicated producers (Producers).

[5] The extension was sought by United Gas Pipe Line Company (United) and Southern Natural Gas Company. United's request was supported by Columbia Gas Transmission Corporation and Transcontinental Gas Pipe Line Corporation (Transco).

[6] This request was made by Transco.

[7] Associated Gas Distributors (AGD), the Florida Cities, Pitts Oil Company, *et al.*, Industrial Users and the American Paper Institute, Inc. (API).

[8] Some of the filings were labeled motions. However, motions may not be filed in an informal rulemaking proceeding such as this. 18 CFR 385.212(a)(3) (1984). The Commission is treating these motions as petitions for reconsideration.

ENVIRONMENTAL PROTECTION AGENCY

21 CFR Part 561

[00000/R705; FRL-2757-2]

Tolerances for Pesticides in Animal Feeds; Cyano(3-Phenoxyphenyl)Methyl-4-Chloro-Alpha-(1-Methylethyl)Benzeneacetate; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: This document corrects an inadvertent error in 21 CFR 561.97 by changing the commodity entry for peanut hulls to soybean hulls.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT:

Timothy Gardner, Product Manager (PM) 17, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460. Office location and telephone number: 1921 Jefferson Davis Highway, Rm. 207, CM #2, Arlington, VA 22202, 703-557-2690.

SUPPLEMENTARY INFORMATION: In FR Doc. 81-28394 appearing in the **Federal**

Register of September 30, 1981 (46 FR 47772), EPA added § 561.97 (21 CFR 561.97) establishing a tolerance of 1.0 part per million of the insecticide cyano(3-phenoxyphenyl)methyl-4-chloro-alpha(1-methylethyl)benzeneacetate in or on soybean hulls. In FR Doc. 82-9355 appearing in the **Federal Register** of April 7, 1982 (47 FR 14896), EPA amended § 561.97 to add tolerances for dried apple pomace and tomato pomace. The amendment inadvertently listed the preexisting soybean hull entry as peanut hulls. This error is being corrected.

(Sec. 409(c)(1), 72 Stat. 1786 (21 U.S.C. 346(c)(1)))

List of Subjects in 21 CFR Part 561

Animal feeds, Pesticides and pests.

Dated: January 8, 1985.

Steven Schatzow,

Director, Office of Pesticide Products.

PART 561—[AMENDED]

§ 561.97 [Corrected]

Therefore, § 561.97 *Cyano(3-phenoxyphenyl-methyl-4-chloro-alpha-(1-methylethyl)benzeneacetate* is corrected by changing "peanut hulls" to "soybean hulls" in the list of commodities.

[FR Doc. 85-1090 Filed 1-15-85; 8:45 am]

BILLING CODE 6560-50-M

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1155

Statement of Organization and Procedures

Correction

In FR Doc. 85-345 beginning on page 1032 in the issue of Tuesday, January 8, 1985 make the following corrections:

§ 1155.2 [Corrected]

1. On page 1032, in the third column, in the introductory text of § 1155.2, in the third line, "every month" should read "every other month".

§ 1155.3 [Corrected]

2. On page 1034, in the first column, in § 1155.3(a)(3)(iii), in the first line, "avoided" should read "voided".

3. On the same page, in the second column, in § 1155.3(c), in the fourth line, "ot" should read "to".

BILLING CODE 1505-01-M

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 501, 515, 522, 552

[APD 2800.12 CHGE 7]

General Services Administration Acquisition Regulations System; Other Miscellaneous Changes

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR) Chapter 5, is amended to add section 501.105 to list the OMB approval numbers, obtained in accordance with the Paperwork Reduction Act, for the information collection requirements in the GSAR and section 501.675 to provide guidance on the ratification of unauthorized contractual commitments. This change cancels GSAR Acquisition Circular AC-84-7. In addition, miscellaneous changes are made in section 501.104-2, Arrangement of regulation; 501.171-2, Acquisition Letters; 501.404, Class deviations; 501.603, Contracting Officer Warrant Program; 501.671-3, Types of contracts subject to audit; 515.106-1, Examination of Records by GSA clause; 522.402-3, Contract Work Hours and Safety Standards Act; and 552.205-70, Examination of Records by GSA. The intended effect is to improve the regulatory coverage and to provide uniform procedures for contracting under the regulatory system.

EFFECTIVE DATE: January 4, 1985.

FOR FURTHER INFORMATION: Ida Ustad, Office of GSA Acquisition Policy and Regulations (VP), (202) 523-4754.

SUPPLEMENTARY INFORMATION:

Background

On October 11, 1984, the General Services Administration published in the **Federal Register** (49 FR 39872) GSAR Notice No. 5-57 inviting comments from interested parties on these proposed changes to the regulation and provided a 30-day comment period. No public comments were received. Comments received from various organization elements within GSA have been analyzed, reconciled, and incorporated, when applicable, into this GSAR final rule.

Impact

The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. The exemption applies to this rule. The General Services Administration (GSA) certified in the original document (49 FR 39872, Oct. 11, 1984) that this document would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.). Therefore, no regulatory flexibility analysis has been prepared. This rule does not contain information collection requirements which require the approval of OMB under 44 U.S.C. 3501 et. seq.

List of Subjects in 48 CFR Parts 501, 515, 522, and 552

Government procurement.

1. The authority citation for 48 CFR, Chapter 5, reads as follows:

Authority: 40 U.S.C. 486(c).

2. Part 501, title is amended to read as follows:

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATIONS SYSTEM

3. Part 501, table of contents is amended by adding or revising the following section titles to read as follows:

* * * * *

501.105 OMB approval under the Paperwork Reduction Act.
501.170 The General Services Administration Acquisition Regulation (GSAR)

* * * * *

501.601-70 Responsibility for Administration of Contracting Officer Warrant Program (COWP)

* * * * *

501.675 Ratification of unauthorized contractual commitments.
501.675-1 Definitions.
501.675-2 Authority.
501.675-3 Procedures.

4. Section 501.104-2 is amended by revising paragraphs (c)(2), (c)(3), and (c)(3)(i) thru (c)(3)(vi) to read as follows:

501.104-2 Arrangement of regulations.

* * * * *

(c) * * *

(2) This regulation may be referred to as the General Services Administration Acquisition Regulation or the GSAR.

(3) Using the GSAR coverage at 509.106-4(d) as an example reference to the—

(i) Part would be "GSAR Part 509" outside the GSAR and "Part 509" within the GSAR.

(ii) Subpart would be "GSAR subpart 509.1" outside the GSAR and "Subpart 509.1" within the GSAR.

(iii) Section would be "GSAR 509.106" outside the GSAR and "509.106" within the GSAR.

(iv) Subsection would be "GSAR 509.106–4" outside the GSAR and "509.106–4" within the GSAR.

(v) Paragraph would be "GSAR 509.106–4(d)" outside the GSAR and "509.106–4(d)" within the GSAR.

(vi) Reference to two or more sections, subsections, and/or paragraphs would be "GSAR 509.106, 509.106–4, and 509.106–4(d)" outside the GSAR and "509.106, 509.106–4, and 509.106–4(d)" within the GSAR.

* * * * *

5. Subpart 501.1 is amended by adding section 501.105 to read as follows:

501.105 OMB Approval under the Paperwork Reduction Act.

The Paperwork Reduction Act of 1980 (Pub. L. 96–511) imposes a requirement on Federal agencies to obtain approval from the Office of Management and Budget (OMB) before collecting information from 10 or more members of the public. The information collection and recordkeeping requirements contained in this regulation have been approved by OMB. The following OMB control numbers apply:

GSAR segment	OMB control Nos.
507.305	3090–0141
509.105–1(a)	3090–0007
509.105–70(a)	3090–0214
510.004–72	3090–0203
512.104(a)	3090–0204
512.104(c)	3090–0204
512.104(e)	3090–0204
514.201–6(d)	3090–0200
514.202–4(b)	3090–0167
515.406–2	3090–0199
522.403(a)	1215–0140 1215–0141 1215–0017 1215–0149
522.405–3(a)	1215–0140
522.405–6(f)	1215–0149
523.370	3090–0205
525.105–70(b)	3090–0205
528.202–71(a)	3090–0198
532.111(e)	1510–0050
532.502–3	
532.7005	3090–0071
537.110(a)	3090–0197
537.110(b)	3090–0006
542.1107(a)	3090–0027
552.207–70	3090–0104
552.209–71	3090–0214
553.210–74	3090–0203
552.212–1(b)	3090–0204
552.212–71	3090–0204
552.212–73	3090–0204
552.214–75	3090–0200
552.215–75	3090–0199
552.222–70	1215–0140 1215–0141
552.222–73	1215–0140 1215–0017 1215–0149
552.223–71	3090–0205
552.225–70	3090–0198
552.228–74	3090–0189
552.232–73	1510–0050
552.232–74	
552.232–76	3090–0071
552.237–70	3090–0197
552.237–71	3090–0006
552.242–70	3090–0027
SF–2	3090–0072
SF–2–B	3090–0072
GSA–72	3090–0004
GSA–72–A	3090–0121
GSA–434	3090–0167
GSA–527	3090–0007
GSA–618–D	1215–0149
GSA–1056	3090–0204
GSA–1142	3090–0208
GSA–1364	3090–0086
GSA–1678	3090–0027
GSA–2428	1215–0140
GSA–3017	1215–0017

6. Section 501.171–2 is amended by revising paragraphs (e)(3) through (e)(8) to read as follows:

501.171–2 Acquisition Letters (AL).

* * * * *

(e) * * *

(3) Effective date.

(4) Termination date.

(5) Cancellation.

(6) Applicability (offices to which AL is applicable).

(7) Reference to regulations (FAR or GSAR), handbooks or orders.

(8) Instructions/procedures.

* * * * *

501.404 [Amended]

7. Section 501.404 is amended by deleting paragraph (d).

8. Section 501.603 is amended by revising paragraphs (c)(4) and (c)(5) and adding paragraph (c)(6) to read as follows:

501.603 Selection, appointment, and termination of appointment.

* * * * *

(c) * * *

(4) "Delivery order" means placing an order for supplies and/or nonpersonal services against an already established contract under the terms conditions of the established contract.

(5) "Warrant Limitations" means limitations which, in addition to the FAR, GSAR, laws, Executive Orders, GSA Orders, and other applicable regulations, are imposed on the authority of contracting officers either by delegation or actions of the designating official, and which will be set forth in the Certificate of Appointment (Standard Form 1402). Warrant limitations may include but are not limited to requirements for prior reviews, approvals, and other controls.

(6) "GSA established source contracts," as used in connection with the contracting officer warrant program, means contracts established by GSA and other Federal agencies when GSA is required by regulation to use those contracts as Government supply sources. (See Part 8 of the FAR.)

9. Section 501.603–2 is amended by revising paragraphs (a), (b), (c), (c)(3)(vi)(B), and (c)(5) to read as follows:

501.603–2 Selection.

(a) Contracting officers (CO's) shall be designated only in those instances in which a valid organizational need for warranted personnel can be demonstrated. Factors to be considered in assessing the need for a contracting officer designation include volume of actions, complexity of work, and organizational structure.

(b) To certify organizational needs and ensure that the candidate meets minimum CO qualifications, a completed GSA Form 3410, Request for Appointment, shall be signed by the candidate's immediate supervisor and submitted to the appropriate warrant board along with a statement of fact. The Request for Appointment shall be accompanied by GSA Form 3409, Personal Qualifications Statement for Appointment as a Contracting Officer, prepared and signed by the candidate.

(c) Warrant boards will evaluate candidates for CO warrants based on supervisory recommendations, experience, education, training, business acumen, judgment, character, ethics, and reputation. Warrant boards may establish additional qualification requirements, as appropriate. Minimum qualifications of contracting officers (purchasing contracting officers (PCO's) and administrative contracting officers (ACO')) are based on a combination of training and experience with consideration of relevant academic credit or degrees earned. The following warrant levels are equated with dollar value of individual transactions (e.g., contract, modification, supplemental agreement, etc.) and not the aggregate contract value.

(3) * * *

(vi) * * *

(B) Contract Law—60–80 hours.

* * * * *

(5) *Substitute courses.* Training courses of equivalent content will be allowable substitutes to acquisition/contracting training plan courses. Personnel involved in motor pool operations may substitute the GSA Fleet Management Procurement course for the requirement for 40 hours of training in small purchases and Federal supply schedules. Courses from the following sources are considered to be equivalent by the Office of Acquisition Policy, provided the training meets the minimum hours required in (c) of this section:

* * * * *

10. Section 501.671–3 is amended by revising paragraphs (a) introductory text, (a)(3), and (a)(6) to read as follows:

501.671-3 Types of contracts subject to audit.

(a) The following types of contracts, (excluding small purchases) shall include either the Audit-Negotiation clause prescribed in FAR 15.106-2 or the Examination of Records by GSA clause at GSAR 552.215-70 and are subject to audit.

* * * * *

(3) Contracts that provide for advance payments, progress payments based on costs, or guaranteed loans;

* * * * *

(6) Fixed-price contracts or leases with economic price adjustment, with incentives and with prices redetermination;

* * * * *

11. Sections 501.675, 501.675-1, 501.675-2, and 501.615-3 are added to read as follows:

501.675 Ratification of Unauthorized Contractual Commitments.

§ 501.675-1 Definitions.

(a) "Ratification" means the act of confirming an unauthorized contractual commitment.

(b) "Unauthorized contractual commitment" means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into the agreement on behalf of the Government.

(c) "Otherwise proper" means the agreement could have been entered into by a Government official with the authority to obligate the Government contractually without violating any statute or regulatory requirement implementing a statute.

501.675-2 Authority.

(a) Subject to the limitations and in accordance with the procedures prescribed in GSAR 501.675-3, contracting officers may ratify a contractual commitment made by an employee who did not have the requisite authority to enter into a contract on the Government's behalf if the head of the contracting activity (HCA) has approved the ratification action.

(b) The HCA may approve ratification of an unauthorized contractual commitment if—

(1) Ratification is in the Government's interest;

(2) The resulting contractual action would otherwise have been proper if made by an authorized contracting officer;

(3) The price is determined to be fair and reasonable; and

(4) Funds are available to pay for the acquisition.

501.675-3 Procedures.

(a) Generally, the Government is not bound by agreements or contractual commitments made by persons to whom contracting authority has not been delegated. Such unauthorized acts may be in violation of the Federal Property and Administrative Services Act, other Federal laws, the FAR, the GSAR, and good acquisition practice. Therefore, such unauthorized contractual commitments should be considered as serious employee misconduct and consideration given to initiating disciplinary action. In any instances where suspected irregularities may involve fraud against the Government, or any type of misconduct which might be punishable as a criminal offense, either the employee's supervisor or the contracting officer should immediately report the matter to the Office of the Inspector General with a request for a complete investigation.

(b) The individual who made the unauthorized commitment shall furnish the appropriate contracting director all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to, a statement as to why normal acquisition procedures were not followed, why the contractor was selected and a list of other sources considered, description of work or products, estimated or agreed contract price, citation of appropriation available, and a statement regarding the status of the performance. Under exceptional circumstances, such as when the person who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the contracting director may waive the requirement that the responsible employee initiate and document the request for ratification; provided that a written determination is made stating that a commitment was in fact made by an employee who shall be identified in the determination.

(c) The appropriate contracting director will assign the request for ratification action to an individual contracting officer for processing. The contracting officer assigned the action will be responsible for—

(1) Reviewing and determining the adequacy of all facts, records, and documents furnished, and for obtaining any additional material required;

(2) Obtaining an opinion from legal counsel as to whether the acquisition can be expressly ratified or has been implicitly ratified;

(3) Stating whether the price involved is considered fair and reasonable;

(4) Determining that sufficient funds are available to pay for the acquisition; and

(5) Preparing a summary statement of facts addressing the foregoing to include a recommendation as to whether the transaction should be ratified and stating the reasons therefor. Advice against express ratification should include a recommendation for other appropriate disposition. When express ratification is not permissible due to legal improprieties in the procurement, the contracting officer may recommend that payment be made for services rendered on a quantum meruit basis (the reasonable value of work or labor) or for goods furnished on a quantum valebant basis (the reasonable value of goods sold and delivered) provided there is a showing that the Government received a benefit and that the unauthorized action has been impliedly ratified by authorized contracting officials of the Government.

(d) The request for ratification, the information required by paragraphs (a), (b), and (c) above, and a recommendation for corrective action to preclude recurrence, shall be forwarded, through appropriate channels, to the HCA for consideration.

(e) The HCA, upon receipt and review of the complete file, may approve the ratification if determined to be in the Government's best interest, direct payment be made on a quantum meruit or quantum valebant basis, or direct other disposition as appropriate. Acquisitions which have been approved for ratification shall be forwarded to the appropriate contracting officer for issuance of the necessary contractual documents. If the request for ratification is not justified, the HCA shall return the request without approval and provide an explanation for the decision not to approve ratification.

(f) Each HCA shall maintain a separate file containing a copy of each request for approval to ratify an unauthorized contractual commitment. This file shall be made available for review by the Office of Acquisition Policy and the Inspector General.

PART 515—CONTRACTING BY NEGOTIATION

12. Section 515.106-1 is amended by revising paragraphs (a) and (b) to read as follows:

515.106-1 Examination of Records by GSA Clause.

(a) The contracting officer shall insert the clause at GSAR 552.215-70, Examination of Records by GSA, in solicitations and contracts that do not

include the Audit-Negotiation clause prescribed in FAR 15.106-2 and are subject to audit as indicated in GSAR 501.671-3.

(b) In some of the contracts listed in GSAR 501.671-3, it may be appropriate to define the specific area of audit such as (1) the use or disposition of Government-furnished property, or (2) variable or other special features of the contract; e.g., price escalation and compliance with the price warranty or price reductions clauses. In these cases, the contract clause in GSAR 552.215-70 may be appropriately modified with the concurrence of the Office of General Counsel or Regional Counsel, and the Assistant Inspector General-Auditing, or the Regional Inpector General-Auditing, as appropriate.

* * * * *

PART 522—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

13. Section 522.402-2 is revised to read as follows:

522.402-2 Copeland Act.

The Copeland ("Anti-kickback") Act (18 U.S.C. 874 and 40 U.S.C. 276c) makes it unlawful to induce, by force or otherwise, any person employed in the construction or repair of public buildings, public works, financed in whole or in part by the United States, to give up any part of the compensation to which the person is entitled under a contract of employment. The Copeland Act also requires each contractor and subcontractor to furnish weekly statements of compliance with respect to the wages paid each employee during the preceding week. Contracts subject to the Act shall contain a clause (see GSAR 552.222-74) requiring contractors and subcontractors to comply with the regulations issued by the Secretary of Labor under the Copeland Act.

14. Section 522.402-3 is amended by revising paragraph (a) to read as follows:

522.402-3 Contract Work Hours and Safety Standards Act.

(a) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), requires that certain contracts contain a clause (see GSAR 552.222-71), specifying that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 8 hours in any one calendar day or 40 hours in any workweek unless such laborer or mechanic is compensated at not less than one and one-half times his basic rate of pay for all hours worked in excess of 8 hours in any one calendar day or 40 hours in any workweek. The worker will be paid according to the calculation that represents the greater number of overtime hours. (See also FAR Subpart 22.3.)

* * * * *

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

15. Section 552.215-70 is amended by revising the introductory text and removing paragraphs (a) through (i) to read as follows:

552.215-70 Examination of records by GSA.

As prescribed in GSAR 515.106-1 and 514.201-6(e), when awarding contracts (excluding small purchases), insert the following clause:

* * * * *

Dated: January 4, 1985.

Allan W. Beres,

Assistant Administrator for Acquisition Policy.

[FR Doc. 85-1240 Filed 1-15-85; 8:45 am]

BILLING CODE 6820-61-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 574

[Docket No. 84-07; Notice 2]

Tire Identification and Recordkeeping

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends Part 574 to give retreaders of tires for motor vehicles other than passenger cars an option during the retreading process of either removing the original manufacturer's DOT symbol from the sidewall of the finished retread or leaving that symbol on the tire. This action is taken because NHTSA has determined that no significant safety interest is served by requiring that retreaders remove the original manufacturer's DOT symbol as part of the retreading process. That requirement, which did not expressly appear in Part 574, resulted from unforeseen events and from unexpected effects of the language in Part 574. This rule avoids imposing unnecessary costs on these retreaders without degrading the safety of the tires or the safety value of the information available to consumers.

EFFECTIVE DATE: This rule takes effect February 15, 1985.

ADDRESS: Petitions for reconsideration of this rule may be submitted within 30 days of the date of publication of the rule in the **Federal Register**, and should be addressed to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590.

FOR FURTHER INFORMATION CONTACT: Arturo Casanova, Office of Vehicle Safety Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590 (202-426-1715).

SUPPLEMENTARY INFORMATION: The Federal Motor Vehicle Safety Standards require that a DOT symbol appear on the sidewall of most new and retreaded tires as a means of certifying compliance with the performance requirements of the applicable safety standard. Thus, the DOT symbol must appear on new tires for use on passenger cars which are subject to Standard No. 109, new tires for use on vehicles other than passenger cars which are subject to Standard No. 119, and retreaded passenger car tires which are subject to Standard No. 117. (For the sake of easy reference, tires for use on motor vehicles other than passenger cars will be referred to as "non-car tires" throughout the rest of this preamble.)

Regulations issued under the National Traffic and Motor Vehicle Safety Act expressly prohibit the presence of the DOT symbol on tires not subject to a Federal safety standard. 49 CFR Part 574, *Tire Identification and Recordkeeping*, provides, in pertinent part: "The DOT symbol shall not appear on tires to which no Federal Motor Vehicle Safety Standard is applicable . . ." (574.5). Since retreaded non-car tires are the only new or retreaded tires not subject to a Federal safety standard, they are the only tires subject to that prohibition.

NHTSA adopted the language in § 574.5 because of its concern that the appearance of the DOT symbol on tires to which no safety standard was applicable would confuse consumers. That is, NHTSA believed that consumers could mistakenly conclude that the tires in question met some applicable Federal requirements, when, in fact, there were no such requirements.

However, although the agency's concern in adopting the prohibition in § 574.5 was with the addition of a DOT symbol to a tire that was not subject to

any Federal safety standard, the language of the prohibition was broader. It did not simply state that manufacturers cannot add the DOT symbol to tires to which no Federal safety standard is applicable. It stated that the DOT symbol "shall not appear" on such tires. The breadth of that language gave rise to a duty not only to refrain from adding a DOT symbol to tires to which no safety standard was applicable, but also to remove an original manufacturer's symbol when, as in the case of retreaded non-car tires, the tires were subject to a safety standard when new but are not subject to any standard when retreaded. In no other circumstances under the Safety Act, such as in the remanufacturing of a vehicle, is a person required to remove a previous manufacturer's certification. Additionally, the agency learned that most non-car tire retreaders had not been removing the original manufacturer's DOT symbol.

NHTSA tentatively concluded that there was no safety or informational value associated with the requirement that non-car tire retreaders remove the original manufacturer's DOT symbol. Accordingly, the agency published a notice of proposed rulemaking on this subject at 49 FR 20880, May 17, 1984. That notice explained in detail the origins of the prohibition in § 574.5, and the bases for the agency's tentative conclusions that no safety or informational purposes were served by the requirement that retreaders of non-car tires remove the original manufacturer's DOT symbol from the sidewall of the tire. Further, the notice noted that, although NHTSA had received over 10,000 consumer complaints regarding non-car tires since 1976, not one of those complaints related to the presence or absence of the DOT symbol on a retreaded non-car tire. The hypothetical consumer confusion which NHTSA thought might occur has in fact *not* occurred with respect to retreaded non-car tires. Accordingly, NHTSA proposed that the prohibition in § 574.5 be replaced by language which would give non-car tire retreaders the option of removing the original manufacturer's DOT symbol or leaving it on the finished retread, while emphasizing that those retreaders were still prohibited from adding a new DOT symbol to the sidewall of retreaded non-car tires.

Three commenters responded to the notice of proposed rulemaking. All three supported the agency's proposal to eliminate the requirement that non-car tire retreaders remove the original manufacturer's DOT symbol. One of the commenters suggested that the agency move beyond its proposed option for these retreaders to remove or not remove the original manufacturer's DOT symbol, and instead require that any non-car tires with a DOT symbol on the sidewall retain that DOT symbol after the retreading is completed.

The agency has not been persuaded by this comment for the reasons expressed in the proposal. To repeat, the value of the DOT symbol on a worn tire carcass in assessing the probable performance capabilities of a retreaded tire is not very significant. Intervening factors such as latent problems with the carcass, inadvertent damage to the carcass during the retreading process, the amount of old tread not buffed off during the retreading, and the application and design of the new tread are of far greater significance in determining the performance of the retread than is the condition of the carcass when the tire was new. Those retreaders which choose to retain the original manufacturer's DOT symbol on the sidewall are free to do so, and those retreaders which choose to remove the original manufacturer's DOT symbol are also free to do so, since NHTSA has concluded that the symbol has so little significance for purchasers of retreaded non-car tires. Hence, the proposed change to the language in § 574.5 is hereby adopted, for the reasons set forth in the proposal.

NHTSA has analyzed this rule and determined that it is neither "major" within the meaning of Executive Order 12291 nor "significant" within the meaning of the Department of Transportation regulatory policies and procedures. The impact of this rule is simply to authorize a practice which has been followed by most non-car tire retreaders for the last seven years (i.e., not removing the original manufacturer's DOT symbol). No additional paperwork or costs will be imposed as a result of this rule. No cost savings are expected, either, since this rule merely authorizes existing practices. Since the impacts associated with the rule are so minimal, a full regulatory evaluation has not been prepared.

NHTSA has also analyzed this rule in accordance with the Regulatory Flexibility Act. Based on that analysis, I certify that this amendment will not have a significant economic impact on a substantial number of small entities. This rule does not impose any additional burden on tire retreaders, because it merely authorizes a practice most of them have followed, i.e., leaving the original manufacturer's DOT symbol on the sidewall of the finished retread. Those retreaders which have not followed that practice will be able to reduce their costs slightly by leaving that symbol on the sidewall, if they choose. Small organizations and small governmental jurisdictions which purchase non-car tires will not be affected by this rule. To the extent that this rule might produce some cost savings for the retreaders by allowing them not to buff off the original manufacturer's DOT symbol, those savings are already reflected in the prices charged for most retreaded non-car tires. Hence, no significant savings are expected for small entities as a result of this rule. A full Regulatory Flexibility Analysis has not been prepared for this rule.

Finally, the agency has considered the environmental implications of this rule in accordance with the National Environmental Policy Act and determined that this rule will have no effect on the human environment.

List of Subjects in 49 CFR Part 574

Labeling, Motor vehicle safety, Motor vehicles, Reporting and recordkeeping requirements, Rubber and rubber products, Tires.

PART 574—[AMENDED]

In consideration of the foregoing, 49 CFR 574.5 is amended by revising the introductory text to read as follows:

§ 574.5 Tire identification requirements.

Each tire manufacturer shall conspicuously label on one sidewall of each tire it manufactures, except tires manufactured exclusively for mileage-contract purchasers, by permanently molding into or onto the sidewall, in the manner and location specified in Figure 1, a tire identification number containing the information set forth in paragraphs (a) through (d) of this section. Each tire retreader, except tire retreaders who retread tires solely for their own use, shall conspicuously label one sidewall of each tire it retreads by permanently molding or branding into or onto the sidewall, in the manner and location specified in Figure 2, a tire identification number containing the information set forth in paragraphs (a) through (d) of this section. In addition, the DOT symbol required by Federal Motor Vehicle Safety Standards shall be located as shown in Figures 1 and 2. The DOT symbol shall not appear on tires to which no Federal Motor Vehicle Safety Standard is applicable, except that the DOT symbol on tires for use on motor vehicles other than passenger cars may, prior to retreading, be removed from the sidewall or allowed to remain on the sidewall, at the retreader's option. The

symbols to be used in the tire identification number for tire manufacturers and retreaders are: "A, B, C, D, E, F, H, J, K, L, M, N, P, R, T, U, V, W, X, Y, 1, 2, 3, 4, 5, 6, 7, 8, 9, 0". Tires manufactured or retreaded exclusively for mileage-contract purchasers are not required to contain a tire identification number if the tire contains the phrase "for mileage contract use only" permanently molded into or onto the tire sidewall in lettering at least one-quarter inch high.

* * * * *

(Secs. 103, 119, and 201, Pub. L. 89-5631, 80 Stat. 718 (15 U.S.C. 1392, 1407, and 1421); delegation of authority at 49 CFR 1.50)

Issued on: January 10, 1985.

Diane K. Steed,

Administrator.

[FR Doc. 85-1279 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-59-M

Urban Mass Transportation Administration

49 CFR Part 661

Buy America Requirements

AGENCY: Urban Mass Transportation Administration, DOT.

ACTION: Final rule.

SUMMARY: This final rule revises the existing Urban Mass Transportation Administration Buy America regulation to implement the provision mandated by section 10 of Pub. L. 98-229, (98 Stat. 55), enacted on March 9, 1984. Section 10 amends section 165(a) of the Surface Transportation Assistance Act of 1982 (STAA of 1982) by striking "cement" from the materials and products that are covered under section 165. In this document, UMTA is revising its "Buy America" regulations to delete "cement" from their applicability, and to specify the contracts to which the change applies.

EFFECTIVE DATE: This final rule became effective on March 9, 1984.

FOR FURTHER INFORMATION CONTACT: Edward J. Gill, Jr., Office of the Chief Counsel, Room 9228, 400 Seventh Street SW, Washington, D.C. 20590, (202) 426-4063.

SUPPLEMENTARY INFORMATION: On March 9, 1984, the President signed into law an Act (Pub. L. 98-229) authorizing apportionment of certain funds for construction of Interstate Highways. Section 10 of this Act also amended the Surface Transportation Assistance Act of 1982 (STAA) by deleting cement from coverage under section 165 of the STAA (the "Buy America" provision). Section 165, as signed into law on January 6, 1983, provides that Urban Mass Transportation funds cannot be obligated for grantee projects unless all steel, cement and manufactured products used in such projects are produced in the United States. By enacting section 10, Congress clearly indicated that the domestic preference requirements of Section 165 should not be applied to the procurement of cement and cement products in UMTA grantee third party contracts utilizing federal funds. The UMTA regulations are being amended to delete the references to cement in § 661.5, and to revise § 661.1 to indicate that the use of foreign cement is permitted in projects in which the grantee third-party contract has been entered into on or after March 9, 1984. The statutory and regulatory changes should not be construed to permit grantees to modify third-party contracts for cement or cement products entered into prior to March 9, 1984.

UMTA recognizes that there may be some questions which arise concerning bid solicitations documents which were issued prior to March 9, 1984, which contain language indicating that the Buy America requirements apply to cement. There have been very few questions to date since most grantees were able to amend their bid solicitation documents to reflect the statutory change. Any questions that have arisen have been handled by UMTA on a case by case basis, with the specific circumstances of the contract in question being taken into consideration. It is anticipated that very few questions remain on this issue, but UMTA intends to continue to respond on a case by case basis. Under the Administrative Procedure Act, 5 U.S.C. 553(d), publication of a rule must normally take place 30 days before the rule's effective date. However, exceptions to this normal requirement are permissible in the case of a substantive rule which the agency finds for good cause must be made effective less than 30 days after publication. Since the statutory provision which governs this regulatory change became effective on March 9, 1984, it has been determined that circumstances warrant the issuance of a final rule with a retroactive effective date so as to immediately implement the statutory provision. Notice and comment are unnecessary in this case since, under 5 U.S.C. 553(b)(B), the Agency finds that notice and comment would be contrary to the public interest because the regulatory change merely tracks a statutory change which reduces a burden, and the Agency is bound by the new statutory change.

It is anticipated that the economic impact of this rulemaking action will be minimal, since such economic impact as will occur is mandated by the cited statutory changes themselves, and not by rulemaking action. Accordingly, a full regulatory evaluation is not required. For the foregoing reasons and under the criteria of the Regulatory Flexibility Act, it is certified that this action will not have a significant economic impact on a substantial number of small entities.

UMTA has determined that this document contains neither a major rule under Executive Order 12291 nor a significant regulation under the regulatory policies and procedures of the Department of Transportation.

List of Subjects in 49 CFR Part 661

Buy America, Domestic preference, Contracts, Grants Programs—transportation, Mass transportation.

PART 661—[AMENDED]

Accordingly, Part 661 of Title 49 of the Code of Federal Regulations is amended as follows:

1. In Section 661.1, by adding a new paragraph (c) to read as follows:

§ 661.1 Applicability.

* * * * *

(c) These regulations do not apply to a third party procurement contract for cement or cement products that is entered into by the grantee on or after March 9, 1984.

2. In Section 661.5, by removing the word "cement" in paragraph (a), and the words "and cement" in paragraph (b).

(Sec. 165, Pub. L. 97-424; Sec. 10, Pub. L. 98-229; 49 CFR 1.51)

Dated: January 9, 1985.

Ralph L. Stanley,

Administrator.

[FR Doc. 85-1208 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-57-M

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1051, 1320, 1321, 1322, 1323, and 1324

[Ex Parte No. MC-1] [1]

Payment of Rates and Charges of Motor Carriers

AGENCY: Interstate Commerce Commission.

[1] Embraces Ex Parte No. 73, Regulations for Payment of Rates and Charges; Ex Parte No. 73

Continued

ACTION: Notice of final rules.

SUMMARY: With some changes, the Commission has modified and adopted the rail, motor, water carrier, and freight forwarder credit regulations that were published on January 18, 1983 (48 FR 2151). Its purpose is to reduce governmental regulation by giving carriers more flexibility in their credit extension practices, change unrealistic provisions in the present credit regulations, and to make them clearer. Obsolete express carrier credit regulations in part 1321 are removed. Authorized credit periods are expanded to 15 calendar days for all carriers. All carriers may elect by tariff publication to reduce that period, or to expand it up to a maximum of 30 calendar days. Service charges and discounts are authorized, time limits for presentation of rail and water carrier freight bills are lengthened, and the measurement of the credit period on "to be prepaid" shipments is based on receipt of the shipment by the carrier at origin rather than delivery at destination. Credit terms on household goods shipments by motor common carriers are unchanged. The credit rules for all modes of carriage will now appear in 49 CFR Part 1320.

DATES: These rules will be effective on February 15, 1985.

FOR FURTHER INFORMATION CONTACT: Louis E. Gitomer (202) 275-7245 or Mont L. Burrup (202) 275-6447.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision write to T.S. InfoSystems, Inc., Room 2227, Interstate Commerce Commission, Washington, DC 20423, or call 289-4357 (DC Metropolitan area) or toll free (800) 424-5403.

Environment and Energy

This action will not significantly affect the quality of the human environment or energy conservation.

Regulatory Flexibility Act

These credit regulations have a significant economic impact on businesses and other entities who transport, ship, or receive goods in interstate commerce, including a substantial number of small entities.

A Final Regulatory Flexibility Analysis is contained in the Commission's decision.

List of Subjects

49 CFR Part 1051

Freight, Motor carriers.

49 CFR Part 1320

Credit, Freight, Freight forwarders, Maritime carriers, Motor carriers, Railroads.

This notice is issued pursuant to 5 U.S.C. 553 and 49 U.S.C. 10321, 10701, 10702, 10741, 10743, and 10744.

Decided: January 4, 1985.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio. Chairman Taylor dissented in part with a separate expression.

James H. Bayne,

Secretary.

Appendix

Title 49 of the Code of Federal Regulations is amended as follows:

PART 1051—[AMENDED]

(1) Section 1051.1 is amended by adding a cross reference after paragraph (b) to read as follows:

§ 1051.1 Information to be shown.

* * * * *

(b) * * *

Cross Reference: For a requirement that credit information be included on or with freight bills see 49 CFR 1320.3(c).

(2) The heading and text of Part 1320 are revised to read as follows:

PART 1320—EXTENSION OF CREDIT TO SHIPPERS BY RAIL COMMON CARRIERS, MOTOR COMMON CARRIERS, WATER COMMON CARRIERS, AND FREIGHT FORWARDERS

Sec.
1320.1 Scope.
1320.2 Extension of credit to shippers.
1320.3 Presentation of freight bills.
1320.4 Effect of mailing freight bills or payments.
1320.5 Additional charges.
1320.6 Computation of time.
1320.7 Charges under average demurrage agreements.
1320.8 Household goods shipments by motor common carriers.
1320.9–1330.16 [Reserved]
1320.17 Interline settlement of revenues.

Authority: 5 U.S.C. 553 and 49 U.S.C. 10321, 10701, 10702, 10741, 10743, and 10744.

§ 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor, and water carriers and freight forwarders, except as otherwise provided.

(b) *Exceptions.* These regulations do not apply to—

(1) Contract carriage operations.

(2) Transportation for—

(i) The United States or any department, bureau, or agency thereof,

(ii) Any State, or political subdivision thereof,

(iii) The District of Columbia.

(3) Property transportation incidental to passenger operations.

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a)(2) of this section may—

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified—

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the standard credit period. The term "standard credit period," as used in the preceding sentence, means—

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit

(Sub-No. 1), Regulations for Payment of Rates and Charges—Credit Period on Prepaid Shipments; Ex Parte No. 143, Rules and Regulations Governing the Settlement of Rates and Charges of Common Carriers of Property by Water; Ex Parte No. 170, Rules and Regulations Governing the Settlement of Rates and Charges of Common Carriers of Property by Express; and Docket No. 37152, Southern Railway Company—Petition for Rulemaking—Modification of 49 CFR 1320.1.

period (as defined in paragraph (e)(1) of this section) and its additional credit period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expiration of an authorized credit period. Such a rule shall—

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers—

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier,

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraphs (e) (2) or (3) of this section may establish minimum charges.

(f) *Discounts.* Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (d), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

§ 1320.3 Presentation of freight bills.

(a) *"To be prepaid" shipments.* (1) On "to be prepaid" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraphs (a)(2) of this section, except—

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the carrier received the shipment. This time period does not include Saturdays, Sundays, or legal holidays.

(b) *"Collect" shipments.* (1) On "collect" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (b)(2) and of this section, except—

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the shipment was delivered at its destination. This time period does not include Saturdays, Sundays, or legal holidays.

(c) *Bills or accompanying written notices shall state credit time limits and service charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state the time limit by which payment must be made and any applicable service charge and discount terms.

(d) *When the carrier lacks sufficient information to compute tariff charges.* (1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its freight bill for payment within 7 days following the day upon which sufficient information becomes available at the billing point. This time period does not include Saturdays, Sundays, or legal holidays.

(2) A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier.

(3) As used in this paragraph, the term "shipper" includes, but is not limited to, freight forwarders, and shippers' associations and shippers' agents within the meaning of 49 U.S.C. 10562 (3) and (4).

(e) *Freight bill presentation on railroad transported export traffic loaded into vessels.* The term "delivered at its destination" as used in paragraph (b)(2) of this section shall mean the time when the vessel is completely loaded, when—

(1) The traffic in export traffic that is loaded into vessels either—

(i) Direct from railroad cars or piers, or

(ii) From such cars or pirers by means of lighters, and

(2) the freight bills are presented to vessel owners or their representatives.

§ 1320.4 Effect of mailing freight bills or payments.

(a) *Presentation of freight bills by mail.* When carriers present freight bills by mail, the time of mailing shall be deemed to be the time of presentation of the bills. The term "freight bills," as used in this paragraph, includes both paper documents and billing by use of electronic media such as computer tapes or disks, when the mails are used to transmit them.

(b) *Payment by mail.* Wnen shippers mail acceptable checks, drafts, or money orders in payment of freight charges, the act of mailing them within the credit period shall be deemed to be the collection of the tariff charges within the credit period for the purposes of the regulations in this part.

(c) *Disputes as to date of mailing.* In case of dispute as to the date of mailing, the postmark shall be accepted as such date.

§ 1320.5 Additional charges.

When a carrier—

(a) Has collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and

(b) Thereafter presents to the shipper another freight bill for additional charges—

the carrier may extend credit in the amount of such additional charges for a period of 30 calendar days from the date of the presentation of the freight bill for the additional charges.

§ 1320.6 Computation of time.

Time periods involving calendar days shall be calculated pursuant to 49 CFR 1104.7(a).

§ 1320.7 Charges under average demurrage agreements.

(a) *Conditions for special credit rules regarding demurrage charges.* The rules in paragraph (b) of this section shall apply to demurrage charges, if—

(1) The amount of demurrage charges is determinable under average agreements made in accordance with tariff provisions, and

(2) The carrier takes reasonable actions to assure payment of the tariff charges within the credit period.

(b) *Special credit rules for demurrage charges.* When both conditions in paragraph (a) of this section are met, the carrier may—

(1) Delay presentation of bills for such demurrage charges for a period not exceeding 15 calendar days after the end of the authorized demurrage period, and

(2) Extend credit, in the amount of the demurrage charges accrued during the demurrage period, for 15 calendar days from the date of presentation of the bill for such charges.

§ 1320.8 Household goods shipments by motor common carriers.

(a) *Exceptions—Household goods "collect on delivery" shipments.* The regulations in the other sections of this

part and in paragraph (c) of this section do not apply when the carrier is required by 49 CFR 1056.3(d) to relinquish possession of an otherwise "collect on delivery" household goods shipment in advance of payment of all of the charges.

(b) *Charge card reversed transactions.* The regulations of this part apply when—

(1) Charges for household goods movements are paid by use of charge cards pursuant to 49 CFR 1056.19, and

(2) The shipper forces an involuntary extension of credit by the carrier by causing the charge card issuer to reverse the charge transaction and charge payments back to the carrier's account.

(c) *Exceptions—House goods credit shipments.* The provisions in paragraphs (c) (1) through (3) of this section are exceptions to the other regulations in this part. They apply to credit extensions for household goods transportation by motor common carriers (except as provided in paragraph (a) of this section)—

(1) A freight bill shall be presented within 15 days (excluding Saturdays, Sundays, and legal holidays) of the date of delivery of a shipment at its destination.

(2) The credit of period is 7 days (excluding Saturdays, Sundays, and legal holidays).

(3) Motor Common carriers of household goods must provide in their tariffs that—

(i) The credit period shall automatically be extended to a total of 30 calendar days for any shipper who has not paid the carrier's freight bill within the 7-day period.

(ii) Such shipper will be assessed a service charge by the carrier equal to 1 percent of the amount of the freight bill, subject to a $10 minimum charge, for such extension of the credit period, and

(iii) No such carrier shall grant credit to any shipper who fails to pay a duly presented freight bill within the 30-day period, unless and until such shipper affirmatively satisfies the carrier that all future freight bills duly presented will be paid strictly in accordance with the rules and regulations prescribed by the Commission for the settlement of carrier rates and charges.

§ 1320.9-1320.16 [Reserved]

§ 1320.17 Interline settlement of revenues.

Nothing in this part shall be interpreted as affecting the interline settlement of revenues from traffic which is transported over through routes composed of lines of common carriers subject to Interstate Commerce Commission jurisdiction under subchapters I, II, or III or chapter 105 of title 49, subtitle IV, of the United States Code.

PARTS 1321, 1322, 1323, and 1324—[REMOVED]

(3) Parts 1321, 1322, 1323, and 1324 are removed.

[FR Doc. 85-1198 Filed 1-15-85; 8:45 am]
BILLING CODE 7035-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 652

[Docket No. 41032-4132]

Atlantic Surf Clam and Ocean Quahog Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Emergency rule, extension of effective date.

SUMMARY: An emergency rule amending the Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries (FMP) is in effect through January 12, 1985. The Secretary of Commerce (Secretary) extends this rule for an additional 90 days, through April 12, 1985, because the conditions requiring measures to reduce the surf clam discard mortality rate still exist. This extension continues the 5¼ inch minimum size.

EFFECTIVE DATES: January 13, 1985, to April 12, 1985.

FOR FURTHER INFORMATION CONTACT: Salvatore A. Testaverde, 617-281-3600 (ext. 273).

SUPPLEMENTARY INFORMATION: Under section 305(e)(2) of the Magnuson Fishery Conservation and Management Act (Magnuson Act) the Secretary issued an emergency rule amending the FMP effective on October 14, 1984 (49 FR 40580, October 17, 1984). This rule extends the 5¼ inch minimum size limit for surf clams for an additional 90 days throughout the surf clam range, except in the New England area (see 49 FR 49093, December 18, 1984, for more information on the exception for the New England area). A detailed discussion of the background, the issues and regulations, and the classification of the rulemaking is set forth in the preamble to the original emergency rule.

Both the Mid-Atlantic and the New England Fishery Management Councils have voted to extend this emergency rule for an additional 90 days, since the conditions within the fishery requiring the original emergency rule still exist. This action is authorized by section 305(e)(3)(b) of the Magnuson Act.

The emergency rule is exempt from the normal review procedures of Executive Order 12291 as provided for in section 8(a)(1) of that order. This rule is being reported to the Director of the Office of Management and Budget, with an explanation of why it is not possible to follow the procedures of that order.

List of Subjects in 50 CFR Part 652

Fisheries, Fishing.

Dated: January 11, 1985.

Joseph W. Angelovic,

Deputy Assistant Administrator for Science and Technology, National Marine Fisheries Service.

[FR Doc. 85-1277 Filed 1-11-85; 4:12 pm]
BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 50, No. 11
Wednesday, January 16, 1985

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 40

Uranium Mill Tailing Regulations; Conforming NRC Requirements to EPA Standards

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On November 26, 1984, (49 FR 46418), the NRC published for public comment a proposed rule amending its regulations governing the disposal of uranium mill tailings. The proposed changes are intended to conform existing NRC regulations to the regulations published by the Environmental Protection Agency. The comment period for this proposed rule was to have expired on January 10, 1985. A number of commenters have requested an extension of the comment period. In view of the importance of the proposed rule, and the desire of the Commission to allow all parties to fully express their views, the NRC has decided to extend the comment period for an additional thirty days. The extended comment period now expires on February 10, 1985.

DATES: The comment period has been extended and now expires February 10, 1985. Comments received after this date will be considered if it is practical to do so but assurance of consideration cannot be given except as to comments received before this date.

ADDRESSES: Send written comments or suggestions to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street NW. Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Fonner, Office of the Executive Legal Director, on (301) 492-8692, or Kitty S. Dragonette Division of Waste Management on (301) 427-4300, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

Dated at Washington, D.C., this 11th day of January, 1985.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 85-1258 Filed 1-15-85; 8:45 am]

BILLING CODE 7590-01-M

10 CFR Part 40

Uranium Mill Tailings Regulation; Ground Water Protection and Other Issues

AGENCY: Nuclear Regulatory Commission.

ACTION: Advanced notice of proposed rulemaking; extension of comment period.

SUMMARY: On November 26, 1984 (49 FR 46425), the NRC published for public comment an Advanced Notice of Proposed Rulemaking indicating that the NRC is considering further amendments to its uranium mill tailings regulations to incorporate ground water protection provisions and other requirements established by EPA for similar hazardous wastes into NRC regulations. The comment period for this proposed rule was to have expired January 25, 1985. A number of commenters have requested an extension of the comment period. In view of the importance of the proposed rule, and the desire of the Commission to allow all parties to fully express their views, the NRC has decided to extend the comment period. The extended comment now expires on March 1, 1985.

DATES: The comment period has been extended and now expires March 1, 1985. Comments received after this date will be considered if it is practical to do so but assurance of consideration cannot be given except as to comments received before this date.

ADDRESSES: Send written comments or suggestions to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Fonner, Office of the Executive Legal Director, on (301) 492-8692, or Kitty S. Dragonette, Division of Waste Management on (301) 492-4300, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

Dated at Washington D.C., this 11th day of January 1985.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 85-1257 Filed 1-15-85; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 84-NM-131-AD]

Airworthiness Directives; Boeing Model 757 Series Airplanes Equipped With Certain Air Cruisers Slides

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD) which would require inspection and replacement, as necessary, of certain Air Cruisers evacuation slides installed on Boeing Model 757 airplanes. This notice is prompted by reports of excessive slide fabric porosity, which results in leakage of the evacuation slide could result in an unuseable slide and jeopardize successful emergency evacuation of an airplane.

DATE: Comments must be received on or before March 8, 1985.

ADDRESSES: Send comments to Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

The service documents cited in this AD may be obtained upon request from the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124 or may be examined at the FAA, Seattle Aircraft Certification

Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Roger Young, Airframe Branch, ANM-120S; telephone (206) 431-2929. Mailing address: Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data; views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified below. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the rules docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the rules docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel, Attention: Airworthiness Rules Docket No. 84-NM-131-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

There have been several reports of high leakage rates in Air Cruisers escape slides installed on Boeing 757 airplanes The slides have become porous due to fungus growth. The extent to which the slide becomes porous is directly related to time in service. Slides which remain unchecked for extended periods of time could, upon inflation, become unuseable several minutes after inlfation because of porosity, thereby jeopardizing the success of an emergency evacuation. Regular inspection of the slides following the procedures in Boeing Service Bulletin 757-25-0040 will ensure that the slides do not become unsafe due to porosity.

It is estimated that 16 airplanes of U.S. operators would be affected by this AD, and that approximately 32 manhours per airplane would be required to perform the necessary inspections. Based on an estimated labor cost of $40 per manhour, the total cost to the impact of this AD is estimated to be $20,480.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedurers (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities because few, if any, Model 757 airplanes are operated by small entities. A final evaluation has been prepared for this regulation and has been placed in the docket. A copy of it may be obtained by contacting the person identified under the caption **"FOR FURTHER INFORMATION CONTACT."**

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) by adding the following new airworthiness directive:

Boeing: Applies to all Model 757 series airplanes equipped with Air Cruisers evacuation slides, part numbers (P/N) as specified in Boeing Service Bulletin 757-25-0040. To assure slides do not become unsafe due to porosity, accomplish the following, unless already accomplished.

A. For airplanes equipped with Air Cruisers evacuation slides as listed in Boeing Service Bulletin 757-25-0040, dated December 21, 1984, or later FAA approved revisions, accomplish inspection procedures in accordance with the service bulletin, as follows:

1. For slides manufactured prior to one year before the effective date of this AD, accomplish the inspections within the next 180 days.

2. For all other slides, accomplish the inspections with 18 months after the date of manufacture.

3. Slides which do not meet the limitations set forth in the service bulletin must be replaced prior to further flight.

B. Repeat the inspection procedures of paragraph A., above, at intervals not to exceed 18 months.

C. Alternate means of compliance which provide an equivalent level of safety may be used when approved by the Manager, Seattle Aircraft Certification Office.

D. Upon request of an operator, an FAA Principal Maintenance Inspector, subject to prior approval by the Manager Seattle Aircraft Certification Office, may adjust the compliance times if the request contains substantiating data to justify the request.

E. Aircraft may be ferried to a base for maintenance in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations.

All persons affected by this directive who have not already received these documents from the manufacturer may obtain copies upon request to Boeing Commerical Airplane Company, P.O. Box 3707, Seattle, Washington 98124. These documents may also be examined at FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

(Secs. 313(a), 314(a), 601 through 610, and 1102 of the Federal Aviation Act of 1958 (49 U.S.C. 1354(a), 1421 through 1430, and 1502); 49 U.S.C. 106(g) Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.85)

Issued in Seattle, Washington, on January 7, 1985.

Charles R. Foster,

Director, Northwest Mountain Region.

[FR Doc. 85-1179 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 84-ANM-18]

Proposed Alteration of VOR Federal Airways; Denver, CO

Correction

In FR Doc. 84-33147 beginning on page 49481 in the issue of Thursday, December 20, 1984, make the following correction:

§ 71.123 [Corrected]

On page 49482, first column, under V-382[New], in the third line, "2559° T" should read "259° T".

BILLING CODE 1505-01-M

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 50203-5003]

Arbitration of Patent Interference Cases

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Section 105 of the Patent Law Amendments Act of 1984 provides for arbitration of patent interference cases. The Patent and Trademark Office plans to issue regulations to implement the arbitration provisions of the Patent Law Amendments Act of 1984. Interested

individuals are invited to make suggestions and to comment on the proposed rules being considered. A notice of proposed rulemaking could be published as early as April 1, 1985.

DATE: Comments and Suggestion should be received by March 1, 1985.

ADDRESS: Address written comments to Box 8, Commissioner of Patents and Trademarks, Washington, D.C. 20231 marked to the attention of Fred E. McKelvey (703) 557–4025.

FOR FURTHER INFORMATION CONTACT: Fred E. McKelvey, by telephone at (703) 557–4025, or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, D.C. 20231.

SUPPLEMENTARY INFORMATION: Section 105 of the Patent Law Amendments Act of 1984, Pub. L. 98–622, enacted on November 8, 1984, provides for arbitration of patent interference cases. Section 105, codified as 35 U.S.C. 135(d), provides:

Arbitration of Interferences.

Parties to a patent interference, within such time as may be specified by the Commissioner by regulation, may determine such contest or any aspect thereof by arbitration. Such arbitration shall be governed by the provisions of title 9 to the extent such title is not inconsistent with this section. The parties shall give notice of any arbitration award to the Commissioner, and such award shall, as between the parties to the arbitration, be dispositive of the issues to which it relates. The arbitration award shall be unenforceable until such notice is given. Nothing in this subsection shall preclude the Commissioner from determining patentability of the invention involved in the interference.

The Patent and Trademark Office (PTO) conducts interference cases to determine who as between two or more applicants for patent or one or more applicants and one or more patentees is the first inventor of a patentable invention. Patent interference cases can be quite expensive. Arbitration may prove useful to minimize expenses in interference cases.

Arbitration will be governed by title 9 of the U.S. Code to the extent that title 9 is not inconsistent with section 105 of Pub. L. 98–622. Within the confines of title 9 of the U.S. Code and section 105 of Pub. L. 98–622, the parties can agree on the procedure to be used in arbitrating a patent interference case. An example of rules which parties might adopt are the Patent Arbitration Rules of American Arbitration Association (June 1, 1983).

The PTO favors settlement of interference cases, but has not had extensive experience in connection with arbitration of interferences. It has been suggested that patent attorneys and agents likewise may have had little experience with arbitration of patent matters. Field, *Patent Arbitration: Past, Present, and Future.* 24 Idea 235 (1984). The following non-exhaustive list of articles may be helpful to familiarize readers with arbitration in patent matters generally: (1) Field, *supra;* (2) Goldstein, *Arbitrating Disputes Relating to Patent Validity and Infringement,* 72 Illinois Bar Journal 350 (Mar. 1984); (3) Carmichael, *Arbitration of Patent Disputes,* 38 The Arbitration Journal 3 (Mar. 1983); (4) Note, *Arbitration and Intellectual Property: A Survey of Arbitration in Patent, Trademark and Copyright Cases,* 48 Albany Law Journal 797 (1984)(the entire Spring 1984 edition of the Albany Law Journal is directed to arbitration issues), (5) Devitt, *International Arbitration of Patent Disputes,* 65 J. Pat. Off. Soc'y 621 (1983); (6) *PTC Research Report; Alternatives to Court Litigation in Intellectual Property Disputes: Binding Arbitration and/or Mediation—Patent and Nonpatent Issues,* 22 Idea 271 (1982); (7) Davis, *Resolving Patent Disputes by Arbitration and Minitrial,* 65 J. Pat. Off. Soc'y 275 (1983); (8) Davis, *A New Approach to Resolving Costly Litigation,* 61 J. Pat. Off. Soc'y 482 (1979); and (9) Janicke, *Resolving Patent Disputes by Arbitration: An Alternative to Litigation,* 62 J. Pat. Off. Soc'y 339 (1980).

In order to provide some basis for comments and suggestions, a proposed § 1.690 being considered is set out in this notice.

Paragraph (a) of proposed § 1.690 being considered states, consistent with section 105 of Pub. L. 98–622, that parties to an interference may determine the interference or any aspect thereof by arbitration. This paragraph would permit parties to arbitrate the issue of priority based on counts (and claims corresponding thereto) as determined by the PTO and set out in a notice declaring the interference. One issue which might arise in arbitration is the extent to which parties may arbitrate other "aspects" of an interference, e.g., the scope of a count and claims corresponding thereto. Section 105 of Pub. L. 98–622 vests the PTO with final authority, subject to judicial review, to determine patentability. Hence, interested individuals may wish to consider and comment on the effect of an award which arbitrates the scope of a count (or claims corresponding thereto) or the ultimate issue of priority based on that count where the PTO later determines that the counts or claims corresponding thereto were improper vehicles for deciding priority.

Paragraph (b) of proposed § 1.690 being considered states that an arbitration shall take place within such time as an examiner-in-chief may set. The examiner-in-chief would set a time for making an award on a case-by-case bais depending upon the status of the case. For example, if all the testimony had been taken and the only issue for the arbitrator was deciding priority based on that testimony, a relatively short time could be set. On the other hand, if the parties wanted witnesses to appear before the arbitrator, a longer period of time might be needed. Extensions of time for making an award could be obtained under 37 CFR 1.645 (49 FR 48464 (Dec. 12, 1984)). However, it should be expected that the examiner-in-chief will make a reasonable effort to dispose of the interference within 24 months from the date it is declared. 37 CFR 1.610 (49 FR 48457 (Dec. 12, 1984)).

Paragraph (c) of proposed § 1.690 being considered would provide that an award shall be in writing and shall be definite with respect to the issue or issues arbitrated and to the disposition of each issue. The arbitration award would have to be signed by the arbitrator or arbitrators and would have to be filed in the PTO within twenty (20) days from the date of the award. As between the parties, the award would be dispostive of the issues arbitrated.

Paragraph (d) of proposed § 1.690 being considered states that an arbitration award does not preclude the Office from determining patentability of any invention involved in an interference. Thus, the parties cannot establish *vis-a-vis* the public that subject matter is patentable.

List of Subjects in 37 CFR Part 1

Administrative practice and procedures, Authority delegations, Conflicts of interest, Courts, Inventions and patents, Lawyers.

PART 1—[AMENDED]

The proposed rule under consideration would add § 1.690 to Subpart E of 37 CFR Part 1 as follows:

§ 1.690 Arbitration of interferences.

(a) Parties to a patent interference may determine the interference or any aspect thereof by arbitration.

(b) An interference or any aspect thereof shall be arbitrated within such time as may be authorized on a case-by-case basis by an examiner-in-chief.

(c) An arbitration award shall be in writing and shall state in a clear and definite manner (1) the issue or issues which were arbitrated and (2) the disposition of each issue. The parties

shall give notice to the Office of an arbitration award by filing within twenty days from the date of the award a copy of the award signed by the arbitrator or arbitrators. When an award is timely filed, the award shall, as to the parties to the arbitration, be dispositive of the issue to which it relates.

(d) An arbitration award shall not preclude the Office from determining patentability of any invention involved in the interference.

Dated: January 8, 1985.

Gerald J. Mossinghoff,

Commissioner of Patents and Trademarks.

[FR Doc. 85-1221 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-16-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300110; FRL-2755-4]

2-Hydroxy-4-N-Octoxybenzophenone; Proposed Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: This document proposes that 2-hydroxy-4-*n*-octoxybenzophenone be exempted from the requirement of a tolerance when used as a light stabilizer in pesticide formulations applied to growing crops only. This proposed regulation was requested by the American Hoechst Corp.

DATE: Written commens, identified by the document contol number [OPP-300110], must be received on or before February 15, 1985.

ADDRESS: By mail, submit comments to:

Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20406.

In person, deliver comments to: Registration Support and Emergency Response Branch, Registration Division (TS-767), Environmental Protection Agency, Rm. 716, No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. All written comments will be available for public inspection in Rm. 236 at the address given above from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail:

N. Bhushan Mandava, Registration Support and Emergency Response Branch, Environmental Protection Agency, 401, M St., SW., Washington, D.C. 20406.

Office location and telephone number: Registration Support and Emergency Response Branch, Rm. 724A, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703-557-7700.

SUPPLEMENTARY INFORMATION: At the request of the American Hoechst Corp., the Administrator proposes to amend 40 CFR 180.1001(d) by establishing an exemption from the requirement of a tolerance for 2-hydroxy-4-*n*-octoxybenzophenone when used as a light stabilizer in pesticide formulations applied to growing crops only.

Inert ingredients are all ingredients which are not active ingredients as defined in 40 CFR 162.3(c), and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): solvents such as water; baits such as sugar, starches, and meat scraps; dust carriers such as talc and clay; fillers; wetting and spreading agents; propellants in aerosol dispensers; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active.

Preambles to proposed rulemaking documents of this nature include the common or chemical name of the substance under consideration, the name and addresss of the firm making the request for the exemption, and toxicological and other scientific bases used in arriving at a conclusion of safety in support of the exemption.

Name of Inert Ingredient

2-Hydroxy-4-*n*-octoxybenzophenone.

Name and Address of Requestor

American Hoechst Corp., Somerville, NJ 08876.

Bases for Approval

(1) 2-Hydroxy-4-*n*-octoxybenzophenone is cleared under 21 CFR 178.2010 for use as an antioxidant or stablizer at a level not to exceed 0.5 percent by weight of olefin polymers.

(2) 2-Hydroxy-4-*n*-octoxybenzophenone is cleared under 21 CFR 178.3710 as a petroleum wax stabilizer at a level not to exceed 0.01 percent by weight of the petroleum wax.

(3) The amount of 2-hydroxy-4-*n*-octoxybenzophenone when used as a light stabilizer is limited to 0.2 percent of the formulation.

Based on the above information and review of its use, it has been found that when used in accordance with good agricultural practices this ingredient is useful and does not pose a hazard to humans or the environment. It is concluded, therefore, that the proposed amendment to 40 CFR Part 180 will protect the public health, and it is proposed that the regulation be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains this inert ingredient, may request within 30 days after publication of this notice in the **Federal Register** that this rulemaking proposal be referred to an Advisory Committee in accordance wtih section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating both the subject and the petition and document control number, "[OPP-300110]." All written comments filed in response to this notice of proposed rulemaking will be available for public inspection in the Registration Support and Emergency Response Branch at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164; 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e)))

List of Subjects in 40 CFR Part 180

Administrative practice and procedure Agricultural commodities, Pesticides and pests.

Dated: January 2, 1985.

Douglas D. Campt.

Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR 180.1001(d) be amended by adding and alphabetically inserting the inert ingredient as follows:

PART 180—[AMENDED]

§ 180.1001 Exemptions from the requirement of a tolerance.

* * * * *

(d) * * *

Inert ingredients	Limits	Uses
* * * * *		
2-Hydroxy-4-*n*-octoxy-benzophenone (CAS Reg. No. 1843-05-6).	Not more than 0.2 pct. of pesticide formulation	Light stablizer.
* * * * *		

[FR Doc. 85-863 Filed 1-15-85; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 395

[BMCS Docket No. MC-70-2; Notice No. 84-10]

Hours of Service of Drivers; 10 Hour Exemption; Driver's Logs

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Withdrawal of proposed rulemaking.

SUMMARY: The FHWA is withdrawing a notice of proposed rulemaking (NPRM) concerning a proposed exemption from the recording of a driver's hours of service if a driver reports for duty, is relieved from duty and returns to the same work location within 10 hours. This action is being taken since the 50-mile exemption was increased to 100 air-miles, and motor carriers now have the option of using other company forms in lieu of the logs then required.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Mr. Neill L. Thomas, Bureau of Motor Carrier Safety, (202) 426-9767, or Mrs. Kathleen S. Markman, Office of the Chief Counsel, (202) 426-0346, Federal Highway Administration, 400 7th Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The FHWA published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** on November 9, 1977 (42 FR 58418) requesting information on a possible exemption from the requirement to record a driver's time when engaging in operations conducted between certain fixed geographic locations. The purpose of this rulemaking action was to reduce the paperwork burden for motor carriers and drivers who have established regularly scheduled, short elapsed time, trips which are repetitive in nature. The FHWA's intent was to provide such an exempton for motor carriers and drivers who operate motor vehicles over the same route day after day. The proposed exemption was designed for trips which do not approach the maximum daily time limitations and, on a cumulative basis, do not exceed the maximum 7 or 8-day on-duty limitations.

Comments received in response to the ANPRM document the fact that the many different types of carrier operations make it difficult to develop an exemption for trips that are repetitive in nature. Three State law enforcement agencies expressed concern about the idea of an exemption from preparing logs and felt it would hamper highway enforcement. One suggested that if a fixed point exemption were adopted, drivers should be required to carry a letter from the U.S. Department of Transportation naming fixed locations and routes.

The International Brotherhood of Teamsters (IBT) stated that "the unwarranted relaxation will have a detrimental effect on highway safety," and that enforcement would be impaired.

A notice of proposed rulemaking (NPRM) was published in the **Federal Register** on December 15, 1980 (45 FR 82291) in response to the public comments. The fixed point exemption was revised to propose an exemption from log preparation if the driver reports for duty and is relieved from duty at the same work reporting location within 10 consecutive hours. The intent of the NPRM was to provide a reduction to the paperwork burden for motor carriers and drivers without compromising highway safety. The proposed exemption was designed to accommodate routine work situations where the employee's total on-duty and driving time does not exceed 10 consecutive hours on a daily basis. Under the proposed exemption, the motor carrier would keep time records at the terminal showing the driver's on-duty time.

Docket Comments to the NPRM

Comments to the docket again indicated that without further relaxation the proposed exempton would be of little value to many motor carrier operations. The American Trucking Associations, Inc. (ATA) proposed a logging exemption for those motor carriers who keep time records at the terminal. The ATA proposed that the 10-hour exemption be expanded to 12 hours, and the Private Truck Council of America, Inc., proposed that it be expanded to 15 hours.

Central Freight Lines Inc., opposed the proposed exemption, explaining that it would limit the motor carrier's control over the driver's hours of service. Complete Auto Transit, Inc. indicated that it would have a problem monitoring the driver's hours of service because the driver may be under the exemption one day, and not the next.

Three State agencies and the IBT opposed the exemption because it would make enforcement of the hours of service regulations very difficult. Commenters indicated that the enforcement officer would have difficulty computing a driver's available hours of service, particularly in those operations where the driver's route and time on the road vary. If time records are maintained only at the motor carrier's place of business, the officer on the road cannot determine if the driver has exceeded the hours of service. The commenters indicated that through the exemption the public would lose protection against the driver who exceeds the hours of service.

Driver's Record of Duty Status

The FHWA published a final rule in the **Federal Register** on November 26, 1982 (47 FR 53383). This rulemaking reduced the recordkeeping burden for drivers and motor carriers by revising the requirements for recording and filing a driver's record of duty status. For example, the motor carrier now is required to retain the record of duty status for 6 months instead of 12 months. The driver is required to keep his or her record for the past 8 days instead of 30 days. The record may be combined with other forms, such as the trip report, further reducing the recordkeeping burden for the motor carrier.

In the preamble to the final rule, the FHWA discussed the importance of the driver's daily log in that it has been the primary regulatory tool used by the

Federal government, State governments, and commerical motor carriers to determine a driver's compliance with the maximum hours of service limitations prescribed in the FMCSR. For example, during the last six months of 1981, the Bureau reviewed over 600,000 logs for driver and carrier compliance with the hours of service requirements. This included logs checked during management audits made at the carrier's terminals and those checked during roadside inspections. The information obtained from the log is used to place drivers out of service when they are in violation of the maximum limitations at the time of inspection. It is also used in determining a motor carrier's overall safety compliance status in controlling excess on duty hours, a major contributory factor in fatigue induced accidents. Additionally, it has traditionally been the principal document that is accepted by the court system as evidence to support enforcement actions for excess hours of service violations. Many motor carriers use the log to determine whether a driver has available hours to drive within the limitations set out in the regulations. Currently, it is the only single university recognized instrument available to both Government and industry to insure compliance with the hours of service rules.

The rulemaking on the driver's record of duty status also demonstrated the importance of uniformity in hours of service records. The need for uniformity was a concern expressed by the States, carriers, drivers, individuals and national organizations such as the IBT, the Professional Drivers Council of Teamsters for a Democratic Union (PROD), and the Commerical Vehicle Safety Alliance (CVSA). Commenters pointed out that if differing time records were allowed, enforcement personnel would be required to familarize themselves with all forms in use thereby increasing the cost of enforcement.

Conclusion

The FHWA has determined that the docket comments to the proposed 10-hour exemption rulemaking that describe potential enforcement and or audit problems have merit. If time records are required only at the motor carrier's terminal, the State enforcement official, performing a roadside inspection, would be hampered in determining if the driver has exceeded the hours of service. The proposed exemption, as worded, would provide no safeguard against the motor carrier operation where the hours of service are routinely exceeded and the motor carrier routinely claims to be operating under the 10-hour exemption. If an exemption such as the one described by the ATA was permitted, the enforcement official would have a dual problem in examining a driver's hours of service: (1) The enforcement official would be examining non-uniform time records at motor carrier terminals, and (2) would have no records to examine when performing roadside inspections.

The FHWA published an NPRM in the **Federal Register** on February 22, 1982 (47 FR 7702) proposing to revise the logging requirements for drivers and motor carriers. Included in the rulemaking was a proposal to withdraw the 10-hour logging exemption. No adverse comments were received.

In view of the above, the FHWA has determined that the proposed 10-hour exemption would impede the enforcement capabilities of both Federal and State agencies. Safeguards necessary to preclude certain type violations of the hours of service rules would be objectionable and burdensome to the motor carriers. Additionally, most of the motor carrier operations being conducted within a period of 10 consecutive hours may avail themselves of the 100 air-mile radius exemption from the required recordkeeping, and the optional drivers record of duty status.

Based on the review of the docket comments and conclusions, the notice of proposed rulemaking published in the **Federal Register** on December 15, 1980 (45 FR 82291], Docket No. MC-70-2) is hereby withdrawn.

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the Department of Transportation.

List of Subjects in 49 CFR Part 395

Highways and roads, Motor carriers—driver's hours of service, Reporting and recordkeeping requirements.

(49 U.S.C. 3102; 49 CFR 1.48 and 301.60)

(Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety.)

Issued on: January 10, 1985.

Kenneth L. Pierson,

Director, Bureau of Motor Carrier Safety.

[FR Doc. 85-1248 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Guidelines on Minimum Criteria for Identification of Nontoxic Shot Zones for Waterfowl Hunting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of draft guidelines.

SUMMARY: This notice contains a draft of specific criteria that would be used as guidelines in determining areas where ingestion of lead pellets is considered to be a significant problem and where nontoxic shot should be used by waterfowl hunters. The ingestion of spent lead pellets by waterfowl while feeding may cause sickness or death. The only nontoxic shot available on the market at this time is steel shot. An analysis would be made after the first year of implementation of these criteria to assess their effectiveness and practicality.

DATES: Comments must be submitted by February 22, 1985. When submitting comments on these guidelines please distinguish between the FWS proposal (Table 2) and the recommendations of the representatives from flyway councils (Table 1).

ADDRESS: Submit comments to Director (FWS/MBMO), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Telephone 202-254-3207.

FOR FURTHER INFORMATION CONTACT: Rollin D. Sparrowe, Chief, Office of Migratory Bird Management, Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Telephone 202-254-3207.

SUPPLEMENTARY INFORMATION: When eaten by waterfowl, spent leads pellets may have a toxic effect. The only nontoxic shot available to the hunter at this time is steel shot. As indicated in 50 CFR 20.21(j) and 50 CFR 20.108, nontoxic shot is required for hunting waterfowl in certain designated zones. Since 1976, these zones have been selected in a variety of ways; however, since 1978 no nontoxic shot zone could be implemented or enforced by the Fish and Wildlife Service (FWS) without approval of the appropriate authorities in each State affected. The restriction on use of funds by FWS has been contained in the Interior Department Approprations Bill each year. As a consequence, the FWS has proposed additions and deletions to the

designated nontoxic shot zones for hunting waterfowl only with the approval of State authorities. The manner in which nontoxic shot zones are selected has varied by region and State and the subject has been controversial.

Current FWS actions are based primarily on the 1976 Environmental Impact Statement (EIS) on steel shot for waterfowl hunting and resulting policies established by the Secretary. The main features are:

1. That lead poisoning of waterfowl should be alleviated wherever it is determined to be a significant problem;
2. States will be provided maximum opportunity to determine the most appropriate application of nontoxic shot zones within their boundaries;
3. FWS will advise and assist the States with recommendations and guidelines to the maximum extent possible; and
4. Use of nontoxic shot on national wildlife refugues and other lands under direct Service jurisdiction will be based on (a) clear evidence that a lead poisoning problem in waterfowl exists in or near the area where waterfowl hunting will take place; or (b) the State wildlife agency requests that FWS lands be included in a nontoxic shot zone established and enforced by the State.

Officials of the Department of the Interior have heard from many interested organizations, States, and individuals concerning the nature, extent, and significance of lead poisoning of waterfowl. Through these discussions it has become clear that States, flyway councils, private organizations, and individuals are seeking greater participation from the FWS in addressing this subject.

On September 25, 1984, the FWS published in the **Federal Register** a Notice of Intent (49 FR 37672). That Notice solicited comments and recommendations from interested parties as to the specific criteria that should be proposed as guidelines in selecting nontoxic shot zones within the four administrative flyways used in managing the waterfowl resource. Comments were received until October 30, 1984. Thirty-one State wildlife agencies and the four administrative flyway councils offered recommendations on the subject. Seventeen private organizations and twenty-eight individuals submitted suggestions.

After consultations between FWS and a group of State wildlife agency Directors representing each of the four flyway councils, it became apparent that there was no consensus among the administrative flyways regarding national criteria. Members of one flyway had developed criteria that were perferred by that flyway but were not acceptable to the other three flyways. The various minimum criteria perferred by representatives of the four flyway councils are displayed in Table 1.

Following a review of information on this subject, an analysis of the suggestions provided through public comment, and the criteria recommended by representatives of flyway councils, the FWS has developed a proposal which provides guidance in making decisions on the use of nontoxic shot. This proposal is outlined in Table 2.

The FWS does not imply by this proposal that States with areas not meeting these criteria should be prohibited from nontoxic shot. Individual States or flyways may determine for their own management purposes that the use of lead shot in waterfowl feeding areas in any degree should be prohibited. The FWS will continue to honor States' requests to establish nontoxic shot zones in areas not meeting established minimum Federal criteria.

Table 1 shows the minimum criteria developed by representatives of the four flyway councils and outlines the steps to be taken to determine whether nontoxic shot should be required for hunting waterfowl at a particular location. These procedures would help identify areas where the ingestion of spent lead pellets by ducks, geese, swans, or coots (*Fulica americana*) is considered a significant problem.

Procedures Proposed by Representatives From the Four Flyway Councils

Two levels of criteria are established by the procedures outlined in Table 1: triggering criteria and decision criteria.

I. *Triggering Criteria* identify counties or other designated areas as having a potential for a significant lead poisoning problem in waterfowl. Designated areas are specific units of waterfowl habitat within a county or within several counties, as identified by the State.

A county or designated area will be triggered if it meets either of the criteria below.

A. *Harvest per square mile*—Counties or other designated areas with a 3-year average annual harvest of 5 ducks and/or geese per square mile would be triggered in the Atlantic, Mississippi, and Central Flyways. This criterion would account for areas where 82 percent of the waterfowl harvest occurs if applied nationwide. As shown in Table 1, the Pacific Flyway criteria differ from those of the other three flyways.

B. *Number of dead waterfowl diagnosed as dying from lead poisoning*—Counties or designated areas where one or more dead waterfowl were diagnosed to have died from lead poisoning would be identified for further monitoring or proposed as a nontoxic shot zone.

Representatives from three flyways generally felt that once a county or area meets the triggering criteria it should automatically be proposed as a nontoxic shot zone, unless the State notifies the FWS that a monitoring program will be implemented and decision criteria measured. Since others felt that triggering criteria alone do not provide sufficient information to make a determination of whether or not there is a lead poisoning problem in a given area, decision criteria were developed to provide a means for monitoring and validating the existence of a problem within areas identified by the triggering criteria.

II. *Decision Criteria*—Criteria used to determine whether or not a significant lead poisoning problem exists in areas meeting either of the triggering criteria.

Four decision criteria are identified in Table 1. A county or area identified by either one of the triggering criteria must then be monitored for at least two of the decision criteria, except in the Pacific Flyway where the decision is based essentially upon the number of dead birds diagnosed as having died from lead poisoning.

Implementation of the triggering and decision criteria as presented in Table 1 could involve large commitments of money and manpower in some States if all triggered counties or areas are monitored. For example, some 840 counties throughout the United States would be triggered at a level of 5 ducks and/or geese harvested per square mile. Some additional counties or areas also may be triggered by the finding of only one dead bird diagnosed as having died from lead poisoning.

Because of the costs and personnel required to monitor areas for the decision criteria, the FWS believes that somewhat less encompassing triggering criteria should be used initially, which would ensure that most areas with potential for a problem will be included.

The following proposal was developed by the FWS and is outlined in Table 2.

Procedures Proposed by FWS

Triggering Criteria

A county or area would be triggered if it met either of the two criteria below.

Harvest per square mile—The FWS proposes that a harvest level of 10 ducks

and/or geese per square mile be used as this criterion. This would reduce the potential workload and expense imposed upon the States and the Federal government. At a harvest level of 10 birds per square mile, 466 counties would be triggered and the area would be covered when 67 percent of the waterfowl harvest of the United States occurs. By imposing slightly higher harvest levels than those set forth in Table 1, the FWS believes that it will be utilizing more reasonable data in triggering areas to be monitored.

The FWS recognizes that all or a portion of some of these counties are already in nontoxic shot zones. Thus, the number of counties or areas to be monitored would be reduced accordingly.

Number of dead waterfowl diagnosed as having died from lead poisoning—The FWS proposes that this criterion be three dead waterfowl rather than one. The FWS feels that this number is more likely to be representative of a significant problem in that location, since it is therefore likely that the birds picked up the lead in the area where they died. Not only will this focus future efforts on areas where problems are most likely to exist, it will significantly reduce the initial costs associated with monitoring as required under Decision Criteria discussed below.

Decision Criteria

One or more ingested shot in five percent or more of the gizzards examined, 2 ppm lead in five percent or more of the liver tissues sampled (wet weight), and 0.2 ppm lead in five percent or more of the blood samples drawn from hunter-killed or live-trapped waterfowl would serve as decision criteria. An area identified by either of the triggering criteria would then be monitored for ingested shot, and at least one of the other two decision criteria. Gizzard samples would have to be a part of the monitoring process since shot incidence in gizzards indicates that lead found in tissues and blood is probably from ingested lead shot. The other criterion monitored would be either lead levels in the liver or in blood. Elevated lead in either of these is evidence that birds have been exposed to some type of lead and that lead has been assimilated. When analyzed in combination with the incidence of shot in gizzards, it provides a basis for making decisions on the source and extent of lead poisoning within a given area. A sample size of 100 birds would be required.

Any area meeting the gizzard criterion plus either the liver or blood criterion would be proposed as a nontoxic shot zone.

States must make a commitment to monitor the decision criteria within 90 days of determining that a triggering criterion has been met. They must also advise that monitoring will begin within 1 year. If a State cannot meet that commitment, a schedule for monitoring decision criteria should be submitted to the FWS for approval by the Director. This would enable those States with a large number of areas triggered initially to establish priorities and develop a systematic approach to monitoring, since it may not be practical to monitor all areas the first year. If a State determines that areas covered by triggering criteria should be designated nontoxic shot zones without additional monitoring, FWS will propose an amendment of 50 CFR 21.108 consistent with the State's recommendations to include these areas in nontoxic shot zones.

If monitoring reveals that the decision criteria are not met, a county or designated area would be considered not to have a lead poisoning problem unless, at a subsequent date, three or more dead waterfowl confirmed as lead poisoned are reported from the area, in which event monitoring would be reinstituted. The State may, however, decide to remonitor the county or area for a second successive year or to reschedule it for monitoring at some point in the future when all other counties or areas that have met a triggering criterion have been checked.

Once a State has completed monitoring or other appropriate action on areas with a harvest of 10 ducks and/or geese per square mile, it would be free to monitor areas with lower harvest levels. If at any time, three or more dead waterfowl are reported from a county or other area that has no nontoxic shot zone, it would have to be monitored or included in the State's schedule of areas to be monitored.

In the opinion of FWS, the proposal presented in Table 2 represents a sound approach to area designations within flyways of States. Further, this proposal covers those areas where serious lead poisoning of waterfowl from ingested shot is most likely to occur.

It should be recognized that State wildlife authorities have the authority to require nontoxic shot on any additional areas where they determine that a problem exist by means other than these criteria. It is our desire, however, to establish a set of minimum criteria that are reasonably uniform, scientifically determined, and practical to implement.

Scheduled review of criteria—The FWS proposes to analyze the effectiveness and practicality of these procedures after the first year of implementation. At such time, States will be notified and appropriate announcements made in the **Federal Register** to obtain the benefit of State and public comment for use in this analysis.

Dated: January 10, 1985.

Rolf L. Wallenstrom,

Acting Director.

BILLING CODE 4310-55-M

Table 1. Minimum Criteria or Guidelines for Establishing Nontoxic Shot Zones Based Upon Comments Received From State Wildlife Agency Directors Representing Each Flyway Council

CRITERIA	FLYWAY			
	Atlantic	Mississippi	Central	Pacific
I. Triggering Criteria 1/				
Gizzard (ingested shot)	—	—	—	5% w/2 shot
Liver (lead content)	—	—	—	10% -6ppm
Blood (lead content)	—	—	—	10%-0.5 ppm
Harvest (by county, per sq. mi. or other designated area as jointly agreed by State and FWS; harvest levels noted are based on a 3-year running average from FWS data)	5 ducks and geese/sq. mi. or +1% State Harvest within area	5 ducks and geese/sq. mi.	5 ducks and geese/sq. mi.	5 ducks and geese/sq. mi.
Dead waterfowl (from confirmed lead poisoning)	1	1	1	1
II. Decision Criteria 2/				
Gizzard (ingested shot)	5% w/1 shot	5% w/1 shot	5% w/1 shot	—
Liver (lead content)	5% w/2 ppm	5% w/2 ppm	5% w/2 ppm	3/
Blood (lead content)	5% w/0.2 ppm	5% w/0.2 ppm	5% w/0.2 ppm	—
Dead waterfowl (from confirmed lead poisoning)				100 (habitat management option retained) 4/
III. Other Conditions				
Sample size (species known to be susceptible to lead poisoning) 5/	100 (hunter killed or trapped)	100 (hunter killed or trapped)	100 (hunter killed or trapped)	300 confirmed lead poisoned waterfowl
Period of Sample	A four week period of time during the latest part of the hunting season, weather permitting, beginning the 1985-86 season.			

1/ In areas where any of the triggering criteria are met, the following will occur. 1) If a State does not choose to monitor the area it will be included in the next FWS rulemaking to require nontoxic shot in the subsequent hunting season. 2) If a State does not choose to monitor an area, the State must notify the Director within 90 days of that intention.
2/ Any area meeting two of the decision criteria will be proposed for nontoxic shot.
3/ To Be Determined.
4/ Pacific Flyway includes management options to reduce lead poisoning before implementing nontoxic shot.
5/ Applies only to decision criteria, except in Pacific Flyway, where it also applies to triggering criteria.

Table 2. FWS Proposed Minimum Criteria or Guidelines for Establishing Nontoxic Shot Zones

CRITERIA	FLYWAY			
	Atlantic	Mississippi	Central	Pacific
I. Triggering Criteria 1/				
Harvest (by county, per sq. mi. or other designated area as jointly agreed by State and FWS; harvest estimate based on most recent 3-year average from FWS data)	10 or more ducks and geese/sq. mi.	10 or more ducks and geese/sq. mi.	10 or more ducks and geese/sq. mi.	10 or more ducks and geese/sq. mi.
Dead waterfowl (individual specimens confirmed as lead poisoned)	3	3	3	3
II. Decision Criteria 2/				
Gizzard (ingested shot)	1 or more shot in 5%	1 or more shot in 5%	1 or more shot in 5%	1 or more shot in 5%
Liver (lead content)	2 ppm wet weight in 5%	2 ppm wet weight in 5%	2 ppm wet weight in 5%	2 ppm wet weight in 5%
Blood (lead content)	0.2 ppm in 5%	0.2 ppm in 5%	0.2 ppm in 5%	0.2 ppm in 5%
III. Other Conditions				
Sample size (species known to be susceptible to lead poisoning) 3/	100 (hunter killed or trapped)	100 (hunter killed or trapped)	100 (hunter killed or trapped)	100 (hunter killed or trapped)
Sampling procedures 4/	Most susceptible species only	Most susceptible species only	Most susceptible species only	Most susceptible species only

1/ In areas where one or more of the triggering criteria are met, a State must monitor the gizzard criterion and either one of the other two decision criteria. Within 90 days of making a determination that any triggering criterion has been met, the State must provide the FWS with either a commitment to monitor the area within 1 year or submit a proposed schedule for monitoring to begin within one year for approval by the Director.
2/ Any area meeting two of the decision criteria will be proposed for nontoxic shot.
3/ Applies only to decision criteria.
4/ Specimens can be collected by shooting or trapping. No more than 25% of a hunter-killed sample should occur in the first week of the hunting season. At least 50% of a sample of hunter-killed birds should occur in the last half of the waterfowl season.

[FR Doc. 85-1125 Filed 1-15-85; 8:45 am]
BILLING CODE 4310-55-C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 655

[Docket No. 31220-244]

Atlantic Mackerel, Squid, and Butterfish Fisheries

Correction

In FR Doc. 85-877 beginning on page 1890 in the issue of Monday, January 14, 1985, make the following correction:

On page 1891, first column, the "**DATE**" paragraph should be corrected to read as follows:

"**DATE:** Comments must be submitted in writing on or before January 29, 1985".

BILLING CODE 1505-01-M

Notices

Federal Register
Vol. 50, No. 11
Wednesday, January 16, 1985

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Modification of 1985 Sugar Import Quota Year

AGENCY: Office of the Secretary, USDA.

ACTION: Notice.

SUMMARY: This notice changes the 1985 sugar import quota year from the period October 1, 1984 through September 30, 1985 to the period October 1, 1984 through November 30, 1985.

EFFECTIVE DATE: January 16, 1985.

ADDRESS: Mail comments to Chief, Sugar Group, Horticultural and Tropical Products Division, Foreign Agricultural Service, USDA, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: John Nuttall, Foreign Agricultrual Service, Department of Agriculture, Washington, D.C. 20250, Telephone: (202) 477-2916.

SUPPLEMENTARY INFORMATION: Presidential Proclamation No. 4941, dated May 5, 1982, amended Headnote 3 of subpart A, part 10, schedule 1 of the Tariff Schedules of the United States (TSUS) in part to authorize the Secretary of Agriculture to amend the quota period for sugar imported into the United States. Under the terms of Headnote 3, the Secretary of Agriculture established an annual sugar import quota period of October 1–September 30 beginning October 1, 1982 (47 FR 34812). For the 1985 quota year the quota level was set at 2,552,000 short tons, raw value, and the quota period was established as October 1, 1984–September 30, 1985 (49 FR 36669).

Notice

Notice is hereby given that, in accordance with the requirements of Headnote 3, subpart A, part 10, schedule 1 of the TSUS, I have determined that the sugar import quota year is changed from the period October 1, 1984 through September 30, 1985 to the period October 1, 1984 through November 30, 1985.

I have also determined that this change in the sugar import quota year gives due consideration to the interests in the United States sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade.

In conformity with the above, paragraph (a) of Headnote 3, subpart A, part 10, schedule 1 of the TSUS is modified to read as follows:

3. (a) The total amount of sugars, sirups and molasses described in items 155.20 and 155.30, the products of all foreign countries entered, or withdrawn from warehouse, for consumption between October 1, 1984 and November 30, 1985, inclusive, shall not exceed in the aggregate 2,552,000 short tons, raw value. Of this amount, the total amount permitted to be imported for purposes of paragraph (c)(i) of this headnote (the total base quota amount) shall be 2,550,000 short tons, raw value, and the remaining 2,000 short tons, raw value, may only be used for the importation of "specialty sugars," as defined by the United States Trade Representative in accordance with paragraph (c)(ii) of this headnote.

Signed at Washington, D.C. on January 11, 1985.

John R. Block,
Secretary of Agriculture.

[FR Doc. 85-1276 Filed 1-15-85; 8:45 am]

BILLING CODE 3410-10-M

Forms Under Review by Office of Management and Budget

January 11, 1985.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Pub. L. 96-511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, Room 404-W Admin. Bldg., Washington, D.C. 20250, (202) 447-2118.

Comments on any of the items listed should be submitted directly to: Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attn: Desk Officer for USDA.

If you anticipate commenting on a submission but find that preparation time will prevent you from doing so promptly, you should advise the OMB Desk Officer of your intent as early as possible.

Revision

- Farmers Home Administration.

7 CFR 1944-A, Section 502 Rural Housing Loan Policies, Procedures, Authorizations
FmHA 431-3, 440-34, 1944-4, -6, -A6, -12, -36, FH-13
On occasion
Individuals or households; Businesses or other for-profit; Small businesses or organizations; 712,600 responses; 356,640 hours; not applicable under 3504(h)
Ray McCracken (202) 382-1486

- Food and Nutrition Service.

Household Composition, Income Standards, Initial Month Benefits, Adjustments, Deductions and Outreach (Model Food Stamp Forms)
FNS-385, 386, 387, 394, 396, 437, 439, 441, 442, 524
On occasion, Monthly, Quarterly, Semi-annually, Annually
Individual's or households; State or local governments; 90,087,783 responses; 18,527,160 hours, not applicable under 3504(h) Peggy Hickman (703) 756-3443

Extension

- Rural Electrification Administration.

Request for Release of Lien and/or Approval of Sale

REA 793
On occasion
Small businesses or organizations; 75 responses; 75 hours; not applicable under 3504(h)
David B. Cohen (202) 382-8549
New

• Forest Service.

Objectives for Management of Sierran Meadow Succession
Nonrecurring
Individuals or households; 270 responses; 200 hours; not applicable under 3504(h)
Charles F. Schwarz (415) 449-3246

Jane A. Benoit,
Departmental Clearance Officer.

[FR Doc. 85-1261 Filed 1-15-85; 8:45 am]

BILLING CODE 3410-01-M

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

Agricultural Marketing Service

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

ENVIRONMENTAL PROTECTION AGENCY

Regulatory Activities Concerning Residues of Drugs, Pesticides, and Environmental Contaminants in Foods

Memorandum of Understanding

Among the

Food Safety and Inspection Service and Agricultural Marketing Service U.S. Department of Agriculture

and the

Food and Drug Administration U.S. Department of Health and Human Services

And the

U.S. Environmental Protection Agency

I. Purpose

October 5, 1984.

The purpose of this agreement is to set forth the working relationships among the U.S. Department of Agriculture (USDA), specifically the Food Safety and Inspection Service (FSIS) and the Agricultural Marketing Service (AMS), the Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA) to promote more effective, efficient, and coordinated Federal regulatory activities concerning residues of drugs, pesticides, and environmental contaminants that may adulterate food.

This memorandum of understanding (MOU) supersedes an April 1975 MOU between the Animal and Plant Health Inspection Service (APHIS) and FDA, an August 1977 MOU between the Food Safety and Quality Service (FSQS) and EPA, and a May 1975 MOU between FDA and EPA. By a reorganization dated January 9, 1978, the meat and poultry inspection program was transferred from APHIS TO FSQS; and by a reorganization dated September 30, 1981, it was transferred to FSIS.

This MOU does not modify any existing agreements between USDA, FDA, and/or EPA. It supplements an MOU, revised in 1983, defining the authorities and responsibilities of FDA and AMS regarding eggs and egg products.

II. Background

Food, including meat, poultry, egg products, and animal feed, may become adulterated with residues of drugs, pesticides, or environmental contaminants as a result of drug or pesticide misuse (i.e., unapproved or non-registered use) or because of the presence of pesticides or other chemicals in the environment or other indirect sources of contamination. Regardless of the source of the adulteration, the immediate and primary concern is to assure removal of adulterated food from consumer channels and to prevent further marketing of such adulterated food.

USDA is charged with the enforcement of the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (FPIA), and the Egg Products Inspection Act (EPIA). Within USDA, FSIS is responsible for the wholesomeness and safety of meat, poultry, and products thereof intended for human consumption. This is accomplished, in part, by inspection at slaughtering and processing establishments and by sampling and analyzing edible tissues derived from livestock and poultry at the time of slaughter or after slaughter at other location outside the establishments to assure, among other things, that meat and poultry do not contain residues of drugs, pesticides, or environmental contaminants that cause them to be adulterated under the FMIA or PPIA. AMS is responsible for the wholesomeness and safety of egg products. Among other things, it conducts inspection and samples for such residues at plants processing egg products to assure compliance with the EPIA.

FDA is charged with the enforcement of the Federal Food, Drug, and Cosmetic Act (FFDCA). Under this act, FDA is responsible for ensuring that human foods and animal feeds are safe and, among other things, do not contain illegal residues of drugs, pesticides, or environmental contaminants. FDA also approves drugs used for food producing animals, establishes tolerances for residues of animal drugs in edible tissues, establishes tolerances (other than for pesticides) and action levels for unavoidable environmental contaminants that may adulterate food, inspects the processing and distribution of human foods and animal feeds, and examines samples of these products to assure compliance with the FFDCA.

EPA is responsible for administering and enforcing the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under this act, EPA has the authority to protect humans and their environment from unreasonable adverse effects of pesticide chemicals by regulating the sale and use of pesticide products. EPA samples pesticide chemicals to verify label claims concerning content and safety, and investigates incidents where the misuse of pesticides may have occurred. EPA is responsible under the FFDCA for establishing tolerances and recommending action levels to FSIS and FDA for residues of pesticides in food and has the authority to monitor the effectiveness of surveillance and enforcement. Under the Toxic Substances Control Act (TSCA), EPA also regulates other chemical substances (e.g., industrial chemicals) that can adulterate food.

Because FSIS, AMS, FDA, and EPA have common and related objectives in carrying out their respective enforcement responsibilities, it is desirable and in the public interest to set forth in a memorandum of understanding the working arrangements adopted to discharge these responsibilities as effectively as possible.

III. Substance of Agreement

A. USDA agrees to:

1. Furnish EPA and FDA headquartes with a list of all federally inspected meat and poultry slaughtering and processing establishments and egg product plants. This shall include periodic updates of changes or additions to the list.

2. Upon request, sample and analyze specific lots of livestock and poultry at slaughtering establishments and egg products at processing plants that FDA or EPA suspects contain residues of drugs, pesticides, or evironmental

contaminants that exceed tolerances or action levels or otherwise adulterate meat or poultry, or products thereof, or egg products.

3. Notify the appropriate EPA regional office and headquarters of any findings of residues of pesticides or chemical substances in edible tissues samples of meat or poultry, or products thereof, or egg products that may indicate a violation of FIFRA or TSCA. Subsequent relevant information on these findings shall be similarly provided.

4. Notify the appropriate FDA district office and headquarters of any findings of residues of drugs, pesticides, or environmental contaminants in edible tissue samples of meat or poultry, or products thereof, or egg products that exceed tolerances or action levels or otherwise adulterate such food. Subsequent relevant information of these findings shall be similarly provided.

5. Review and investigate as necessary reports from FDA or EPA that meat or poultry, or products thereof, or egg products may be adulterated with residues of drugs, pesticides, or environmental contaminants and notify the referring office of the results.

6. Keep FDA and EPA headquarters informed of all FSIS and AMS sampling and testing programs for residues of drugs, pesticides, and environmental contaminants in meat or poultry, or products thereof, or egg products; and consult periodically with FDA and EPA headquarters on FSIS's National Residue Program through the agencies' Surveillance Advisory Team and other appropriate means.

7. Provide FDA and EPA headquarters with periodic reports listing results of all such residue sampling and testing programs, including, to the extent appropriate, the number and product identity of samples tested, the residues for which tests were conducted, the analytical and statistical methodologies used, and other related information.

8. Notify FDA headquarters whenever FSIS plans to seek an action level or tolerance from EPA for a pesticide residue in meat or poultry so that FDA may also consider the need for an action level or tolerance for that pesticide residue in animal feed and animal feed ingredients.

9. Provide FDA with any other information obtained concerning residues of drugs, pesticides, or environmental contaminants that may indicate a violation of the FFDCA; and provide EPA with any such information that may indicate a violation of FIFRA or TSCA.

B. FDA agrees to:

1. Notify the appropriate EPA regional office of investigations or findings concerning possible misuse of pesticides or chemical substances that may indicate a violation of FIFRA or TSCA. Subsequent relevant information on these investigations or findings shall be similarly provided.

2. Notify USDA headquarters of findings of illegal residues of drugs, pesticides, or environmental contaminants in human food or animal feed which indicate that the residues also may be present in meat or poultry, or products thereof, or egg products. Subsequent relevant information on these findings shall be similarly provided.

3. Notify the affected FSIS regional office or headquarters, as appropriate, upon obtaining any information that animals that have been or are expected to be offered at any establishment under FSIS inspection may contain residues that would adulterate meat or poultry, or products thereof. Subsequent relevant information on these findings shall be similarly provided.

4. Review and investigate as necessary reports from USDA or EPA that animals or eggs intended for human food or animal feed may contain residues that would adulterate such food or feed and notify the referring office of the results.

5. Keep USDA headquarters informed of all FDA sampling and testing programs for residues of drugs, pesticides, and environmental contaminants in animal feed, dairy products, and eggs and provide USDA headquarters with periodic reports listing results, including, to the extent appropriate, the number and product identity of samples tested, the residues for which tests were conducted, the analytical methodology used, and other related information.

6. Keep EPA headquarters informed of all FDA sampling and testing programs for residues of pesticides and chemical substances and notify EPA of any significant new findings from these programs.

7. When requested by USDA, consider the need for establishing tolerances or action levels for environmental contaminants in meat, poultry, or eggs.

8. Notify USDA headquarters whenever it intends to establish or amend a tolerance for an animal drug or a tolerance or action level for an environmental contaminant that may affect USDA's responsibilities under the FMIA, PPIA, or EPIA, and include a summary of the information and evaluation upon which such tolerance or action level is based and a method of analysis to be used to enforce such tolerance or action level. Also notify USDA headquarters whenever it intends to seek an action level recommendation or tolerance from EPA for a pesticide residue in animal feed, feed ingredients, dairy products, or eggs.

9. Provide USDA with any other information obtained concerning residues of drugs, pesticides, or environmental contaminants that may indicate a violation of the FMIA, PPIA, or EPIA; and provide EPA with any such information that may indicate a violation of FIFRA or TSCA.

10. Notify FSIS headquarters when it authorizes to be used for food animals that have been treated with an investigational new animal drug under section 512(j) of the FFDCA and provide relevant information upon which FSIS can authorize slaughter.

C. EPA agrees to:

1. Notify the appropriate FDA district office and USDA headquarters, as appropriate, of any pesticide use encountered by EPA that may have resulted in residues that adulterate human food or animal feed, and include relevant safety information on the pesticide(s) involved. Subsequent relevant information shall be similarly provided.

2. Review and investigate as necessary, or refer to the appropriate state enforcement authority for investigation, reports from USDA or FDA of pesticide misuse or other possible violations of FIFRA or TSCA and notify the referring office of the results.

3. Provide USDA and FDA headquarters with information from any monitoring programs, investigations, or other sources involving pesticides or chemical substances that may contaminate human food or animal feed.

4. Notify USDA and FDA headquarters, as appropriate, or regulatory actions under TSCA involving the manufacture, processing, distribution in commerce, use, or disposal of chemical substances when the risks being assessed may include contamination of human food or animal feed.

5. Notify USDA headquarters and FDA headquarters and regional offices, as appropriate, of experimental use permits issued under section 5 and emergency exemptions granted under section 18 of FIFRA that involve uses of pesticides that might affect food; and provide relevant information on the approved non-registered use, including regulatory limits established for residues of the pesticide resulting from such use.

6. Recommend, upon request from and in consultation with FDA and/or FSIS,

action levels for pesticide residues in human food or animal feed and consider the need for tolerances.

7. Notify USDA and FDA headquarters, as appropriate, whenever it intends to establish or amend a tolerance, temporary tolerance, or exemption from the requirement for a tolerance for a pesticide residue in food, and include a summary of the information and evaluation upon which the action is based and a method of analysis to be used to enforce such tolerance or temporary tolerance.

D. It is jointly agreed that each agency will:

1. Maintain a close working relationship with the others both in headquarters and in the field, with FSIS coordinating the headquarters relationship for USDA.

2. Exchange information with the others relative to analytical methodology it uses to identify and quantify residues of drugs, pesticides, and environmental contaminants in food, and cooperate in the development and implementation of analytical and statistical methodologies to ensure comparability of results in the examination of food and avoid duplication of effort.

3. Advise the other agency or agencies and exchanges information whenever it is considering proposing or issuing regulations regarding residue policy or procedures that may affect the other agency or agencies.

4. Advise the other agency or agenices and exchange information whenever it is considering a release of informational materials that may affect the other agency or agencies.

5. When exchanging information, each agency will comply with any relevant restrictions of Federal law concerning trade secrets, confidential commercial or financial information, and personnel, medical, or other similar information constituting a clearly unwarranted invasion of personal privacy. Implementing regulating and procedures shall apply to any agency provided with such materials under this agreement.

6. Coordinate the residue investigations with the others, and with state and other government officials, as appropriate, to avoid duplication of effort.

7. Upon request, make agency personnel available for testimony and make agency documents available to support a regulatory action involving residues of drugs, pesticides, or environmental contaminants.

8. Advise the other agency or agencies whenever engaging in litigation involving issues that affect the duties of the other agency or agencies regarding residues of drugs, pesticides or environmental contaminants that may adulterate food; coordinate litigation that may involve violations of statute(s) enforced by the other agency or agencies, and consolidate such litigation where it appears to be in the interest of the Federal Government; and provide such other agency or agencies with a reasonable opportunity for review prior to entering into any consent judgement or similarly binding legal instrument which may result in a need for regulatory action by or othewise affect the administrative actions of the other agency or agencies.

(9) Assure the effective implementation of this agreement by:

(a) Designating as the liaison officer responsible for implementing and being the primary contact for matters concerning this agreement a person whose primary function is managing USDA's, FDA's, or EPA's program(s) for residues in foods;

(b) Appointing an appropriate senior executive from USDA, FDA, and EPA to an interagency oversight committee that shall be chaired by an executive from a different agency each year and meet at least once each quarter to evaluate and report on the implementation of this agreement and make recommendation to agency heads on its effectiveness;

(c) Assigning appropriate personnel to interagency task forces, upon request of affected agency heads, to help coordinate responses to specific residue contamination incidents or other needs, including those related to monitoring, surveillance, analytical methodology, or enforcement; and

(d) Issuing and exchanging with the other agencies its instructions implementing this agreement that shall include the identities of the liaison officer, the oversight committee member, and contact points at the field level and shall set forth guidance for field personnel and other appropriate operational procedures.

E. Other Agreements:

1. This MOU supersedes the 1975 MOU between APHIS and FDA, the 1977 MOU between FSQS and EPA, and the 1975 MOU between FDA and EPA described above. It does not modify any other existing agreements.

2. Nothing in this MOU precludes the agencies from entering into additional, separate agreements with each other as they deem appropriate to achieve the purpose of this MOU.

IV. Name and Address of Agencies

A. U.S. Department of Agriculture, Foods Safety and Inspection Service and Agricultural Marketing Service, 14th Street and Independence Avenue, SW., Washington, DC 20250

B. Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857

C. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460

V. Period of Agreement

This agreement will become effective upon acceptance by all parties as indicated below and will continue indifinitely. It may be modified by unanimous consent or terminated by any party upon a 30-day advance written notice to other parties.

Approved and Accepted for the Food and Drug Administration.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

December 7, 1984.

Approved and Accepted for the Food Safety and Inspection Service.

Donald Houston,

Administrator.'

Dated October 12, 1984.

Approved and Accepted for the Agricultural Marketing Service.

William T. Manley,

Acting Administrator.

November 5, 1984.

Approved and Accepted for the Environmental Protection Agency.

Jack Moore,

Assistant Administrator for Substances.

Dated November 21, 1984.

[FR Doc. 85-1241 Filed 1-15-85; 8:45 am]

BILLING CODE 3410-DM-M

DEPARTMENT OF AGRICULTURE

Packers and Stockyards Administration

Proposed Posting of Stockyards; the Auction Farm, Sheldon, Iowa, et al.; Correction

On November 30, 1984, (49 FR 47051) a notice was published in the **Federal Register** giving notice of the proposed posting for certain stockyards listing their facility number, name, and location of stockyards.

This notice is to correct the facility no. assigned to the following market in that publication.

The notice should have read: IN-161 Bobby Lamb Feeder Pigs, Sedalia, Indiana.

Done at Washington, D.C. this 10th day of January 1985.

Harold W. Davis,

Director, Livestock Marketing Division.

[FR Doc. 85-1262 Filed 1-15-85; 8:45 am]

BILLING CODE 3410-02-KD

COMMISSION ON CIVIL RIGHTS

Vermont Advisory Committee; Agenda and Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Vermont Advisory Committee to the Commission will convene at 7:00 p.m. and will end at 9:00 p.m., on January 24, 1985, at the University of Vermont, William Science Hall, Room 511, Burlington, Vermont. The purpose of the meeting is to dicuss the feasibility of establishing a Vermont human rights commission and a possible study of state standards for public schools as they pertain to civil rights.

Persons desiring additional information, or planning a presentation to the Committee, should contact the New England Regional Office at (617) 223-4671.

The meeting will be conducted pursuant to the provisions of the Rules and Regulations of the Commission.

Dated at Washington, D.C., January 10, 1985.

Bert Silver,

Assistant Staff Director for Regional Programs.

[FR Doc. 85-1177 Filed 1-15-85; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-201-403]

Oil Country Tubular Goods From Argentina; Preliminary Determination of Sales as Less Than Fair Value

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that oil country tubular goods (OCTG) from Agentina are being, or are likely to be, sold in the United States at less than fair value. We also have preliminarily determined that critical circumstances do not exist. We have notified the U.S. International Trade Commission (ITC) of our determination. We have directed the U.S. Customs Service to suspend the liquidation of all entries of the subject merchandise as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by March 25, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: John J. Kenkel, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone: (202) 377-3965.

Preliminary Determination

We have preliminarily determined that OCTG from Argentina are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act).

We have preliminarily found that the foreign market value of OCTG from Argentina exceeded the United States price on 100 percent of the sales of this product. These margins ranged from 27.07 percent to 169.13 percent. The weighted-average margin for all comparisons made was 104.11 percent.

Case History

On June 13, 1984, we received a petition from Lone Star Steel Company and CF&I Corporation on behalf of the domestic OCTG industry. In compliance with the filing requirements of section 353.36 of the Commerce Regulations (19 CFR 353.36), the petitioners alleged that imports of OCTG from Argentina are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring, or are threatening material injury to, a United States industry. The petition also alleged sales of the subject merchandise were being made at less than the cost of production. After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping investigation. The petitioners, however, did not provide enough information to justify a cost investigation. We notified the ITC of our action and initiated such an investigation on July 2, 1984 (49 FR 28087). On August 8, 1984, the ITC determined that there is reasonable indication that imports of OCTG from Argentina are materially injuring a U.S. industry.

On July 18, 1984, we presented antidumping questionnaries to counsel for Dalmine Siderca S.A.I.C. (Dalsid). An extension of time to respond was granted, and on September 17, 1984, we received Dalsid's response to the questionnarie. Once we received the response, the petitioners requested again the initiation of a cost production investigation. We agreed and initiated a cost of production investigation.

On July 26, 1984, LTV Steel Company became an additional petitioner. On October 26, 1984, all of the petitioners requested that the Department extend the preliminary determination until not later than January 9, 1985. The Department granted that request on October 31, 1984 (49 FR 44318).

Scope of the Investigation

The merchandise covered by this investigation is OCTG. The term OCTG covers hollow steel products of circular cross section intended for use in the drilling of oil or gas. It includes oil well casing, tubing and drill pipe of carbon or alloy steel, whether welded or seamless, to either American Petroleum Institute (API) or non-API specification (such as proprietary), as currently provided for in the Tariff Schedules of the United States Annotated (TSUSA) items 610.3216, 610.3219, 610.3233, 610.3242, 610.3243, 610.3249, 610.3252, 610.3254, 610.3256, 610.3258, 610.3262, 610.3264, 610.3721, 610.3722, 610.3751, 610.3925, 610.3935, 610.4025, 610.4035, 610.4225, 610.4235, 610.4325, 610.4335, 610.4942, 610.4944, 610.4946, 610.4954, 610.4955, 610.4956, 610.4957, 610.4966, 610.4967, 610.4968, 610.4969, 4970, 610.5221, 610.5222, 610.5226 610.5234, 610.5240, 610.5242, 610.5243, 610.5244.

This investigation includes OCTG that are finished and unfinished.

This investigation covers the period from January 1 to June 30, 1984. Dalsid is the only known Argentine producer who exports the subject merchandise to the United States. We examined virtually all United States sales made during the period of investigation.

Fair Value Comparison

To determine whether sales of the subject merchandise in the United States were made as less than fair value, we compared the United States price with the foreign market value.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent the United States price because the merchandise was sold to unrelated U.S. purchasers prior to its importation into the United States.

We calculated the purchase price for Dalsid based on the C&F or FOB price to the unrelated United States purchasers. We made deductions, where appropriate, for port charges, inland

freight, and ocean freight costs incurred in delivering the product.

Foreign Market Value

The petitioner alleged that sales in the home market were at prices below the cost of producing OCTG.

There was not a viable home market. Therefore, we chose Peru as the best third country alternative, since the merchandise most similar to that sold in the United States was sold there.

We found that all sales to Peru of the merchandise under investigation were made at prices below the cost of production over an extended period of time in substantial quantities, and at prices that did not permit recovery of all costs within a reasonable period of time in the normal course of trade. We examined production costs, including materials, labor and general expenses. Therefore, we disregarded these sales in our analysis in accordance with section 773(b) of the Act since there were insufficient sales at or above cost of production. Instead, we used constructed value to determine foreign market value. In accordance with section 773 of the Act, we calculated constructed value, where appropriate, by adding the costs of materials, fabrication, general expenses, and profit. For materials and fabrication, we used the producer's actual cost figures. For general expenses, the actual expenses were used except for the financial income and expense. More detailed information will be requested for the final determination. We used the statutory minimum eight percent for profit prescribed in section 773(e)(1(B) of the Act, since actual profit was less than eight percent of the sum of costs and general expenses. We added U.S. packing to the foreign market value in accordance with § 353.16 of our regulations.

In calculating foreign market value, we made currency conversions from Argentine pesos to United States dollars in accordance with §353.56(a)(1) of our regulations using the certified daily exchange rates for January and February 1984 established by the U.S. Federal Reserve. The Federal Reserve discontinued the collection of data for Argentina at the end of February. Beginning with March, therefore, we used the rates published by the Central Bank of Argentina.

Verification

In accordance with section 776(a) of the Act, we verified the information provided by Dalsid by using standard verification procedures, which included on-site inspection of manufacturer's facilities and examination of relevant sales and financial records of the company.

Preliminary Negative Determination of Critical Circumstances

Counsel for petitioner alleged that imports of OCTG from Argentina present "critical circumstances." Under section 773(e)(1) of the Act, critical circumstances exist when the Department finds that (1) there have been massive imports of the merchandise under investigation over a relatively short period and (2)(a) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise under investigation or (b) the person by whom or for whose account the merchandise was imported knew or should have known that the exporter was selling the merchandise under investigation at less than its fair value.

In determining whether there have been massive imports over a relatively short period, we considered the following factors: recent import penetration levels, changes in import penetration since the date of the ITC's preliminary affirmative determination of injury, whether imports have surged recently, whether recent imports are significantly above the average calculated over several years, and whether the patterns of imports over the last several years may be explained by seasonal swings. Based upon our analysis of the information, we preliminarily determine that imports of the products covered by this investigation do not appear massive over a relatively short period.

We therefore, did not need to consider whether there is a history of dumping of OCTG from Argentina or whether the person by whom of for whose account these products were imported knew or should have known that the exporters were selling these products at less than fair value.

For the reasons described above, we preliminarily determine that "critical circumstances" do not exist with respect to OCTG from Argentina.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-confidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports are materially injuring, or threaten to materially injure, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination or 45 days after we make an affirmative final determination.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of the subject OCTG from Argentina, which are entered, or withdrawn from warehouse, for consumption on or after the date this notice is published in the **Federal Register.** The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price. This suspension of liquidation will remain in effect until further notice. The weighted-average margin is as follows:

	Margin (percent)
Dalmine Siderca S.A.I.C.	104.11
All other manufacturers, producers and exporters	104.11

Article VI.5 of the General Agreement on Tariffs and Trade provides that "(n)o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." This provision is implemented by section 722(d)(1)(D) of the Act. Since the dumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there is no reason to require a cash deposit or bond for that amount. Accordingly, the level of export subsidies as determined in the final affirmative countervailing duty determination on OCTG from Argentina will be subtracted from the dumping margin for deposit or bonding purposes.

Public Comment

In accordance with § 353.47 of the Commerce Department Regulations, if requested, we will hold a public hearing at 10:00 a.m. on February 21, 1985, to afford interested parties an opportunity to comment on this preliminary determination at the U.S. Department of Commerce, Room 1410, 14th Street and Constitution Avenue, N.W. Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant

Secretary for Import Administration, Room B099, at the above address within 10 days of this notice's publication.

Requests should contain: (1) The party's name, address, and telephone number (2) the number of participants (3) the reason for attending and (4) a list of the issues to be discussed. In addition, prehearing briefs in at lease 10 copies must be submitted to the Deputy Assistant Secretary by February 13, 1985. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46 within 30 days of this notice's publication, at the above address and in at lease 10 copies.

Dated; January 9, 1985.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 85-1195 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-351-402]

Oil Country Tubular Goods From Brazil; Preliminary Determination of Sales at Less Than Fair Value

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: We have preliminarily determined that oil country tubular goods (OCTG) from Brazil are being, or are likely to be, sold in the United States at less than fair value. We have also preliminarily determined that critical circumstances exist in this investigation. We have notified the U.S. International Trade Commission (ITC) of our determination. We have directed the U.S. Customs Service to suspend liquidation on all entries of the subject merchandise as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by March 25, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Paul Tambakis, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone: (202) 377-0186.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

Based upon our investigation, we preliminarily determine that OCTG from Brazil are being, or are likely to be, sold in the United States at less than fair value, pursuant to section 733(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). We have found margins on sales of OCTG for two of the three firms investigated. For Mannesmann, S.A., we found no sales at less than fair value. Therefore, we are excluding imports of OCTG from Mannesmann from this preliminary determination.

For Persico Pizzamiglio, S.A. and Confab Industrial, S.A., we found that the foreign market value of OCTG exceeded the United States price on 100 percent of the sales we compared. These margins ranged from 6.6 percent to 74 percent. The overall weighted-average margin is 33.08 percent. The weighted-average margins for individual companies investigated are listed in the "Suspension of Liquidation" section of this notice.

Case History

On June 13, 1984, we received a petition from Lone Star Steel Company, LTV Steel Company and CF&I Steel Corporation on behalf of the U.S. industry producing OCTG. In compliance with the filing requirements of § 353.36 of our Regulations (19 CFR 353.36), the petition alleged that imports of OCTG from Brazil are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are causing material injury, or threaten material injury, to a United States industry. The petition also alleged that critical circumstances exist under section 733(e) of the Act.

After reviewing the petition, we determined it contained sufficient grounds upon which to initiate an antidumping investigation. We are also investigating whether there were sales in the home market at less than the cost of production. We notified the ITC of our action and initiated such an investigation on July 10, 1984 (49 FR 28084-28088). On August 8, 1984, the ITC determined that there is a reasonable indication that imports of OCTG are materially injuring a United States industry (49 FR 31782). On October 26, 1984, we received a request from petitioners to extend the Department's preliminary determination from November 20, 1984, to January 9, 1985. On November 6, 1984, we granted this request and postponed our preliminary determination until not later than January 9, 1985 (49 FR 44318).

We found that the three companies named by petitioner, Persico, Mannesmann, and Confab, accounted for all known OCTG exports to the United States during the period of investigation.

Questionnaires were presented to these companies on July 26, 1984. On August 13 and 22, 1984, respondents requested an extension of the time to respond to the Department's questionnaire. A two-week extension for filing questionnaire responses was granted on August 30, 1984. Responses to the questionnaires were received on September 10, 1984. Supplemental responses were received from Mannesmann on October 29, 1984, and from Confab and Persico on November 23, 1984.

On October 4, 1984, petitioner alleged that respondents' home market sales were at prices below their cost of production. On October 25, 1984, the Department requested that respondents submit additional information on home market sales and cost of production. Cost of production responses were submitted between November 9, 1984, and December 14, 1984.

Scope of Investigation

The term "Oil Country Tubular Goods (OCTG)" covers hollow steel products of circular cross section intended for use in the drilling of oil or gas. It includes oil well casing, tubing and drill pipe of carbon or alloy steel, whether welded or seamless, manufactured to either American Petroleum Institute (API) or non-API (e.g. proprietary), specifications as currently provided for in the Tariff Schedules of the United States Annotated (TSUSA) items 610.3216, 610.3219, 610.3233, 610.3242, 610.3243, 610.3249, 610.3252, 610.3254, 610.3256, 610.3258, 610.3262, 610.3264, 610.3721, 610.3722, 610.3751, 610.3925, 610.3935, 610.4025, 610.4035, 610.4225, 610.4235, 610.4325, 610.4335, 610.4942, 610.4944, 610.4946, 610.4954, 610.4955, 610.4956, 610.5957, 610.4966, 610.4967, 610.4968, 610.4969, 610.4970, 610.5221, 610.5222, 610.5226, 610.5234, 610.5240, 610.5242, 610.5243, and 610.5244.

This investigation includes OCTG that are finished and unfinished.

Fair Value Comparison

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value or, where appropriate, constructed value.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent the United States price for sale by Confab and Persico, because the merchandise was sold to unrelated purchasers prior to its importation into the United States.

For Mannesmann, we used exporter's sales price, as provided by section 772(c) of the Act, because the merchandise was sold to unrelated purchasers in the United States after the date of importation.

We calculated the purchase price and exporter's sales price based on the C.I.F., F.O.B. or C.&F. unpacked prices to unrelated purchasers in the United States. We made deductions, where appropriate, for foreign inland freight and insurance, brokerage and handling charges, ocean freight, marine insurance, wharfage, loading and unloading charges, stowage, United States duty, U.S. inland freight, discounts, and rebates in the United States market. We also made an adjustment for the amount of taxes imposed on such sales in Brazil which were not collected by reason of the exportation of the merchandise to the United States. Where we used exporter's sales price, we made additional deductions for indirect selling expenses and credit expenses.

Foreign Market Value

In accordance with section 773(a) of the Act, we calculated foreign market value for Mannesmann and Confab based on home market prices. For Persico, we used constructed value since there were no sales of such or similar merchandise in the home market or in third country markets. We compared identical merchandise where possible. Where no identical merchandise was sold in the home market, for purposes of determining such or similar merchandise, in accordance with section 771(16) of the Act, we made comparisons based on type, grade and dimensional categories selected by a Commerce Department industry expert.

The petitioner alleged that sales in the home market were at prices below the cost of producing the merchandise. We examined production costs which included all appropriate costs for materials, fabrication and general expenses. We found sufficient sales in the home market above the cost of production to allow us to use home market prices in accordance with section 773(a)(1)(A) of the Act to determine foreign market value for Mannesmann and Confab.

Where we used home market prices as the basis for foreign market value, we calculated the home market price on the basis of the ex-factory or FOB delivered, unpacked, price to unrelated purchasers. We made deductions, where appropriate, for foreign inland freight and insurance. We made adjustments for differences in credit terms in accordance with § 353.15 of the regulations (19 CFR 353.15). For Mannesmann, we made adjustments for physical differences in the merchandise in accordance with section 773(a)(4)(C) of the Act. These adjustments for differences in the merchandise were based on differences in the cost of material, direct labor, and directly related factory overhead. For Confab, the reported cost adjustments for physical differences in the merchandise were based on assumptions that could not be verified through examination of Confab's cost records. Consequently, for purposes of this preliminary determination, we made no difference in merchandise adjustment for this producer. We will seek further information from Confab on this adjustment for our final determination. Since the merchandise subject to this investigation was sold unpacked in both markets, no adjustment was made for packing.

When we compared exporter's sales price with foreign market value, we treated credit expenses and inspecting and testing expenses as deductions instead of ajdustments for the differences, and deducted indirect selling expenses to offset United States selling expenses.

The following claims were disallowed in calculating foreign market value. Persico claimed a circumstance of sale adjustment to constructed value for warehousing expenses. We did not allow this adjustment because these expenses were incurred prior to the sale of the merchandise. Mannesmann claimed a level of trade adjustment and an adjustment for direct selling expenses in the home market. None of these claims have been allowed at this time because of insufficient documentation and explanation. We will seek further information on these adjustments for purposes of our final determination. Confab claimed circumstance of sale adjustments for pricing premiums charged to state-owned enterprises to compensate for: (1) Decree Law 2037, which limits Confab's price adjustments on sales to the government to 95 percent of the inflation rate, (2) "escalation losses" resulting from the time limits imposed by the government on calculating price adjustments, and (3) "penalty losses" resulting from the additional penalties and the government may charge Confab for late deliveries. We did not allow these adjustments. For the first claimed adjustment, because we determined home market price on date of delivery (as opposed to the earlier purchase order date), the effect of any premium on sales to the government would be neutralized. For the latter claimed adjustments, we consider these penalties to be normal in the course of trade, and any price premiums to compensate for them are not properly characterized as circumstance of sale adjustments. Consequently, we are disallowing these claims in this preliminary determination.

For Persico, we used constructed value as the basis of foreign market value, since all home market sales were of line pipe, which we do not consider as being such or similar to casing. Lacking home market and third country sales of casing, we calculated constructed value, in accordance with section 773 of the Act, by adding the cost of materials and fabrication, general expenses and profit. We added expenses incurred in selling OCTG to the United States since we did not have home market or third country selling expenses for OCTG. We adjusted for differences in credit terms based on home market sales of line pipe since we obtained these terms at verification and we considered "line pipe" to be in the same "general class or kind." For the final determination, we will seek additional information concerning selling expenses for the home market for the "general class or kind". The amount added for general expenses was the actual general expenses, since they were higher than the statutory minimum of 10 percent of the sum of material and fabrication costs. The amount added for profit was the statutory minimum of 8 percent of the sum of materials, fabrication costs, and general expenses. We did not add packing since merchandise sold to the United States was sold unpacked.

Preliminary Affirmative Determination of Critical Circumstances

Counsel for the petitioners alleged that imports of OCTG from Brazil present "critical circumstances." Under section 733(e)(1) of the Act, critical circumstances exist if we determine (1) there is a history of dumping in the United States or elsewhere of the class or kind of the merchandise which is the subject of the investigation, or the person by whom, or for whose account, the merchandise was imported knew or should have known that exporter was selling the merchandise which is the subject of the investigation at less than its fair value; and (2) there have been massive imports of this class or kind of merchandise that is the subject of the investigation over a relatively short period.

In determining whether there is a history of dumping of OCTG from Brazil in the United States or elsewhere, we

reviewed past antidumping findings of the Department of the Treasury as well as past Department of Commerce antidumping duty orders. We also reviewed the antidumping actions of other countries, and found no past antidumping determinations on OCTG from Brazil.

We then considered whether the person by whom, or for whose account, this product was imported knew or should have known that the exporter was selling this product at less than its fair value. It is the Department's position that this test is met where margins calculated on the basis of responses to the Department's questionnaire are sufficiently large that the importer knew or should have known that prices for sales to the United States (as adjusted according to the antidumping law) were significantly below home market sales prices. In this case, the margins calculated on the basis of the responses to the Department's questionnaire are sufficiently large, except with respect to Mannesmann and Persico, that the importer knew or should have known that the merchandise was being sold in the United States at less than fair value. Therefore, We determine that this test is met for imports of the merchandise from all producers, except Mannesmann and Persico. If the margins calculated for Mannesmann and Persico in our fianl determination become sufficiently large to meet the importer's knowledge test, we will include them in our final critical circumstances determination.

We generally consider the following concerning massive imports: (1) Recent trends in import penetration levels; (2) whether imports have surged recently; (3) whether recent imports are significantly above the average calculated over the last three years; and (4) whether the pattern of imports over that three year period may be explained by seasonal swings.

In considering this question, we analyzed recent trade statistics on import levels and import penetration ratios for OCTG from Brazil for equal periods immediately preceding and following the filing of the petition. Based on our analysis of recent trade data, we find that imports of OCTG from Brazil during the period subsequent to receipt of the petition have been massive when compared to recent import levels and import penetration ratios.

Therefore, we determine that critical circumstances exist with respect to imports of OCTG from Brazil, except those produced by Mannesmann and Persico.

Verification

In accordance with section 776(a) of the Act, we verified the information used in making this determination for Confab and Persico by using standard verification procedures, including on-site inspection of the manufacturers' operations and examination of accounting records and selected documents containing relevant information. We will verify all information used in reaching a final determination in this investigation.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of OCTG from Brazil for all manufacturer/producers/exporters, with the exception of Mannesmann and Persico, which are entered, or withdrawn from warehouse, for consumption 90 days prior to the date of publication of this notice in the **Federal Register.** For Persico, we are directing the United States Customs Service to suspend liquidation of all entries of OCTG from Brazil, which are entered or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register.** For Mannesmann, liquidation is not suspended. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price. This suspension of liquidation will remain in effect until further notice.

The weighted-average margins are as follows:

Manufacturers	Weighted-average margin (percent)
Persico Pizzamiglio	17.83
Confab Industrial	63.78
Mannesmann	0.00
All other manufacturers/producers/exporters	33.08

Article VI.5 of the General Agreement on Tariffs and Trade provides that "(n)o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." This provision is implemented by section 772(1)(D) of the Act. Since dumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there is no reason to require a cash deposit or bond for that amount. Accordingly, the level of export subsidies (as determined in the November 27, 1984, final affirmative countervailing duty determinations on OCTG from Brazil (49 FR 46570) will be subtracted from the dumping margins for deposit or bonding purposes.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether the domestic industry is materially injured, or threatened with material injury, by reason of these imports.

Public Comment

In accordance with § 353.47 of the Commerce Regulations, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10:00 a.m. on February 7, 1985, at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230.

Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room B-099, at the above address within 10 days of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reason for attending, and (4) a list of the issues to be discussed. In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by January 31, 1985. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice.

Dated: January 9, 1985.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 85-1194 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-580-401]

Oil Country Tubular Goods From Korea; Preliminary Determination of Sales at Not Less Than Fair Value

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice.

SUMMARY: We have preliminarily determined that oil country tubular goods (OCTG) from Korea are not being, nor are likely to be, sold in the United States at less than fair value.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Paul Thran, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone: (202) 377-3963.

Preliminary Determination

We have preliminarily determined that OCTG from Korea is not being, nor is likely to be, sold in the United States at less than fair value,as provided in section 733 (b) of the Tariff Act of 1930, as amended (19 U.S.C. 1673b(b)) (the Act). We have preliminary found that the margins for all companies investigated are zero or *de minimis*.

Individual company margins are:

Company	Margin (percent)
Dongjin Steel Co. Ltd.	0.00
Hyundai Pipe Ltd.	0.04
Pusan Steel Pipe Ind. Co.	0.00

Case History

On June 13, 1984, we received a petition from Lone Star Steel and CF&I Steel Corporation on behalf of the domestic OCTG industry. In compliance with the filing requirements is § 353.36 of the Commerce Regulations (19 CFR 353.36), the petitioners alleged that imports of OCTG from Korea are being, or are likely to be sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring or are threatening material injury to a United States indurstry. The petition also alleged that sales of the subject merchandise were being made at less than the cost of production and that critical circumstances existed in the case. After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping investigation. We notified the International Trade Commission (ITC) of our action and initiated such an investigation on July 21, 1984 (49 FR 28088). On August 8, 1984, the ITC determined that there is a reasonable indication that imports of OCTG from Korea are materially injuring a U.S. Industry.

We presented antidumping questionnaires to counsel for Pusan Steel Pipe Ind. Co. (Pusan), Hyundai Pipe Ltd. (Hyundai), and Dongjin Steel Co. Ltd. (Dongjin). On November 6, 1984, we postponed our preliminary deterimination at the request of petitioners.

Products Under Investigation

The products under investigation are oil country tubular goods (OCTG). OCTG are extention hollow steel products of circular cross section intended for use in the drilling of oil or gas. OCTG includes oil well casing, tubing and drill pipe of carbon or alloy steel, whether welded or seamless, to either American Petroleum Institute (API) or non-API specifications (such as proprietary), as currently provided for in the Tariff Schedules of the United States Annotated (TSUSA) items 610.3216, 610.3219, 610.3233, 610.3242, 610.3243, 610.3249, 610.3252, 610.3254, 610.3256, 610.3258, 610.3262, 610.3264, 610.3721, 610.3722, 610.3751, 610.3925, 610.3935, 610.4025, 610.4035, 610.4225, 610.4235, 610.4325, 610.4335, 610.4942, 610.4944, 610.4946, 610.4954, 610.4955; 610.4956, 610.4957, 610.4966, 610.4967, 610.4968, 610.4969, 610.4970, 610.5221, 610.5222, 610.5226, 610.5234, 610.5240, 610.5242, 610.5243, and 610.5244. This investigation includes OCTG that are finished and unfinished.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent the United States price because the merchandise was sold to unrelated U.S. purchasers prior to its importation into the United States.

We calculated the purchase price based on the price to the (first) unrelated United States purchaser. We deducted brokerage, handling, U.S. duty, inland freight, ocean freight, marine insurance, and added back drawback amounts, where appropriate.

Foreign Market Value

In accordance with section 773(a)(2) of the Act, we used constructed value to determine foreign market value, for Pusan and Dongjin, as they sold OCTG only to the United States. For Hyundai, we used a combination of constructed value and third country prices. We deducted brokerage, handling, inland freight, ocean freight, marine insurance, adjusted for differences in credit terms, and added back duty drawback, where appropriate, on third country sales. The petitioners alleged that sales in the third country were at prices below the cost of production. We examined production costs, including materials, labor, and general expenses and found this not to be the case.

In accordance with section 773 of the Act, we calculated constructed value, where appropriate, by adding the costs of materials, fabrication, general expenses and profit. For materials, and fabrication, we used the appropriate producers' actual cost figures. We used the statutory 10 percent for general expenses and 8 percent for profit since actual expenses and profits for each company were below the minimums prescribed in section 773(e)(1)(B) of the Act.

In calculating foreign market value, we made currency conversions from Korean won to United States dollars in accordance with § 353.56(a)(1) of our regulations, using the certified daily exchange rates.

Critical Circumstances

Petitioners alleged the existence of critical circumstances in this case. As our preliminary determination is negative, this issue is moot.

Verification

In accordance with section 776(a) of the Act, we will verify the information provided by the respondents by using standard verification procedures including examination of relevant sales and financial records of the company.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-confidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information either publicly or under an administrative protective order without the written consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports are materially injuring, or threatening to materially injure, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination, or 45 days after we make our final determination.

Public Comment

In accordance with § 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10:00 a.m. on February 8, 1985, at the U.S. Department of Commerce, room 3708, 14th St. and Constitution Ave., NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by February 4, 1985. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice, at the above address in at least 10 copies.

We will make our final determination whether these imports are being sold at less than fair value within 75 days.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

Dated: January 9, 1985.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 85-1193 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-201-403]

Oil Country Tubular Goods From Mexico; Preliminary Determination of Sales at Less Than Fair Value

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that oil country tubular goods (OCTG) from Mexico are being or are likely to be sold in the United States at less than fair value. We also have preliminarily determined that critical circumstances do not exist. We have notified the U.S. International Trade Commission (ITC) of our determination. We have directed the U.S. Customs Service to suspend the liquidation of all entries of the subject merchandise as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make our final determination by March 25, 1985.

EFFECTIVE DATE: January 16, 1985. For further information contact: John J. Kenkel, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone: (202) 377-3965.

Preliminary Determination

We have preliminarily determined that OCTG from Mexico are being, or are likely to be sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act).

We have preliminarily found that the foreign market value of OCTG from Mexico, exceeded the United States price on more than 80 percent of the sales of this product. These margins ranged from zero percent to 92.54 percent. The weighted-margin for all comparisons made was 20.77 percent.

Case History

On June 13, 1984, we received a petition from Lone Star Steel and CF&I Steel Corporation on behalf of the domestic OCTG industry. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petitioners alleged that imports of OCTG from Mexico are being, or are likely to be sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring or are threatening material injury to a United States industry. The petition also alleged sales of the subject merchandise were being made at less than the cost of production. After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation but not sufficient as to whether sales were below the cost of production. We notified the ITC or our action and initiated such an investigation on July 2, 1985 (49 FR 28086). On August 8, 1984, the ITC determined that there is reasonable indication that imports of OCTG from Mexico are materially injuring a U.S. industry.

On July 18, 1984, we presented antidumping questionnaires to counsel for Tubos de Acero de Mexico S.A. (TAMSA). An extension of the time to respond was granted, and on September 10, 1984, we received its response to the questionnaire. On July 26, 1984, LTV Steel Company became an additional petitioner. Once we received the response, the petitioners provided further support for the allegation of sales below cost. We agreed and initiated a cost of production investigation. On October 26, 1984, the petitioners requested that the Department extend the preliminary determination until not later than January 9, 1985. The Department granted that request on October 31, 1984 (49 FR 44318).

Scope of the Investigation

The merchandise covered by this investigation is OCTG. The term OCTG covers hollow steel products of circular cross section intended for use in the drilling of oil or gas. It includes oil well casing, tubing and drill pipe of carbon or alloy steel, whether welded or seamless, to either American Petroleum Institute (API) or non-API specifications (such as proprietary), as currently provided for in the Tariff Schedules of the United States Annotated (TSUSA) items 610.3216, 610.3219, 610.3233, 610.3242, 610.3243, 610.3249, 610.3252, 610.3254, 610.3256, 610.3258, 610.3262, 610.3264, 610.3721, 610.3722, 610.3751, 610.3925, 610.3935, 610.4025, 610.4035, 610.4225, 610.4235, 610.4325, 610.4335, 610.4942, 610.4944, 610.4946, 610.4954, 610.4955, 610.4956, 610.4957, 610.4966, 610.4967, 610.4968, 619.4969, 610.4970, 610.5221, 610.5222, 610.5226, 610.5234, 610.5240, 610.5242, 610.5243, and 610.5244.

This investigation includes OCTG that are finished and unfinished.

This investigation covers the period from January 1 to June 30, 1984. TAMSA is the only known Mexican producer who exported the subject merchandise to the United States during the period of investigation. We examined virtually all United States sales made during the period of investigation.

Fair Value Comparison

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent the United States price because the merchandise was sold to unrelated U.S. purchasers prior to its importation into the United States.

We calculated the purchase price for TAMSA based on the CIF or FOB price to unrelated United States purchasers. We made deductions, where appropriate, for port charges, inland

freight, ocean freight and insurance costs incurred in delivering the product.

Foreign Market Value

In accordance with section 773(a)(1) of the Act, we used home market sales prices to determine foreign market value for OCTG other than "green tube," where there were sufficient home market sales at or above cost of production. In accordance with section 771(16)(B) of the Act, we made comparisons of "such or similar" merchandise based on grade categories, as determined by our Commerce Department industry expert. The petitioner alleged that sales in the home market were at prices below the cost of production. After examining production costs, including materials, labor and general expenses, however, we found that all home market sales were made above cost.

We calculated the home market price for TAMSA based on the FOB price to the home market purchasers. We made adjustments for the physical differences in the merchandise since, in most instances, TAMSA did not sell indentical merchandise in both markets. We also made an adjustment for differences in credit terms in each market, in accordance with § 353.15 of our regulations.

Semifinished OCTG, or "green tube" in only sold in the United States. Therefore, we used constructed value to determine foreign market value. In accordance with section 773 of the Act, we calculated constructed value, appropriate, by adding the costs of materials, fabrication, general expenses and profit. For materials fabrication and general expenses we used the producer's actual costs figures. We used actual general and administrative expsnses since those expenses exceeded the satutory minimum of 10 percent of the sum of material and fabrication costs. We calculated profit using the statutory minimum eight percent of the sum of the general expenses and costs since the actual profit was less than the statutory minimum. We added the costs of U.S. packing in accordance with § 353.16 of our regulations.

In calculating foreign market value, we made currency conversions from Mexican pesos to United States dollars in accordance with § 353.56(a)(1) of our regulations using the certified daily excange rates.

Verification

In accordance with section 776(a) of the Act, we verified the information provided by TAMSA by using standard verfication procedures, which included on-site inspection of the manufacturer's facilities and examination of relevant sales and financial records of the company.

Preliminary Negative Determination of Critical Circumstances

Petitioners alleged that imports of OCTG from Mexico present "critical circumstances." Under section 733(e)(1) of the Act, critical circumstances exist when the Department finds that (1) there have been massive imports of the merchandise under investigation over a relatively short period and (2)(a) there is a history of dumping in the United States or elsewhere of the class or kind of the merchandise under investigation, or (2) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise under investigation at less than its fair value.

In preliminarily determining whether there is a reasonable basis to believe or suspect that there have been massive imports over a relatively short period, we considered the folling factors: Recent import penetration levels; changes in import penetration since the date of the ITC's preliminary affirmative determination of injury, whether imports have surged recently, whether recent imports are significantly above the average calculated over the past several years, and whether the patterns of imports over the period may be explained by seasonal swings. Based upon our analysis of the information we preliminarily determine that imports of the products covered by this investigation do not appear massive over a relatively short period.

We therefore did not need to consider whether there is a history of dumping of OCTG from Mexico or whether importers know or should have know that the merchandise was being sold at less than fair value.

Therefore, for the reasons described above, we preliminarily determine that "critical circumstances" do not exist with respect to OCTG from Mexico.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-confidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information either publicly or under an administrative protective order without the written consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports are materially injuring, or threatening material injury to, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination or 45 days after we make an affirmative final determination. We will make our final determination whether these imports are being sold at less than fair value within 75 days of this determination.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of the subject OCTG from Mexico, which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register.** The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price. This suspension of liquidation will remain in effect until further notice. The weighted-average margin is as follows:

	Margin (percent)
Tubos de Acero de Mexico S.A.	20.77
All other manufacturers, producers and exporters	20.77

Article VI.5 of the General Agreement on Tariffs and Trade provides that (n)o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." This provision is implemented by section 772(d)(1)(D) of the Act. Since the dumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there is no reason to require a cash deposit or bond for that amount. Accordingly, the level of export subsidies (as determined in the final affirmative countervailing duty determination) will be subtracted from the dumping margin for deposit or bonding purposes.

Public Comment

In accordance with § 353.47 of the Commerce Department Regulations, if requested, we will hold a public hearing at 10:00 a.m. on February 8, 1985, to afford interested parties an opportunity to comment on this preliminary determination at the U.S. Department of Commerce, Room 1410, 14th Street and Constitution Avenue, NW. Washington,

D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication.

Requests should contain: (1) The party's name, address, and telephone number (2) the number of participants (3) the reason for attending and (4) a list of the issues to be discussed. In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by February 1, 1985. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46 within 30 days of this notice's publication, at the above address and in at least 10 copies.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 85-1196 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-469-405]

Oil Country Tubular Goods From Spain; Preliminary Determination of Sales at Less Than Fair Value

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value.

SUMMARY: We preliminarily determine that oil country tubular goods (OCTG) from Spain are being, or likely to be, sold in the United States at less than fair value, and that "critical circumstances" exist with respect to imports of the merchandise under investigation. We have notified the U.S. International Trade Commission (ITC) of our determination, and we have directed the U.S. Customs Service to suspend liquidation on all entries of the subject merchandise as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by March 25, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Raymond Busen, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; Telephone: (202) 377-2830.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

Based upon our investigation, we preliminarily determine that OCTG from Spain are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673d) (the Act). The estimated margins for the two respondents were based on the best information available, as explained below in the sections of this notice which describe our fair value comparisons and calculations. The weighted-average margins for individual companies investigated are listed in the "Suspension of Liquidation" section of this notice. We also found that critical circumstances exist with respect to exports of OCTG from Spain. If this investigation proceeds normally, we will make a final determination by March 25, 1985.

Case History

On June 13, 1984, we received a petition from Lone Star Steel Company and CF&I Steel Corporation on behalf of themselves and the domestic producers of OCTG. In compliance with the filing requirements of § 353.36 of our regulations (19 CFR 353.36), the petition alleged that imports of OCTG from Spain are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are causing material injury, or are threatening material injury, to a United States industry.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We notified the ITC of our action and initiated such an investigation on July 2, 1984 (49 FR 28084). On August 8, 1984, the ITC determined that there is a reasonable indication that imports of OCTG are materially injuring a U.S. industry.

On July 27, 1984, questionnaires were presented to Altos Hornos de Vizcaya, S.A. (AHV) and Tubos Reunidos, S.A. (TR), in Spain. On September 6, 1984, petitioners alleged that critical circumstances exist, as defined in section 733(e) of the Act.

Based on a request from petitioners, on October 31, 1984, we postponed our preliminary determination to not later than January 9, 1985 (49 FR 44318).

On September 28, 1984, we received incomplete questionnaire responses from AHV and TR and petitioners requested that the Department investigate whether respondents' home market and/or third country sales were at prices below respondents' cost of production.

On October 11, 1984, we advised AHV and TR that their responses were deficient and that they must submit corrected data by October 23, 1984, or we might rely on the best information available for our preliminary determination. We did not receive a written supplemental response from TR or AHV until November 13, 1984. On October 24, 1984, we advised TR to submit, in addition to price information, cost of production information not later than November 5, 1984. (AHV had submitted cost of production information in its original September 28, 1984, response, which we found to be deficient.)

On November 21, 1984, we received TR's cost response. On December 20, 1984, we advised TR and AHV that their supplemental cost responses were deficient and that the deficiencies had to be corrected by December 31, 1984, and we reiterated that failure to file a timely, proper, and complete response could require us to use the best information available in the preliminary determination. To date, we have not received any further response from TR or AHV.

Scope of Investigation

The merchandise covered by this investigation is oil country tubular goods. The term "oil country tubular goods" covers hollow steel products of circular cross section intended for use in the drilling of oil or gas. It includes oil well casing, tubing and drill pipe of carbon or alloy steel, whether welded or seamless, manufactured to either American Petroleum Institute (API) or non-API (e.g., proprietary), specifications as currently provided for in the Tariff Schedules of the United States Annotated (TSUSA) items 610.3216, 610.3219, 610.3233, 610.3242, 610.3243, 610.3249, 610.3252, 610.3254, 610.3256, 610.3258, 610.3262, 610.3264, 610.3721, 610.3722, 610.3751, 610.3925, 610.3935, 610.4025, 610.4035, 610.4225, 610.4235, 610.4325, 610.4335, 610.4942, 610.4944, 610.4946, 610.4954, 610.4955, 610.4956, 610.4957, 610.4966, 610.4967, 610.4968, 610.4969, 610.4970, 610.5221, 610.5222, 610.5226, 610.5234, 610.5240, 610.5242, 610.5243, and 610.5244. This investigation includes OCTG that are finished and unfinished.

Because AHV and TR accounted for substantially all the exports of this merchandise to the United States, we limited our investigation to these firms. We investigated all sales of OCTG by the two firms during the period January 1 through June 30, 1984.

Fair Value Comparison

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price, based on the best information available, with the foreign market value, also based on the best information available. We used the best information available as required by section 776(b) of the Act because respondents did not submit adequate responses in a timely manner and in an acceptable form.

United States Price

As provided in section 772 of the Act, we calculated the purchase price of OCTG by using information provided in the petition, which was the best information available.

Foreign Market Value

Since respondents did not submit adequate cost responses in a timely manner on in an acceptable form, we used the best information available as required by section 776(b) of the Act. The best information available for calculating foreign market value was cost of manufacturing data compiled by Commerce Department industry experts, which we converted to constructed value according to section 773(e) of the Act. We calculated profit on the basis of the statutory minimum of 8 percent of the cost of materials, fabrication and general expenses.

Preliminary Affirmative

Determination of Critical Circumstances

Counsel for the petitioners alleged that imports of OCTG from Spain present "critical circumstances." Under section 733(e) of the Act, critical circumstances exist if we have a reasonable basis to believe or suspect that (1) there is a history of dumping in the United States or elsewhere of the class or kind of the merchandise which is the subject of the investigation; or the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value; and (2) there have been massive imports of the class or kind of merchandise that is the subject of the investigation over a relatively short period.

In determining whether there is a history of dumping of OCTG from Spain in the United States or elsewhere, we reviewed past antidumping findings of the Department of the Treasury as well as past Department of Commerce antidumping duty orders. We also reviewed the antidumping actions of other countries, and found no past antidumping determinations on OCTG from Spain.

We then considered whether the person by whom, or for whose account, this product was imported knew or should have known that the exporter was selling this product at less than its fair value. It is the Department's position that this test is met where margins calculated are sufficiently large that the importer knew or should have known that prices for sales to the United States (as adjusted according to the antidumping law) were significantly below foreign market value. In this case the margins calculated are sufficiently large that the importer knew, or should have known, that the merchandise was being sold in the United States at less than fair value. Therefore, we determine that this test is met for the merchandise from all producers.

We generally consider the following concerning massive imports; (1) Recent trends in import penetration levels, (2) whether imports have surged recently, (3) whether the recent imports are significantly above the average calculated over the last three years; and (4) whether the pattern of imports over that three year period may be explained by seasonal swings.

In considering this question, we analyzed recent trade statistics on import levels and import penetration ratios for OCTG from Spain for the periods immediately preceding and subsequent to the filing of the petition. Based on our analysis of recent trade data, we find that imports of OCTG from Spain during the period subsequent to receipt of the petition have been massive when compared to recent import levels and import penetration ratios.

Therefore, we preliminarily determine that critical circumstances exist with respect to all imports of OCTG from Spain.

Verification

In accordance with section 776(a) of the Act, we will verify all data used in reaching the final determination in this investigation.

Suspension of Liquidation

In accordance with section 733(e)(2) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of OCTG from Spain which are entered or withdrawn from warehouse, for consumption, 90 days prior to the date of publication of this notice in the **Federal Register.** The Customs Service shall require a cash deposit or bond in an amount equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price.

This suspension of liquidation will remain in effect until further notice. The weighted-average margins are as follows:

Manfacturers	Weighted-average margin (percent)
AHV	80.5
TR	67.4
All other manufacturers/producers/exporters	74.0

Article VI.5 of the General Agreement on Tariffs and Trade provides that "(n)o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization". This provision is implemented by section 772(d)(1)(D) of the Act. Since dumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there is no reason to require a cash deposit or bond for that amount. Accordingly, the level of export subsidies, as determined in the final affirmative countervailing duty determination on OCTG from Spain (49 FR 47060), will be subtracted from the dumping margin for deposit or bonding purposes.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports are materially injuring, or threating to materially injure, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination, or 45 days after we make our final determination.

Public Comment

In accordance with § 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10:00 a.m. on February

11, 1985, at the U.S. Department of Commerce, room 3708, 14th St. and Constitution Ave., NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by February 4, 1985. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice, at the above address in at least 10 copies.

January 9, 1985.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 85-1197 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-403-401]

Carbon Steel Structural Shapes From Norway; Initiation of Antidumping Duty Investigation

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the United States Department of Commerce, we are initiating an antidumping duty investigation to determine whether carbon steel structural shapes from Norway are being, or are likely to be, sold in the United States at less than fair value. Critical circumstances have been alleged. We are notifying the United States International Trade Commission (ITC) of this action so that it may determine whether imports of this product are causing material injury, or threaten material injury, to a United States industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before February 4, 1985, and we will make ours on or before May 29, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Paul Aceto, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone: (202) 377-3534.

SUPPLEMENTARY INFORMATION:

The Petition

On December 20, 1984, we received a petition in proper form filed by Chaparral Steel Company. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of the subject merchandise from Norway are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports are causing material injury, or threaten material injury, to a United States industry. Critical circumstances have also been alleged under section 733(e) of the Act.

The petitioner based the United States prices on offers for sale during the third quarter of 1984 of carbon steel structural shapes to U.S. purchasers, less freight, insurance, handling, and U.S. customs duties.

The petitioner based foreign market value on its own costs of production, adjusted for estimated differences in production costs in Norway.

By comparing the values calculated by the foregoing methods the petitioner arrived at a dumping margin of 56 percent.

Initiation of Investigation

Under section 732(c) of the Act, we must determine, within 20 days after a petition is filed, whether it sets forth the allegations necessary for the initiation of an antidumping duty investigation and whether it contains information reasonably available to the petitioner supporting the allegations.

We examined the petition on carbon steel structural shapes and have found that it meets the requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether carbon steel structural shapes from Norway are being, or are likely to be, sold in the United States at less than fair value. If our investigation proceeds normally we will make our preliminary determination by May 29, 1985.

Scope of Investigation

The products under investigation are "carbon steel structural shapes," which covers hot-rolled, forged, extruded, or drawn, or cold-formed or cold-finished carbon steel angles, shapes, or sections, not drilled, not punched, and not otherwise advanced, and not conforming completely to the specifications given in the headnotes to Schedule 6, Part 2, Subpart B of the *Tariff Schedules of the United States Annotated ("TSUSA")*, for blooms, billets, slabs, sheet bars, bars, wire rods, plates, sheets, strip, wire, rails, joint bars, tie plates, or any other tubular products set forth in the *TSUSA*, having a maximum cross-sectional dimension of 3 inches or more, as currently provided for in items 609.8005, 609.8015, 609.8035, 609.8041, or 609.8045 of the *TSUSA*. Such products are generally referred to as structural shapes.

Notification of ITC

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonconfidential information. We will also allow the ITC access to all privileged and confidential information in our files, provided it confirms that it will not disclose such information either publicly or under an administrative protective order without the consent of the Deputy Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by February 4, 1985, whether there is a reasonable indication that imports of carbon steel structural shapes from Norway are causing material injury, or threaten material injury, to a United States industry. If its determination is negative the investigation will terminate; otherwise, it will proceed according to the statutory procedures.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

January 9, 1985.

[FR Doc. 85-1202 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-455-403]

Carbon Steel Structural Shapes From Poland; Initiation of Antidumping Duty Investigation

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the United States Department of Commerce, we are initiating an antidumping duty investigation to determine whether carbon steel structural shapes from Poland are being, or are likely to be, sold in the United States at less than fair

value. Critical circumstances have been alleged. We are notifying the United States International Trade Commission (ITC) of this action so that it may determine whether imports of this product are causing material injury, or threaten material injury, to a United States industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before February 4, 1985, and we will make ours on or before May 29, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Paul Aceto, Office of Investigations, Imports Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone: (202) 377-3534.

SUPPLEMENTARY INFORMATION:

The Petition

On December 20, 1984, we received a petition in proper form filed by Chaparral Steel Company. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of the subject merchandise from Poland are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports are causing material injury, or threaten material injury, to a United States industry. Critical circumstances have also been alleged under section 733(e) of the Act.

The petitioner based the United States prices on actual sales and offers for sale during the third quarter of 1984 of carbon steel structural shapes, to U.S. purchasers, less inland and ocean freight insurance, handling, and U.S. Customs duties.

The petitioner based foreign market value on the average entered value of carbon steel structural shapes imports into the United States from Japan and Canada in August, 1984.

The petitioner alleges that since Poland is a state-controlled economy, the foreign market value of its carbon steel structural shapes must be determined by using the surrogate country method, in accordance with section 773(c) of the Act. Petitioner claims that Japan and Canada should be used as surrogate countries for the purpose of determining foreign market value.

By comparing the values calculated by the foregoing methods the petitioner alleged a dumping margin of 47 percent.

Initiation of Investigation

Under section 732(c) of the Act, we must determine, within 20 days after a petition is filed, whether it sets forth the allegations necessary-for the initiation of an antidumping duty investigation and whether it contains information reasonably available to the petitioner supporting the allegations.

We examined the petition on carbon steel structural shapes and have found that it meets the requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether carbon steel structural shapes from Poland are being, or are likely to be, sold in the United States at less than fair value. If our investigation proceeds normally we will make our preliminary determination by May 29, 1985.

Scope of Investigation

The products under investigation are "carbon steel structural shapes," which covers hot-rolled, forged, extruded, or drawn, or cold-formed or cold-finished carbon steel angles, shapes, or sections, not drilled, not punched, and not otherwise advanced, and not conforming completely to the specifications given in the headnotes to Schedule 6, Part 2, Subpart B of the *Tariff Schedules of the United States Annotated ("TSUSA")*, for blooms, billets, slabs, sheet bars, bars, wire rods, plates, sheets, strip, wire, rails, joint bars, tie plates, or any other tubular products set forth in the *TSUSA*, having a maximum cross-sectional dimension of 3 inches or more, as currently provided for in terms 609.8005, 609.8015, 609.8035, 609.8041, or 609.8045 of the *TSUSA*. Such products are generally referred to as structural shapes.

Notification of ITC

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonconfidential information. We will also allow the ITC access to all privileged and confidential information in our files, provided it confirms that it will not disclose such information either publicly or under an administrative order without the consent of the Deputy Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by Februray 4, 1985, whether there is a reasonable indication that imports of carbon steel structural shapes from Poland are causing material injury, or threaten material injury, to a United States, industry. If its determination is negative the investigation will terminate; otherwise, it will proceed according to the statutory procedures.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

January 9, 1985.

[FR Doc. 85-1203 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[C-433-402]

Initiation of Countervailing Duty Investigations; Certain Carbon Steel Products From Austria

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating countervailing duty investigations to determine whether manufacturers, producers, or exporters in Austria of certain carbon steel products, as described in the "Scope of the Investigations" section of this notice, receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission (ITC) of this action, so that it may determine whether imports of the subject merchandise from Austria materially injure, or threaten material injury to, a U.S. industry. If our investigations proceed normally, the ITC will make its preliminary determination on or before February 4, 1985, and we will make ours on or before March 14, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Alain Letort or Stuart Keitz, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377-5050 or 377-1769.

SUPPLEMENTARY INFORMATION: .

Petition

On December 19, 1984, we received a petition in proper form from the United States Steel Corporation of Pittsburgh, Pennsylvania, filed on behalf of the U.S. industries producing certain carbon steel products. In compliance with the filing requirements of 355.26 of the Commerce Regulations (19 CFR 355.26),

the petition alleges that manufacturers, producers, or exporters in Austria of certain carbon steel products receive subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act). Since Austria is a "country under the Agreement" within the meaning of section 701(b) of the Act, Title VII of the Act applies to these investigations, and the ITC is required to determine whether imports of the subject merchandise from Austria materially injure, or threaten material injury to, a U.S. industry.

Initiation of Investigations

Under section 702(c) of the Act, we must determine, within 20 days after a petition is filed, whether a petition sets forth the allegations necessary for the initiation of a countervailing duty investigation, and whether it contains information reasonably available to the petitioner supporting the allegations. We have examined the petition on certain carbon steel products from Austria, and we have found that the petition meets these requirements. Therefore, we are initiating countervailing duty investigations to determine whether the manufacturers, producers, or exporters in Austria of certain carbon steel products, as described in the "Scope of the Investigations" section of this notice, receive subsidies.

Scope of the Investigations

The products covered by this investigation are certain carbon steel products, which comprise:

- Hot-rolled carbon steel sheet,
- Cold-rolled carbon steel sheet, and
- Galvanized carbon steel sheets.

These products are more fully described in the Appendix to this notice.

Allegations of Subsidies

The petition alleges that manufacturers, producers, or exporters in Austria of certain carbon steel products receive benefits under the following programs which constitute subsidies:

- Government Equity Infusions
- Government Grants to the Austria Steel Industry
- Preferential Export Financing
  —Kontrollbank Export Credits
  —Osterreichische Investitionskredit TOP-1 and TOP-2 Loans
  —Export-oriented Research and Development Loans
- Labor Subsidies
  —Government-funded Labor Training
  —Special Assistance Act
- Local Incentives

Notification of ITC

Section 702(d) of the Act requires us to notify the U.S. International Trade Commission (ITC) of these actions, and to provide it with the information we used to arrive at these determinations. We will notify the ITC and make available to it all nonprivileged and nonconfidential information in our files. We will also allow the ITC access to all privileged and confidential information in our files, provided it confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

January 8, 1985.

Appendix—Description of Products, Austria

1. The term *"hot-rolled carbon steel flat-rolled products"* covers hot-rolled carbon steel products, whether or not corrugated, or crimped; not cold-rolled; not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal and not clad; 0.1875 inch or more in thickness and over 8 inches in width and pickled, as currently provided for in item 607.8320 of the *TSUSA*; and not pickled and in coils; as currently provided in item 607.6610, or under 0.1875 inch in thickness and over 12 inches in width, whether or not pickled, whether or not in coils, as currently provided for in items 607.6710, 607.6720, 607.6730, 607.6740, or 607.8342 of the *TSUSA*.

2. The term *"cold-rolled carbon steel flat-rolled products"* covers cold-rolled carbon steel products, whether or not corrugated or crimped; whether or not painted or varnished and whether or not pickled; not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal, over 12 inches in width and 0.1875 or more in thickness, as currently provided for in item 607.8320 of the *TSUSA;* or over 12 inches in width and under 0.1875 inch in thickness, whether or not in coils as currently provided for in items 607.8350, 607.8355, or 607.8360 of the *TSUSA*.

3. The term *"galvanized carbon steel sheet"* covers hot- or cold-rolled carbon steel sheet which have been coated or plated with zinc including any material which has been painted or otherwise covered after having been coated or plated with zinc, as currently provided for in items 608.0730, 608.1310, 608.1320, or 608.1330, if the *TSUSA*. Hot- or cold-rolled carbon steel sheet which has been coated or plated with metal other than zinc is not included.

[FR Doc. 85-1204 Filed 1-15-85; 8:45 am]
BILLING CODE 3510-DS-M

[C-401-401]

Initiation of Countervailing Duty Investigations; Certain Carbon Steel Products from Sweden

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating countervailing duty investigations to determine whether manufacturers, producers, or exporters in Sweden of certain carbon steel products, as described in the "Scope of the Investigations" section of this notice, receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission (ITC) of this action, so that it may determine whether imports of the subject merchandise from Sweden materially injure, or threaten material injury to, a U.S. industry. The ITC will make its preliminary determination on or before February 4, 1985, and if our investigations proceed normally, we will make our preliminary determination on or before March 14, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Alain Letort or Stuart Keitz, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377-5050 or 377-1769.

SUPPLEMENTARY INFORMATION:

Petition

On December 19, 1984, we received a petition in proper form from the United States Steel Corporation of Pittsburgh, Pennsylvania, filed on behalf of the U.S. industries producing certain carbon steel products. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), the petition alleges that manufacturers, producers, or exporters in Sweden of certain carbon steel products receive subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act). Since Sweden is a "country under the Agreement" within the meaning of section 701(b) of the Act,

Title VII of the Act applies to these investigations, and the ITC is required to determine whether imports of the subject merchandise from Sweden materially injure, or threaten material injury to, a U.S. industry.

Initiation of Investigations

Under section 702(c) of the Act, we must determine, within 20 days after a petition is filed, whether a petition sets forth the allegations necessary for the initiation of a countervailing duty investigation, and whether it contains information reasonably available to the petitioner supporting the allegations. We have examined the petition on certain carbon steel products from Sweden, and we have found that the petition meets these requirements. Therefore, we are initiating countervailing duty investigations to determine whether the manufacturers, producers, or exporters in Sweden of certain carbon steel products, as described in the "Scope of the Investigations" section of this notice, receive subsidies.

Scope of the Investigations

The products covered by this investigation are certain carbon steel products, which comprise:

- Carbon steel plate,
- Hot-rolled carbon steel sheet, and
- Cold-rolled carbon steel sheet.

These products are more fully described in the Appendix to this notice.

Allegations of Subsidies

The petition alleges that manufacturers, producers, or exporters in Sweden of certain carbon steel products receive benefits under the following programs which constitute subsidies:

- Government Equity Infusions
- Government Grants
- Preferential Government Loans
- Government Loan Guarantees
- Regional Development Subsidies
- Research and Development Subsidies
- Inputs at Preferential Prices

Petitioner alleges that the state-owned Svenskst Staal AB (SSAB) steel company has an arrangement with Luossavaara-Kiirunavaara AB (LKAB), a state-owned mining company in Sweden, whereby it obtains iron ore at preferential rates.

Petitioner alleges further that LKAB has received large amounts of subsidies from the Swedish government, and that these subsidies to LKAB have been passed-through to SSAB, both companies being under common government ownership. However, the petition does not allege, nor does it provide any evidence, that the bounties or grants received by LKAB have a significant effect on the cost of manufacturing the subject steel products as required by section 613 of the Trade and Tariff Act of 1984. Therefore, we are not initiating an investigation of upstream subsidies at this time. We will promptly reconsider this question on the basis of any additional information provided during the investigation.

The petition does, however, adequately allege, for the purposes of section 701(b) of the Act, that LKAB is providing iron ore inputs to SSAB at preferential rates, and we are initiating our investigation with regard to this issue.

Notification of ITC

Section 702(d) of the Act requires us to notify the U.S. International Trade Commission (ITC) of these actions, and to provide it with the information we used to arrive at these determinations. We will notify the ITC and make available to it all nonprivileged and nonconfidential information in our files. We will also allow the ITC access to all privileged and confidential information in our files, provided it confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

January 8, 1985.

Appendix—Description of Products, Sweden

1. The term *"carbon steel plate"* covers hot-rolled carbon steel products, whether or not corrugated, or crimped; not pickled; not cold-rolled; not in coils, not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal and not clad; 0.1875 inch or more in thickness and over 8 inches in width; as currently provided for in item 607.6620, and 607.6625 of the *TSUSA*. Semifinished products of solid rectangular cross-section with a width at least four times the thickness and processed only through primary mill hot-rolling are not included.

2. The term *"hot-rolled carbon steel flat-rolled products"* covers hot-rolled carbon steel products, whether or not corrugated, or crimped; not cold-rolled; not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal and not clad; 0.1875 inch or more in thickness and over 8 inches in width; pickled, and as currently provided for in item 607.8320 of the *TSUSA;* and not pickled and in coils; as currently provided for in item 607.6610 or under 0.1875 inch in thickness and over 12 inches in width, whether or not pickled, whether or not in coils, as currently provided for in items 607.6710, 607.6720, 607.6730, 607.6740, or 607.8342 of the *TSUSA*.

3. The term *"cold-rolled carbon steel flat-rolled products"* covers cold-rolled carbon steel products, whether or not corrugated or crimped; whether or not painted or varnished and whether or not pickled; not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal and not clad; over 12 inches in width, and 0.1875 inch or more in thickness, as currently provided for in item 607.8320 of the *TSUSA;* or over 12 inches in width and under 0.1875 inch in thickness, whether or not in coils; as currently provided for in item 607.8350, 607.8355, or 607.8360 of the *TSUSA*.

[FR Doc. 85-1205 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-122-403]

Egg Filler Flats From Canada; Preliminary Determination of Sales at Less Than Fair Value

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value.

SUMMARY: We preliminarily determine that egg filler flats from Canada are being, or are likely to be, sold in the United States at less than fair value. We have notified the United States International Trade Commission (ITC) of our determination. We have directed the U.S. Customs Service to suspend liquidation on all entries of the subject merchandise as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by March 26, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Paul Aceto, Office of Investigations, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, D.C. 20230; telephone: (202) 377-3534.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that egg filler flats from Canada are being, or are likely to be, sold in the United States at less than fair value, pursuant to section

733(b) of the Tariff Act of 1930, as amended (the Act).

We found that the foreign market value of egg filler flats exceeded the United States price on 53 percent of the sales compared. These margins ranged from 0 percent to 42.56 percent. The overall weighted-average margin on all sales compared is 7.59 percent. The weighted-average margins for individual companies investigated are listed in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by March 26, 1985.

Case History

On August 3, 1984, we received a petition from Keyes Fibre Company and the Packaging Corporation of America on behalf of the U.S. industry producing egg filler flats.

In compliance with the filing requirements of § 353.36 of our regulations (19 CFR 353.36), the petition alleged that imports of egg filler flats from Canada are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are causing material injury, or threaten material injury, to a United States industry.

After reviewing the petition, we determined it contained sufficient grounds upon which to initiate an antidumping duty investigation. We notified the ITC of our action and initiated such an investigation on August 23, 1984 (49 FR 34381). On September 12, 1984, the ITC determined that there is a reasonable indication that imports of egg filler flats are materially injuring a United States industry.

On September 12, 1984, questionnaires were sent to Cascades, Inc. and Fripp Fibre forms, Ltd., two producers of egg filler flats. We received their responses on October 26, 1984 and October 29, 1984.

Scope of Investigation

The merchandise covered by this investigation is molded pulp egg filler flats, measuring 4"x5" and 5"x6" as currently provided for under item number 256.7000 of the *Tariff Schedules of the United States, Annotated (TSUSA).*

Fair Value Comparisons

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent the United States price because the merchandise was sold to unrelated purchasers prior to its importation into the United States. We calculated the purchase price based on the c.i.f. duty-paid price to United States purchasers. We made deductions, where appropriate, for inland freight, insurance, U.S. customs duties and brokerage charges.

Foreign Market Value

In accordance with section 773(a)(1) of the act, we used home market prices to determine foreign market value. The home market prices were based on ex-factory or delivered prices to unrelated home market purchasers. In calculating foreign market value, we made currency conversions from Canadian dollars to United States dollars in accordance with § 353.56(a)(1) of the Commerce Regulations, using the certified quarterly exchange rates. We made deductions were appropriate, for inland freight, insurance and discounts. In accordance with § 353.15 of the Commerce Regulations, we made a circumstance of sale adjustment for differences in credit expenses. We also made deductions for commissions paid to unrelated commissionaires in the home market. We will be seeking additional information concerning indirect selling expenses in the U.S. market.

The following claims for adjustment were disallowed. Cascades claimed an adjustment for commissions paid in the home market. The claim was disallowed because the commission is paid to sales personnel as part of the company's compensation plan.

Cascades also claimed a level of trade adjustment, as provided for in § 353.19 of the Commerce Regulations. This claim was disallowed because Cascades was not able to quantify that the differences in price are due to differences in the level of trade. Fripp claimed an adjustment to foreign market value to account for a loyalty discount offered to U.S. purchasers. This claim was disallowed because we do not consider a loyalty discount to be a proper circumstance of sale adjustment. Shortly before this preliminary determination, Fripp requested a level of trade adjustment. We did not have sufficient time to analyze this submission, and thus did not consider it for the purposes of this determination. We will, however, consider this claim in the final determination.

If additional verifiable information regarding the disallowed adjustments is provided, it will be considered for the purposes of the final determination.

Verification

We will verify all data used in reaching the final determination in this investigation.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of egg filler flats from Canada. This suspension of liquidation applies to all merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register.** The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeded the United States price.

This suspension of liquidation will remain in effect until further notice. The weighted-average margins are as follows:

Manufacturers	Weighted-average margin percentage
Cascades, Inc.	0.60
Fripp Fibre Forms, Ltd.	14.57
All other manufacturers/producers/exporters	7.59

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

The ITC will determine whether these imports are materially injuring, or threatening to materially injure, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination, or 45 days after we make our final determination.

Public Comment

In accordance with § 353.47 of the Commerce Regulations, if requested, we

will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 2:00 p.m. on February 12, 1985, at the U.S. Department of Commerce, Room 3708, 14th and Constitution Avenue NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room B-099, at the above address within 10 days of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed. In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by February 5, 1985. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice, at the above address and in at least 10 copies.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

January 10, 1985.

[FR Doc. 85-1256 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-DS-M

[C-351-408]

Initiation of Countervailing Duty Investigation; Iron Ore Pellets From Brazil

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating a countervailing duty investigation to determine whether the manufacturers, producers, or exporters in Brazil of iron ore pellets, as described in the "Scope of Investigation" section below, receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission (ITC) so that it may determine whether imports of the subject merchandise materially injure or threaten material injury to a U.S. industry. The petition also alleges that "critical circumstances" exist within the meaning of section 703(e)(1) of the Act. If our investigation proceeds normally, we will make our preliminary determination on or before March 15, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Vincent Kane, Office of Investigations, Import Administration, International Trade Administrtion, U.S. Department of Commerce, 14th Street & Constitution Avenue NW, Washington, D.C. 20230. Telephone (202) 377-3530 or 377-5414.

SUPPLEMENTARY INFORMATION:

Petition

On December 20, 1984, we received a petition from the Cleveland-Cliffs Iron Company, Oglebay Norton Company, Picklands Mather & Company, merchant producers of iron ore pellets, and the United Steelworkers of America, the union which represents the production and maintenance workers of the merchant producers at their iron ore producing facilities, filed on behalf of the iron ore pellets producers who comprise the U.S. industry. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), the petition alleges that manufacturers, producers, or exporters of iron ore pellets in Brazil directly or indirectly receive benefits which constitute subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act), and that these imports materially injure or threaten material injury to a U.S. industry. In addition, the petition alleges that "critical circumstances" exist within the meaning of section 703(e)(1) of the Act. Brazil is a "country under the Agreement" within the meaning of section 701(b) of the Act; therefore Title VII of the Act applies to this investigation and an injury determination is required.

Initiation of Investigation

Under section 702(c) of the Act, within 20 days after a petition is filed, we must determine whether the petition sets forth the allegations necessary for the initiation of a countervailing duty investigation and whether it contains information reasonbly available to the petitioner supporting the allegations. We have examined the petition on iron ore pellets from Brazil and we have found that the petition meets those requirements. Therefore, we are initiating a countervailing duty investigation to determine whether manufacturers, producers, or exporters in Brazil of iron ore pellets, as described in the "Scope of the Investigation" section of this notice, receive benefits which constitute subsidies. If our investigation proceeds normally, we will make our preliminary determination by March 15, 1985.

Scope of the Investigation

The merchandise covered by this investigation is iron ore pellets, which are defined for purposes of this proceeding as: fine particles of iron oxide, hardened by heating and formed into balls of ⅜" and ⅝" for use in blast furnaces to obtain pig iron, as currently provided for in items 601.2430 and 601.2450 of the *Tariff Schedules of the United States, Annotated* (TSUSA).

Allegations of Subsidies

The petition alleges that Brazilian manufacturers, producers, or exporters of iron ore pellets receive benefits which constitute subsidies. We are initiating an investigation on the following allegations:

- Working Capital Financing for Export—Resolutions 674 and 882/950.
- Export Financing Under CIC-CREGE 14-11 Circular.
- Guarantees for Long-Term Foreign-Currency Loans.
- FINEX Export-Financing Program—Resolution 68.
- Financing for Storage of Export Merchandise Program—Resolution 330.
- PROEX—Export Promotion Credit.
- Income Tax Exemption for Export Earnings—Decree-Laws 1158 and 1721.
- Accelerated Deprectation of Equipment—Decree-Law 1137.
- IPI Export-Credit Premium.
- Industrial Development Council (CDI) Program—Exemption of IPI Tax and Customs Duties on Imported Equipment—Decree-Laws 1428 and 1726.
- Tax Reductions on Export-Production Equipment—Decree-Law 1428
- BEFIEX—Decree-Laws 77065 and 1219
- Mineral Tax Reductions on Iron Ore Exports
- Mineral Tax Basis Calculation Incentives
- Mining Industry Incentives
- Government Long-Term Loans (BNDES and FINAME)
- Regional Incentives under the Grande Carajas Program
- Carajas Infrastructure Subsidies

We have determined not to initiate on the following allegations:

1. *Government Assistance in Repaying Foreign Loans (Aviso GB-588).* Aviso GB-588 is an internal government communication which provides that under certain circumstances, the government of Brazil will assume obligations on the direct dollar debt of companies unable to meet such overseas debt as it comes due. Under the program, the Banco do Brasil assumes payments due overseas lenders

with funds provided by the Central Bank (Banco Central do Brasil). The assumed payments are converted into cruzeiro loans from the Banco do Brasil to the companies. The program is open to any company that has incurred such debt subject to a government guarantee.

In our Final Affirmative Countervailing Duty Determination on Certain Carbon Steel Products from Brazil (49 FR 13726) of April 6, 1984, we determined that the Aviso GB-588 program is available to all companies unable to meet scheduled payments on government-guaranteed direct-dollar debt; it does not operate for the sole benefit of any one industry or group of industries. Consequently, we found this program to be generally available and therefore not countervailable. The petition presents no new evidence of changed circumstances with respect to this program; we will not consider it at this time.

2. *IPI Rebates for Capital Investment.* Decree-Laws 1547 and 1843 provide incentives for firms producing basic steel and certain fabricated steel products and do not apply to this investigation. Therefore, we will not examine it at this time.

3. *Investment in the Carajas Iron Ore Mine.* Petitioners allege that the Companhia Vale do Rio Doce (CVRD), a company in which the government of Brazil has majority ownership, will provide $1.88 billion in equity to the Serro do Carajas iron ore mine project. Petitioners estimate that CVRD will suffer massive losses in undertaking this investment and therefore the investment is inconsistent with commercial considerations.

Based on the information in the petition, the Carajas iron ore mine project appears to be an expansion of CVRD's operations. A variety of sources fund the project: CVRD provides equity; BNDES, foreign and international banks provide long-term loans. Despite majority government ownership of CVRD, there is no evidence that the government of Brazil provided equity infusions into CVRD to finance the project, nor do there appear to be government equity infusions into the project itself.

The Department has consistently held that government ownership *per se* does not confer a subsidy. That CVRD chooses to invest in this project does not mean that the government is investing these funds. Absent new government participation in CVRD, or government equity infusions into the project, we are not investigating CVRD's investment in the Carajas iron ore mine project.

Allegation of Critical Circumstances

Petitioners allege that critical circumstances exist with respect to imports of iron ore pellets from Brazil. They claim that the subject merchandise benefits from export subsidies that are inconsistent with the Agreement (the Subsidies Code), and that imports have been massive over a relatively short period.

Notification of ITC

Section 702(d) of the Act requires us to notify the U.S. International Trade Commission (ITC) of this action, and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonconfidential information. We will also allow the ITC access to all privileged and confidential information in our files, provided it confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by February 4, 1985, whether there is a reasonable indication that imports of iron ore pellets from Brazil materially injure or threaten material injury to a U.S. industry. If ITC's determination is negative, the investigation will be terminated, otherwise, the investigation will proceed to conclusion.

January 9, 1985.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 85-1200 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-25-M

[C-469-408]

Extension of Deadline for Final Countervailing Duty Determination; Certain Welded Carbon Steel Pipes and Tubes from Spain

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We are extending the deadline for the final determination on our countervailing duty investigation concering certain welded carbon steel pipes and tubes ("welded pipe and tube") from Spain in order to investigate further the upstream subsidies provided to Spanish welded pipe and tube producers. On December 21, 1984, petitioner requested that we extend the deadline for our final determination to complete our examination of possible upstream subsidies which were alleged in the petition. Based on information gathered during verification, we find that there is a reasonable basis to believe or suspect that an upstream subsidy is being bestowed on Spanish welded pipe and tube producers. Under section 703(h)(2)(B) of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, we may extend the deadline for a final determination to 165 days after an affirmative preliminary countervailing duty determination whenever there is a reasonable basis to believe or suspect that an upstream subsidy is paid or bestowed and if the petitioner opts for an extension of the final determination and if additional time is required to investigate the upstream subsidy allegation. We determine that such additional time is required and will make our final determination by March 25, 1985.

EFFECTIVE DATE: January 16, 1985.

FOR FURTHER INFORMATION CONTACT: Jack Davies, Loc Nguyen, or Stuart Keitz, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, D.C. 20230; telephone: (202) 377-1784, 377-0167, or 377-1769.

SUPPLEMENTARY INFORMATION:

Case History

On July 17, 1984, we received a petition from the Committee on Pipe and Tube Imports, a trade association composed of domestic pipe and tube producers, which was filed on behalf of the U.S. pipe and tube industry. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), petitioner alleged that manufacturers, producers, or exporters in Spain of welded pipe and tube receive, directly or indirectly, benefits which constitute subsidies within the meaning of section 701 of the Act, and that these imports are materially injuring, or threatening material injury to, a U.S. industry. Petitioner also alleged that "critical circumstances" exist under section 703(e) of the Act.

We found that the petition contained sufficient grounds upon which to initiate a countervailing duty investigation, and on August 6, 1984, we initiated an investigation (49 FR 32248). In our notice of initiation, we stated that we expected to issue a preliminary determination by October 10, 1984.

Since Spain is a "country under the Agreement" within the meaning of

section 701(b) of the Act, an injury determination is required for this investigation. On August 31, 1984, the U.S. International Trade Commission ("ITC") determined that there is a reasonable indication that these imports are materially injuring, or threatening material injury to, a U.S. industry (49 FR 35871).

We presented a questionnaire concerning the allegations to the Government of Spain at its embassy in Washington, D.C. on August 13, 1984. We received responses from the Government of Spain on September 25, from Conducciones y Derivados, S.A. ("CONDESA") and Perfil en Frio, S.A. ("PERFRISA") on September 26, and from Jose Maria Aristrain-Madrid, S.A. ("JMA") on October 9. These three companies accounted for about 95 percent of Spanish welded pipe and tube exports to the United States during the period of investigation.

On October 10, we preliminarily determined that benefits constituting subsidies within the meaning of the countervailing duty law were being provided to manufacturers, producers, or exporters in Spain of welded pipe and tube, and that critical circumstances existed with respect to these imports.

We held a verification of the questionnaire responses in Madrid, Spain, on October 21–25.

In response to a request by petitioner and respondents, we held a public hearing on this case on November 21. We received pre-hearing briefs from the parties to the proceeding on November 19. Post-hearing briefs were received on December 5.

Upstream Subsidy Allegation

On August 6, 1984, we initiated a countervailing duty investigation on petitioner's allegation that producers, manufacturers, and exporters in Spain of welded pipe and tube receive an "upstream subsidy" through the purchase of subsidized steel inputs used in manufacturing welded pipe and tube.

Based on information gathered during verification, we find that there is a reasonable basis to believe or suspect that an upstream subsidy is being bestowed on Spanish welded pipe and tube producers. On December 21, 1984, petitioner requested that we extend the deadline for the final determination to complete the investigation on upstream subsidization. Since our verification was completed before October 30, 1984, when the new upstream subsidy provisions of the Trade and Tariff Act of 1984 came into effect, we need additional time to gather further information on upstream subsidization in this investigation.

Under section 703(h)(2)(B) of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, we may extend the deadline for a final determination to 165 days after an affirmative preliminary countervailing duty determination whenever there is a reasonable basis to believe or suspect that an upstream subsidy is paid or bestowed and if the petitioner opts for an extension of the final determination and if additional time is required to investigate the upstream subsidy allegation. We intend to make our final determination on or by March 25, 1985.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

December 24, 1984.

[FR Doc. 85-1201 Filed 1-15-85; 8:45 am]

BILLING CODE 3510-25-M

National Bureau of Standards

[Docket No. 30812-4141]

Approval of Federal Information Processing Standard 109, Pascal

AGENCY: National Bureau of Standards, Commerce.

ACTION: The purpose of this notice is to announce that the Secretary of Commerce has approved a new standard, which will be published as FIPS Publication 109.

SUMMARY: On September 13, 1983, notice was published in the **Federal Register** (48 FR 41062) that a Federal Information Processing Standard for Pascal was being proposed for Federal use.

The written comments submitted by interested parties and other material available to the Department relevant to this standard were reviewed by NBS. On the basis of this review, NBS recommended that the Secretary approve the standard as a Federal Information Processing Standard (FIPS), and prepared a detailed justification document for the Secretary's review in support of that recommendation.

The detailed justification document which was presented to the Secretary, and which includes an analysis of the written comments received, is part of the public record and is available for inspection and copying in the Department's Central Reference and Records Inspection Facility, Room 6628, Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, N.W., Washington, DC 20230.

The approved standard contains two portions: (1) An announcement portion which provides information concerning the applicability, implementation, and maintenance of the standard and (2) a specifications portion which deals with the technical requirements of the standard. Only the announcement portion of the standard is provided in this notice.

ADDRESS: Interested parties may purchase copies of this new standard, including the technical specifications portion, from the National Technical Information Service (NTIS). Specific ordering information from NTIS for this standard is set out in the Where to Obtain Copies Section of the announcement portion of the standard.

FOR FURTHER INFORMATION CONTACT: Mr. John Cugini, Center for Programming Science and Technology, Institute for Computer Sciences and Technology, National Bureau of Standards, Gaithersburg, MD 20899, (301) 921-2431.

Dated: January 10, 1984.

Ernest Ambler,

Director.

Federal Information Processing Standards Publication 109

[Date]

Announcing the Standard for Pascal

Federal Information Processing Standards Publications (FIPS PUBS) are issued by the National Bureau of Standards pursuant to Section 111(f)(2) of the Federal Property and Administrative Services Act of 1949, as amended, Pub. L. 89-306 (79 Stat. 1127), Executive Order 11717 (38 FR 12315, dated May 11, 1973), and Part 6 of Title 15 Code of Federal Regulations (CFR).

1. *Name of Standard.* Pascal (FIPS PUB 109).

2. *Category of Standard.* Software Standard, Programming Language.

3. *Explanation.* This publication announces the adoption of American National Standard Pascal Computer Programming Language, ANSI/IEEE770X3.97-1983, as a Federal Information Processing Standard (FIPS). The American National Standard Pascal, ANSI/IEEE770X3.97-1983, specifies the form and establishes the interpretation of programs expressed in the Pascal programming language. The purpose of the standard is to promote portability of Pascal programs for use on a variety of data processing systems. The standard is used by implementors as the reference authority in developing compilers, interpreters, or other forms of high level language processors; and by other computer professionals who need to know the precise syntactic and semantic rules of the standard.

4. *Approving Authority.* Secretary of Commerce.

5. *Maintenance Agency.* Department of Commerce, National Bureau of Standards (Institute for Computer Sciences and Technology).

6. *Cross Index.* American National Standard ANSI/IEEE770X3.97-1983, Pascal.

7. *Related Documents.*

a. Federal Information Resources Management Regulation 201-36.1310, Implementation of Federal Information Processing and Federal Telecommunications Standards into Solicitation Documents, Federal Information Processing Standards (FIPS) Programming Languages.

b. Federal Information Processing Standards Publication 29-1, Interpretation Procedures for Federal Information Processing Standard Programming Languages.

c. NBS Special Publication 500-117, Selection and Use of General-Purpose Programming Languages.

8. *Objectives.* Federal standards for high level programming languages permit Federal departments and agencies to exercise more effective control over the production, management, and use of the Government's information resources. The primary objectives of Federal programming language standards are:

—To encourage more effective utilization and management of programmers by insuring that programming skills acquired on one job are transportable to other jobs, thereby reducing the cost of porgrammer re-training;

—To reduce the cost of program development by achieving the increased programmer productivity that is inherent in the use of high level programming languages;

—To reduce the overall software costs by making it easier and less expensive to maintain programs and to transfer programs among different computer systems, including replacement systems;

—To protect the existing software assets of the Federal Government by insuring to the maximal feasible extent that Federal programming language standards are technically sound and that subsequent revisions are compatible with the installed base.

Government-wide attainment of the above objectives depends upon the widespread availability and use of comprehensive and precise standard language specifications.

9. *Applicability.*

a. Federal standards for high level programming languages should be used for computer applications and programs that are either developed or acquired for government use. FIPS Pascal is one of the high level programming language standards provided for use by all Federal departments and agencies. FIPS Pascal is suited for use in programming applications that employ structured programming techniques and that require advanced data typing facilities, especially those applications which are of a size compatible with an implementation in a minicomputer or microcomputer environment.

b. The use of FIPS high level programming languages is strongly recommended when one or more of the following situations exist:

—It is anticipated that the life of the program will be longer than the life of the presently utilized equipment.

—The application or program is under constant review for updating of the specifications, and changes may result frequently.

—The application is being designed and programmed centrally for a decentralized system that employs computers of different makes, models and configurations.

—The program will or might be run on equipment other than that for which the program is initially written.

—The program is to be understood and maintained by programmers other than the original ones.

—The advantages of improved program design, debugging, documentation and intelligibility can be obtained through the use of this high level language regardless of interchange potential.

—The program is or is likely to be used by organizations outside for Federal Government (i.e., State and local governments, and others).

c. Non-standard language features should be used only when the needed operation or function cannot reasonably be implemented with the standard features alone. Although non-standard language features can be very usefull, it should be recognized that their use may make the interchange of programs and future conversion to an extended Pascal standard or replacement processor more difficult and costly.

d. It is recognized that programmatic requirements may be more economically and efficiently satisfied through the use of report generation, database management, or text processing languages. The use of any facility should be considered in the context of system life, system cost, and the potential for data sharing.

e. Programmatic requirements may be also more economically and efficiently satisfied by the use of automatic program generators. However, if the final output of program generator is a Pascal source program, then the resulting program should conform to the conditions and specifications of FIPS Pascal.

10. *Specifications.* FIPS Pascal specifications are the language specifications contained in American National Standard Pascal Computer Programming Language, ANSI/IEEE770×3.97-1983.

The ANSI/IEEE770×3.97-1983 document defines the syntax and semantics of the Pascal language by specifying requirements for a conforming processor and program.

The standard does not specify the size or complexity of programs, the method for reporting errors or warnings, minimum system requirements, the means of supervisory control of programs, or the means of transforming programs for processing.

11. *Implementation.* The implementation of FIPS Pascal involves three areas of consideration: acquisition of Pascal processors, interpretation of FIPS Pascal, and validation of Pascal processors.

11.1 *Acquisition of Pascal Processors.* This standard becomes effective upon publication in the **Federal Register** of an announcement by the National Bureau of Standards of approval by the Secretary of Commerce. Pascal processors acquired for Federal use after this date should implement FIPS Pascal. Conformance to FIPS Pascal should be considered whether Pascal processors are developed internally, acquired as part of an ADP system procurement, acquired by separate procurement, used under an ADP leasing arrangement, or specified for use in contracts for programming services.

A transition period provides time for industry to produce Pascal processors conforming to the standard. The transition period begins on the effective date and continues for eighteen (18) months thereafter. The provisions of this publication apply to orders placed after the date of this publication; however, a Pascal language processor not conforming to FIPS Pascal may be acquired for interim use during the transition period.

11.2 *Interpretation of FIPS Pascal.* NBS provides for the resolution of questions regarding FIPS Pascal specifications and requirements, and issues official interpretations as needed. All questions about the interpretation of FIPS Pascal should be addressed to: Director, Institute for Computer Sciences and Technology, ATTN: Pascal Interpretation, National Bureau of Standards, Gaithersburg, MD 20899.

11.3 *Validation of Pascal Processors.* The General Services Administration (GSA), through its Federal Software Testing Center (FSTC), provides a service for the purpose of validating the conformance to this standard of compilers offered for Federal procurement. The validation system reports the nature of any deviations that are detected. This service is offered on a reimbursable basis. Further information about the validation service can be obtained from the FSTC which is located at 5203 Leesburg Pike, Suite 1100, Falls Church, Virginia 22041-3467 (703-756-6153).

12. *Where to Obtain Copies.* Copies of this publication are for sale by the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22161. (Sale of the included specifications document is by arrangement with the Institute of Electrical and Electronics Engineers, Incorporated.) When ordering, refer to Federal Information Processing Standards Publication 109 (FIPS PUB 109), and title. Payment may be made by check, money order, or deposit account.

[FR Doc. 85-1192 Filed 1-15-85; 8:45 am]
BILLING CODE 3510-13-M

National Oceanic and Atmospheric Administration

Marine Fisheries Advisory Committee; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

SUMMARY: As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1982), notice is hereby given of subcommittee meetings of the Marine Fisheries Advisory Committee (MAFAC). MAFAC was established by the Secretary of Commerce on February 17, 1971, to advise the Secretary on matters pertinent to the Department's responsibilities for marine fisheries resources and on means to facilitate cooperation between public and private interests in these matters.

DATES: The meetings will convene on January 28 and 29, 1985, from 9:00 a.m. to 5:30 p.m.

ADDRESS: The meetings will be held in the Lewis Room, Capitol Holiday Inn, 550 C. Street, SW., Washington, DC.

Meeting agenda. On January 28, 1985, the Habitat Conservation Subcommittee will meet from 9:00-11:00 a.m. to discuss the NOAA habitat alterations policy; the NMFS habitat conservation policy, and the regional fishery management councils involvement with habitat conservation issues. The Commercial Fisheries Subcommittee will meet from 1:00-3:00 p.m. to discuss joint ventures; phase-out of foreign fishing; and NMFS export marketing programs. The Consumer Affairs Subcommittee will meet from 3:30-5:30 p.m. to discuss inspection as it relates to seafood products; the health aspects of seafood; and educational and marketing activities related to seafood. On January 29, 1985, the Budget and Strategic Planning Subcommittee will meet from 9:00-11:00 a.m. to discuss budget operations; program proposals; long-range plans; strategic plan; and cooperative objective plans. The Marine Recreational Fisheries Subcommittee will meet from 1:00-3:00 p.m. to discuss the NMFS MRF coordinators and program development plans; the NMFS MRF policy; the MRF statistical survey; NMFS staff office responsibilities for MRF activities; and the Magnuson Act reauthorization. The State/Federal/Regional Councils Subcommittee will meet from 3:30-5:30 p.m. to discuss reauthorization of Pub. L. 88-309; reauthorization of the Magnuson Act; status of NMFS interjurisdictional fisheries policy; and Regulatory Flexibility Act.

FOR FURTHER INFORMATION CONTACT: Ann Smith, Executive Secretary, Marine Fisheries Advisory Committee, National Marine Fisheries Service, Washington, DC 20235, telephone: (202) 634-9563.

Dated: January 10, 1985.

William G. Gordon,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

[FR Doc. 85-1253 Filed 1-15-85; 8:45 am]
BILLING CODE 3510-08-M

National Technical Information Service

Government-Owned Inventions; Availability for Licensing

The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

Technical and licensing information on specific inventions may be obtained by writing to: Office of Federal Patent Licensing, U.S. Department of Commerce, P.O. Box 1423, Springfield, Virginia 22151.

Please cite the number and title of inventions of interest.

Douglas J. Campion,

Office of Federal Patent Licensing, National Technical Information Service, U.S. Department of Commerce.

Department of Agriculture

SN 6-327,296 (4,480,040); Sensitive and Rapid Diagnosis of Viroid Diseases and Viruses

SN 6-448,675 (4,483,950); Modified Starches as Extenders for Absorbent Polymers

SN 6-518,779 (4,483,689); Abrasion-Resistant Durable-Press Acrylic Finishes for Cotton Textiles by Use of Nonoxidative Polymerization Initiators and Accelerators in Two-Stage Heat Curing

SN 6-532,431 (4,484,539); Ovipositional Stimulant for Trichogramma SPP

SN 6-637,241; Soil Sampling Apparatus

Department of Commerce

SN 6-261,415 (4,481,517); Echometry Device and Method

SN 6-671,539; Process of Synthesizing Mixed BaO-TiO2 Based Powders for Ceramic Applications

Department of Health and Human Services

SN 6-548,849; Saponin-Based Polyether Polyols

SN 6-554,795 (4,487,693); Multi-Layer Coil Countercurrent Chromatrograph with Adjustable Revolutional Radius

SN 6-582,759 (4,486,179); Biocompatible Cementitious Dental Compositions

SN 6-657,630; Immortal Line of Human Fetal Glial Cells

SN 6-663,969; Transducer Hydrophone with Filled Reservoir

Department of the Interior

SN 6-376,852; (4,387,655); Method for Controlled Burnout of Abandoned Coal Mines and Waste Banks

Department of the Air Force

SN 6-552,552; (4,476,062); Pseudo-P-1,1,2,2,9,9,10,10-Octofluoro [2,2]-P-Cyclophane Bis-Acid Chloride

SN 6-627,691; Data Acquisition Channel Apparatus

SN 6-643,201; Miniature High Performance Pulsed Modulator Apparatus

SN 6-651,961; Multiple Rate Shock Isolator Damping Valve

SN 6-651,983; Heater Block Assembly for Use in Thermal Oxidation Testing of Jet Fuel

SN 6-653,641; Programmable Realtime Interface Between a Block Floating Point Processor and Memory

SN 6-654,338; Integrated Defense Communications Systems Antijamming Antenna System
SN 6-656,844; An Adaptive Fast Fourier Transform Weighting Technique to Increase Small Target Sensitivity
SN 6-656,845; Gain Restoration After Doppler Filtering
SN 6-657,099; A Technique for Rapid Determination of Probability of Detection in Pulse Doppler Radars
SN 6-657,100; Inert Atmosphere Transfer Vessel
SN 6-661,549; High Efficiency Electron Beam Gun Foil Support
SN 6-661,834; Flow Measurement Device

Department of the Army

SN 6-669,912; Dual Mode Scanner/Tracker

Environmental Protection Agency

SN 6-514,192 (4,485,747); Reducing Pollutant Emissions by Fines Removal

[FR Doc. 85-1239 Filed 1-15-85; 8:45 am]
BILLING CODE 3510-04-M

DEPARTMENT OF EDUCATION

Education Appeal Board; Applications for Review Accepted for Hearing

AGENCY: Department of Education.

ACTION: Notice.

SUMMARY: This notice is a list of applications for review that were received and accepted for hearing by the Education Appeal Board between July 1, 1984, and September 25, 1984. A summary of each appeal has been included to help potential intervenors. In addition, the notice explains how interested third parties may intervene in proceedings before the Board.

FOR FURTHER INFORMATION CONTACT: Orman W. Ketcham, Acting Chairman, Education Appeal Board, 400 Maryland Avenue, SW., (Room 1065, FOB-6), Washington, D.C. 20202. Telephone: (202) 245-7835.

SUPPLEMENTARY INFORMATION: Under sections 451 through 454 of the General Education Provisions Act (20 U.S.C. 1234 *et seq.*), the Education Appeal Board has authority to conduct: (1) Audit appeal hearings, (2) withholding, termination, and cease and desist hearings initiated by the Secretary of Education, and (3) other proceedings designated by the Secretary as being within the jurisdiction of the Board.

The Secretary has designated the Board as having jurisdiction over appeal proceedings related to final audit determinations, the withholding or termination of funds, and cease and desist actions for most programs administered by the Department of Education (ED). The Secretary also has designated the Board as having jurisdiction to conduct hearings concerning most ED administered programs that involve (a) a determination that a grant is void, (b) the disapproval of a request for permission to incur an expenditure during the term of a grant, or (c) determinations regarding cost allocation plans or special rates negotiated with specified grantees. Final regulations governing Board jurisdiction and procedures were published in the **Federal Register** on May 18, 1981 at 46 FR 27304, (34 CFR Part 78).

APPLICATIONS ACCEPTED:

Vocational Rehabilitation

A number of the appeals involve audits of vocational rehabilitation programs:

Appeal of the State of Ohio, Docket No. 25-(157)-84, ACN 05-30030

The State appealed a final audit determination issued by the Acting Regional Commissioner of the Rehabilitation Services Administration. The audit reviewed case service costs under the vocational rehabilitation program for the period October 1, 1977, through September 30, 1980.

The Acting Regional Commissioner disallowed case service costs on the grounds of alleged client ineligibility and inadequate documentation. Maintenance payments were also disallowed because the amount was unreasonable or unjustified or the amount was unallowable as replacement for other income.

The Department seeks a refund of $386,312. Ohio agrees to repay $31,006 and contests $355,306.

Appeal of Trust Territory of the Pacific Islands, Docket No. 28-(160)-84, ACN 09-41510

The Trust Territory appealed a final audit determination made by the Regional Commissioner of the Rehabilitation Services Administration. The underlying audit, conducted by Touche, Ross and Company, reviewed vocational rehabilitation subgrants for fiscal years 1980 and 1981.

The Regional Commissioner disallowed travel costs because of inadequate documentation. Unliquidated obligations which should have been deobligated were disallowed. Counseling costs overexpended were disallowed. Costs also were disallowed because the local matching requirement was not met. Subgrants to Palau, Yap, Kosrae, and Truk were involved.

The Department seeks a refund of $82,426. The Trust Territory concedes $8,710 leaving $73,716 at issue.

Appeal of Guam, Docket No. 30-(162)-84, ACN 09-41507

Guam appealed a final audit determination made by the Regional Commissioner of the Rehabilitation Services Administration. The underlying audit reviewed Guam's vocational rehabilitation program for Fiscal Year 1982.

The Regional Commissioner disallowed costs associated with the Guam Rehabilitation and Workshop Center because the costs were not necessary or reasonable for proper administration of the vocational rehabilitation program. Common expenses were also disallowed because no cost allocation plan existed.

The Department seeks a refund of $281,228. Guam concedes liability of $102,506.56. The amount of $178,721.44 remains at issue.

Miscellaneous Programs

The remaining appeals concern other programs administered by the U.S. Department of Education:

Appeal of the State of Texas, Docket No. 27-(159)-84, ACN 06-30009

Texas requested review of a final audit determination issued by the Assistance Management and Procurement Service (AMPS). The final audit determination was based on an audit of indirect costs at the Richardson Education Service Center from July 1, 1979, through September 30, 1981.

AMPS disallowed overclaimed indirect costs under Title I of the Elementary and Secondary Education Act of 1965 and the Education for the Handicapped Act because "pass-through" funds to local educational agencies were included in the direct cost base.

AMPS also disallowed costs because the restricted indirect cost rate was overstated by the inclusion of legal and administrative expenses and by the exclusion of Common Core Data Project rental expenses in the computations.

The Department requests a refund of $176,263. Texas disputes all liability.

Appeal of PUSH for Excellence, Incorporated, Docket No. 26-(158)-84, ACN 05-30013

PUSH appealed a final audit determination issued by the Assistance Management and Procurement Service (AMPS). The audit reviewed a project to promote excellence and improve the motivation of inner city school students

administered by PUSH from March 1, 1980, through February 28, 1981.

AMPS disallowed costs because of inadequate documentation, duplicate claims, unallowable charges, and costs which were incurred prior to the grant period. Indirect costs were disallowed because the indirect cost rate applied only to national office employees. AMPS also requested the return of the unexpended amount of the grant award.

The Department requests a refund of $288,739. PUSH contests all liability.

Appeal of the State of West Virginia, Docket No. 29-(161)-84, ACN 03-30004

West Virginia requested review of a final audit determination made by Assistant Secretary for Vocational and Adult Education. The audit reviewed programs conducted under the Vocational Education Act of 1963 from July 1, 1977, through June 30. 1980, and personal service costs for a five-year period ending June 30, 1982.

The Assistant Secretary disallowed personal service costs and administrative costs which were inadequately documented. Costs were also disallowed because Fairmont State College failed to maintain fiscal effort.

The Department seeks a refund of $265,017. West Virgina has agreed to repay $15,279; thus, $249,738 remains at issue.

Appeal of Moses Lake School District, Docket No. 31-(163)-84, ACN 10-3001

Moses Lake appealed a final audit determination issued by the Assistance Management and Procurement Service (AMPS). The Audit reviewed a Title VII Bilingual Education grant awarded to the Columbia Basin Consortium Project for the period July 1, 1979, through June 30, 1980, and Title VII grants made directly to Moses Lake for the period October 1, 1980, through September 30, 1982.

AMPS disallowed the amount of each grant audited because Moses Lake had less than 60 percent limited English proficient participants in its bilingual program.

The Department requests a refund of $309,070.52. Moses Lake disputes all liability.

Appeal of the State of New Jersey, Docket No. 32-(164)-84, ACN 02-15626, 02-20103, and 02-25001

New Jersey appealed a final audit determination issued by the Acting Deputy Under Secretary for Management, the Assistant Secretary for Elementary and Secondary Education, and the Assistant Secretary for Special Education and Rehabilitative Services. The underlying audits reviewed, 1) vocational education programs from July 1, 1977, through June 30, 1980, 2) programs conducted under the Elementary and Secondary Education Act of 1965 and programs conducted under the Education of the Handicapped Act from July 1, 1978, through June 30, 1980, and 3) all Federal programs administered by New Jersey during Fiscal Year 1980.

Costs totaling $4,815,681 were disallowed because of inadequate time records. New Jersey disputes all liability.

Appeal of Guam Community College, Docket No. 33-(165)-84, ACN 90-41515

Guam Community College requested review of a final audit determination made by the Assistance Management and Procurement Service (AMPS). The audit reviewed Federal financial transactions at the College during the period October 1, 1981, through September 30, 1982.

AMPS disallowed costs which were not adequately documented, which exceeded budgeted amounts, and which were unallowable.

The Department seeks a refund of $175,107. The College disputes all liability.

Appeal of the State of California, Docket No. 34-(166)-84, ACN 90-30027

California appealed a final audit determination of the Assistant Secretary for Elementary and Secondary Education. The underlying audit reviewed the Mini-Corps Program administered by the Butte County Superintendent of Schools from the beginning of the 1978-79 school year through the end of the 1982 summer program.

The Assistant Secretary disallowed costs of the Counselor Training Program because the eligibility of the trainees was inadequately documented. Travel costs were also disallowed because of inadequate documentation.

The Department requests a refund of $492,610. California contests all liability.

Appeal of Community School District Two, Docket No. 35-(167)-84, ACN 02-30022

Community School District Two, New York, New York, appealed a final audit determination issued by the Assistance Management and Procurement Service AMPS). The audit reviewed a Title VII Bilingual Education grant awarded for a Pre-School Demonstration Project during the period October 1, 1980, Through September 30, 1981.

AMPS disallowed costs because of an incomplete evaluation report and inadequate documentation of student eligibility. Indirect costs associated with the disallowed direct costs were also disallowed.

The Department seeks a refund of $35,537.00. Community School District Two disputes liability.

Appeal of the State of Texas, Docket No. 36-(168)-84, ACN 60-30007

Texas appealed a final audit determination of the Assistance Management and Procurement Service (AMPS). The audit reviewed costs charged to Federal grants by the Austin Education Service Center during fiscal years 1980 and 1981.

AMPS disallowed indirect costs because the indirect cost rate was overstated and should not have been applied to "pass-through" funds.

The Department requests a refund of $93,705. Texas contests all liability.

Appeal of the Commonwealth of Massachusetts, Docket No. 37-(169)-84, ACN 01-30017

Massachusetts request review of a final audit determination issued by the Assistant Secretary for Special Education and Rehabilitative Services. The underlying audit reviewed programs conducted under Part B of the Education of the Handicapped Act and Title I of the Elementary and Secondary Education Act during fiscal years 1980, 1981, and 1982.

Costs were disallowed because funds given to local educational agencies by the State educational agency were not obligated within the 27-month period of availability. Equipment costs found to be unrelated to program activities also were disallowed.

The Department seeks a refund of $275,648. Massachusetts disputes all liability.

Appeal of the State of Texas, Docket No. 38-(170)-84, ACN 06-30008

Texas appealed a final audit determination issued by the Assistance Management and Procurement Service. The underlying audit reviewed costs charged to Federal grant awards during fiscal years 1980 and 1981 by the Houston Education Service Center.

Direct costs were disallowed because of inadequate documentation and improper allocation of costs. Indirect costs were disallowed because other costs were erroneously characterized as direct or indirect cost.

The Department requests a refund of $800,031. Texas contests liability of $683,299.

The remaining appeal was inadvertently omitted from the list of acceptances published in 49 FR 35543

(September 10, 1984). This appeal was accepted for review by the Education Appeal Board on September 12, 1983:

Appeal of the State of Texas, Docket No. 14-(124)-83, ACN 06-20102 and ACN 06-20601

Texas appealed a final audit determination made by the Assistant Secretary for Vocational and Adult Education. The audits reviewed Texas' vocational education program for the period July 1, 1977, through June 30, 1980.

The Assistant Secretary disallowed costs because Texas awarded funds without the use of the fund allocation formula in the State plan, misused funds set aside for the excess costs of handicapped and disadvantaged students in mainstreamed programs, did not use the required criteria for awarding funds to areas of high youth unemployment or dropouts, and claimed unallowable charges.

The Department seeks a refund of $748,706. Texas disputes all liability.

Intervention

Section 78.43 of the final regulations establishing procedures for the Education Appeal Board provides that an interested person, group, or agency, may upon application to the Board Chairman, intervene in appeals before the Education Appeal Board, including the above appeals.

An application to intervene must indicate to the satisfaction of the Board Chairman or, as appropriate, the Panel Chairperson, that the potential intervenor has an interest in, and information relevant to, the specific issues raised in the appeal. If an application to intervene is approved, the intervenor becomes a party to the proceedings.

These applications to intervene, or questions, should be addressed to Orman W. Ketcham, Acting Chairman, Education Appeal Board, 400 Maryland Avenue, SW. (Room 1065, FOB-6), Washington, D.C. 20202. Telephone: (202) 245-7835.

(20 U.S.C. 1234)

Dated: January 10, 1985.

A. Wayne Roberts,

Deputy Under Secretary, Intergovernmental and Interagency Affairs.

(Catalog of Federal Domestic Assistance No. not applicable)

[FR Doc. 85-1229 Filed 1-15-85; 8:45 am]

BILLING CODE 4000-01-M

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Deputy Under Secretary for Management invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before February 15, 1985.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, D.C. 20503. Requests for copies of the proposed information collection requests should be addressed to Margaret B. Webster, Department of Education, 400 Maryland Avenue, SW., Room 4074, Switzer Building, Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster (202) 426-7304.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Deputy Under Secretary for Management publishes this notice containing proposed information collection requests prior to the submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Agency form number (if any); (4) Frequency of the collection; (5) The affected public; (6) Reporting burden; and/or (7) Recordkeeping burden; and (8) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: January 11, 1985.

Linda M. Combs,

Deputy Under Secretary for Management.

Office of Special Education and Rehabilitative Services

Type of Review Requested: New
Title: Report of Federal, State, and Local Funds Expended for Special Education and Related Services
Agency Form Number: ED 869-1
Frequency: Annually
Affected Public: State or local Governments
Reporting Burden
Responses: 58
Burden Hours: 580
Recordkeeping Burden
Recordkeepers: 0
Burden Hours: 0
ABSTRACT: This package provides instructions and forms necessary for States and local education agencies to report the amount of funds expended for special education and related services.

Type of Review Requested: New
Title: Report of Special Education/Related Services in Need of Improvement and Handicapped Children and Youth in Need of Improved Services and Programs
Agency Form Number: ED 869-2
Frequency: Annually
Affected Public: State or Local Governments
Reporting Burden
Responses: 58
Burden Hours: 580
Recordkeeping Burden
Recordkeepers: 0
Burden Hours: 0
ABSTRACT: This package provides instructions and forms necessary for States and local education agencies to report the services/programs in need of improvement as well as the number, categories, and ages of handicapped children and youth who are in need of these improved services and programs.

Type of Review Requested: New
Title: Report of: A) Handicapped Children and Youth Exiting the Educational System (1984-1985 School Year) and B) Anticipated Services Needed by These Handicapped Children and Youth (1985-1986 School Year)
Agency Form Number: ED 869-3
Frequency: Annually
Affected Public: State or Local Governments
Reporting Burden
Responses: 58
Burden Hours: 1102
Recordkeeping Burden
Recordkeepers: 0
Burden Hours: 0
ABSTRACT: This package provides instructions and forms necessary for States and local education agencies to report the number of handicapped children and youth exiting educational

system and the number, categories, and ages of handicapped youth needing anticipated services for the succeeding year.

Type of Review Requested: New
Title: Number of Additional Personnel Needed to Provide Special Education and Related Services to Handicapped Children and Youth
Agency Form Number: ED 869-7
Frequency: Annually
Affected Public: State or Local Governments
Reporting Burden
Responses: 58
Burden Hours: 116
Recordkeeping Burden
Recordkeepers: 0
Burden Hours: 0
ABSTRACT: This package provides instructions and forms necessary for States and local education agencies to report the number of additional personnel needed to provide educational services to handicapped children and youth. This information is used to monitor the implementation of Federal legislation, for planning Federal programs and as a part of Congressionally mandated reporting information requirements.

[FR Doc. 85-1230 Filed 1-15-85; 8:45 am]
BILLING CODE 4000-01-M

Advisory Council on Dependents' Education; Open Meeting

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Council on Dependents' Education and of two standing committees concerning education programs and administration. This notice also describes the functions of the council. Notice of these meetings is required under section 10(1)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of its opportunity to attend.

DATE: The Advisory Council on Dependents' Education: January 28, 1985, 9:00 a.m. to 5:00 p.m.; and January 30, 1985, 9:00 a.m. to 5:00 p.m. The committees: January 29, 1985, 9:00 a.m. to 4:00 p.m.

ADDRESS: Rosslyn Westpark Hotel, The Shenandoah A-B Room, 1900 Fort Myer Drive, Rosslyn, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Dr. William F. Keough, Administrator of Education for Overseas Dependents, Mailstop 6337, 400 Maryland Avenue SW, Washington, D.C. 20202, (202) 245-8011.

SUPPLEMENTARY INFORMATION: The Advisory Council on Dependents' Education is established under section 1411 of the Defense Dependents' Education Act of 1978, as amended (20 U.S.C. 929). The Council is established to recommend to the Director general policies for operation of the defense dependents' education system with respect to curriculum selection, administration, and operation of the system.

The meeting of the Council is open to the public. The proposed agenda for the full Council on January 28 includes: a report of the Administrator on Council matters, a progress report by the Director, a report by the Director on previously expressed ACDE concerns, a presentation by Dr. George Levine, of the National School Safety Center on "In-House Suspensions and Related Disciplinary Trends," and presentations by DoDDS staff members on DoDDS TV and radio programs, the DoDDS testing program, and alcohol and drug abuse. The proposed agenda for the full Council on January 30 includes a presentation by Ms. Marsha Gilmer-Hill of the National Center for Missing & Exploited Children on "Current Efforts to Handle the Problem of Missing and Exploited Children" and reports by the two standing committees, with discussion and voting on proposed recommendations.

The proposed agenda for the Education Program Committee on January 29 includes the DoDDS testing program, the intercultural instructional program, cntinued DoDDS response to the National Commission on Excellence in Education Report, the prekindergarten pilot program, the TAG program, the Atlantic Region's demographic study, the student placement regulation, and alcohol and drug abuse.

The proposed agenda for the Administration Committee includes projections of school enrollment, DoDDS publicity and its evaluation, promotion of local community involvement with the schools, revision of DOD Instruction 5105.49, the certification/recertification program, school construction, and missing and exploited children.

Records are kept of all Council proceedings and are available for inspection at the office of the Advisory Council on Dependents' Education, Room 3047, Mailstop 6337, 400 Maryland Avenue SW., Washington, D.C., from the hours of 8:30 a.m. to 5:00 p.m.

Dated: January 3, 1985.

A. Wayne Roberts,
Deputy Under Secretary for Intergovernmental and Interagency Affairs.

[FR Doc. 85-1236 Filed 1-15-85; 8:45 am]
BILLING CODE 4000-01-M

Advisory Council on Education Statistics (ACES); Meeting

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Council on Education Statistics. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATE: February 14-15, 1985.

ADDRESS: 1200 19th Street NW., Room 823, Washington, DC 20208.

FOR FURTHER INFORMATION CONTACT: John W. Christensen, Executive Director, 1200 19th Street NW, (Brown Building) Room 717-C, Washington, DC 20208. Telephone—(202) 254-8227.

SUPPLEMENTARY INFORMATION: The Advisory Council on Education Statistics is established under section 406(c)(1) of the Education Amendments of 1974, Pub. L. 93-380. The Council is established to review general policies for the operation of the National Center for Education Statistics (NCES) and is responsible for establishing standards to insure that statistics and analyses disseminated by the Center are of high quality and are not subject to political influence

The meeting of the Council is open to the public. The proposed agenda includes:

A discussion of program direction and priorities for the National Center for Education Statistics.

An update on the evaluation of NCES.

An update on vocational education data collection.

A discussion of the tenth annual ACES report to the Congress.

Such old business and new business as the Chairman or membership may put before the Council.

Records are kept of all Council proceedings, and are available for public inspection at the office of the Executive Director, Advisory Council on Education Statistics, 1200 19th Street NW, (Brown Building), Room 717-C, Washington, DC 20208.

Dated January 11, 1985.

Donald J. Senese,
Assistant Secretary for Educational Research and Improvement.

[FR Doc. 85-1233 Filed 1-15-85; 8:45 am]
BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP75-205-004]

ANR Pipeline Co.; Tariff Filing Pursuant to Order Amending Order Issuing Certificate of Public Convenience and Necessity

January 9, 1985.

Take notice that on January 2, 1985, ANR Pipeline Company (ANR) (formerly Michigan Wisconsin Pipe Line Company) tendered for filing the following revised tariff sheets to Rate Schedule X-44, all under First Revised Volume No. 2 of its F.E.R.C. Gas Tariff.

Second Revised Sheet No. 427
First Revised Sheet No. 428
Original Sheet No. 428A
First Revised Sheet No. 436
Original Sheet No. 436A
Second Revised Sheet No. 438
First Revised Sheet No. 438A

ANR states the revised tariff sheets reflect the addition of four (4) additional exchange points to an exchange agreement with Natural Gas Pipeline Company of America (Natural) approved by the Federal Energy Regulatory Commission (Commission) on May 16, 1984.

ANR further states the tariff sheets also reflect the addition of two (2) additional exchange points which previously had not been reflected on Rate Schedule X-44. These revisions were approved by the Commission on February 28, 1977 and February 28, 1978, respectively.

ANR requests that Original Sheet Nos. 438A and 438B be cancelled as they contain revisions authorized by the Commission on March 19, 1976 and have now been incorporated on First Revised Sheet No. 428 and Second Revised Sheet No. 438.

ANR requests that the revised tariff sheets be accepted for filing and made effective on May 16, 1984, the date of the Commission order issued in Docket No. CP75-205-003.

Any person desiring to be heard or to protest said should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol St., NE., Washington, D.C. 20426, in accordance with Rule 211 or Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before January 16, 1985. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party to the proceeding must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,
Secretary.

[FR Doc. 85-1215 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ID-1816-001 et al.]

A. Joseph Dowd, et al.; Interlocking directorate filings

January 10, 1985.

Comments are due on the following filings on or before February 4, 1985, in accordance with Standard Paragraph E at the end of this notice.

Take notice that the following filings have been made with the Commission:

1. A. Joseph Dowd

[Docket No. ID-1816-001]

Take notice that on December 31, 1984, A. Joseph Dowd (applicant) filed an application pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Vice President and Director.	AEP Generating Co	Electric Utility.
Secretary	Cardinal Operating Co	Do.
Vice President	Columbus and Southern Ohio Electric Co.	Do.
Do	Indiana & Michigan Electric Co.	Do.
Vice President and Director.	Kentucky Power Co	Do.
Do	Kingsport Power Co	Do.
Vice President	Michigan Power Co	Do.
Vice President and Director.	Ohio Power Co	Do.
Vice President	Wheeling Electric Co	Do.

2. Willis S. White, Jr.

[Docket No. ID-1598-002]

Take notice that on December 31, 1984, Willis S. White, Jr. (applicant) filed an application pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Chairman of the Board and Chief Executive Officer and Director.	AEP Generating Co	Electric utility.
Do	Appalachian Power Co.	Do.
President and Director.	Cardinal Operating Co	Do.
Chairman of the Board and Chief Executive Officer and Director.	Columbus and Southern Ohio Electric Co.	Do.
President & Director	Indiana-Kentucky Electric Corp.	Do.
Chairman of the Board and Chief Executive Officer and Director.	Indiana & Michigan Electric Co.	Do.
President and Director.	Kanawha Valley Power Co.	Do.
Chairman of the Board and Chief Executive Officer and Director.	Kentucky Power Co	Do.
Do	Kingsport Power Co	Do.

3. Peter J. DeMaria

[Docket No. ID-1831-003]

Take notice that on December 31, 1984, Peter J. DeMaria (applicant) filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Treasurer and Director.	AEP Generating Co	Electric utility.
Treasurer	Appalachian Power Co.	Do.
Do	Cardinal Operating Co	Do.
Director and Treasurer.	Columbus and Southern Ohio Electric Co.	Do.
Treasurer	Indiana & Michigan Electric Co.	Do.
Do	Kanawha Valley Power Co.	Do.
Do	Kentucky Power Co	Do.
Do	Kingsport Power Co	Do.
Do	Michigan Power Co	Do.
Treasurer and Director.	Ohio Power Co	Do.
Treasurer	Wheeling Electric Co	Do.
Do	Beech Bottom Power Co.	Do.

4. Richard F. Hering

[Docket No. ID-2147-000]

Take notice that on December 31, 1984, Richard F. Hering (applicant) filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Director	AEP Generating Co	Electric utility.
Vice President	Indiana & Michigan Electric Co.	Do.

5. David H. Williams, Jr.

[Docket No. ID-2148-000]

Take notice that on December 31, 1984, David H. Williams, Jr., filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Director and Vice President.	AEP Generating Co	Electric utility.

Position	Name of corporation	Classification
Director	Appalachian Power Co.	Do.
Do	Columbus and Southern Ohio Electric Co.	Do.
Do	Ohio Valley Electric Co.	Do.

6. John R. Burton

[Docket No. ID-1734-001]

Take notice that on December 31, 1984, John R. Burton (applicant) filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Secretary	AEP Generating Co	Electric utility.
Do	Appalachian Power Co.	Do.
Do	Columbus and Southern Ohio Electric Co.	Do.
Do	Indiana & Michigan Electric Co.	Do.
Secretary and Director.	Kanawha Valley Power Co.	Do.
Secretary	Kentucky Power Co	Do.
Do	Kingsport Power Co	Do.
Secretary and Director.	Michigan Power Co	Do.
Secretary	Ohio Power Co	Do.
Do	Wheeling Electric Co	Do.
Do	Beech Bottom Power Co.	Do.

7. Gerald P. Maloney

[Docket No. ID-1549-002]

Take notice that on December 31, 1984, Gerald P. Maloney (applicant) filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of corporation	Classification
Vice President and Director.	AEP Generating Co	Electric utility.
Do	Appalachian Power Co.	Do.
Vice President and Principal Financial Officer and Director.	Columbus and Southern Ohio Electric Co.	Do.
Vice President	Indiana-Kentucky Electric Corp.	Do.
Vice President and Director.	Indiana & Michigan	Do.
Vice President	Kanawha Valley Power Co.	Do.
Vice President and Director.	Kentucky Power Co	Do.
Do	Kingsport Power Co	Do.
Do	Michigan Power Co	Do.
Do	Ohio Power Co	Do.
Vice President	Ohio Valley Electric Corp.	Do.
Vice President and Director.	Wheeling Electric Co	Do.

8. Joseph H. Vipperman

[Docket No. ID-2149-000]

Take notice that on December 31, 1984, Joseph H. Vipperman filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Position	Name of Corporation	Classification
Director and Vice President.	Appalachian Power Co.	Electric utility.
Do	Cardinal Operating Co.	Do.
Do	Columbus and Southern Ohio Electric Co.	Do.
Do	Indiana & Michigan Electric Co.	Do.
Do	Kanawha Valley Power.	Do.
Do	Kentucky Power Co	Do.
Do	Kingsport Power Co	Do.
Do	Michigan Power Co	Do.
Do	Ohio Power Co	Do.
Do	Wheeling Electric Co	Do.

Standard Paragraphs:

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb

Secretary.

[FR Doc. 85-1211 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP85-151-000, et al.]

Equitable Gas Company, et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Equitable Gas Company

[Docket No. CP85-151-000]

January 8, 1985.

Take notice that on December 4, 1984, Equitable Gas Company (Applicant), 420 Boulevard of the Allies, Pittsburgh, Pennsylvania 15219, filed in Docket No. CP85-151-000 an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale of up to 100,00 dt equivalent of natural gas per day on a best efforts basis to Consolidated Edison Company of New York, Inc. (Con Edison), for resale until October 31, 1985, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant states that in accordance with an August 10, 1984, agreement between Applicant and Con Edison (Agreement), it proposes to sell gas to Con Edison at a price lower than Applicant's current average system load factor rate. Applicant proposes that the price would be set at a level which would be competitive in the market place, but would not be less than Applicant's average weighted commodity cost of gas. Applicant also states that the agreement provides for monthly adjustments of the price to account for fluctuations in the Applicant's average weighted cost of gas. In this regard, Applicant requests a variance from the pricing provisions of the Commission's Policy Statement on Off-System Sales in Docket No. PL83-2-000 (23 FERC §¶ 61,140).

Applicant states that Texas Eastern Transmission Corporation (TETCO) and/or Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee), would transport the gas by displacement to Con Edison. Con Edison proposes to arrange and pay for the transportation to be provided by TETCO and/or Tennessee, it is explained.

Applicant alleges that the gas to be sold is surplus to the requirements of Applicant's customers. Additionally, Applicant states that the proposed sale would enable Applicant to avoid some of the estimated $1,131,000 in minimum bill payments to TETCO and $829,000 in minimum bill payments to Tennessee for April through October of 1985. Applicant states that no construction would be necessary as delivery of the gas would be made by displacement through existing delivery points with TETCO and/or Tennessee.

Comments are due on or before January 28, 1985, in accordance with Standard Paragraph F at the end of this notice.

[Docket No. CP85-171-000]

2. Trunkline Gas Company

January 8, 1985.

Take notice that on December 13, 1984, Trunkline Gas Company (Applicant), P.O. Box 1642, Houston, Texas 77001, filed in Docket No. CP85-167-000 an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the transportation of up to 50,000 Mcf of natural gas per day for Transcontinental Gas Pipe Line Corporation (Transco), all as more fully set forth in the application which is on

file with the Commission and open to public inspection.

Applicant proposes to implement the terms of a transportation agreement between Applicant and Transco dated July 23, 1984, whereby Applicant has agreed to transport, on an interruptible basis, up to 50,000 Mcf per day of natural gas for Transco until July 23, 1986. Applicant proposes a transportation charge of 15.16 cents per Mcf. Applicant states that it would receive gas for Transco's account in Hidalgo and Jim Wells Counties, Texas, and redeliver it a point of interconnection with Transco in Beauregard Parish, Louisiana.

Comments are due on or before January 28, 1985, in accordance with Standard Paragraph F at the end of this notice.

3. Transcontinental Gas Pipe Line Corporation

[Docket No. CP79-411-004]

January 9, 1985.

Take notice that on December 10, 1984, Transcontinental Gas Pipe Line Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, filed in Docket No. CP79-411-004 a petition to amend the order issued December 3, 1979, in Docket No. CP79-411, as amended, pursuant to Section 7(c) of the Natural Gas Act so as to authorize the deletion of the Ragley point of delivery to Northern Natural Gas Company, Division of InterNorth, Inc. (Northern), and to provide for the addition of Vinton, Katy, Fulshear and Bammel points of delivery (all points located in Louisiana), all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

It is stated that Northern requested Transco to eliminate the Ragley delivery point due to the abandonment of a previous certificated transportation service and due to the completion of a new delivery point.

Transco has also stated that by amendatory agreement dated December 19, 1983, new delivery points at Vinton, Katy and Fulshear, Louisiana, have been added to or for the account of Northern.

Comments are due on or before January 29, 1985, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

4. Colorado Interstate Gas Company

[Docket No. CP84-595-002]

January 11, 1985.

Take notice that on December 27, 1984, Colorado Interstate Gas Company (CIG), P.O. Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP84-595-002 an amendment to its pending application filed in Docket Nos. CP84-595-000 and CP84-595-001 pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity to reflect a change in its proposal to transport natural gas in interstate commerce for Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee), all as more fully set forth in the amendment which is on file with the Commission and open to public inspection.

By the instant amendment CIG revises the sections of and exhibits to the Gas Transportation Agreement between CIG and Tennessee, dated January 12, 1984, which refer to any curtailments required by capacity constraints on CIG's transmission system. These revisions are reflected in an amended gas transportation agreement dated December 17, 1984. CIG states that this amended agreement eliminates any implication of setting forth a revised curtailment priority system. CIG also states that in all other respects its application, as previously amended, remains unchanged.

Comments are due on or before January 31, 1985, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

5. Natural Gas Pipeline Company of America

[Docket No. CP76-278-003]

Texas Eastern Transmission Corporation Natural Gas Pipeline Company of America

[Docket No. CP77-568-015]

January 8, 1985.

Take notice that on December 6, 1984, Naural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP76-278-003 and Texas Eastern Transmission Corporation (Texas Eastern) (jointly referred to as Petitioners), P.O. Box 2521, Houston, Texas 77252, and Natural filed in Docket No. CP77-568-015 a joint petition to amend further the orders issued June 26, 1980, in Docket No. CP76-278 and November 29, 1977, in Docket No. CP77-568 pursuant to Section 7(c) of the Natural Gas Act so as to authorize the transportation and exchange of a new source of gas supply and for a new balancing point, all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

Petitioners state that in Docket No. CP76-278 Natural received authorization to transport up to 30,000 Mcf of gas per day for Texas Eastern from West Cameron Blocks 522 and 543, South Addition, offshore Louisiana, to West Cameron Block 565. It is further stated that in Docket No. CP77-568 Petitioners were authorized to exchange up to 40,000 Mcf of gas per day from Vermilion Blocks 262, 369 and 386 and West Cameron Blocks 436, 437, 522, 537, 551, 552 and 593, offshore Louisiana.

It is stated that Texas Eastern has purchased natural gas in High Island Blocks A-289 and A-290, East Addition, South Extension, offshore Texas, and that Texas Eastern has existing facilities to transport the gas from these blocks to Natural in West Cameron Block 543. Petitioners request amendment of the existing authorization in Docket No. CP76-278 to permit Natural to transport up to 17,000 Mcf of gas per day from West Cameron Block 543 to the existing delivery point in West Cameron Block 565. Petitioners further request amendment of the existing authorization in Docket No. CP77-568 to exchange the High Island A-289 and A-290 gas at the West Cameron Block 565 point under the existing exchange arrangement, with redelivery to Texas Eastern in Vermilion Block 262, West Cameron Block 286 and East Cameron Block 312. In addition Petitioners propose to amend the exchange arrangement in Docket No. CP77-568 to permit the existing interconnection of Natural's and Tennessee Gas Pipeline Company, a Division of Tenneco Inc.'s (Tennessee), facilities in Wharton County, Texas, which Natural would use to deliver gas to Tennessee for Texas Eastern's account.

Petitioners assert that this proposal would permit them to move gas supplies to market at a minimal cost.

Comments are due on or before January 28, 1985, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

6. Valero Interstate Transmission Company

[Docket No. CP85-186-000]

January 8, 1985.

Take notice that on December 20, 1984, Valero Interstate Transmission Company (Vitco), P.O. Box 1569, San Antonio, Texas 78296, filed in Docket No. CP85-186-000 an application pursuant to Section 7(b) of the Natural Gas Act for permission and approval for its producer-suppliers to abandon certain sales to Vitco and for Vitco to abandon its resale of gas to Transcontinental Gas Pipe Line Corporation (Transco). Also, pursuant to Section 7(c) of the Natural Gas Act Vitco requests the issuance of a blanket certificate of public convenience and necessity authorizing the sale for resale

of gas by Vitco and its producer-suppliers and transportation of gas in interstate commerce by Vitco, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Vitco states that it obtained authorization to sell Transco three increments of up 70,000 Mcf of gas per day for a daily total of 210,000 Mcf. However, it is stated, Transco has cancelled its contract with Vitco and has significantly reduced its purchases from Vitco.

Vitco states that pursuant to the terms of the February 17, 1959, contract between Vitco and Transco, Transco gave notice of cancellation effective December 12, 1983. It is further stated that on January 10, 1984, Transco filed an application in Docket No. CP-84-183-000 for an order permitting and approving abandonment of its purchase of gas from Vitco. Vitco states that in Transco's application, Transco expressed a concern that the contract between Vitco and Transco has no provision for price reduction. It is stated that Transco subsequently reduced its level of purchase of gas from Vitco from approximately 30,000 Mcf per day to 10,000 Mcf per day.

Vitco asserts that in light of Transco's unwillingness to purchase gas from Vitco and to proceed with negotiations for a new gas purchase contract with Vitco, Vitco must seek abandonment authorization in order to find a market which will purchase a sufficient quantity of gas to keep the Vitco system economically viable and provide a sufficient sales level for Vitco's producers. Consequently, Vitco requests authorization on behalf of itself and its producers for permission and approval to abandon the sale to Transco and to Vitco, respectively.

Vitco asserts that if abandonment authorization is not granted, gas dedicated exclusively to Transco would be shut in to the detriment of Vitco and Vitco's customers. Finally, it is asserted that Vitco's other customers would be harmed if no abandonment authorization is granted because the Vitco rate filing due by June 18, 1985, would approximately double its gathering charge as a result of the decrease in deliveries of gas dedicated to Transco.

Pending completion of long-term gas sales arrangements, Vitco also requests on behalf of itself and its producers a certificate of public convenience and necessity to continue its sale of up to an average of 10,000 Mcf per day of gas to Transco until May 1, 1985, and for authorization to transport and sell surplus gas to new customers until authorization for a long-term sale and/or transporation service, or until December 31, 1985, whichever is earlier. It is stated that Transco has committed to purchase up to 10,000 Mcf per day until May 1, 1984, in order to assist Vitco in securing a firm long-term market. In addition, it is stated, Vitco may be able to locate additional customers pending finalization of a long-term commitment.

Comments are due on or before January 28, 1985, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs:

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1209 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP85-62-000]

Florida Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

January 9, 1985.

Take notice that on December 31, 1984 Florida Gas Transmission Company (FGT) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, 1st Revised Sheet No. 57. The tariff sheet is proposed to be made effective January 1, 1985.

FGT states that this tariff sheet is being filed pursuant to Commission Opinion No. 226 issued September 28, 1984 in Docket No. RP84-85-000, which amended and approved Gas Research Institute's (GRI) 1985 Research and Development Program and Related Five-Year Plan for 1985-1989. The tariff sheet effects the change ordered in Opinion No. 226 that collections of the GRI funding unit be remitted to GRI within fifteen (15) days of receipt.

The Company states that copies of the filing were served upon the Company's jurisdictional customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before January 16, 1985. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1216 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ER85-210-000, et al.]

Kansas Power and Light Co., et al.; Electric Rate and Corporate Regulation Filings

Take notice that the following filings have been made with the Commission:

1. Kansas Power and Light Company

[Docket No. ER85-210-000]

January 9, 1985.

The filing Company submits the following:

Taken notice that on December 31, 1984, the Kansas Power and Light Company (KPL) tendered for filing a newly executed renewal contract dated December 10, 1984, with the City of Altamont, Kansas for wholesale service to that community. KPL states that this contract permits the City of Altamont to receive service under rate schedule WSM-12/83 designated Supplement No. 10 to R.S. FERC No. 172. The proposed effective date is March 7, 1985. The proposed contract change provides essentially for the ten year extension of the original terms of the presently approved contract. In addition, KPL states that copies of the contract have been mailed to the City of Altamont and the State Corporation Commission of Kansas.

Comment date: January 24, 1985, in accordance with Standard Paragraph E at the end of this notice.

2. United Illuminating Company

[Docket No. ER85-211-000]

January 10, 1985.

The filing Company submits the following:

Take notice that on December 31, 1984 United Illuminating Company (UI) tendered for filing a Notice of Termination of Rate Schedule FPC UI No, 9. UI requests an effective date of April 27, 1968.

Copies of this filing have been mailed to the Western Massachusetts Electric Company and the Connecticut Light, Power Company, and the New England Power Company.

Comment date: January 25, 1985, in accordance with Standard Paragraph E at the end of this notice.

3. United Illumination Company

[Docket No. ER85-212-000]

January 10, 1985.

The filing Company submits the following:

Take notice that on December 31, 1984, United Illuminating Company (UI) tendered for filing a Notice of Termination of Rate Schedule FPC UI No. 31. UI requests an effective date of October 31, 1974.

Copies of this filing have been served upon Commonwealth Electric Company.

Comment date: January 25, 1985, in accordance with Standard Paragraph E at the end of this notice.

4. Pacific Power & Light Company

[Docket No. ER84-687-001]

January 9, 1985.

Take notice that on December 17, 1984, Pacific Power & Light Company (Pacific) as assumed business name of PacifiCorp submitted for filing a compliance report pursuant to the Commission's order dated November 16, 1984.

Comment date: January 18, 1985, in accordance with Standard Paragraph H at the end of this notice.

Standard Paragraphs:

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

H. Any person desiring to be heard or to protest this filing should file comments with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, on or before the comment date. Comments will be considered by the Commission in determining the appropriate action to be taken. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1212 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA85-1-14-000 and TA85-1-14-001]

Lawrenceburg Gas Transmission Corp.; Proposed Change in FERC Gas Tariff

January 9, 1985.

Take notice that on January 2, 1985 Lawrenceburg Gas Transmission Corporation (Lawrenceburg) tendered for filing three (3) revised gas tariff sheets to its FERC Gas Tariff, First Revised Volume No. 1, all of which are dated as issued on December 31, 1985 proposed to become effective February 1, 1985:

Thirty-fifth Revised Sheet No. 4
Eleventh Revised Sheet No. 4-B
Thirty-first Revised Sheet No. 18

Lawrenceburg states that its revised tariff sheets were filed under its Purchased Gas Adjustment (PGA) Provision and Incremental Pricing Surcharge Provision.

Copies of this filing were served upon Lawrenceburg's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with § 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such petitions or protests should be filed on or before January 16, 1985. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1217 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP85-59-000]

National Fuel Gas Supply Corp.; Withdrawal of Filing

January 9, 1985.

Take notice that on January 2, 1985, National Fuel Gas Supply Corporation (National) tendered for filing a Notice of Withdrawal of Filing of its proposed FERC Gas Tariff, First Revised Volume No. 1, Rate Schedule E and Form of Service Agreement for sales service that was filed on December 31, 1984, in the above-captioned proceeding.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before January 16, 1985. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file

with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1218 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP84-577-002]

Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff

January 9, 1985.

Take notice that Panhandle Eastern Pipe Line Company (Panhandle) on December 31, 1984 tendered for filing the following sheets to its FERC Gas Tariff, Original Volume No. 2:

Third Revised Sheet No. 1-I, Table of Contents

Original Sheet Nos. 2874 through 2885, Consisting of Rate Schedule LT-4

Panhandle states that this change is made to provide Rate Schedule LT-4 for the transportation of natural gas on behalf of Truckline Gas Company (Trunkline) as authorized by the Commission's Order dated October 29, 1984. Panhandle proposed an effective date of December 1, 1984.

A copy of this filing has been served on Trunkline.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such petitions or protests should be filed on or before January 16, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-1219 Filed 1-15-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP85-169-000, et al.]

United Gas Pipe Line Co., et al., Natural Gas Certificate Filings

Comments are due on the following filings on or before February 25, 1985, in accordance with Standard Paragraph G at the end of this notice.

Take notice that the following filings have been made with the Commission:

1. United Gas Pipe Line Company

[Docket No. CP85-169-000]

January 11, 1985.

Take notice that on December 12, 1984, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77001, filed in Docket No. CP85-169-000 a request pursuant to Section 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to construct and operate a 1-inch sales tap on United's Rusk tap line located north of Rusk, Cherokee County, Texas, under the certificate issued in Docket No. CP82-430-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

United States that the sales tap would enable United to supply an estimated average of 12 Mcf of natural gas per day to Entex, Inc., for resale to the First United Pentacostal Church for residential type use, under United's Schedule DG-N.

United further states it would construct and operate the proposed sales tap and that it has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers.

2. Columbia Gas Transmission Corporation

[Docket No. CP84-228-001]

January 11, 1985.

Take notice that on December 13, 1984, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, SE., Charleston, West Virginia 25314, filed in Docket No. CP84-228-001 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to continue to transport natural gas on behalf of Howmet Aluminum Corporation (Howmet) under the certificate issued in Docket No. CP83-76-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

By request noticed on February 13, 1984, in Docket No. CP84-228-000, pursuant to the prior notice and protest procedure set forth in 18 CFR 157.205 Columbia was authorized to transport up to 3,000 MMBtu equivalent of natural gas per day through November 29, 1984, to Howmet's Lancaster, Pennsylvania, plant. Columbia proposes to continue the transportation through June 30, 1985, on the same terms and conditions.

3. United Gas Pipe Line Company

[Docket No. CP85-168-000]

January 11, 1985.

Take notice that on December 12, 1984, United Gas Pipe Line Company (United), Post Office Box 1478, Houston, Texas 77001, filed in Docket No. CP85-168-000 a request pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to construct and operate a sales tap on United's 6-inch Slidell lateral line located in St. Tammany Parish, Louisiana, under its certificate issued in Docket No. CP82-430-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

United States that the sales tap would enable it to supply an average of 12 Mcf of natural gas per day to Entex, Inc., for resale to the Northshore Shopping Center for commercial use. The service would be provided under United's Rate Schedule DG-N. United further states it has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers.

4. United Gas Pipe Line Company

[Docket No. CP85-157-000]

January 11, 1985.

Take notice that on December 7, 1984, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77001, filed in Docket No. CP85-157-000 a request pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to construct and operate a new sales tap to provide gas to Entex, Inc. (Entex), for resale to the residence of E.W. McPherson in Trinity County, Texas, under the certificate issued in Docket No. CP82-430-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

It is asserted that the 1-inch sales tap would supply Entex with an estimated average of 1 Mcf of natural gas per day for residential use under United's Rates Schedule DG-N.

United states that it has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers.

It is also stated that the proposed sales tap would be located on United's 6-inch Boggy Creek-Huntsville line and that Extex would reimburse United for all installation cost of the tap.

5. Northwest Central Pipeline Corporation)

[Docket No. CP 85-149-000]

January 10, 1985.

Take notice that on December 4, 1984, Northwest Central Pipeline Corporation (Northwest Central), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP85-149-000 a request pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas for an end-user, Georgia-Pacific Corporation (Georgia-Pacific), under the certificate issued in Docket No. CP82-479-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

It is stated that Northwest Central proposes to transport up to 2 billion Btu of natural gas per day on an interruptible basis for Georgia-Pacific for low-priority use in Georgia-Pacific's paper mill in Taylorville, Illinois. Northwest Central submits that its limited-term gas transportation agreement with Georgia-Pacific, dated October 30, 1984, shall continue in effect for one year, subject to either termination upon proper notice or extension beyond such term in accordance with Commission Regulations. Northwest Central states that Georgia-Pacific has entered into a gas purchase contract to purchase gas from Williams Gas Supply Company to be produced from wells in Pawnee, Washington, Payne, and Nowata Counties, all in Oklahoma. Northwest Central proposes to receive the gas at the delivery points listed above and redeliver the gas to Northern Natural Gas Company, Division of InterNorth, Inc. (Northern), for the account of Georgia-Pacific at an existing point of interconnection in Barton County, Kansas. Northwest Central states that Northern would deliver the gas to Panhandle Eastern Pipe Line Company. It is further stated that final transportation of the gas would be made by Central Illinois Public Service Company.

Northwest Central proposes to change Georgia-Pacific in accordance with the then effective rates and provisions, excluding Gas Research Institute and added incentive charge, set forth from time to time in Northwest Central's F.E.R.C. Gas Tariff, Original Volume No. 2.

6. Columbia Gas Transmission Corporation

[Docket No. CP85-179-000]

January 10, 1985.

Take notice that on December 14, 1984, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, SE., Charleston, West Virginia 25314, filed in Docket No. CP85-179-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas on behalf of Corning Glass Works (Corning Glass), under the certificate issued in Docket No. CP83-76-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Columbia proposes to transport up to 3,000 MMBtu equivalent of natural gas per day for Corning Glass through June 30, 1985. Columbia states that the gas to be transported would be purchased from Ohio Gas Marketing and Texas-Ohio Gas Corp. (Sellers) and would be used as boiler fuel and process gas in Corning Class's State College, Pennsylvania, plant.

It is indicated that Columbia has released certain gas supplies of Sellers and that these supplies are subject to the ceiling price provisions of Section 103 of the Natural Gas Policy Act of 1978. Columbia further indicates that a portion of the gas to be transported by it is nonreleased gas. It is further indicated that Corning Glass has made arrangements to purchase this released and nonreleased gas from Sellers. Columbia states that it would receive the gas from Sellers and redeliver the gas to Columbia Gas of Pennsylvania, Inc. (CPA), the distribution company serving Corning Glass, near State College, Pennsylvania. Columbia proposes to charge 29.93¢ per dt equivalent, as set forth in its Rate Schedule TS-1 of Columbia's FERC Gas Tariff. Columbia states that it would retain 2.43 percent of the total quantity of gas delivered into its system for company-use and unaccounted-for gas, as set forth in Columbia's Rate Schedule TS-1.

Standard Paragraph:

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1214 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. QF85-140-000, et al.]

Beker Industries Corp., et al. Conda, ID; Small Power Production and Cogeneration Facilities; Qualifying Status; Certificate Application, etc.

January 10, 1985.

Comments are due on the following filings on or before thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

Take notice that the following filings have been made with the Commission:

1. Beker Industries Corp., Conda, Idaho

[Docket No. QF85-1s40-000]

On December 14, 1984, Beker Industries Corp., (Applicant), of 124 West Putnam Avenue, Greenwich, Connecticut 06836 submitted for filing an application for certification of a facility as a cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Coda, Caribou County, Idaho. The facility will contain a sulphuric acid plant heat-recovery unit. High pressure steam will drive an extraction steam turbine generator. The extracted steam will be used in various processes in other manufacturing units. The electric power production capacity of the facility will be 32.3 MW. The primary energy source will be heat from exothermic reaction and made available to the facility as high pressure steam. The expected date of installation of the facility is May 1, 1985.

2. Beker Industries Corp., Taft, Louisiana

[Docket No. QF85-141-000]

On December 14, 1984, Beker Industries Corp. (Applicant), of 124 West Putnam Avenue, Greenwich, Connecticut 06836 submitted for filing an application for certification of a facility as a cogeneration facility pursuant to

§ 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Taft, St. Charles Parish, Louisiana. The facility will contain a sulphuric acid plant heat-recovery unit. High pressure steam will drive an extraction steam turbine generator. The extracted steam will be used in various processes in other manufacturing units. The electric power production capacity of the facility will be 36 MW. The primary energy source will be heat from exothermic reaction and made available to the facility as high pressure steam. The expected date of installation of the facility is May 1, 1985.

3. Birch Power Company

[Docket No. QF85-126-000]

On December 10, 1984, Birch Power Co. (Applicant), 550 Linden Drive Idaho Falls, Idaho 83401 submitted for filing an application for certification of a facility as a qualifying small power production facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The 3 megawatts hydroelectric utility (P. 7194) will be located near Birch Creek, in Clark County, Idaho.

A separate application is requied for a hydroelectric project license, preliminary permit or exemption from licensing. Comments on such applications are requested by separate public notice. Qualifying status serves only to establish eligibility for benefits provided by PURPA, as implemented by the Commission's regulations, 18 CFR Part 292. It does not relieve a facility of any other requirements of local, State or Federal law, including those regarding siting, construction, operation, licensing and pollution abatement.

Standard Paragraphs:

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-1210 Filed 1-15-85; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPP-240056; FRL-2755-5]

State Registration of Pesticides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received notices of registration of pesticides to meet special local needs under section 24(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, from 17 States. A registration issued under this section of FIFRA shall not be effective for more than 90 days if the Administraton disapproves the registration or finds it to be invalid within that period. If the Administrator disapproves a registration or finds it to be invalid after 90 days, a notice giving that information will be published in the **Federal Register**.

DATE: The last entry for each item is the date the State registration of that product become effective.

FOR FURTHER INFORMATION CONTACT:

Sandra English, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C.

Office location and telephone number: Rm. 726A, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-7116).

SUPPLEMENTARY INFORMATION: Most of the registrations listed below were received by the EPA in August 1984. Receipts of State registrations will be published periodically. Four of the following registrations involve a changed-use pattern and are identified by the abbreviation (CUP). The term "changed-use pattern" is defined in 40 CFR 162.3(k) as a significant change from a use pattern approved in connection with the registration of a pesticide product. Examples of significant changes include, but are not limited to, changes from nonfood to food use, outdoor to indoor use, terrestrial to aquatic use, ground to aerial application, and nondomestic to domestic use.

California

EPA SLN No. CA 84 0205. Nor-Am Chemical Co. Registration is for Ficam ULV to be used in California to control mosquitoes. August 3, 1983.

Florida

EPA SLN No. FL 84 0021. Pfizer, Inc., Chemical Div. Registration is for Floguard/1015 Industrial Microbiocide to be used in coal slurry systems to control slime, foaming bacteria, and fungi. August 2, 1984.

EPA SLN No. FL 84 0022. Mobay Chemical Corp. Registration is for Sencor DF 75% Dry Flowable Herbicide to be used on soybeans to control sicklepod. August 10, 1984.

Idaho

EPA SLN No. ID 84 0011. Stauffer Chemical Co. Registration is for Prefar 4-E Selective Herbicide to be used on bulb onions to control watergrass, redroot pigweed, common lambsquarter, and foxtail. August 23, 1984.

Maine

EPA SLN No. ME 84 0002. Mobay Chemical Corp. Registration is for Mesurol 75% Wettable Powder to be used on tree seeds (nonedible) for nursery plantings to control cowbirds, crows, grackles, morning doves, and sparrows. August 10, 1984.

Maryland

EPA SLN No. MD 84 0006. Velsicol Chemical Corp. Registration is for Ramik Green to be used on dormant bearint and nonbearing fruit tree orchards to control pine voles and meadow voles. (CUP—indoor to outdoor use) August 16, 1984.

Michigan

EPA SLN No. MI 84 0012. Velsicol Chemical Corp. Registration is for Ramik Green to be used on dormant bearing and nonbearing fruit tree orchards to control pine voles and meadow voles. (CUP—indoor to outdoor use) August 14, 1984.

Missouri

EPA SLN No. MO 84 0006. Stauffer Chemical Co. Registration is for ordram 10-G to be used on rice to reduce competition from red rice (*Oryza sativa*) and to suppress sprangletop and barnyard grass. August 21, 1984.

New Hampshire

EPA SLN No. NH 84 0002. Prentiss Drug & Chemical Co. Registration is for Prentox to be used on potatoes, tomatoes, and eggplants to control Colorado potato beetles. August 16, 1984.

New Jersey

EPA SLN No. NJ 84 0016. Dow Chemical Co. Registration is for Tordon 10K Pellets Herbicide to be used on permanent grass pastures to control unwanted woody plants. August 24, 1984.

New Mexico

EPA SLN No. NM 84 0006. FMC Corp. Registration is for Pounce 3.2 EC Insecticide to be used on range grass to control range caterpillars. August 10, 1984.

EPA SLN No. NM 84 0007. Avitrol Corp. Registration is for Avitrol Double Strength Whole Corn to be used in the area of pecan, pistachio, and peanut corps to control crows and ravens. August 14, 1984.

North Dakota

EPA SLN No. ND 84 0003. HGC, Inc. Registration is for Scarecrow to be used on sunflower fields to control blackbirds. August 8, 1984.

Oregon

EPA SLN No. OR 84 0038. Platte Chemical Co. Registration is for Clean Crop Rampart 10-G Systemic Insecticide to be used on field corn to control aphids, mites, and corn earworms. August 2, 1984.

EPA SLN No. OR 84 0039. E.I. Du Pont De Nemours & Co. Registration is for DuPont Glean Herbicide to be used after harvest or on fallow land to burn down Russuan thistle. August 13, 1984.

EPA SLN No. OR 84 0040. Wilbur-Ellis Co. Registration is for Red-Top Dimethoate 2.6 EC to be used on ornamental shade and nursery trees to control aphids. August 16, 1984.

EPA SLN No. OR 84 0041. Stauffer Chemical Corp. Registration is for Prefar 4E Selective Herbcide to be used on bulb onions to control barnyard grass, redroot pigweed, common lambsquarters, and foxtail. August 27, 1984.

Tennessee

EPA SLN No. TN 84 0006. Monsanto Co. Registration is for Roundup Herbicide to be used on grain sorghum to control annual and perennial grasses and broadleaf weeds. August 1, 1984.

Texas

EPA SLN No. TX 84 0018. Soweco, Inc. Registration is for Larvacide 100 to be used on wooden poles and felled logs to control fungi and insects. August 17, 1984.

Vermont

EPA SLN No. VT 84 0003. Velsicol Chemical Crop. Registration is for Ramik Green to be used on dormant bearing and nonbearing fruit tree orchards to control pine voles and meadow voles. (CUP—indoor to outdoor use) August 17, 1984.

Washington

EPA SLN No. WA 84 0002. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used on winter wheat to suppress volunteer rye and downy brome. August 3, 1984.

EPA SLN No. WA 84 0003. Platte Chemical Co. Registration is for Clean Crop Paraquat to be used in wheat/fallow/wheat rotation to control pigweed, mustard, cheat, downy brome, Russian thistle, kochia, field pennycress, lambsquarter, common chickweed, henbit, volunteer wheat, and wild sunflowers. August 3, 1984.

EPA SLN No. WA 84 0004. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used on alfalfa and clover to desiccate ryegrass, bluegrass, downy brome, dogfennel, chickweed, and tansy mustard. August 3, 1984.

EPA SLN No. WA 84 0005. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used in a wheat/fallow/wheat rotation to control pigweed, mustard, cheat, downy brome, Russian thistle, kochia, field pennycress, lambsquarter, common chickweed, henbit, volunteer wheat, and wild sunflowers. August 3, 1984.

EPA SLN No. WA 84 0006. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used in a wheat/fallow/wheat rotation to control pigweed, mustard, cheat, downy brome, Russian thistle, kochia, field pennycress, lambsquarter, common chickweed, henbit, volunteer wheat, and wild sunflowers. August 3, 1984.

EPA SLN No. WA 84 0007. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used in a wheat/fallow/wheat system to control weeds present at time of application. August 3, 1984.

EPA SLN No. WA 84 0008. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used on potatoes to control weeds and grasses. August 3, 1984.

EPA SLN No. WA 84 0009. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used on alfalfa to control bluegrass, henbit, cheat, rescuegrass, chickweed, downy brome, Japanese brome, and shepherdspurse. August 3, 1984.

EPA SLN No. WA 84 0010. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used on alfalfa to control weeds. August 3, 1984.

EPA SLN No. WA 84 0011. Platte Chemical Co. Registration is for Clean Crop Paraquat Plus to be used on alfalfa to control bluegrass, henbit, cheat, rescuegrass, chickweeds, downy brome, Japanese brome, and shepherdspurse. August 3, 1984.

EPA SLN No. WA 84 0060. Wilbur-Ellis Co. Registration is for Red Top Dimethoate 2.67 EC to be used on ornamental shade and nursery trees to control aphids and elm leaf beetles. August 1, 1984.

West Virginia

EPA SLN No. WV 84 0004. Velsicol Chemical Corp. Registration is for Ramik Green to be used on dormant bearing and nonbearing fruit tree orchards to control pine voles and meadow voles. (CUP—indoor to outdoor use) August 6, 1984.

(Sec. 24, as amended, 92 Stat. 835 (7 U.S.C. 136))

Dated: December 31, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

[FR Doc. 85-864 Filed 1-15-85; 8:45 am]

BILLING CODE 6560-50-M

[PF-399; FRL-2756-3]

Mobay Chemical Corp.; Pesticide Tolerance Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received pesticide, food and feed additive petitions relating to the establishment and/or withdrawal of tolerances for certain pesticide chemicals in or on certain agricultural commodities.

ADDRESS: By mail, submit comments identified by the document control number [PF-399] and the petition number, attention Product Manager (PM-21), at the following address:

Information Services Section (TS-757C), Program Management and Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

In person, bring comments to: Information Services Section (TS-757C), Environmental Protection Agency, Rm. 236, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with

procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments filed in response to this notice will be available for public inspection in the Information Services Section office at the address given above, from 8 a.m., to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail:

Henry Jacoby, (PM-21), Registration Division (TS-767C), Environmental Protection Agency, Office of Pesticide Programs, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 229, CM No. 2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703-557-1900).

SUPPLEMENTARY INFORMATION: EPA has received pesticide (PP) and food/feed additive petitions (FAP) from Mobay Chemical Corporation, P.O. Box 4913 Hawthorne Road, Kansas City, MO 64120, relating to the establishment and/or withdrawal of tolerances for certain pesticide chemicals in or on certain agricultural commodities.

I. Initial Filings

1. *PP 4F3155.* Mobay Chemical Corp. Proposes to amend 40 CFR Part 180 by establishing tolerances for the combined residues of the fungicide beta-(4-chlorophenoxy-alpha-(1,1-dimethylethyl)-1*H*-1,2,4-triazole-1-ethanol and its metabolite 4-(4-chlorophenoxy)-2,2-dimethyl-4-(1*H*1, 2, 4-triazol-1-yl)-1,3-butanediol in or on the commodities sorghum, grain at 0.05 part per million (ppm) and surghum, dry forage and green forage at 0.01 ppm. The proposed analytical method for determining residues is gas chromatographic using a nitrogen-specific detector.

2. *FAP 4H5445.* Mobay Chemical Corp. Proposes amending 21 CFR Part 193 (food) and 561 (feed) by establishing a regulation permitting residues of the above fungicide in or on the commodities as follows:

CFR affected	Commodities	Part per million (ppm)
21 CFR Part 193	Grape juice	0.6
21 CFR Part 561	Grape ponace	2.5
	Raisin Waste	1.8

3. *PP 4F3148 & FAP 4H5443.* Mobay Chemical Corp. proposes amending 40 CFR 180.410 (raw agricultural commodities) and 21 CFR Parts 193 (food) and 561 (feed) by establishing tolerances for the combined residues of the fungicide 1-(4-chlorophenoxy)-3,3-dimethyl-1-(1H-1,2,4-triazol-1-yl)-2-butanone and its metabolite beta-(4-chlorophenxy)-alpha-(1,1-dimethlethyl)-H-1, 2, 4-triazol-1-ethanol in or on the commodities as follows:

Petition ID	CFR affected	Commodities	Part per million (ppm)
PP 4F3148	40 CFR 180.410	Tomatoes	0.2
FAP 4H5443	21 CFR Part 193	Tomato catsup	1.0
		Tomato paste	1.0
FAP 4H5443	21 CFR Part 561	Tomato dry pomace	4.0
		Tomato wet pomace	2.0

The proposed analytical method for determining residues is gas liquid chromatography.

4. *PP 5E3168.* Mobay Chemical Corp. proposes amending 40 CFR 180.410 by establishing a tolerance for the combined residues of the above fungicide (PP 4F3148) in or on Mangoes at 0.07 ppm. The proposed analytical method for determining residues is gas chromatography with a nitrogen-specific alkali flame detector.

II. Petition Withdrawal

PP 0F2349. Mobay Chemical Corp. EPA issued a notice published in the **Federal Register** of June 13, 1980 (45 FR 40218) which announced that Mobay Chemical Corp., had submitted pesticide petition 0F2349 to the Agency proposing to amend 40 CFR Part 180 by establishing tolerances for the combined residues of the above funigicide (PP 4F3148) in or on the commodities grapes (fresh) and melons at 0.2 ppm.

Subsequently, Mobay Chemical Corp. proposed a tolerance for the crop group cucurbits (pp 3F2887, 48 FR 32077, July 13, 1983) at 0.3 ppm. The crop group cucurbits includes the commodity melons. In the **Federal Register** of April 22, 1981 (46 FR 22983), Mobay reproposed under PP 1F2474 a higher tolerance level for grapes at 1.0 ppm.

Accordingly, Mobay Chemical Corp. has withdrawn PP 0F2349.

(Sec. 408(d)(2) 68 Stat. 512 (21 U.S.C. 346a(d)(2)), 409(c)(1), 72 Stat. 1786 (21 U.S.C. 348(c)(1))

Dated: December 28, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 85-858 Filed 1-15-85; 8:45 am]

BILLING CODE 6560-50-M

Science Advisory Board; Closed Meeting

[SAB-FRL-2757-6]

Under Pub. L. 92-463, notice is hereby given that a meeting of an ad-hoc Subcommittee of the Science Advisory Board will be held in Washington, D.C. on January 31 and February 1, 1985 to determine the recipients of the Agency's 1984 Scientific and Technological Achievement Cash Awards. These awards are established to give honor and recognition to EPA employees who have made outstanding contributions in the advancement of science and technology through their research and development activities, and who have published their results in peer reviewed journals.

Pursuant to section 10(d) of the U.S.C. Appendix 1 and 5 U.S.C. 522(c), I hereby determine that this meeting is concerned with information exempt from disclosure, and that the public interest requires that this meeting be closed.

In selecting the recipients for the awards, and in determining the actual cash amount of each award, the Agency requires full and frank advice from the Science Advisory Board. This advice will involve professional judgments on those employees who published research results are deserving of a cash award as well as those that are not. In addition, the Board will advise on the amount of money to be allocated for each award. Discussions of such a personal nature, where disclosure would constitute an unwarranted invasion of personal privacy, are exempted under section 10(d) of Title 5, U.S. Code, Appendix 1. In accordance with the provisions of the Federal Advisory Committee Act, minutes of the meeting will be kept for Agency and Congressional review.

The Science Advisory Board shall be responsible for maintaining records of the meeting, and for providing an annual report setting forth a summary of the meeting consistent with the policy of U.S.C. Appendix 1, section 10(d).

Dated: January 10, 1985.

Lee M. Thomas,

Acting Administrator.

[FR Doc. 85-1234 Filed 1-15-85; 8:45 am]

BILLING CODE 6560-50-M

[OPP-30085A; FRL-2757-3]

FY 84/85 Pesticide Registration Standards and Special Reviews and Data Call-In Schedule for Review and/or Issuance; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correction notice.

SUMMARY: In FR Doc. 84-33119 published in the **Federal Register** of December 20, 1984 (49 FR 49544), in the second column of page 49547 under the heading Special Review in Fiscal Year 1984—Continued, Position Document 4 (PD 4) was listed incorrectly for Larvadex. This document corrects the listing to read "Larvadex . . . PD 2/3."

FOR FURTHER INFORMATION CONTACT: By mail: Cheryl Smith, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460. Office location and telephone number: Rm. 1114, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-0592).

Dated: January 3, 1985.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 85-1089 Filed 1-15-85; 8:45 am]

BILLING CODE 6560-50-M

[OPP-00191A; PH-FRL 2758-6]

FIFRA Scientific Advisory Panel; Supplemental Notice of Closed Meeting of Subpanel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: A notice of a closed meeting to be held on January 22, 1985, of a subpanel of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel was published in the **Federal Register** on January 10, 1985 (50 FR 1272). This Supplemental Notice explains the reasons for providing less than 15 days notice of the meeting and explains in greater detail the reasons why the meeting is being closed.

FOR FURTHER INFORMATION CONTACT:

By mail: Philip H. Gray, Jr., Executive Secretary, FIFRA Scientific Advisory Panel, Office of Pesticide Programs (TS-766C), 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 1117, Crystal Mall, Building No. 2, Arlington, VA, (703-557-7096).

SUPPLEMENTARY INFORMATION:

A. Notification Period

The Federal Advisory Committee Act (FACA) (5 U.S.C. App. I 1982)) requires that timely notice of each meeting of an advisory committee be published in the **Federal Register.** The interim regulations of the General Services Administration (GSA) (41 CFR Part 101 through 106 implementing FACA generally require 15 days notice, but permit less than 15 days notice under exceptional circumstances, provided that the reasons for doing so are included in the meeting notice. Although signed by the Acting Administrator on January 8, 1985, the meeting notice was not published until January 10, thereby falling short of the time period prescribed by GSA. The reasons for providing less than 15 days notice are detailed below.

The subpanel is to meet in order to review a notification submitted to EPA by Advanced Genetic Sciences, Inc. (AGS) concerning its intent to conduct small scale field studies with a genetically altered microbial pesticide. The notification from AGS was the first one received by EPA pursuant to its Interim Policy on Small Scale Field Testing, published in the **Federal Register** of October 17, 1984 (49 FR 40659), and the procedures for handling such notifications are still being developed. the decision by EPA that the notification should be considered by the subpanel was not made until late December 1984. Because of the holidays it was difficult locating subpanel members to establish a mutually convenient meeting date. The first such date was January 22, 1985. EPA could not delay the meeting beyond that date because, under the interim Policy, EPA has 90 days to evaluate the notification submitted by AGS. EPA's evaluation must be completed by February 2, 1985. Thus, EPA will have only a short period after the scheduled meeting to obtain recommendations from the subpanel, consider these recommendations, make its decision, and notify AGS.

B. Reasons for Closed Meetings

Section 10(d) of FACA provides that an advisory committee meeting may be closed to the public "in accordance with subsection (c) of section 552b of Title 5." The January 22, 1985 meeting of the subpanel is being closed because the material to be considered at the meeting consists of trade secrets and commercial or financial information obtained from a person and privileged or confidential pursuant to 5 U.S.C. 552b(c)(4) and section 10(b) of FIFRA. A written determination that the meeting shall be closed was made by the Acting Administrator on January 8, 1985, pursuant to section 10(d) of FACA for the following reasons:

1. The AGS submission contains Confidential Business Information.

2. Making the submission public would disclose information that could do substantial harm to AGS' competitive position.

3. The AGS product is at an early stage of development, i.e., 1 to 3 years before the company would normally request a registration from EPA. Thus, AGS is anxious to protect its product for as long as possible, in order to prevent competitors from unfairly benefitting from its research and development efforts.

The Agency intends to make a verbatim transcript of the subpanel meeting. If, upon review of that transcript, EPA should determine that any portions of the transcript do not contain exempt material, EPA will make those portions of the transcript available to the public.

Dated: January 14, 1985.

John A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 85-1437 Filed 1-15-85; 9:11 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

Inactive Tariffs; Bureau of Tariffs Order

By Notice published in the **Federal Register** on November 28, 1984, the Commission notified the carriers named therein of its intent to cancel their domestic offshore tariffs 30 days thereafter, in the absence of a showing of good cause why such tariffs should not be cancelled.

The Notice was served on 39 carriers by certified mail on November 21, 1984; of the 39 three carriers replied to the Notice requesting that their tariffs remain active. Accordingly, the tariffs of the following carriers will be retained in the Commission's files as active:

Caribbean Project Lines, c/o Logistics Agency Ltd., 725 Market Street, Wilmington, Delaware 19801

Marine Shippers, Inc., 1343 Logan Avenue, Costa Mesa, California 92626

Pan American Express, Inc., Division Street, Chicago, Illinois 60622

Six carriers responded by requesting the cancellation of their tariffs; five carriers acknowledged receipt of the Notice that was served, but did not respond; and four carriers failed to acknowledge receipt of the Notice. The

Notice served on 21 of the carriers was returned as undeliverable, indicating that they were no longer located at the address shown in the Commission's files.

It is misleading to the public, potentially unfair to competing carriers, and an administrative burden on the Commission's staff for inactive tariffs to be kept on file. Inactive tariffs contravene the implicit requirements of 46 CFR 550.3 which necessitate the prompt submission of accurate information concerning the services offered by a common carrier including the suspension of all or any of the operations described in its published tariffs.

Therefore, it is ordered, That pursuant to 46 CFR 550.3, the tariffs identified on the attached Appendix are cancelled.

It is fruther ordered, That this Order be published in the **Federal Register** and a copy thereof be filed with the tariffs.

By the Commission pursuant to authority delegated by section 9.04 of Commission Order No. 1 (Revised) dated November 12, 1981.

Eugene P. Stakem,

Deputy Director, Bureau of Tariffs.

Appendix

Aleut-Alaska Shipping Company, 600 S. Brandon, Seattle, Washington 98108 ..... FMC-F No. 2
Aleut-Alaska Shipping Company, 600 S. Brandon, Seattle, Washington 98108 ..... FMC-F No. 3
Alexander & Associates, 112 Erie Avenue, Seattle, Washington 98122 ..... FMC-F No. 2
Alse Almacen Inc., G.P.O. Box 884, San Juan, Puerto Rico 00936 ..... FMC-F No. 1
Atlantic Consolidators, Inc., 2500. 83rd Street, North Bergen, New Jersey 07047 ..... FMC-F No. 1
Cal-Hawaii Freight Systems, Inc., 5901 South Eastern Avenue, Commerce, California 90040 ..... FMC-F No. 2
Cal-Hono Freight Forwarders, Inc., 1740 E. 4th Street, Los Angeles, California 90033 ..... FMC-F No. 1
California Freight Specialists, Inc., 111 San Leandro Boulevard, San Leandro, California 94577 ..... FMC-F No. 5
California Freight Specialists, Inc., 111 San Leandro Boulevard, San Leandro, California 94577 ..... FMC-F No. 6
California Freight Specialists, Inc., 111 San Leandro Boulevard, San Leandro, California 94577 ..... FMC-F No. 7
Caribbean Express Corp., 3751 W. North Avenue, Chicago, Illinois 60647 ..... FMC-F No. 3

Appendix—Continued

Caribbean Freight Service, Inc., 11102 Downs Road, Pineville, North Carolina 28134 ..... FMC-F No. 1
Caribe Shipping, Inc., 24 Dodworth Street, Brooklyn, New York 11221 ..... FMC-F No. 3
Christie-Lambert Van & Storage Co., Inc., 1010 6th Avenue N. Kent, Washington 98031 ..... FMC-F No. 1
Coastal Barge Lines, Inc., 834 Nickerson Street, Seattle, Washington 98111 ..... FMC-F No. 3
Divesco International P.O. Box 100-Ortega Station, Jacksonville, Florida 32210 ..... FMC-F No. 1
Econofreight Caribbean, Inc., G.P.O. Box 70155, San Juan, Puerto Rico 00936 ..... FMC-F No. 1
Gem Shipping Service, 305 Valasco Street, Houston, Texas 77003 ..... FMC-F No. 3
Ghezzi Trucking, Inc., 2517 N.W. 195 Place, Seattle, Washington 98177 ..... FMC-F No. 5
Hawaiian Container Corporation, 730 11th Street, Oakland, California 94606 ..... FMC-F No. 2
Intermodal Freight Transportation, Inc., P.O. Box 3506, Carolina, Puerto Rico 00630 ..... FMC-F No. 1
Islands Freight Transportation, Inc., P.O. Box 4374, Carolina, Puerto Rico 00630 ..... FMC-F No. 2
Key Warehouse Corp., P.O. Box 524282, Miami, Florida 33152 ..... FMC-F No. 3
La Isla Transport Corp., 166 South 1st Street, Brooklyn, New York 11211 ..... FMC-F No. 2
Maislin Transport of Delaware, Inc., 50 Harrison Avenue, Kearny, New Jersey 07032 ..... FMC-F No. 1
Maritime Transportation Resources, Inc., Apartado 13641, Santurce, Puerto Rico 00908 ..... FMC-F No. 1
Ocean Freight Consolidators, Inc., P.O. Box 527, Mataway, New Jersey 07747 ..... FMC-F No. 1
Presto Shipping Inc., 14021 S.W. 56th Terrace, Miami, Florida 33183 ..... FMC-F No. 1
Sea Freight Forwarders, P.O. Box 5960, Ketchikan, Alaska 99901 ..... FMC-F No. 3
Seabridge Freight Systems, Inc., 214 South Santa Fe Avenue, Los Angeles, California 90012 ..... FMC-F No. 2
Smith Lighterage Company, Box 106, Dillingham, Alaska 99576 ..... FMC-F No. 6
St. Croix Freight Forwarders, Inc., 3320 N.W. 48th Street, Miami, Florida 33142 ..... FMC-F No. 1
Thru-Island Express, Inc. 63-69 Hook Road, Bayonne, New Jersey 07002 ..... FMC-F No. 2

Appendix—Continued

Trans-Pacific Freigthways Corp., P.O. Box 17789, Honolulu, Hawaii 96817 ..... FMC-F No. 1
Twin Express, Inc., 1810 Tonnelle Avenue, North Bergen, New Jersey 07047 ..... FMC-F No. 7
Twin Express, Inc., 1810 Tonnelle Avenue, North Bergen, New Jersey 07047 ..... FMC-F No. 8
Twinex Transport Corporation, P.O. Box 522832, Miami, Florida 33152 ..... FMC-F No. 1
Unifreight Corporation, G.P.O. Box 6001, San Juan, Puerto Rico 99036 ..... FMC-F No. 2
Virgin Island Run East Express, Inc., P.O. Box 478, Sabana Seca Station, Puerto Rico 00749 ..... FMC-F No. 1

[FR Doc. 85-1252 Filed 1-15-85; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

First United Corp., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that request a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than February 7, 1985.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *First United Corporation,* Oakland, Maryland; to become a bank holding company by acquiring 100 percent of the voting shares of First United National Bank & Trust, Oakland, Maryland.

B. **Federal Reserve Bank of St. Louis** (Delmer P. Weisz, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Carlisle Bancshares, Inc.,* Little Rock, Arkansas; to become a bank holding company by acquiring 97.2 percent of the voting shares of Grand Prairie Bancshares, Inc., Carlisle, Arkansas, thereby indirectly acquiring Citizens Bank and Trust, Carlisle, Arkansas.

Board of Governors of the Federal Reserve System, January 10, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-1190 Filed 1-15-85; 8:45 am]

BILLING CODE 6210-01-M

Greater Metro Bank Holding Co., et al.; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1)) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo;* either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resource, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 5, 1985.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Greater Metro Bank Holding Company,* Aurora, Colorado; to engage *de novo* through its subsidary, Greater Metro Insurance Agency, Inc., Aurora, Colorado, in the sale of credit related life accident and health insurance.

B. **Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Franciso, California 94105:

1.0 *First Interstate Bancorp,* Los Angeles, California; to engage directly in providing portfolio investment advice and furnished general economic information and advice to its franchisee bank. Comments on this application must be received no later than January 30, 1985.

Board of Governors of the Federal Reserve System, January 10, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-1191 Filed 1-15-85; 8:45 am]

BILLING CODE 6210-01-M

Elm Marine Bancshares, Inc., et al.; Formation of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than February 8, 1985.

A. **Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Elm Marine Bancshares, Inc.,* Elmhurst, Illinois; to acquire 100 percent of the voting shares of The St. Charles National Bank, Saint Charles, Illinois.

2. *FINB Holding Corp.,* Bettendorf, Iowa; to become a bank holding company by acquiring 100 percent of the voting shares of First Illinois National Bank, Savanna, Illinois.

3. *Royce Bancorporation, Inc.,* Omaha, Nebraska; to become a bank holding company by acquiring 96 percent of the voting shares of The First National Bank of Fonda, Iowa.

4. *University Bancorp, Inc.,* University Park, Illinois; to become a bank holding company by acquiring 80 percent or more of the voting shares of Heritage Bank of University Park, University Park, Illinois.

B. **Federal Reserve Bank of Dallas** (Anthony J. Montelaro, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *Texas State Bancshares, Inc.,* El Paso, Texas; to become a bank holding company by acquiring 69.8 percent of the voting shares of Bank of Sierra Blanca, Sierra Blanca, Texas.

Board of Governors of the Federal Reserve System, January 11, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-1264 Filed 1-15-85; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 79P-0060 et al.]

Availability of Approved Variances for Laser Light Shows

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that variances from the performance standard for laser products have been approved by FDA's Center for Devices and Radiological Health (CDRH) for eight organizations that manufacture and produce laser light shows, light

show projectors, or both. The projector provides a laser light display to produce a variety of special lighting effects. The principal use of these products is to provide entertainment to general audiences.

DATES: The effective dates and termination dates of the variances are listed in the table below under "Supplementary Information."

ADDRESS: The applications and all correspondence on the applications have been placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Tracy Summers, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: Under § 1010.4 (21 CFR 1010.4) of the regulations governing establishment of performance standards under section 358 of the Radiation Control for Health and Safety Act of 1968 (42 U.S.C. 263f), FDA has granted each of the eight organizations listed in the table below a variance from § 1040.11(c) (21 CFR 10.40.11(c)) of the performance standard for laser products.

Each variance permits the listed manufacturer to introduce into commerce a demonstration laser product assembled and produced by the manufacturer, which is its particular variety of laser light show, laser light show projector, or both. Each laser product involves levels of accessible laser radiation in excess of Class II levels but not exceeding those required to perform the intended function of the product.

CDRH has determined that suitable means of radiation safety and protection are provided by constraints on the physical and optical design, by warnings in the user manual and on the products, and by procedures for personnel who will operate the products. Therefore, on the effective dates specified in the table below, FDA approved the requested variances by letter to each manufacturer from the Deputy Director of CDRH.

So that each product may show evidence of the variance approved for the manufacturer of the product, each product shall bear on the certification label required by § 1010.2(a) (21 CFR 1010.2(a)) a variance number, which is the FDA docket number, and the effective date of the variance as specified in the table below.

Docket No.	Organization granted the variance	Demonstration laser product	Effective date/ termination date
79P-0060 (extension)	Laser Presentations, Inc., 3900 Fisher Road, A., Columbus, OH 43228	Laser Presentations Class IIIb or Class IV LP Model Series laser projectors and laser light shows known as Laser 1 or Laser Space Theatre assembled and produced by Laser Presentations, Inc., containing the Model LP-4 or LP-4K(1) projectors.	Oct. 29, 1984 to Oct 29, 1986.
80P-0157 (amendment)	Image Engineering Corp., 10 Beacon Street, Somerville, MA 02143.	Laser light show for the Goodyear tradeshow booth exhibit	Oct.4, 1984 to June 11, 1986.
80P-0214 (extension)	Laser Presentations, Inc., 3900 Fisher Road, A., Columbus, OH 43228.	Laser Space Theatre Sky Beacon Display manufactured, assembled, and produced by Laser Presentations, Inc., containing an Argon ion laser with a maximum output power of 2 watts.	Oct. 29, 1984 to Oct 29, 1986.
80P-0448 (extension)	Laser Presentations, Inc., 3900 Fisher Road, A., columbus, OH 43228.	Room Laser Shows produced by Laser Presentations, inc., utilizing projectors from their LP Series.	Do.
84V-0082	Tau Beta Pi Association, California Epsilon Chapter, 5800 Boelter Hall, U.C.L.A. Campus, Los Angeles, CA 90024.	Tau Beta Pi, California Epsilon Chapter LASERAMA laser light show incorporating the argon and helium--neon Class IIIb LASERAMA Laser Projector, Model 1984-2.	Oct. 29, 1984 to Oct 29, 1985.
84V-0335	La Mama Experimental Theatre Club, inc., 66 East 4th Street, New York, NY 10003.	Compagnia Teatrale Krypton laser projector and laser light show	Sept. 28, 1984 to Sept. 28, 1985.
84V-0356	S.E.C.T., Inc., dba S.E.C.T. Theatrical Supplies, Inc., 406 East 18th Street, Kansas City, MO 64108.	Laser light shows assembled and produced by S.E.C.T., Inc., d.b.a. S.E.C.T. Theatrical Supplies, Inc., containing the class IV Model I Laser Projector incorporating an argon ion laser.	Oct. 19, 1984 to Oct 19, 1986.
84V-0357	Dallas Sidekicks c/o Reunion Arena, 777 Sports Street, Dallas, TX 75207.	Sidekicks Laser Show and the incorporated Class IV argon Laser Porjection System	Oct. 29, 1984 to Oct 29, 1986.

In accordance with § 1010.4, the applications and all correspondence on the applications have been been placed on public display under the designated docket number in the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m. Monday through Friday.

Dated: January 9, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-1184 Filed 1-15-85; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 82P-0286 et al.]

Availability of Approved Variances for Laser Products

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that variances from the performance standard for laser products have been approved by FDA's Center for Devices and Radiological Health (CDRH) for various models of laser products manufactured by three organizations. Two of the laser products are used in a variety of surgical procedures while the other is a measurement system.

DATES: The effective dates and termination dates of the variances are listed in the table below under "Supplementary Information."

ADDRESS: The applications and all correspondence on the applications have been placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Tracy Summers, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: Under § 1010.4 (21 CFR 1010.4) of the regulations governing establishment of performance standards under section 358 of the Radiation Control for Health and Safety Act of 1968 (42 U.S.C. 263f), FDA has granted each of the three organizations listed in the table below a variance from requirements of the performance standard for laser products (21 CFR 1040.10). FDA has granted approval for the listed products to vary as specified from that portion of § 1040.10(f)(6) requiring a beam attenuator to reduce laser radiation output to below Class I limits. All other provisions of § 1040.10 remain applicable to the listed laser products.

CDRH has determined that: (a) The requirement of § 1040.10(f)(6) is not appropriate for the product; and (b)

suitable means of radiation safety and protection are provided by the existing equipment design and by conditions imposed by the terms of the variances. Therefore, on the effective dates specified in the table below, FDA approved the requested variances by letter to each manufacturer from the Deputy Director of CDRH.

So that each product may show evidence of the variance approved for the manufacturer of the product, each product shall bear on the certification label required by § 1010.2(a) (21 CFR 1010.2(a)) a variance number, which is the FDA docket number, and the effective date of the variance as specified in the table below.

Docket No.	Organization granted the variance	Laser Product	Effective date/ termination date
82P-0286	Autech Corporation, 7060 Huntly Road, Columbus, OH 43229.	Autech laser measurement systems	Aug. 6, 1984 to Aug. 6, 1989.
83V-0253	Advanced Biomedical Instruments, 4 Plympton Street, Woburn, MA 01801.	Biolas 80S surgical CO laser system with HeNe[2] guide beam	Oct. 22 1984 to Oct. 22, 1989.
83V-0380	Directed Energy, Inc., 17931 Skypark Circle, Suite E, Irvine, CA 92714.	Hand-held CO_2 laser system for cardiovascular, arthroscopic, and ophthalmic surgery.	Do.

In accordance with § 1010.4, the applications and all correspondence on the applications have been placed on public display under the designated docket number in the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 9, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-1182 Filed 1-15-85; 8:45 am]

BILLING CODE 4160-01-M

[Docket Nos. 84V-0122 et al.]

Availability of Approved Variances for Sunlamp Products

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that variances from the performance standard for sunlamp products have been approved by FDA's Center for Devices and Radiological Health (CDRH) for certain specified sunlamps and sunlamp products manufactured or imported by five organizations. The intended use of the products is to produce ultraviolet radiation for tanning the skin.

DATES: The effective dates and termination dates of the variances are listed in the table below under "Supplementary Information."

ADDRESS: The applications and all correspondence on the applications have been placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Tracy Summers, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: Under § 1010.4 (21 CFR 1010.4) of the regulations governing establishment of performance standards under section 358 of the Radiation Control for Health and Safety Act of 1968 (42 U.S.C. 263f), FDA has granted each of the five organizations listed in the table below a variance from certain requirements of the performance standard for sunlamp products (21 CFR 1040.20). FDA has granted approval for the listed products to vary as specified from the portion of § 1040.20(c)(2)(ii) requiring the maximum timer interval for a sunlamp product to be 10 minutes or less. All other provisions of § 1040.20 remain applicable to the listed sunlamp products and ultraviolet lamps.

Each of the variances for the nominally ultraviolet-A (UVA) sunlamp products permits the listed manufacturer or importer to introduce into commerce sunlamp products that have less than 5 percent of their ultraviolet radiation at wavelengths shorter than 320 nanometers. FDA's experience with the kind of sunlamp product indicates that the relatively lengthy exposure recommended by the manufacturer does not result in severe acute skin burns or corneal injury. Therefore, some of the requirements of § 1040.20 are not appropriate for these UVA products. Even though the skin hazard is reduced, there is still a need to wear protective eyewear to eliminate the unnecessary risk to chemically sensitized lenses or of cornea damage or of long-term development of lens opacities.

CDRH has determined that suitable and/or alternate means of radiation protection are proved by constraints on the physical and optical design and by warnings in the user manual and on the products for all of the variances in lieu of the requirement that was determined to be inappropriate. Therefore, on the dates specified in the table below, FDA approved the requested variances by letter to each manufacturer or importer from the Deputy Director of CDRH.

So that each product may show evidence of the variance approved for the manufacturer or importer of that product, each product shall bear on the certification label required by § 1010.2(a) (21 CFR 1010.2(a)) a variance number, which is the FDA docket number, and the effective date of the variance as specified in the table below.

Docket No.	Organization granted the variance	Sunlamp product	Effective date/ termination date
84V-0122	Ultrabronz Ltd., Alma Mill, Crompton Road, Macclesfield, Cheshire, England.	UVA sunlamp products manufactured by Ultrabronz Ltd	Oct. 12, 1984 to Oct. 12, 1989.
84V-0318	Philips International B.V., P.O. Box 225, 9700 AE Groningen, Eindhoven Nederland, Holland.	UVA Solaria manufactured by Philips International B.V	Do.
84V-0324	Manufacutred Tan International AB, Fabriksgatan 8, P.O. Box 162, S-570 80 Virserum, Sweden.	UVA tanning devices manufactured by Manufactured Tan International AB	Do.
84V-0333	International Solarium Manufacturer, Inc., 7005 Tujunga Avenue, North Hollywood, CA 91605.	UVA suntanning bed for home or commercial use manufactured by International Solarium Manufacturer, Inc.	Oct. 30, 1984 to Oct. 30, 1989.
84V-0343	An-Mar International, Ltd., 3101 North Cicero Avenue, Chicago, IL 60641.	UVA suntanning products manufactured by An-Mar International, Ltd	Nov. 2, 1984 to Nov. 2, 1989.

In accordance with § 1010.4, the applications and all correspondence on the applications have been placed on public display under the designated docket number in the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 9, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-1183 Filed 1-15-85; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 84M-0438]

Dornier System, GMBH; Premarket Approval of the Dornier Lithotripter, Model HM3

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Dornier System GmbH, c/o Onek, Klein, & Farr, Washington, DC, for premarket approval, under the Medical Device Amendments of 1976, of the Dornier Lithotripter, Model HM3. After reviewing the recommendation of the Gastroenterology-Urology Devices Panel, FDA notified the applicant that FDA approved the application because the applicant had shown the device to be safe and effective for use as recommended in the submitted labeling.

DATE: Petitions for administrative review by February 15, 1985.

ADDRESS: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Arthur A. Ciarkowski, Center for Devices and Radiological Health (HFZ-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION: On February 22, 1984, Dornier System GmbH, c/o Onek, Klein, & Farr, Washington, DC 20037, submitted to FDA an application for premarket approval of the Dornier Lithotripter, Model HM3. The device is an extracorporeal shock wave lithotripter which consists of a water bath and water treatment system, a shock wave generator and shock wave focusing apparatus, and an upper urinary stone visualization system (x-ray) and patient positioning system. The device is indicated for use in the disintegration of upper urinary stones, i.e., renal calyx stones, renal pelvic stones, and upper ureteral stones. The Gastroenterology-Urology Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On December 19, 1984, FDA approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, Center for Devices and Radiological Health.

A summary of the safety end effectiveness data on which FDA based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at the Center for Devices and Radiological Health—contact Arthur A. Ciarkowski (HFZ-420), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorized any interested person to petition under section 515(g) of the act (21 U.S.C. 360e(g)) for administrative review of FDA's decision to approve this application. A petitioner may request either a formal hearing under Part 12 (21 CFR Part 12) of FDA's administrative practices and procedures regulations or a review of the application and of FDA's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration of FDA's action under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register.** If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before February 15, 1985 file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 9, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-1186 Filed 1-15-85; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 84-M-436]

Hybritech Incorporated; Premarket Approval of Tandem®-R CEA Immunoradiometric Assay

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Hybritech Incorporated, San Diego, CA, for premarket approval, under the Medical Device Amendments of 1976, of the TANDEM®-R CEA Immunoradiometric Assay. After reviewing the recommendation of the Immunology Devices Panel, FDA notified the applicant that FDA approved the application because the applicant had shown the device to be safe and effective for use as recommended in the submitted labeling.

DATE: Petitions for administrative review by February 15, 1985.

ADDRESS: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Srikrishna K. Vadlamudi, Center for Devices and Radiological Health (HFZ-402), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7550.

SUPPLEMENTARY INFORMATION: On April 17, 1984, Hybritech Incorporated, San Diego, CA 92121, submitted to FDA an application for premarket approval of the TANDEM®-R CEA Immunoradiometric Assay. The TANDEM®-R CEA Immunoradiometric Assay is an immunological test system used as an aid in the prognosis and management of cancer patients. The TANDEM®-R CEA Immunoradiometric Assay is an in vitro device indicated for the quantitive measurement of

carcinoembryonic antigen (CEA) in human serum to be used as an aid in the prognosis and management of cancer patients in whom changing concentrations of CEA are observed. On June 29, 1984, the Immunology Devices Panel, and FDA advisory committee, reviewed and recommended approval of the application. On December 18, 1984, FDA approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, Center for Devices and Radiological Health.

A summary of the safety and effectiveness data on which FDA based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at the Center for Devices and Radiological Health—contact Srikrishna K. Vadlamudi (HFZ-440), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorized any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of FDA's decision to approve this application. A petitioner may request either a formal hearing under Part 12 (21 CFR Part 12) of FDA's administrative practices and procedures regulations or review of the application and of FDA's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration of FDA's action under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before February 15, 1985, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 9, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-1185 Filed 1-15-85; 8:45 am]

BILLING CODE 4160-01-M

Drug Abuse Advisory Committee; Meeting Amendment

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is amending an advisory committee meeting notice of the Drug Abuse Advisory Committee to reflect the deletion of one agenda item and that the committee will meet on January 17 only. The announcement of the Drug Abuse Advisory Committee meeting, which was published in the **Federal Register** of December 24, 1984 (49 FR 49939), is revised to read as follows:

Drug Abuse Advisory Committee

Date, time, and place. January 17, 9 a.m., Conference Rms. G and H, Parklawn Bldg., 5600 Fishers Lane, Rockville, MD.

Type of meeting and contact person. Open public hearing, 9 a.m. to 10 a.m.; open committee discussion, 10 a.m. to conclusion; Frederick J. Abramek, Center for Drugs and Biologics (HFN-120), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4020.

General function of the committee. The committee advises the Commissioner of Food and Drugs regarding the scientific and medical evaluation of all information gathered by the Department of Health and Human Services and the Department of Justice with regard to safety, efficacy, and abuse potential of drugs or other substances and recommends actions to be taken by the Department of Health and Human Services with regard to marketing, investigation, and control of such drugs or other substances.

Agenda—Open public hearing. Any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Open committee discussion. The committee will discuss the following:

1. Midazolam, NDA 18-654; Recommendation for control under the Controlled Substances Act.
2. Nalmefene, IND 21,266: Recommendation for control under the Controlled Substances Act.

Dated: January 9, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-1187 Filed 1-15-85; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 84F-0396]

Nalco Chemical Co.; Filing of Food Additive Petition

Correction

In FR Doc. 85-188 appearing on page 551 in the issue of Friday, January 4, 1985, make the following corrections: In the second column, **SUPPLEMENTARY INFORMATION,** eighth line, "§ 172.3570" should read "§ 178.3750"; and in the ninth line "21 CFR 172.3570" should read "21 CFR 178.3570".

BILLING CODE 1505-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F-14865-A]

Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650. 7(d), notice is hereby given that a decision to issue conveyance (DIC) under the provisions of Sec. 12 of the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. 1601, 1611 (1976), will be issued to Deloycheet, Inc., for approximately 34 acres. The lands involved are within Sec. 12, T. 24 N., R. 57 W., Seward Meridian, Alaska.

Upon issuance, the DIC will be published once a week, for four (4) consecutive weeks, in the ANCHORAGE DAILY NEWS. For information on who to obtain copies, contact the Bureau of Land Management, Alaska State Office, 701 C Street, Box 13, Anchorage, Alaska 99513.

Any party claiming a property interest which is adversely affected by the decision shall have until February 15, 1985 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management, Division of Conveyance Management (1960), address identified above, where the requirements for filing an appeal can

be obtained. Parties who do not file and appeal in accordance with the requirements in 43 CFR Part 4, Subpart E (1983) (as amended, 49 FR 6371, February 21, 1984) shall be deemed to have waived their rights.

Helen Burleson,

Section Chief, Branch of ANCSA Adjudication.

[FR Doc. 85-1250 Filed 1-15-85; 8:45 am]

BILLING CODE 4310-JA-M

Oregon; Steens Mountain Recreation Management Plan; Final

AGENCY: Bureau of Land Management, Interior.

ACTION: Burns District, Oregon; Notice of Availability of Steens Mountain Recreation Management Plan—Final and Public Review Period.

SUMMARY: Notice is hereby given that the Steens Mountain Recreation Management Plan—Final will be available for public review after February 22, 1985.

The 30-day public review period will continue from February 22 to March 29, 1985, and the management decisions shown in the final document will be implemented after this time.

FOR FURTHER INFORMATION CONTACT: Joshua L. Warburton, Burns District Manager, Burns District Office, 74 South Alvord Street, Burns, Oregon 97720.

Copies of the Steens Mountain Recreation Management Plan are available for review at the following public libraries or obtainable at the following BLM offices:

Harney County Library, 80 West 'D' Street, Burns, OR 97720 (503) 573-6670

Grant County Library, 507 S. Canyon Boulevard, John Day, OR 97845 (503) 575-1992

BLM—Burns District Office, 74 South Alvord Street, Burns, OR 97720 (503) 573-5241

BLM—Oregon State Office (912), 825 N.W. Multnomah Street, Portland, OR 97208 (503) 231-6274

SUPPLEMENTARY INFORMATION: The plan outlines the various management directions the Bureau of Land Management will be taking in the coming years on the public land in the Steens Mountain Recreation Lands.

The Steens Mountain Recreation Management Plan—Final covers over 152,000 acres of BLM administered land within the Andrews Resource Area which encompasses the southern portion of Harney County, Oregon.

Dated: January 4, 1985.

Joshua L. Warburton,

District Manager, Burns.

[FR Doc. 85-1237 Filed 1-15-85; 8:45 am]

BILLING CODE 4310-33-M

[A-18416-C]

Navajo Relocation Exchange of Public for Private Lands; AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action Designating Public Lands for Transfer out of Federal Ownership in Exchange for Private Lands Selected by the Navajo Tribe for Relocation Purposes.

SUMMARY: Under the provision of Sections 4 and 28 of the Navajo and Hopi Indian Relocation Amendment Act, 1980, 25 U.S.C., 640d-10 and 25 U.S.C. 640d-26, the Navajo Tribe filed a selection application on June 30, 1983, for private lands in Apache County, Arizona, to be obtained by exchange for public lands. Interest has been expressed by the private landowners to select the following public lands for part of the compensation for the lands selected by the Navajo Tribe:

Gila and Salt River Meridian Arizona

Township 15 S., Range 12 E.

Sec. 1, SE¼SW¼	40.00
Sec. 3, lots 1, 2, 9, 10, 15, 16, SW¼SE¼NE¼, N½SE¼NE¼	136.11
Sec. 4, lots 9 and 10, S½NE¼NE¼, W½SE¼NE¼	50.06
Sec. 7, lots 5-15, incl., Lots 17-20, incl., Lands lying S. of Ajo Highway in SW¼	147.85
Sec. 8, lots 58 and 59	10.00
Sec. 9, SW¼SE¼NW¼	10.00
Sec. 10, lots 89, 90, 91, 92	20.11
Sec. 14, SW¼SE¼SE¼	10.00

Township 15, S. Range 13 E.

Sec. 7, lot 64	5.03
Sec. 19, W½NE¼NW¼	20.00

Township 17 S., Range 15 E.

Sec. 5, lots 1 to 3, incl., S½NE¼, SE¼NW¼, S½	509.73
Sec. 7, NE¼NE¼	40.00
Sec. 8, All	640.00
Sec. 9, All	640.00
Sec. 18, lots 1-8, incl., E½W½, E½	689.28
Sec. 19, lots 1-8, incl., E½W½, E½	687.36
Sec. 30, lots 1-8, incl., E½W½, E½	686.08

Comprising 4,341.61 acres, more or less, located in Pima County.

Township 13 N., Range 1½ E.

Sec. 1, lot 4	41.54
Sec. 11, lot 1, 2, 3, 4	205.64
Sec. 12, NW¼NW¼, S½SW¼—loss mining patent, SW¼SE¼—less mining patent	145.00
Sec. 13, all except E½NE¼ M.S. 3917 Approx.	400.00
Sec. 14, lot 1, 2, 3, 4	205.96
Sec. 24, W½	320.00
Sec. 25, NW¼, N½SW¼, SW¼SW¼	280.00

Township 13 N., Range 1 E.

Sec. 13, E½E½	160.00
Sec. 24, E½E½, W½SE¼, E½SW¼, SW¼SW¼	360.00
Sec. 25, lots 1, 2, 3, 4, N½, S½S½	542.40

Gila and Salt River Meridian Arizona—Continued

Township 13 N., Range 2 E.

Sec. 6, S½NW¼, SW¼	240.00
Sec. 7, W½, W½SE¼, SE¼SE¼, S½NE¼SE¼, W½NW¼NE¼SE¼, SW¼SW¼SE¼NE¼, S½SE¼SW¼NE¼, W½SW¼NE¼, SW¼NW¼NE¼, W½NW¼NW¼NE¼, SE¼NW¼NW¼NE¼	510.00
Sec. 17, SW¼	160.00
Sec. 18, All	640.00
Sec. 19, All	640.00
Sec. 20, lots 1-4, incl., W½E½, W½	611.65
Sec. 29, lots 1-4, incl., W½E½, W½	603.36
Sec. 30, N½, SW¼	480.00
Sec. 32, lots 8-11, incl.	147.61

Township 14 N., Range 2 E.

Sec. 30, lots 1-3, incl., SE¼NW¼	128.98
Sec. 31, lots 1-4, incl., E½NW¼	248.08

Comprising 7,070.22 acres, more or less, located in Yavapai County.

Township 2 N., Range 3 W.

Sec. 4, lots 1, 2, 3, 4, S½N½, S½	633.44
Sec. 5, lot 1, SE¼NE¼, E½SE¼	158.47
Sec. 8, E½E½	160.00
Sec. 9, All	640.00
Sec. 14, N½, SW¼	480.00
Sec. 15, All	640.00
Sec. 17, All	640.00
Sec. 18, lots 1, 2, 3, 4, E½E½	294.88
Sec. 19, lots 1, 2, 3, 4, E½E½	296.08
Sec. 20, All	640.00
Sec. 21, All	640.00
Sec. 22, All	640.00
Sec. 26, All	640.00
Sec. 27, N½, N½S½, SE¼SW¼, S½SE¼	640.00
Sec. 28, N½, N½S½, S½SW¼, SW¼SE¼	600.00
Sec. 29, All	640.00
Sec. 33, lots 1 and 2, W½NE¼, NW¼, N½SW¼	405.49
Sec. 34, N½NE¼, NE¼NW¼	120.00
Sec. 35, NE¼NE¼, E½NW¼NE¼, W½NW¼NW¼	80.00

Township 1 N., Range 4 W.

Sec. 13, NE¼NE¼, S½NW¼NE¼, NE¼NW¼NE¼, NE¼NW¼, N½N½SE¼NW¼	105.00

Township 2 N., Range 4 W.

Sec. 13, All	640.00
Sec. 14, Lot 4	42.45
Sec. 16, All; (State Minerals)	640.00
Sec. 24, All	640.00
Sec. 25, All	640.00
Sec. 26, N½, N½S½	480.00
Sec. 27, N½N½, S½NW¼, SW¼	400.00
Sec. 28 N½, SW¼	480.00
Sec. 29, E½, S½NW¼	400.00
Sec. 30, lots 11 and 12	84.93
Sec. 38, All. (State Minerals)	640.00

Township 3 N., Range 4 W.

Sec. 1, All	640.00
Sec. 3, All	640.00
Sec. 11, E½E½E½	80.00
Sec. 12, All	640.00
Sec. 13, All	640.00
Sec. 16, W½; (State Minerals)	320.00
Sec. 24, E½, N½NW¼	400.00
Sec. 25, E½, SE¼SW¼	360.00
Sec. 36, NE¼, E½NW¼. (State Minerals)	240.00

Township 4 N., Range 4 W.

Sec. 4, Lot 3 and 4, S½NW¼, SW¼	283.31
Sec. 9, All	640.00
Sec. 10, All	640.00
Sec. 11, All	640.00
Sec. 12, All	640.00
Sec. 14, N½N½, S½NW¼, NW¼SW¼	280.00
Sec. 15, All	640.00
Sec. 16, All; (State Minerals)	640.00
Sec. 21, N½NW¼, NW¼NE¼	120.00
Sec. 23, SE¼	160.00
Sec. 24, NE¼, E½NW¼, SW¼NW¼, S½	600.00
Sec. 25, All	640.00
Sec. 26, All	640.00
Sec. 27, S½	320.00
Sec. 28, N½N½, S½NW¼, S½	560.00
Sec. 29, SE¼	160.00
Sec. 31, SE¼	160.00

Gila and Salt River Meridian Arizona—Continued

Sec. 32, All; (State Minerals)	640.00
Sec. 33, All	640.00
Sec. 34, All	640.00
Sec. 35, All	640.00
Sec. 36, All. (State Minerals)	640.00
Township 1 N., Range 5 W.	
Sec. 2, SW¼, W½SE¼; (State Minerals)	240.00
Sec. 3, lots 1, 2, 3, 4, S½N½, E½SW¼, SE¼	559.32
Sec. 10, E½, E½NW¼	400.00
Sec. 11, W½W½, W½E½NW¼, E½SW¼	280.00
Sec. 14, W½, E½E½	480.00
Sec. 15, NE¼, N½SE¼	240.00
Sec. 23, NE¼, E½W½, W½SE¼	400.00
Sec. 24, NW¼, SE¼SW¼SW¼, SE¼SW¼	210.00
Sec. 25, E½W½NW¼, S½SW¼SW¼NW¼, NW¼SW¼, NW¼SW¼SW¼, N½SW¼ SW¼SW¼	100.00
Sec. 26, NW¼NE¼, N½SW¼NE¼, N½SW¼ SW¼NE¼	65.00
Sec. 27, SE¼SW¼	40.00
Township 2 N., Range 5 W.	
Sec. 22, E½NE¼, NW¼NE¼, W½, SW¼SE¼	480.00
Sec. 25, E½	320.00
Sec. 26, N½NE¼NW¼NE¼, W½W½NE¼, NW¼, W½SW¼, W½NE¼SW¼, N½NE¼ NE¼SW¼	310.00
Sec. 27, E½, NE¼NW¼, W½SW¼SE¼SW¼	480.00
Sec. 28, All	640.00
Sec. 29, N½N½, SW¼NE¼, S½N½SE¼NE¼, S½SE¼NE¼, S½NW¼, SW¼, W½SE¼	550.00
Sec. 30, NE¼, SE¼NW¼, N½SE¼, SE¼SE¼	320.00
Sec. 31, E½E½	160.00
Sec. 34, All	640.00
Sec. 36, W½SW¼, W½E½SW¼, NE¼NE¼SW¼	130.00

Comprising 36,108.37 acres, more or less in Maricopa County.

Total acreage under consideration for exchange is 47,520.20 acres.

In accordance with the regulations in 43 CFR 2201.1(b), publication of this Notice will segregate the public lands, as described in this Notice, to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, but not the mineral leasing laws or Geothermal Steam Act.

The Segregation of the above-described lands shall terminate upon issuance of a document of conveyance to such lands to the private landowners or upon publication in the **Federal Register** of a notice of termination of the segregation; or the expiration of two years from the date of publication, whichever occurs first.

Inquiries, comments and protests to the Notice should be addressed to either the Indian Project Manager, Indian Project Office, 2708 North 4th Street, Suite B-5, Flagstaff, Arizona 86001, or the District Manager, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

Dated: January 9, 1985.

Marlyn V. Jones,

District Manager.

[FR Doc. 85-1309 Filed 1-15-85; 8:45 am]

BILLING CODE 4310-32-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-207]

Certain Automotive Transmission Shifters; Initial Determination Terminating Respondents of the Basis fo Settlement Agreement

AGENCY: International Trade Commission.

ACTION: Notice is hereby given that the Commission has received an initial determination from the presiding officer in the above-captioned investigation terminating the following respondents on the basis of a settlement agreement: Toyota Motor Corporation on behalf of respondents Toyota Motor Sales Co, Ltd. and Toyota Motor Sales, U.S.A. Inc.

SUPPLEMENTARY INFORMATION: This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the Commission thirty (30) days after the date of its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon the parties on January 7, 1985.

Copies of the initial determination, the settlement agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

Written Comments

Interested persons may file written comments with the Commission concerning termination of the aforementioned respondents. The original and 14 copies of all such comments must be filed with the Secretary to the Commission, 701 E Street NW., Washington, D.C. 20436, no later than 10 days after publication of this notice in the **Federal Register**. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

FOR FURTHER INFORMATION CONTACT: Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, telephone 202-523-0176.

By order of the Commission.

Issued: January 7, 1985.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1268 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 701-TA-221 (Final)]

Certain Cast-Iron Pipe Fittings From Brazil

AGENCY: International Trade Commission.

ACTION: Institution of a final countervailing duty investigation and scheduling of a hearing to be held in connection with the investigation.

SUMMARY: The Commission hereby gives notice of the institution of final countervailing duty investigation No. 701-TA-221 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Brazil of non-alloy cast-iron pipe and tube fittings other than for cast-iron soil pipe, provided for in items 610.62, 610.65, 610.70, and 610.74 of the Tariff Schedules of the United States (TSUS), which have been found by the Department of Commerce, in a preliminary determination, to be subsidized by the Government of Brazil. Commerce will make its final subsidy determination in this investigation on or before February 25, 1985, and the Commission will make its final injury determination by April 17, 1985 (see sections 705(a) and 705(b) of the act (19 U.S.C. 1671d(a) and 1671d(b))).

For further information concerning the conduct of this investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and C (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201).

EFFECTIVE DATE: December 19, 1984.

FOR FURTHER INFORMATION CONTACT: Martha Mitchell (202-523-0301), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436.

SUPPLEMENTARY INFORMATION:

Background

This investigation is being instituted as a result of an affirmative preliminary determination by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 701 of the act (19 U.S.C. 1671) are being provided to manufacturers, producers, or exporters in Brazil of non-alloy cast-iron pipe and tube fittings other than for cast-iron soil pipe. The investigation was requested in a petition filed on September 18, 1984, by the Cast Iron Pipe Fittings Committee.[1] In response to that petition the Commission conducted a preliminary countervailing duty investigation and, on the basis of information developed during the course of that investigation, determined that there was a reasonable indication that an industry in the United States was materially injured by reason of imports of the subject merchandise (49 FR 44690, November 8, 1984).

Participation in the Investigation

Persons wishing to participate in this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's Rules of Practice and Procedure (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the **Federal Register**. Any entry of appearance filed after this date will be referred to the Chairwoman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

Service List

Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance. In accordance with § 201.16(c) of the rules (19 CFR 201.16(c)), each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

Staff Report

A public version of the prehearing staff report in this investigation will be placed in the public record on February 26, 1985, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

Hearing

The Commission will hold a hearing in connection with this investigation beginning at 10:00 a.m. on March 14, 1985, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, DC. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on February 21, 1985. All persons desiring to appear at the hearing and make oral presentations should file prehearing briefs and attend a prehearing conference to be held at 9:30 a.m. on February 26, 1985 in room 117 of the U.S. International Trade Commission Building. The deadline for filing prehearing briefs is March 11, 1985.

Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonconfidential summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any confidential materials must be submitted at least three (3) workings days prior to the hearing (see § 201.6(b)(2) of the Commission's rules (19 CFR 201.6(b)(2), as amended by 49 FR 32569, Aug. 15, 1984)).

Written Submissions

All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with § 207.22 of the Commission's rules (19 CFR 207.220). Posthearing briefs must conform with the provisions of § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on March 21, 1985. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before March 21, 1985.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with section 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for confidential business data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any business information for which confidential treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of section 201.6 of the Commission's rules (19 CFR 201.6, as amended by 49 FR 32569, Aug. 15, 1984).

Authority: The investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

Issued: January 10, 1985.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1274 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[1] The 5 member producers of this committee are Stanley G. Flagg & Co., Inc., ITT-Grinnell, Stockham Valves & Fittings Co., U-Brand Corp., and Ward Foundry Division of Clevepak Corp.

[Investigation No. 337-TA-212]

Certain Convertible Rowing Exercisers; Investigation

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 5, 1984, pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), on behalf of Diversified Products Corporation, 309 Williamson Avenue, P.O. Box 100, Opelika, Alabama 36803. Amended complaints were filed on December 14 and 24, 1984. The amended complaint filed December 24, 1984 supercedes all previously filed complaints. The complaint, as amended, alleges unfair methods of competition and unfair acts in the importation of certain convertible rowing exercisers into the United States, or in their sale, by reason of alleged (1) infringement of claims 1, 2, 3, and 5-18 of U.S. Letters Patent 4,477,071 and (2) infringement of claims 1-9 of U.S. Letters Patent 4,488,719. The complaint further alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The complainant requests the Commission to institute an investigation and, after a full investigation, to issue a permanent exclusion order and permanent cease and desist orders.

FOR FURTHER INFORMATION CONTACT: Robert D. Litowitz, Esq., or Deborah S. Strauss, Esq., Unfair Import Investigations Division, U.S. International Trade Commission, telephone 202-523-4693 or 202-523-1233, respectively.

Authority

The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930 and in § 210.12 of the Commission's Rules of Practice and Procedure (19 CFR 210.12).

Scope of Investigation

Having considered the complaint, the U.S. International Trade Commission, on January 4, 1985, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, an investigation be instituted to determine whether there is a violation of subsection (a) of section 337 in the unlawful importation of certain convertible rowing exercisers into the United States, or in their sale, by reason of alleged (1) infringement of claims 1, 2, 3, and 5-18 of U.S. Letters Patent 4,477,071 and (2) infringement of claims 1-9 of U.S. Letters Patent 4,488,719, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—Diversified Products Corporation, 309 Williamson Avenue, P.O. Box 100, Opelika, Alabama 36803.

(b) The respondents are the following companies, alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

H.C. Enterprise Co., Ltd., P.O. Box 26-842, Taipei, Taiwan

Ever Young Industries Co., Ltd., 11th Floor, No. 624, Ming Chuan East Road, Taipei, Taiwan

Seasonal Merchandise Development Co., Ltd., P.O. Box 43-156, Taipei, Taiwan

Pan's World International, Ltd., 7th Floor, No. 22, Chung-Cheng Road, Shih-Lin, P.O. Box 58937, Taipei, Taiwan

Astar Data International, Inc., 1201 South Edith, Alhambra, California 91803

Sunstar International, Inc., 24-16 Queens Plaza South, Long Island City, New York 11101

M.T.I., Inc., P.O. Box 190, Manan, Idaho 83434

National Sporting Goods Corporation, 25 Brighton Avenue, Passaic, New Jersey 07055

Weslo Design International, Inc., 750 Mountainview Drive, P.O. Box 10, Logan, Utah 84321

Shinn Fu Company of America, Inc., 1004 Andover Park East, Tukwila (Seattle), Washington 98188.

(c) Robert D. Litowitz, Esq., and Deborah S. Strauss, Esq., Unfair Import Investigations Division, U.S. International Trade Commission, 701 E Street NW., Room 126, Washington, D.C. 20436, shall be the Commission investigative attorneys, party to this investigation; and

(3) for the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding administrative law judge.

Responses must be submitted by the named respondents in accordance with § 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21 as amended, 49 FR 46123). Pursuant to §§201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the Administrative Law Judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings.

The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Room 156, Washington, D.C. 20436, telephone 202-523-0471.

Issued: January 8, 1985.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1270 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[TA-131(b)-10]

Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports From Israel

AGENCY: International Trade Commission.

ACTION: Redesignation of Commission investigation No. 332-180 as investigation No. TA-131(b)-10.

Background

On December 10, 1984, the Commission received a letter from the U.S. Trade Representative (USTR) requesting that the Commission provide advice under section 131 of the Trade Act of 1974 (19 U.S.C. 2151) with respect to articles provided for in the Tariff Schedules of the United States and which are products of Israel conforming to the criteria specified in section 402 of the Trade and Tariff Act of 1984 (Pub. L. 98-573, approved Oct. 30, 1984), which articles will be considered for duty-free treatment in the negotiation of a free trade arrangement with Israel. The advice requested concerns the probable economic effect to providing such duty-free treatment on industries in the United States producing like or directly competitive articles and on consumers.

The Commission provided USTR with such advice on May 30, 1984, as a result of investigation No. 332-180. At the request of USTR, that investigation was conducted in all respects as though the advice had been requested under section 131. A public hearing was held. Notice of the investigation and public hearing was published in the **Federal Register** of February 15, 1984 (49 FR 5841).

In response to USTR's request received December 10, the Commission has redesignated investigation No. 332-180 as investigation No. TA-131(b)-10, with no change in scope of the investigation. The Commission has notified USTR that the advice provided on May 30, 1984, in connection with investigation No. 332-180 is to be considered as the Commission's advice for the purpose of this investigation.

EFFECTIVE DATE: January 2, 1985.

Issued: January 7, 1985.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1275 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-196]

Certain Apparatus for Installing Electrical Lines and Components Therefor; Determination Not To Review an Initial Determination Terminating Respondent on the Basis of a Consent Order; Issuance of Consent Order

AGENCY: International Trade Commission.

ACTION: Nonreview of an initial determination (I.D.) terminating a respondent on the basis of a consent order.

SUMMARY: The Commission has determined not to review an I.D. terminating respondent 503156 Ontario Ltd., a Canadian corporation trading as Canadian Flexi Drill (CFD), on the basis of a consent order incorporating a consent order agreement.

SUPPLEMENTARY INFORMATION:

Authority for this action is found in section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and § 211.21 of the Commission's Rules of Practice and Procedure (19 CFR 211.21).

Notice soliciting public comment on the I.D. terminating CFD on the basis of the consent order was published in the **Federal Register** of December 6, 1984, 49 FR 47663. The Commission received neither petitions for review of the I.D., nor comments from the public or other Government agencies.

FOR FURTHER INFORMATION CONTACT: William E. Perry, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0499.

Issued: January 7, 1985.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1266 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-181]

Certain Meat Deboning Machines; Decision To Review Initial Determination; Schedule for Filing of Written Submissions on Violation and on Remedy, the Public Interest, and Bonding; Notice of More Complicated Designation; Notice of Commission Hearing

AGENCY: International Trade Commission.

ACTION: Notice is hereby given that the Commission has determined to review a portion of the administrative law judge's initial determination that there is no violation of section 337 of the Tariff Act of 1930 in the above-captioned investigation.

Authority: The authority for the Commission's disposition of this matter is contained in section337 of the Tariff Act of 1930 (19 U.S.C. 1337) and in §§ 210.53-210.56 of the Commission's Rules of Practice and Procedure (49 FR 46123 (Nov. 23, 1984); to be codified at 19 CFR 210.53-210.56).

FOR FURTHER INFORMATION CONTACT: Stephen A. McLaughlin, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0421.

SUPPLEMENTARY INFORMATION: On November 16, 1984, the presiding administrative law judge issued an initial determination that there is no violation of section 337 in the importation and sale of certain meat deboning machines. Complainants and respondents petitioned for review of various parts of initial determination pursuant to § 210.54(a) of the Commission's rules.

After examining the petitions for review and the responses thereto, the Commission has concluded that there are issues that warrant review. Specifically, the Commission will review the following questions:

1. Whether complainants can demonstrate a sufficient readiness to establish a domestic industry in the United States.

2. Whether the issue of efficiency and economy of operation is a relevant consideration in a "prevention of establishment" case, and, if it is, whether complainants can demonstrate that the prospective industry would/could be so operated; and

3. Whether the importation or sale of respondent's meat deboning machines has the effect or tendency to prevent the establishment of an "industry * * * in the United States."

The Commission's review will be limited to the above issues. No other issues will be considered.

If the Commission finds that a violation of section 337 has occurred, it may issue (1) an order which could result in the exclusion of the subject articles from entry into the United States and/or (2) cease and desist orders which could result in one or more respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions which address the form of remedy, if any, which should be ordered.

If the Commission concludes that a violation of section 337 has occurred and contemplates some form of remedy, it must consider the effect of that remedy upon the public interest. The factors which the Commission will consider include the effect that an exclusion order and/or cease and desist order would have upon (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the U.S. production of articles which are like or directly competitive with those which are the subject of the investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions concerning the effect, if any, that granting a remedy would have on the public interest.

If the Commission finds that a violation of section 337 has occurred and orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving written submissions concerning the amount of the bond, if any, which should be imposed.

More Complicated Investigation

Because of the complex nature of the issues in this case and the relatively short period of time remaining before expiration of the original one year deadline, the Commission, under section 337(b)(1) and § 210.59 of the Commission's Rules of Practice and Procedure (49 FR 46139, Nov. 23, 1984), has designated this investigation more complicated and extended the deadline for completion of the investigation by 49 days, i.e., until April 5, 1985.

Commission Hearing

The Commission will hold a public hearing on February 22, 1985, in the Commission's Hearing Room, 701 E Street, NW., Washington, D.C. 20436, beginning at 10:00 a.m. The hearing will be divided into two parts. First, the Commission will hear oral arguments on those portions of the administrative law judge's initial determination selected for review. Second, the Commission will hear presentations concerning appropriate remedy, the effect that such remedy would have upon the public interest, and the proper amount of the bond in the event that the Commission determines that there is a violation of section 337 and that a remedy should be granted. These matters will be heard on the same day in order to facilitate the completion of this investigation within time limits established under law and to minimize the burden upon the parties.

Oral Arguments

Parties to the investigation and interested Government agencies may present oral arguments concerning those portions of the administrative law judge's initial determination being reviewed. That portion of a party's or an agency's total time allocated to oral argument may be used in any way the party or agency making argument sees fit, i.e., a portion of the time may be reserved for rebuttal or devoted to summation. The oral arguments will be held in the following order: complainants, respondents, Government agencies, and the Commission investigative attorney. Persons making oral arguments are reminded that such argument must be limited to the issues being reviewed by the Commission and must be based upon the evidentiary record certified to the Commission by the administrative law judge.

Oral Presentations on Remedy, the Public Interest, and Bonding

Following the oral arguments on the administrative law judge's initial determination, parties to the investigation, Government agencies, public-interest groups, and interested members of the public may make oral presentations on the issues of remedy, the public interest, and bonding. This portion of the hearing is quasi-legislative in nature; presentations need not be confined to the evidentiary record certified to the Commission by the administrative law judge, and may include the testimony of witnesses. Oral presentations on remedy, the public interest, and bonding, will be heard in this order: complainants, respondents, Government agencies, the Commission investigative attorney, public interest groups, and interested members of the public.

Time Limit for Oral Argument and Oral Presentations

Complainants, (taken together), respondents (taken together), the Commission investigative attorney, and Government agencies will be limited to a total of 30 minutes (exclusive of time consumed by questions from the Commission or its advisory staff) for making both oral argument on violation and oral presentations on remedy, the public interest, and bonding. Persons making presentations solely on remedy, the public interest, and bonding will be limited to 10 minutes (exclusive of time consumed by questions from the Commission and its advisory staff). The Commission may in its discretion expand the aforementioned time limits upon receipt of a timely request to do so.

Written Submissions

The parties to the investigation and interested Government agencies are encouraged to file written submissions on the issues under review and on the issues of remedy, the public interest, and bonding. Complainants and the Commission investigative attorney are also requested to submit a proposed exclusion order and/or a proposed cease and desist order for the Commission's consideration. Persons other than the parties and Government agencies may file written submissions addressing the issues of remedy, the public interest, and bonding. Written submissions on the issues under review must be filed not later than the close of business on January 23, 1985, and submissions on remedy, the public interest, and bonding must be filed not later than the close of business on January 30, 1985. Reply briefs on all issues must be filed not later than the close of business on February 6, 1985. During the course of the hearing, the parties may be asked to file posthearing briefs.

Notice of Appearance

Written requests to appear at the Commission hearing must be filed with the Office of the Secretary by February 15, 1985.

Additional Information

Persons submitting written submissions must file the original document and 14 true copies thereof with the Office of the Secretary on or before the deadlines stated above. Any person desiring to submit a document (or a portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment by the administrative law judge. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Documents containing confidential information approved by the Commission for confidential treatment will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

Notice of this investigation was published in the **Federal Register** of February 15, 1984 (49 FR 5841).

Copies of the nonconfidential version of the administrative law judge's initial determination and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

By order of the Commission.

Issued: January 7, 1985.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1271 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 701-TA-215 through 217 (Final)]

Oil Country Tubular Goods From Brazil, Korea, and Spain

Determinations

On the basis of the record [1] developed in investigations Nos. 701-TA-215 and 701-TA-217 (Final), the Commission determines,[2] pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)), that an industry in the United States is materially injured by reason of imports from Brazil and Spain of oil country tubular goods,[3] provided for in items 610.32, 610.37, 610.39, 610.40, 610.42, 610.43, 610.49, and 610.52 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be subsidized.

On the basis of the record [1] developed in investigation No. 701-TA-216 (Final), the Commission determines [4] pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Korea of oil country tubular goods, provided for in items 610.32, 610.37, 610.39, 610.40, 610.42, 610.43, 610.49, and 610.52 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be subsidized.

Background

The Commission instituted these investigations effective September 12, 1984, following preliminary determinations by the Department of Commerce that manufacturers, producers or exporters of the subject merchandise in Brazil, Korea, and Spain

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[1] The record is defined in § 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(i)).

[2] Vice Chairman Liebeler and Commissioner Lodwick dissenting.

[3] Except drill pipes.

[4] Commissioners Eckes and Rohr dissenting.

receive subsidies. Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing it in the **Federal Register** on October 29, 1984 (49 FR 43526). The hearing was held in Washington, DC, on November 29, 1984, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its report on this investigation to the Secretary of Commerce on January 9, 1985. A public version of the Commission's report (Oil-Country Tubular Goods from Brazil, Korea, and Spain, USITC Publication 1633, January 1985), contains the views of the Commission and information developed during the investigations.

By Order of the Commission.

Issued: January 9, 1985.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1272 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 731-TA-165 (Final)]

Certain Valves, Nozzles, and Connectors of Brass From Italy for Use in Fire Protection Systems

AGENCY: International Trade Commission.

ACTION: Rescheduling of the hearing to be held in connection with the subject investigation.

SUMMARY: The Commission hereby announces that the hearing in the subject investigation, previously postponed from Friday, December 7, 1984, is rescheduled to 10:00 a.m. on Wednesday, January 23, 1985. The Commission will make its final injury determination by February 19, 1985 (see sections 735(a) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(a) and 1673(b))).

For further information concerning the conduct of the investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and C (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201).

EFFECTIVE DATE: January 4, 1985.

FOR FURTHER INFORMATION CONTACT: George L. Deyman (202-523-0481), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436.

SUPPLEMENTARY INFORMATION:

Background

On July 10, 1984, the Commission instituted the subject investigation. On November 30, 1984, the Department of Commerce determined that certain valves, couplings, nozzles and connections, of brass, suitable for use in interior fire protection systems, from Italy, are being sold, or are likely to be sold, in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930 (19 U.S.C. 1673d(a)) (49 FR 47066). However, on December 5, 1984, the Commission was advised by the Department of Commerce that it was recalculating the margins in the subject investigation. Accordingly, the Commission postponed indefinitely its public hearing on the investigation scheduled for December 7, 1984 (49 FR 48394). On January 4, 1985, the Department of Commerce notified the Commission that as a result of the correction of clerical errors, it was amending its final determination in the subject investigation and reducing the overall weighted-average margin; Commerce indicated that it considered this amendment to be its affirmative final determination in the investigation for purposes of section 735(b)(2) of the act. As provided in section 735(b)(2)(B) of the act, the Commission must make its final determination in antidumping investigations within 45 days of Commerce's final determination, or in this case by February 19, 1985.

Staff report

A public version of the prehearing staff report in this investigation was placed in the public record on November 20, 1984, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

Hearing

The Commission will hold a hearing in connection with this investigation beginning at 10:00 a.m. on Wednesday, January 23, 1985, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, DC.

Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonconfidential summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted on November 30, 1984. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any confidential materials must be submitted at least three (3) working days prior to the hearing (see § 201.6(b)(2) of the Commission's rules (19 CFR 201.6(b)(2), as amended by 49 FR 32569, Aug. 15, 1984)).

Written submissions

Posthearing briefs must conform with the provisions of § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on January 29, 1985. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before January 29, 1985.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for confidential business data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any business information for which confidential treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of § 201.6 of the Commission's rules (19 CFR 201.6, as amended by 49 FR 32569, Aug. 15, 1984).

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

Issued: January 9, 1985.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1273 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-174]

Certain Woodworking Machines; Receipt of Initial Determination Terminating Respondents on the Basis of Consent Order Agreement

AGENCY: International Trade Commission.

ACTION: Notice is hereby given that the Commission has received an initial

determination from the presiding officer in the above-captioned investigation terminating the following respondents on the basis of a consent order agreement: TUI Industrial Co., Ltd., Mao Shan Machinery Industrial Co., Ltd. and Union Tool Exporters, Ltd.

SUPPLEMENTARY INFORMATION: This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the Commission thirty (30) days after the date of its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon the parties on January 10, 1985.

Copies of the initial determination, the consent order agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

Written Comments

Interested persons may file written comments with the Commission concerning termination of the aforementioned respondents. The original and 14 copies of all such comments must be filed with the Secretary to the Commission, 701 E Street, NW., Washington, D.C. 20436, no later than 10 days after publication of this notice in the **Federal Register**. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

FOR FURTHER INFORMATION CONTACT: Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, Telephone 202-523-0176.

By order of the Commission.

Issued: January 9, 1985.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-1269 Filed 1-15-85; 8:45 am]

BILLING CODE 7020-02-M

MERIT SYSTEMS PROTECTION BOARD

Federal Employees; Review of Agency Adverse Actions Taken Under 5 U.S.C. 7511 et seq. and Based Upon the Revocation or Denial of a Security Clearance

AGENCY: Merit Systems Protection Board.

ACTION: Amendment to 49 FR 48623 (1984), affording notice of opportunity to file amicus briefs in certain appeals of agency adverse actions taken under 5 U.S.C. 7511 *et seq.* and based upon the revocation or denial of a security clearance.

SUMMARY: The Merit Systems Protection Board provides an opportunity to file amicus briefs on significant issues of law common to a number of cases pending before the Board involving appeals of agency adverse actions taken under 5 U.S.C. 7511 *et seq.* and based upon the agency's revocation or denial of the employee's security clearance.

This amendment supplements a previous notice (49 FR 48623 (1984)), to identify one additional issue for briefing by interested parties, identify four additional cases, and to extend the time for briefing on all issues.

DATE: Amicus briefs submitted in response to this notice, as well as the previous notice published at 49 FR 48623 (1984), shall be filed with the Clerk of the Board on or before February 14, 1985.

ADDRESS: All briefs shall be captioned "Security Clearance Appeals." "Amicus Brief." All briefs shall also contain separate, numbered headings for each issue discussed. The original and twelve (12) copies of each amicus brief submitted in response to this notice shall be filed with the Office of the Clerk of the Board and addressed to Robert E. Taylor, Clerk, Merit Systems Protection Board, Attn: Security Clearance Appeals, 1120 Vermont Avenue, NW., Washington, D.C. 20419.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk, Merit Systems Protection Board, (202) 653-7200. For copies of the Initial Decisions in the referenced cases, contact Research Services Division, Merit Systems Protection Board, (202) 653-7132.

SUPPLEMENTARY INFORMATION: The Merit Systems Protection Board currently has before it numerous petitions for review of initial decisions issued by the Board's regional offices in security clearance appeals. The Board identified several cases, listed below, which address significant issues of law common to a large number of these appeals and in previous notice (49 FR 48623 (1984)), provided an opportunity for the filing of amicus briefs addressing these issues. The cases identified in that earlier notice were the following:

Bogdanowicz v. *Department of the Army*, MSPB Docket No. PH07528110587 (January 18, 1984);

Egan v. *Department of the Navy*, MSPB Docket No. SE07528310257 (December 22, 1983);

Griffin v. *Defense Mapping Agency*, MSPB Docket No. SL07528410150 (July 6, 1984);

Petersen v. *Department of the Navy*, MSPB Docket No. BN07528410010 (February 14, 1984);

Irving v. *Department of the Navy*, MSPB Docket No. BN07528410005 (September 21, 1984). (A petition for review is not pending in this appeal, in which a final order was issued by the Board. However, because this case concerns the issues identified in this and the previous notice, the Board is reopening this case to address those issues).

The Board now adds the following cases to those listed in the earlier notice:

Skees v. *Department of the Navy*, MSPB Docket No. PH07528410257 (June 14, 1984);

Holtcamp v. *Department of the Navy*, MSPB Docket No. SE07528410105 (June 21, 1984);

Drake v. *Department of the Army*, MSPB Docket No. AT07528310851 (November 9, 1983);

Gibson v. *Defense Mapping Agency*, MSPB Docket No. AT07528410438 (June 26, 1984);

In addition to the issues listed in the previous notice, the Board also requests interested parties to address the following question:

I. Scope of the Board's Authority in Security Clearance Cases

C. When an agency wishes to base an action listed in 5 U.S.C. 7512 on the revocation of security clearance, may it do so pursuant to 5 U.S.C. 7513, or is 5 U.S.C. 7532 the exclusive basis for such an action?

The time limit set by the Board in its earlier notice is now extended to February 14, 1985, for filing briefs as to issues identified in both the earlier notice and in this notice.

Dated: January 11, 1985.

For the Board.

Herbert E. Ellingwood,

Chairman.

[FR Doc. 85-1199 Filed 1-15-85; 8:45 am]

BILLING CODE 7400-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 85-06]

NASA Advisory Council, Aeronautics Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee, Subcommittee on Aviation Safety Reporting System (ASRS).

DATE AND TIME: February 5, 1985, 9:00 a.m. to 5:00 p.m.; February 6, 1985, 8:30 a.m. to 12:00 p.m.

ADDRESS: Ames Research Center, Building 200, Director's Committee Room, Moffett Field, CA.

FOR FURTHER INFORMATION CONTACT: Mr. William D. Reyanard, Ames Research Center, Moffett Field, CA 94035 (415/694-6467).

SUPPLEMENTARY INFORMATION: The Subcommittee on ASRS Operations was established to review the ASRS Operations and NASA actions taken in response to Subcommittee recommendations. The Subcommittee, chaired by Mr. John Winant, is comprised of nine members. The meeting will be open to the public up to the seating capacity of the room (approximately 90 persons including the Subcommittee members and participants).

Type of Meeting: Open.

Agenda

February 5, 1985

9:00 a.m.—Chairperson's Opening Remarks.
9:15 a.m.—Administrative Announcements.
9:30 a.m.—Operations Report.
10:30 a.m.—Research Report.
1:00 p.m.—Discussion of Federal Aviation Administration Issues.
3:00 p.m.—Revisions to ASRS Reporting Form and Database Elements.
4:00 p.m.—Air Traffic Control Operations Representation on Subcommittee.
5:00 p.m.—Adjourn.

February 6, 1985

8:30 a.m.—Technology Transfer of ASRS Design.
9:30 a.m.—Air Line Pilots Association (ALPA) Proposal for Ongoing Data Transfer.
10:15 a.m.—Advisory Subcommittee Evaluation Plan and Schedule.
11:00 a.m.—Open Discussion.
12:00 p.m.—Adjourn.

January 10, 1985.

Richard L. Daniels,

Deputy Director, Logistics Management, and Information Programs Division, Office of Management.

[FR Doc. 85-1181 Filed 1-15-85; 8:45 am]

BILLING CODE 7510-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Council on the Arts; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the National Council on the Arts will be held on Friday, February 1, 1985, from 9:00 a.m.-5:30 p.m.; on Saturday, February 2, 1985, from 9:00 a.m.-5:30 p.m.; and on Sunday, February 3, 1985, from 9:00 a.m.-1:00 p.m. in room M-07 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, D.C. 20506.

A portion of this meeting will be open to the public on Friday, February 1, from 9:00 a.m.-5:30 p.m. and on Saturday, February 2, from 9:00 a.m.-3:00 p.m. Topics for discussion wil be: Program Review/Guidelines for Music Ensembles, Expansion Arts, Inter-Arts, Folk Arts, Opera-Musical Theater, Dance and Endowment Fellows Programs; Five-Year Planning and Service Organizations.

The remaining sessions of this meeting on Saturday, February 2, from 3:00 p.m.-5:30 p.m. and on Sunday, February 3, from 9:00 a.m.-1:00 p.m. are for the purpose of Council review, discussion, evaluation and recommendations on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c)(4), (6) and 9(b) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Mr. John H. Clark, Advisory Committee Management Officer, National Endowment for the Arts, Washington, D.C. 20506, or call (202) 682-5433.

January 11, 1985.

John H. Clark,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 85-1280 Filed 1-15-85; 8:45 am]

BILLING CODE 7537-01-M

NUCLEAR REGULATORY COMMISSION

International Atomic Energy Agency Draft Safety Guide; Availability of Draft for Public Comment

The International Atomic Energy Agency (IAEA) is completing development of a number of internationally acceptable codes of practice and safety guides for nuclear power plants. These codes and guides are in the following five areas: Government Organization, Design, Siting, Operation, and Quality Assurance. All of the codes and most of the proposed safety guides have been completed. The purpose of these codes and guides is to provide guidance to countries beginning nuclear power programs.

The IAEA codes of practice and safety guides are developed in the following way. The IAEA receives and collates relevant existing information used by member countries in a specified safety area. Using this collation as a starting point, an IAEA working group of a few experts develops a preliminary draft of a code or safety guide which is then reviewed and modified by an IAEA Technical Review Committee corresponding to the specified area. The draft code of practice or safety guide is then sent to the IAEA Senior Advisory Group which reviews and modifies as necessary the drafts of all codes and guides prior to their being forwarded to the IAEA Secretariat and thence to the IAEA Member States for comments. Taking into account the comments received from the Member States, the Senior Advisory Group then modifies the draft as necessary to reach agreement before forwarding it to the IAEA Director General with a recommendation that it be accepted.

As part of this program, Safety Guide SG-QA5, "Quality Assurance During Operation of Nuclear Power Plants," has been developed and published in 1981. In response to comments from users of the safety guide, SG-QA5 is now being revised to include guidance on quality assurance during commissioning and to incorporate some of the lessons learned from the TMI-2 accident. The working

group, consisting of Mr. J. Mullen from Canada; Mr. J. Koutsky from Czechoslovakia; Mr. Eschbach from France; and Mr. J.E. Vessely (Florida Power & Light Co.) from the United States of America, developed the draft revision of this guide from an IAEA collation. This draft revision was subsequently modified by the IAEA Technical Review Committee for Quality Assurance and the Senior Advisory Group, and we are now soliciting public comment on the revisions to SG–QA5 as reflected in the modified draft (Rev. 2, dated November 13, 1984). Portions of the guide which have been revised, primarily by addition of material, are noted by a line in the right-hand margin. Comments received by the Director, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, by April 15, 1985, will be particularly useful to the U.S. representatives to the Technical Review Committee and the Senior Advisory Group in developing their positions on its adequacy prior to their next IAEA meetings.

Single copies of this draft Safety Guide may be obtained by a written request to the Director, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(5 U.S.C. 522(a))

Dated at Washington, D.C. this 10th day of January 1985.

For the Nuclear Regulatory Commission.

Denwood F. Ross,

Deputy Director, Office of Nuclear Regulatory Research.

[FR Doc. 85–1259 Filed 1–15–85; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–247]

Consolidated Edison Co. of New York; Withdrawal of Application for Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Consolidated Edison (the licensee) to withdraw its December 29, 1981 application of the Indian Point Nuclear Generating Plant, Unit No. 2 (IP–2), located in Weschester County, New York. The proposed amemdment would have revised the Technical Specifications of IP–2 to incorporate NUREG–0737 Items II.F.1.1 and II.F.1.2. The Commission issued a Notice of Consideration of Issuance of the Amendments in the **Federal Register** on August 23, 1983 (48 FR 38394). By letter dated May 17, 1984, the licensee requested, pursuant to 10 CFR 2.107, permission to withdraw its application for the proposed amendment. The licensee intends to file a new amendment request on the above subject at a later date. The Commission has considered the licensee's May 17, 1984 request and has determined that permission to withdraw the December 29, 1981 application for amendment should be granted.

For further details with respect to this action, see (1) the application for amemdment dated December 29, 1981; (2) the licensee's letter dated May 17, 1984, requesting withdrawal of the application for license amemdment; and (3) our letter dated January 8, 1985. All of the above documents are available for public inspection at the Commission's Public Document Room, 1717 H. Street, NW., Washington, D.C. and at the White Plains Public Library, 100 Martine Avenue, White Plains, New York 10610.

Dated 8th day of January 1985, Bethesda, Maryland.

Steven A. Varga,

Chief, Operating Reactors Branch #1, Division of Licensing.

[FR Doc. 85–1260 Filed 1–15–85; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meeting

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on:

Thursday, February 7, 1985
Thursday, February 14, 1985
Thursday, February 21, 1985
Thursday, February 28, 1985.

These meetings will start at 10 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street NW., Washington, D.C.

The Federal Prevailing Rate Advisory Committee is composed of a Chairman, representatives from five labor unions holding exclusive bargaining rights for Federal blue-collar employees, and representatives from five Federal agencies. Entitlement to membership of the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

These scheduled meetings will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chairman to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of the meeting.

Annually, the Committee publishes for the Office of Personnel Management, the President, and Congress a comprehensive report of pay issues discussed, concluded recommendations, and related activities. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chairman on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 1340, 1900 E Street NW., Washington, D.C. 20415 (202) 632–9710).

William B. Davidson, Jr.,

Chairman, Federal Prevailing Rate Advisory Committee.

January 10, 1985.

[FR Doc. 85–1255 Filed 1–15–85; 8:45 am]

BILLING CODE 6325–01–M

POSTAL RATE COMMISSION

[Order No. 600; Docket No. A85–14]

Range, Alabama 36473 (Mr. and Mrs. J.O. English et al., Petitioners); Order Accepting Appeal and Establishing Procedural Schedule

Issued: January 8, 1985.

Before Commissioners: Janet D. Steiger, Chairman; Henry R. Folson, Vice-Chairman; John W. Crutcher; James H. Duffy; Henrietta F. Guiton.

Docket No.: A85-14
Name of Affected post office: Range, Alabama 36473
Name(s) of petitioner(s): Mr. and Mrs. J.O. English and others
Types of determination: Closing
Date of filing of appeal papers: January 3, 1985
Categories of issues apparently raised:
1. Effect on the community [39 U.S.C. 404(b)(2)(A)].
2. Effect on postal services [39 U.S.C. 404(b)(2)(C)].

Other legal issues may be disclosed by the record when it is filed; or conversely, the determination made by the Postal Service may be found to dispose of one or more of these issues.

In the interest of expedition within the 120-day decision schedule [39 U.S.C. 404(b)(5)] the Commission reserves the right to request of the Postal Service memoranda of law on any appropriate issue. If requested, such memoranda will be due 20 days from the issuance of the request; a copy shall be served on the Petitioner. In a brief or motion to dismiss or affirm, the Postal Service may incorporate by reference any such memorandum previously filed.

The Commission orders

(A) The record in this appeal shall be filed on or before January 18, 1985.

(B) The Secretary shall publish this Notice and Order and Procedural Schedule in the **Federal Register.**

By the Commission.

Charles L. Clapp,

Secretary.

January 3, 1985: Filing of Petitions
January 8, 1985: Notice and Order of Filing of Appeal
January 28, 1985: Last day for filing of petitions to intervene [*see* 39 CFR 3001.111(b)].
February 7, 1985: Petitioners' Participant Statement or Initial Brief [*see* 39 CFR 3001.115 (a) and (b)].
February 27 1985: Postal Service Answering Brief [*see* 39 CFR 3001.115(c)].
March 14, 1985 1985: (1) Petitioners' Reply Brief should petitioners choose to file one [*see* 39 CFR 3001.115(c)].
March 21, 1985: (2) Deadline for motions by any party requesting oral argument. The Commission will exercise its discretion, as the interest of prompt and just decision may require, in sheduling or dispensing with oral argument [*see* CFR 3001.116].
May 3, 1985: Expiration of 120-day decisional schedule [*see* 39 U.S.C. 404(b)(5)].

[FR Doc. 85-1238 Filed 1-15-85; 8:45 am]

BILLING CODE 7715-01-M

POSTAL SERVICE

Changes in Certain Postal Rates, Fees and Mail Classifications

Correction

In FR Doc. 85-251 beginning on page 1010 in the issue of Tuesday, January 8, 1985, make the following corrections:

1. On page 1013, in the table headed "Rate Schedule 400", for 39 pounds, Zone 1 and 2 should read "3.37".

2. On page 1016, in the table headed "Rate Schedule 501", for 68 pounds, Zone 6 should read "73.90". For 70 pounds, Zone 8 should read "91.50".

3. On the same page, in the table headed "Rate Schedule 502", for 17 pounds, Zone 7 should read "25.25". There were two entries for 21 pounds, the second entry should be removed entirely. For 25 pounds, Zone 3 should read "23.65" and Zone 4 should read "26.25". For 34 pounds, Zone 8 should read "47.35".

4. On page 1017, in the table headed "Rate Schedule 502", for 43 pounds, Zone 4 should read "39.60". For 54 pounds, Zone 3 should read "42.20"; Zone 4, "47.80"; Zone 5, "52.90"; Zone 6, "58.55"; Zone 7, "63.55"; Zone 8, "70.70"; and Zone 9, "81.05". For 58 pounds, Zone 5 should read "56.25", and for 66 pounds, Zone 3 should read "49.85".

5. On page 1018, in the table headed "Schedule SS-10", in the entries to the right of "Cubic inch capacity", remove all dollar signs.

BILLING CODE 1505-01-M

International Postal Rates and Fees

Correction

In FR Doc. 84-33646 beginning on page 50326 in the issue of Thursday, December 27, 1984, make the following correction:

In the table, in the first and second columns on page 50330, the "Maximum weight limits" for the countries "Qatar" through "United Arab Emirates" were omitted. That portion of the table is reprinted in its entirety as follows:

Country	Rate group	Maximum weight limit for air parcel post
Qatar	C	22
Reunion	E	44
Romania	C	44
Rwanda	D	22
St. Christopher and Nevis	A	22
St. Helena	C	22
St. Lucia	A	22
St. Pierre and Miquelon	A	44
St. Vicent and The Grenadines	A	22
Santa Cruz Islands	C	22
Sao Tome and Principe	D	22
Saudi Arabia	D	22
Senegal	D	44
Seychelles	E	22
Sierre Leone	D	22
Singapore	D	22
Solomon Islands	C	22
Somalia	D	22
Sourh Africia (including South-West Africia and Nambia)	D	22
Spain	C	22
SriLanka	D	22
Sudan	D	22
Suriname	B	44
Swaziland	D	22
Sweden	D	44
Switzerland (including Leichtenstein)	B	44
Syria	C	44
Taiwan	C	44
Tanzania	E	22
Thailand	D	22
Togo	D	44
Tonga	B	22
Trinidad and Tobago	B	22
Tristan da Cunha	E	22
Tunisia	C	44
Turkey	C	44
Turks and Caicos Islands	A	22
Tuvalu (Ellice Islands)	B	22
Uganda	D	22
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BILLING CODE 1505-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 23567; 70-7070]

Hawaiian Electric Industries, Inc., Proposed Aquisition of Utility Securities

January 10, 1985.

Hawaiian Electric Industries, Inc. ("Industries"), 900 Richards Street, Honolulu, Hawaii, 96813, a Hawaii corporation and an exempt holding company under section 3(a)(1) of the Public Utility Holding Company Act of 1935 ("Act"), has filed an application with this Commission, pursuant to sections 9(a) (2) and 10 of the Act.

Industries owns all of the outstanding common stock of Hawaiian Electric Company, Inc. ("HECO"), a Hawaii corporation and an operating electric public utility on the Island of Oahu. HECO has two wholly owned electric utility subsidiaries, Hawaii Electric Light Company, Inc. ("HELCO"), which provides service to the Island of Hawaii and Maui Electric Company, Limited ("MECO") which provides service to the Island of Maui. All three of these islands are within the State of Hawaii. Finally, Industries owns all of the outstanding common stock of HEI Investment Corp. ("HEZII"), a Hawaii corporation which invests in securities of other corporations.

Industries has been examining alternate energy sources including wind energy, geothermal energy, oceanthermal energy, and hydro and refuse-to-energy, as well as cogeneration. Industry has also been negotiating with third parties with respect to use of these alternate energy sources in possible energy production.

Industries proposes to incorporate one or more New Subsidiaries under Hawaii law if and when Industries determines that an alternate energy or cogeneration project should be engaged in by a New Subsidiary. All of the capital stock of a New Subsidiary would be acquired by Industries upon incorporation. It is anticipated that Industries would continue to own a majority of the voting securities of a New Subsidiary. Each of the New Subsidiaries to be created will carry on business related to the alternate energy or cogeneration projects solely within the State of Hawaii and will sell electric energy to HECO, HELCO, or MECO, depending on the project's location.

Industries estimates the capital expenditure requirements for and the estimated capacity of the alternate energy and cogeneration projects actively being considered through 1990 to be as follows:

Type of project	Megawatts of capacity	Total capital expenditure requirements
Alternate Energy:		
Wind Power	12	$30,000,000
Geothermal Power	26	45,000,000
Hydro Power	20	25,000,000
Subtotal	58	100,000,000
Cogeneration	27	45,000,000
Total	85	145,000,000

Should all of the above projects go forward and be completed by 1990, tax credits and deferred taxes are expected to provide approximately $25,000,000 of the total capital expenditure requirements. Present plans contemplate that about $60,000,000 would be funded by common stock invested by Industries and $60,000,000 would come from long term borrowings. As of December 31, 1983, the total installed capability of HECO, HELCO and MECO was 1,552.9 MW. Thus it is anticipated that the maximum total MW capacity of all these projects will not exceed 6% of their total 1983 installed capacity.

The application and any amendments thereto are available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing should submit their views in writing by February 4, 1985, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the applicant at the address specified above. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issues of fact and/or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in this matter. After said date, the proposal, as filed or as it may be amended, may be authorized.

For the Commission, by the Office of Public Utility Regulation, pursuant to delegated authority.

John Wheeler,

Secretary.

[FR Doc. 85-1242 Filed 1-15-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 23568; 70-7058]

Jersey Central Power & Light Co. et al.; Proposal for Issuance and Sale of Common Stock of Subsidiary to Parent; for Parent To Make Open Account Advances to Subsidiary; Issuance and Sale of Debt Instruments by Subsidiary; Exception From Competitive Bidding

Jersey Central Power & Light Company ("JCP&L"), Madison Avenue at Punch Bowl Road, Morristown, New Jersey, 07960, an electric utility subsidiary of General Public Utilities Corporation ("GPU"), a registered holding company; and Energy Initiatives, Incorporated ("EII"), a newly formed corporation, propose a transaction subject to sections 6, 7, 9, 10, and 12(b) of the Public Utility Holding Company Act of 1935 ("Act") and Rules 45, 50(a)(3), 50(a)(5), 87, 90 and 91 thereunder.

EII was formed by JCP&L in compliance with an Order ("Order") of the New Jersey Board of Public Utilities ("NJBPU") entered in a proceeding under the Public Utility Accident Fault Determination Act, N.J.S.A. 48:2-21.4 *et seq.* directing JCP&L to establish a separate entity for the purpose of maximizing the development of cost-effective cogeneration technologies throughout the State of New Jersey thereby making the resulting electrical energy and capacity available for purchase and use by JCP&L to offset or replace JCP&L's future energy and capacity requirements. Specifically, EII will identify, arrange financing for, or fund, and otherwise develop, or invest in and own, or lease to others, or operate and maintain cogeneration, small power production and resource recovery facilities throughout New Jersey for the production of electric energy. It is intended that the facilities owned by or invested in by EII will be limited to those which constitute "qualifying facilities" within the meaning of the Public Utility Regulatory Policies Act and in such instances, the production of electricity will be for sale to JCP&L. EII has not issued any securities or conducted any business at the date of this proposal.

EII proposes to issue to JCP&L, and JCP&L will purchase from EII, all the common stock of EII, consisting of 10,000 shares of common stock (no par value) for an aggregate of $100,000. Thereafter, JCP&L will make, from time to time, open account advances to EII of up to $1,000,000 per year for a period of 5 years. JCP&L will purchase cogenerated energy and capacity through facilities developed by EII.

Investments in "qualifying facilities" by EII will be considered on a case-by-case basis and may take the form of purchase of shares, participation in partnerships and joint ventures, the making of loans, and entry into other contractual arrangements. Any such investments by EII will not exceed 50% equity in a "qualifying facility". To enable it to fund its investments in such facilities and to otherwise carry on its business, EII requests authority, from time to time, until December 31, 1986 and without further Commission approval, to effect secured and/or unsecured borrowings from vendors/suppliers of equipment, and/or from institutional lenders or commercial banks for an aggregate principal amount of up to $2,000,000 at interest rates not exceeding 125% of the prime rate generally in effect at the time of such borrowings. Such flexible authority, EII urges, is necessary to expedite the prompt negotiation of arrangements in respect to respect to the various Facilities, each of which is typically the subject of complex financing and where time is of the essence.

EII will conduct its operations with a limited permanent staff and, therefore, JCP&L may, from time to time, furnish to EII a variety of administrative, accounting, technical, financial, legal and other incidental services and expertise not otherwise available to EII pursuant to a proposed form of agreement governing the provisions of such services. To the extent services are required of JCP&L it will account for, allocate and charge its cost of providing services to EII on a full cost reimbursement basis in accordance with Rules 90 and 91 under the Act, utilizing a cost accumulation system, on a project-

by-project basis, in accordance with the Uniform System of Accounts For Mutual and Subsidiary Service Companies. EII will maintain systems of accounts based upon the Uniform System of Accounts prescribed for public utilities, modified where appropriate, as set forth in 18 CFR Part 101.

EII requests an exception from the competitive bidding requirements of Rule 50 pursuant to Rule 50(a)(5) in connection with EII's issuance and sale of debt instruments to evidence its borrowings. EII asserts that such exception is justified because EII is a non-utility subsidiary and competitive bidding is not necessary or appropriate in the public interest or needed for the protection of investors or consumers.

The proposal and any amendments thereto are available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing should submit their views in writing by February 4, 1985, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the applicants at the addresses specified above. Proof of service (by affidavit or, in the case of an attorney at law by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in this matter. After said date, the proposal, as filed or as it may be amended, may be authorized.

For the Commission, by the Office of Public Utility Regulation, pursuant to delegated authority.

John Wheeler,

Secretary.

[FR Doc. 85-1243 Filed 1-15-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 21644; SR-Amex-84-31]

Self-Regulatory Organizations; American Stock Exchange, Inc.; Filing of Amendment No. 1 to Proposed Rule Change and Order Granting Accelerated Approval of Amended Proposed Rule Change

January 9, 1985.

On October 9, 1984, the American Stock Exchange, Inc. ("Amex") 86 Trinity Place, New York, NY, 10006, submitted a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b-4 thereunder [2] to make certain changes to Amex's rules and policies regarding exercise prices for both stock options and stock index options.[3] On December 31, 1984, Amex submitted Amendment No. 1 to the proposed rule change. The Commission is publishing notice of Amendment No. 1 in this release.

The amended proposed rule change would permit the introduction of stock options with strike prices of $5.00 so long as the underlying stock has not met delisting requirements, and would also allow strike price intervals of $5.00 for options on stocks trading between $100.00 and $200.00 per share.[4] Amex also proposes to allow th elisting of one at-the-money, two in-the-money and two out-of-the-money strike prices for index options upon the introduction of a new expiration month and to add new strike prices in response to changes in the underlying index value so as to maintain two in-the-money and two out-of-the-money strike prices at all times until the last day for adding new strike prices.[5] In addition, Amex proposes to allow the listing of additional strike prices for index options under unusual (highly volatile) market conditions.[6] Finally, Amex proposes to allow the listing of new strike prices for index options up to the fifth business day prior to the expiration of the series.[7]

The Commission is publishing this notice to solicit comment on the amended proposed rule change.[8]

Persons interested in commenting on the amended proposed rule change should submit six copies of their comments within 21 days from the date of publication of this notice in the **Federal Register.** Comments should be sent to Secretary of the SEC, 450 Fifth Street, NW., Washington, DC 20549. Copies of the amended proposed rule change and all documents relating to the amended proposed rule change, except those that may be withheld from the public pursuant to 15 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of the amended filing also are available at the Amex.[9]

As Amex explains in its filing, the existing exchange policies prohibiting $5.00 strike prices date from a time when Amex's rule governing the delisting of options prohibited the addition of any new series to an option class if the underlying stock closed below $10.00 per share for a specified period of time. Because Amex's rules allow the addition of new series only when the value of the underlying stock reaches an existing exercise price, $5.00 strike prices cannot be added until the price of the underlying stock reaches $10.00 per share. Under the old delisting rule it would have been inappropriate to add $5.00 strike prices when the price of the underlying stock reached $10.00 per share because the option might have to be delisted. In November, 1981, Amex changed its rules to prohibit the addition of new series when a stock closed below $8.00 (instead of $10.00) per share for a specified period of time,[10] without also changing the exchange policies prohibiting $5.00 strike prices. Thus, the proposal to permit $5.00 strike prices so long as the underlying stock has not met delisting requirements is designed to reflect that change. For this reason, the Commission finds that this portion of the Amex's proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and in particular the

[1] 15 U.S.C. 78s(b)(1) (1984)

[2] 17 CFR 240.19b-4 (1984).

[3] The proposed rule change was noticed in Securities Exchange Act Release No. 21424, October 24, 1984, 49 FR 43826, October 31, 1984.

[4] Amex currently prohibits strike prices of less than $10.00 and requires strike price intervals of $10.00 for options on stocks trading at $100.00 per share or more.

[5] Amex would maintain two in-the-money and out-of-the-money strike prices by adding strike prices that are $10, or two strike price intervals, above (or below) the index value when the index value reaches an existing strike price. Thus, when the index value rises to 100, strike prices of 110 would be added.

[6] Currently, Amex allows th elisting of one in-the-money and one out-of-the-money strike price for index options upon the introduction of a new expiration month, and adds new strike prices thereafter so as to maintain one in-the-money and one out-of-the-money strike price. Thus, under Amex's existing policy, when the index value rises to 100, a strike price of 110 would be added.

[7] Currently, Amex allows the listing of new strike prices for index options up to the first calendar day of the month in which the series expires, i.e., until 16-21 calendar days prior to expiration of the series.

[8] Under the original proposal Amex could have established $5.00 exercise price intervals for options on stocks trading at or above $200.00 and could have introduced and maintained three (rather than two) in-the-money and out-of-the-money strike prices for index options. Amendment No. 1 also allows Amex to add strike prices until the fifth business day prior to expiration.

[9] The Commission notes that the Chicago Board Options Exchange, Incorporated ("CBOE") and New York Stock Exchange, Inc. (index options only), and the Philadelphia Stock Exchange, Inc. (stock options only) have submitted strike price proposals similar to Amex's and are expected in the near future to amend their filings to make them substantially identical to Amex's amended proposal. See File Nos. SR-CBOE-84-22, NYSE-84-2 and Phlx-84-26, noticed in Securities Exchange Act Release Nos. 21362, 20911, and 21502, September 28, April 30, and November 20, 1984; 49 FR 39135, 19426, and 47146, October 3, May 7, and November 30, 1984.

[10] *See* Securities Exchange Act Release No. 18286, November 24, 1981, 46 FR 58630.

requirements of Section 6 and the rules and regulations thereunder.

As described above, Amex also proposes to narrow to $5.00, from $10.00, the strike price intervals for options on stocks trading between $100.00 and $200.00 per share. Amex argues that narrower strike price intervals will provide additional flexibility for hedgers and traders and have been requested by many market participants. Amex also argues that the utility of $5.00 strike prices intervals for options on underlying instruments valued over $100.00 has been demonstrated in index options. As Amex points out, the Commission previously has approved $5.00 strike price intervals for options on stock indices whose value is over 100 points.[11]

As stated in the Commission's order approving the narrowing of strike price intervals for stock options to their current levels,[12] and narrowing of strike price intervals increases the flexibility accorded market participants and allows options positions to be more finely tailored to achieve intended investment objectives. At the same time, the Commission recognized that in narrowing strike price intervals, exchanges need to avoid creating a number of options series that produce an excessive dispersion of interest and, as a consequence, excessive dilution of liquidity in open options series. In sum, the Commission stated that in narrowing strike price intervals exchanges need to strike a balance between accommodating market participants and causing excessive proliferation of options series.

The Commission notes that stock indices, by definition, on average are less volatile than the stocks comprising the indices, and indeed tend to be less volatile than all but the least volatile individual stocks. Hence, the need to introduce reduced strike price intervals for individual stock options is not directly applicable to individual stock options. Nevertheless, the Commission believes that the Amex has struck an appropriate balance between the concerns noted above by providing $5.00 intervals for options on stocks trading between $100.00 and $200.00 per share. In particular, the Commission accepts Amex's analysis that the benefits to be derived from narrower intervals, in offering participants greater flexibility in achieving investment objectives outweights the possible adverse effects on market liquidity and dispersion of interest that may result from that action. For these reasons, the Commission finds that this portion of the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges and in particular the requirements of section 6.

As described above, Amex also proposes to allow one at-the-money, two in-the-money strike prices for index options from the introduction of a new expiration until the fifth business day prior to the date upon which the option will expire. Amex also proposes to allow the listing of additional strike prices for index options under unusual market conditions. Amex argues that this part of its proposal is necessitated by the increasing short-term, intra-day volatility exhibited by stock indices.[13] Because Amex (like other options exchanges) is unable operationally to establish new strike prices in less than two business days, intra-day movements in index values greater than five points (the current maximum amount by which index options may be away from the market) can result in the absence of at-the-money series for as long as two days. According to the Amex, this proposal will allow the listing of strike prices up to 10 points away from the market (or more than 10 points in unusual market conditions) in anticipation of possible large changes in the index value. Furthermore, because Amex's current rules (like those of the other options exchanges) prohibit the addition of new strike prices for index options after the first day of the month in which the option would expire, large movements in the index value occurring during the 16–21 days prior to expiration can result in the absence of at-the-money or even near-the-money series during part or all of this period. Amex proposes to allow the listing of strike prices for index options until the fifth business day prior to expiration to avoid such occurrences.

Like the portion of Amex's proposal allowing narrower strike price intervals for certain stock options, the Commission believes this Amex proposal strikes an appropriate balance by accommodating market participants without causing excessive proliferation of options series. First, the Commission notes that Amex's proposal permits at most a fairly small absolute increase in the number of index options series that may be outstanding at any one time. Amex's proposal permits the introduction and maintenance through time of only two series more than allowed under Amex's current rules and policies. Furthermore, Amex's proposal sets the maximum permissible number of strike prices; Amex retains discretion to list fewer strike prices than allowed. Finally, Amex rules allow it to delist series with no open interest; thus, should Amex list a new series in anticipation of a large market movement that does not materialize, Amex would be able to delist that series if it attracts no trading interest.

Second, there is some evidence that sufficient demand exists for options series as much as two strike price intervals away from the market that the new series permitted under Amex's proposal will not be significantly illiquid, even at the time of listing. CBOE has submitted data in connection with its related rule filing indicating that series as much as two intervals away from the market attract and sustain relatively significant volume.[14] In addition, there is evidence that trading interest in index options remains high up until a few days before their expiration, so that series added prior to the fifth day before expiration should not be significantly illiquid.[15]

Finally, in light of the Amex's inability to add new strike prices in less than two days and the increased short-term volatility of stock indices, Amex's proposal may be the only practical means of ensuring the relatively constant availability of at-the-money or near-the-money series of index options. Allowing the addition of strike prices to index options up to the fifth business day prior to expiration also will help ensure the availability of near term options that are at-the-money or near-the-money until expiration.

In sum, the Commission finds the Amex proposal should not result in a substantial increase in the number of index options series outstanding, and may be the only practicable means to

[11] Securities Exchange Act Release Nos. 20191 and 21362, September 16, 1983, and September 28, 1984; 48 FR 44306 and 49 FR 39135.

[12] Securities Exchange Act Release No. 17238, October 22, 1980, 45 FR 71453. Prior to this order, strike price intervals were $5.00 for stocks trading between 0 and $50.00 per share, $10.00 for stocks trading between $50.00 and $100.00 per share, and $20.00 for stocks trading over $200.00 per share.

[13] For example, on August 3, 1984, Amex's Major Market Index ("XMI") ranged between 228.45 and 236.11, and rose 7.3 points on that day.

[14] Letter from Frederic M. Krieger, Assistant General Counsel, CBOE, to Richard T. Chase, Associate Director, Division of Market Regulation, SEC, dated September 17, 1984 (File No. SR–CBOE–84–22).

[15] For example, total volume in all December series of XMI options for the four weeks preceding expiration of those series on December 22, 1984, was 172,442, 156,308, 151,588 and 259,012 contracts, respectively, while volume in the January series during these periods was 18,830, 16,197, 77,461 and 62,713, respectively. Telephone conversation of January 4, 1984, between Heidi Litt, Attorney, Options Division, Amex, and Alden Adkins, Attorney, Division of Market Regulation, SEC.

ensure the consistent availability of at-the-money or near-the-money series in options on stock indices through their expiration. For these reasons the Commission finds that the benefits to be derived from this portion of Amex's proposal in accommodating market participants investment needs and objectives outweigh the possible adverse effects on market liquidity and dispersion of interest that may result from this portion of Amex's proposal. Accordingly, the Commission finds that this portion of Amex's proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular the requirements of section 6.

The Commission finds good cause for approving Amex's proposed rule change prior to the thirtieth day after the date of publication of notice of filing of Amendment No. 1 to the proposal in that the original proposed rule change was published for comment for over thirty days, no comments were received in response to that publication and Amendment No. 1 on balance reduces the extent to which Amex's rules would be modified by the proposed rule change.[16]

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that Amex's proposed rule change is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

John Wheeler,

Secretary.

[FR Doc. 85-1245 Filed 1-15-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-21586; File No. SR-MSE-84-10]

Self-Regulatory Organizations; Proposed Rule Change by Midwest Stock Exchange, Inc. Relating to a Change in MSE's Transaction Fee and Volume Fee Schedule

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 6, 1984 the Midwest Stock Exchange, Incorporated filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[16] *See* note 8, *supra*.

I. Self-Regulatory Organization's Statement on the Terms of Substance of the Proposed Rule Change

Attached to the filing as Exhibit A is the revised schedule for MSE's Transaction Fees and Volume Fees.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries set forth in sections (A), (B) and (C) below of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement on the Purpose of, and Statutory Basis for, the Proposed Rule Change.

The Exchange's new pricing schedule generally will make the Exchange more competitive and will more equitably allocate its fees among members in that it more fairly represents the Exchange's incremental costs in facilitating member transactions.

The proposed fee change is consistent with section 6(b)(4) of the Securities Exchange Act of 1934 in that it provides for the equitable allocation of reasonable fees and other charges among Midwest's members.

(B) *Self-Regulatory Organization's Statement on Burden on Competition*

The Midwest Stock Exchange, Incorporated does not believe that any burdens will be placed on competition as a result of the proposed fee change.

(C) *Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others*

Comments have neither been solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Securities Exchange Act of 1934 and subparagraph (e) of Securities Exchange Act Rule 19b-4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by February 6, 1985.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

John Wheeler,

Secretary.

January 10, 1985.

Exhibit A

The Transaction Fee Schedule and the Volume Fee of the Midwest Stock Exchange, Inc. is hereby amended and shall read as follows:

TRANSACTION FEE SCHEDULE

[Item charge; rate in cents]

Round lot trades/month	Rate (per trade)
0 to 500	10
501 to 1000	0
1001 and over	-10
Odd lot item fee	0

TRANSACTION FEE SCHEDULE

[Value charge; rate in cents]

Total gross dollar value/month (in millions)	Rate (per $1,000)
0 to 10	16.0
10.1 to 25	12.0
25.1 to 125	8.5
125.1 to 250	8.0
250.1 to 350	7.5
350.1 to 450	6.5
450.1 to 550	4.5
550.1 and over	3.0

In calculating this amount, each cross order will be valued up to the first 50,000 shares only.

Adjustments are made for: Principal specialist and market maker trades, floor brokerage, and specialist give-ups.

Volume Fee—4¢ per $1,000 of volume payable on round lot sales (or major fraction thereof) as principal whenever the Specialist or Market Maker makes such sale as principal on Midwest.

Effective November 1, 1984.

[FR Doc. 85-1246 Filed 1-15-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-21643; SR-NYSE-84.34]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change

January 9, 1985.

The New York Stock Exchange, Inc. ("NYSE" or "Exchange") 11 Wall Street, New York, New York, 10005, submitted on November 8, 1984, copies of a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder, to amend the NYSE regulatory oversight services fee ("regulatory fee") imposed under NYSE Rule 129 by increasing the charge to its members and member organizations for regulatory oversight services from $0.26 to $0.35 per $1,000 of gross revenues as reported in the FOCUS report.[1] In addition, the NYSE proposes to increase other fees and charges as follows: (1) The current $5 to $40 charge for the NYSE Guide will be increased to $6.25 to $50; (2) the current $100 charge for the NYSE Rule Interpretation Handbook will be increased to $200; (3) the current $11 registered person annual maintenance fee will be increased to $20; (4) the current $75 branch registration fee will be increased to $100; (5) the current $150 FOCUS Feedback charge will be increased to $200; and (6) the capital management fee schedule will be increased. The proposed increases in fees and charges would be effective as of January 1, 1985.

Notice of the proposed rule change together with the terms of substance of the proposed rule change was given by the issuance of a Commission release (Securities Exchange Act Release No. 21494, November 16, 1984) and by publication in the **Federal Register** (49 FR 46230, November 23, 1984). No comments were received with respect to the proposed rule change.

The primary purpose of the proposed rule change is to permit the NYSE to continue to recover costs associated with conducting FINOP regulatory oversight of its members. According to the NYSE, the regulatory fee is used exclusively to defray FINOP related expenses incurred by the Exchange as DEA pursuant to Rule 17d-1 under the Act.[2] Due in large part to a lower than anticipated trading volume, the Exchange collected lower than expected FINOP revenues in 1984. The NYSE has projected that 1984 FINOP revenues will be approximately $10.037 million, or $2 million below the 1984 estimate submitted to the Commission in connection with its previous regulatory fee filing.[3] The NYSE states in its filing that even with the proposed fee increase there will still be a projected loss of $8.7 million in 1984, and $9 million in 1985 in connection with its FINOP regulation.[4]

When the Commission in March 1984 approved an increase in the regulatory oversight fee from $0.13 to $0.26 per $1,000 gross revenues, the Commission indicated that any subsequent increases in the fee would have to be accompanied by a detailed cost justification that would specify for each FINOP-related cost center those expenses related exclusively to the NYSE's responsibilities as DEA under Rule 17d-1.[5] In addition, the Commission recommended that the NYSE devise suitable means for tracking the amount of staff time devoted to carrying out the Exchange's FINOP responsibilities.

The NYSE has submitted statistical data with respect to the instant filing. Among the data provided were: (1) A financial summary of 1984 and 1985 estimated revenues and expenses of the NYSE's Member Firm Regulatory Services Division ("Division"), including detailed revenue breakdowns for FINOP and Sales Practices areas; (2) a manual time-tracking system summary for regulatory review units within the Division, including for a four-week period of the last quarter of 1984, the number of staff hours devoted to FINOP activities, sales practices, market surveillance, and other areas;[6] (3) data relating to staff allocation to FINOP and sales practices in the areas of fingerprinting and automation development and operations; (4) a projected percentage breakdown for 1984 and 1985 for each of the 24 cost centers in the Division of the direct costs allocated to FINOP services and sales practices areas;[7] (5) a description of projected corporate general and administrative expenses for 1984-1985, which are allocated to FINOP based on the ratio of direct FINOP expenses to total NYSE operating expenses; and (6) other data and information relating to various cost centers within the Division,

[1] The Commission first approved the NYSE's regulatory fee on gross revenues in Securities Exchange Act Release No. 20337, October 31, 1983; 48 FR 51188, November 7, 1983 (SR-NYSE-83-34). The purpose of the fee is to provide revenues for NYSE's financial and operational (FINOP) services and examinations of its members. The Commission approved a further increase in the regulatory fee from $0.13 to $0.26 per $1,000 gross revenues as reported in the member's FOCUS report in Securities Exchange Act Release No. 20729, March 6, 1984; 49 FR 9525, March 13, 1984 (SR-NYSE-84-7).

In its October 31, 1983, order approving the NYSE's initial regulatory fee under NYSE Rule 129, the Commission stated that a fee based on gross revenues is appropriate insofar as the NYSE is the designated examining authority ("DEA") under Rule 17d-1 of the Act with respect to conducting the FINOP examination of its members. The Commission noted that no other self-regulatory organization ("SRO") has responsibility for conducting such examinations, which necessarily include inspections of aspects of a member's business not limited to its activities in NYSE-listed securities.

[2] For those members for which NYSE is the DEA, the NYSE is responsible for review and subsequent action on FOCUS Reports, any schedules or forms thereof, and any other generally applicable financial reporting requirements imposed by other SROs, the NYSE, or the Commission. The NYSE's responsibility with respect to these financial reports includes determination of compliance with Commission, NYSE, and other applicable SRO rules related to capital, margin, operations, books and records, reporting, and filing of documents. The NYSE is not responsible for conducting such a review for members for which the NYSE is not DEA and the regulatory fee would not be imposed on such members.

[3] *See* File No. SR-NYSE-84-7 (Securities Exchange Act Release No. 20729, March 6, 1984; 49 FR 9525, March 13, 1984); and letter (and exhibits thereto) from James E. Buck, Secretary, NYSE, to Richard T. Chase, Assistant Director, Division of Market Regulation, dated February 27, 1984.

[4] See Exhibits B, C, and E of File No. SR-NYSE-84-34. The NYSE includes as FINOP revenues the regulatory fee on members' gross revenue, Regulation T extension fees, commodity exchange surveillance charges, and other service fees such as late filing, rule interpretation handbook, NYSE Guide, Fingerprinting and FOCUS Feedback charges. The NYSE estimates that FINOP revenues will increase from $10,037,000 in 1984 to $14,405,000 in 1985, assuming the 35¢ fee level is imposed. Total direct FINOP expenses will increase from $18,722,000 in 1984 to $23,444,000 in 1985, which includes an estimated increase in general and administrative expenses allocated to FINOP from 1984 to 1985.

[5] *See* Securities Exchange Act Release No. 20729, March 6, 1984; 49 FR 9525, March 13, 1984 (SR-NYSE-84-7).

[6] The time tracking system summary indicated that more than 90% of staff time within the NYSE's regulatory review units was devoted to FINOP activities. This is consistent with the NYSE's projections of staff and expense allocations in connection with the Division's FINOP-related activities. The NYSE intends to continue its manual time-tracking system, and to provide the Commission with periodic summaries of regulatory review units' staff time allocated to FINOP and non-FINOP areas.

[7] For a description of the administrative departments and cost centers of the Division, *see* letter (and exhibits thereto) from James E. Buck, Secretary, NYSE, to Richard T. Chase, Assistant Director, Division of Market Regulation, dated February 27, 1984.

and their allocation to FINOP and non-FINOP activities.

Based on the data supplied to the Commission in connection with the proposed regulatory fee increase, the Commission is satisfied that the estimated 1985 revenues generated by the proposed fee will not exceed those NYSE expenses directly related to the Exchange's exclusive FINOP responsibilities as DEA under Rule 17d-1. The Commission will continue to monitor the NYSE's allocation of various Division cost centers to FINOP and non-FINOP areas and to assess the accuracy of the NYSE's projections with respect to the FINOP-related expenses of those cost centers. Furthermore, the Commission will continue to require detailed cost justifications for any further increase in the regulatory fee.[8]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6 and the rules and regulations thereunder. In particular, the Commission finds that the proposed increase in the regulatory fee is consistent with section 6(b)(4) of the Act, which requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members. A charge of 35¢ per $1,000 gross revenue is reasonable in light of the examination services that the NYSE is required to perform[9] and in view of the likelihood that such charges do not appear to exceed the Exchange's anticipated expenses in conducting FINOP-related services. The charge is equitable insofar as all NYSE members are assessed on the same basis. In addition, the Commission finds the proposed fee increases other then the regulatory fee provided for by the proposed rule change to be reasonable and equitable.

The Commission finds further that the proposed increase in the regulatory fee is consistent with section 6(b)(8) of the Act, which requires that an exchange's rules not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Since all NYSE members are assessed on the same basis, and the fee relates to transactions effected other than on the NYSE only to the extent the NYSE is required to perform regulatory oversight functions with respect to such transactions, the Commission does not view the fee as having a significant adverse competitive effect on NYSE members or on other markets. Any burden imposed by such charges is clearly outweighed by the regulatory need to monitor the financial responsibility of NYSE members with respect to all of their financial and operational activities.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the above-mentioned proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

John Wheeler,

Secretary.

[FR Doc. 85-1247 Filed 1-15-85; 8:45 am]

BILLING CODE 8010-01-M

[8] In its March 1984 order approving an increase in the fee, the Commission noted that several Division cost centers appeared to be exclusively related to a member firm's securities business (and in some instances its business in NYSE listed securities only). Funding such cost centers with a fee on FOCUS gross revenues (which includes a member firm's commodities, insurance, real estate and other activities, as well as its securities business) would not appear to be appropriate. The cost centers that would not appear to be appropriate to subsidize by fees on FOCUS gross revenues—credit regulation, rule development and interpetation, fingerprinting and automation development and operations—do not account for a substantial portion of the total expenses the NYSE has characterized in its submissions to the Commission as FINOP-related. Only 18 of approximately 187 Division staff allocated internally by the NYSE to FINOP for 1985 are allocated to these areas. Moreover, certain of these areas, such as credit regulation and fingerprinting, have exchange revenues associated with them that offset all or part of the costs of their administration. Hence, even taking into account appropriate adjustments to overhead and allocated general and administrative expenses, it does not appear that exclusion of these areas would materially reduce the total of the expenses this fee is intended to cover. However, should revenues from the regulatory oversight services fee approach projected expenses, the Commission will require additional justification for funding such cost centers with the fee.

In its October 1983 order approving the NYSE's 13¢ fee, the Commission stated that its determination that the fee is consistent with Section 6 of the Act is directly based on the universal nature of the FINOP examination. Self-regulatory organization fees calculated on members' gross revenues intended to support services directly related to transactions affected solely in that marketplace or for examinations which do not focus on all aspects of a member's business would not appear to be appropriate. *See* Securities Exchange Act Release No. 20337, October 31, 1983, note 18.

[Release No. 34-21646; File No. SR-FHLX 84-14]

Self-Regulatory Organizations; Proposed Rule Change by Philadelphia Stock Exchange, Inc., Relating to the Affiliation of Members and or Participants With Other Members and or Participants of Non-Members

Pursuant to section 19(b)(1) of the Securities Exchange act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on December 17, 1984, the Philadelphia Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule changes as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Philadelphia Stock Exchange, Inc. ("PHLX") proposes to amend Rule 793 and delete Rule 905, thereby modifying PHLX procedures for approval of dual or multiple affiliations of members and/or participants. Italic indicates material proposed to be added; brackets indicate material proposed to be deleted.

Rule 793 [Officer in Single Corporation] *Affiliations—Dual or Multiple*

[No officer or director of a member corporation shall be an officer or director of another member corporation or a general special partner of a member firm. No substantial stockholder of a member corporation or a general partner of a member firm, without the written permission of the committee.] *No person shall at the same time be a partner, whether as a general or a limited partner, or an officer, director or stockholder of more than one member or participant organization, nor shall he be affiliated in any manner with a non-member or non-participant organization which is engaged in the securities business, unless such affiliation has been disclosed to and approved in writing by the member and/or participant organizations and such approval has been filed with the Office of the Secretary. No member or participant shall register more than one member or participant organization for membership and/or participation.*

The Exchange may disapprove multiple affiliations which are inconsistent with Exchange standards of financial responsibility, operational capability, or compliance responsibility.

Commentary

.01 A member or participant organization filing notice of a multiple affiliation with the Office of the Secretary shall include in such filing written approval of such affiliation, an explanation of the business purpose of this arrangement and whom at said organizations shall supervise the business conduct of the person multiply affiliated for compliance with FHLX By-Laws and Rules. The filing should also include sufficient information for the

Exchange to determine whether one person registers more than one organization.

[Rule 905 Partner in Single Firm

No person shall at the same time be a partner in more than one member firm whether as a general or as a limited partner.]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposal rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statements of the Purpose of, and Statutory Basis for the Proposed Rule Change

The proposed rule change modifies previous Exchange procedure for approval of dual or multiple affiliations of members and/or participants. The new rule is based in part upon the Midwest Stock Exhange Rule 8 in that consent to these affiliations must be given, in writing, by the respective member and/or participant organizations and filed with the Exchange's Office of the Secretary. The proposed rule change will relieve standing committees from routinely reviewing these requests. The Exchange reserves the right to disapprove those affiliations which are inconsistent with Exchange standards of financial responsibility, operational capabilities or compliance responsibility.

The proposed rule change is consistent with the requirements of the Securities Exchange Act of 1934 (the "Act"), and rules and regulations thereunder applicable to the Exchange in that it adds to the uniformity in procedures utilized by the self-regulatory organizations and allows members and/or participants to associate with non member or other broker/dealers as provided for in the Act.

Therefore, the proposed rule change is consistent with section 6(b)(5) of the Act, which provides in pertinent part that the rules of the Exchange be designed to promote just and equitable principles of trade, facilitate transactions in securities, and protect investors in the public interest; and are not designed to permit unfair discrimination between brokers or dealers.

B. Self-Regulatory Organizations Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or,

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by February 6, 1985.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: January 9, 1985.

John Wheeler,

Secretary.

[FR Doc. 85-1244 Filed 1-15-85; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Action Subject to Intergovernmental Review

AGENCY: Small Business Administration.

ACTION: Waiver to notice of action subject to intergovernmental review under Executive Order 12372.

SUMMARY: This amends a notice published in the **Federal Register** on January 11, 1985 (50 FR 1665). The California State Department of Commerce, the host organization for the proposed California Small Business Development Center (SBDC), has requested that SBA fund the proposed SBDC on or before February 20, 1985, in order to assure State funding for the Center. This notice amends the referenced notice to a comment period of 39 days which will be February 19, 1985.

DATE: Effective upon publication.

FOR FURTHER INFORMATION CONTACT: Mrs. Johnnie L. Albertson, Deputy Associate Administrator for Management Assistance/SBDC, U.S. Small Business Administration, Washington, D.C. 20416, (202) 653-6768.

SUPPLEMENTARY INFORMATION: In FR Doc. 85-795 appearing at page 1665 in the issue for Friday, January 11, 1985, in the preamble, change the **DATE** paragraph as follows:

DATE: Comments will be received for a period of 39 days from the date of publication of this notice.

In the third paragraph following the subheading Notice of Action Subject to Intergovernmental Review, change the first sentence to read: The proposed SBDC will be funded at the earliest practicable date following the 39-day comment period.

In the fourth paragraph under the subheading referenced above, change the third sentence to read: Comments will be accepted by the relevant proposal developer and SBA through February 19, 1985.

Dated: January 14, 1985.

Irene Castillo,

Acting Administrator.

[FR Doc. 85-1375 Filed 1-15-85; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE-85-1]

Petition for Exemption; Petitions Received Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking releif from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received and corrections. The propose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before: February 5, 1985.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Petition Docket No. , 800 Independence Avenue, SW., Washington, D.C. 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Dockets (AGC-204), Room 916, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, D.C. 20591; telephone (202) 426-3644.

This notice is published pursuant to paragraphs (c),(e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, D.C., on January 8, 1985.

John H. Cassady,

Assistant Chief Counsel, Regulations and Enforcement Division.

PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought
24392	Royal Air Maroc	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 707-320 aircraft for back-up service in noncompliance with the operating noise limits until June 30, 1985.
24276	Western Airlines	14 CFR 63.37(b) and Part 63, Appendix C	To allow an applicant for a flight engineer certificate with a turbojet class rating to obtain the certificate without having received the required 5 hours of flight training in an airplane.
24355	Dept. of California Highway Patrol	14 CFR 45.29	To allow petitioner to operate various types of helicopters and airplanes displaying registration and nationality markings less than 12 inches high.
22690	Boeing Commercial Airplane	14 CFR 61.57(c)	To renew the terms of Exemption 3662, which expired 11/30/84. It would allow certain pilots employed by Boeing to satisfy general recent flight experience requirements by alternate means.
23147	Boeing Commercial Airplane Company	14 CFR 91.195(a)(1)	To renew Exemption 3661 to allow petitioner to conduct noise measurement tests, ground proximity warning system research and development, and certification flight tests at altitudes lower than 1,000 feet above the surface.
24341	HRB-Singer, Inc.	14 CFR 21.181	To allow petitioner to operate a Super King Air B-200 airplane utilizing the provisions of a minimum equipment list.
21266	Flight Management Company	14 CFR 91.169 and 91.181	To extend the January 31, 1985, termination date of Exemption 3294A. It would allow petitioner to continue to operate certain small civil aircraft under the provisions of §§ 91.183 and 91.215.
24380	ISO Aero Service Inc.	14 CFR 141.35	To allow petitioner to serve as Chief Flight Instructor without meeting the minimum flight instruction hours of that section.
24389	Honeywell, Inc	14 CFR 21.181	To allow petitioner to operate certain aircraft utilizing the provisions of a minimum equipment list.
18881	Int'l Aerobatic Club (ICB)	14 CFR 91.22(a)(1)	To extend the March 31, 1985, termination date of Exemption 2689, as amended. It would allow members of the ICB to participate and practice in aerobatic competitions without meeting the fuel requirements for VFR flight.
24399	Peninsula Seafoods	14 CFR 91.303	To allow petitioner to operate one Stage 1 DC-8-55F aircraft in noncompliance with the operating noise limits.
NM-15	Aircraft Technical	CAR 4b. 722	To permit occasional operation of the CV580 airplane up to a maximum altitude of 35,000 ft. MSL with cabin pressure limited to currently approved pressure differential.
24393	Evergreen Int'l	14 CFR 91.303	To allow petitioner to operate one Stage one DC-8-63 until March 30, 1985, and one Stage 1 DC-8-61 until April 19, 1985, in noncompliance with the operating noise limits until its aircraft are reengined.
23063	Tenneco	14 CFR 21.181	To extend the Janauary 31, 1985, termination date of Exemption 3695 to allow petitioner to operate various airplanes utilizing the provisions of minimum equipment lists.

DISPOSITIONS OF PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought disposition
24381	F.A. Conner/Conner Airlines, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Denied 12/21/84.*
24365	Lineas Aereas Paraguayas	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Granted 12/21/84.*
24352	Aer Turas Teoranta	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Denied 12/17/84.*
24331	Rich Int'l. Airways, Inc	14 CFR 91.303	To allow petitioner to operate two Stage 1 DC-8-62 aircraft in noncompliance with the operating noise limits until June 1, 1985, noise limits until June 1, 1985. *Denied 12/13/84.*
24363	Aeronavos Del Peru, S.A	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Denied 12/17/84.*
24357	Compania De Aviation "Faucett", S.A	14 CFR 91.303	To exempt petitioher from January 1, 1985, noise level compliance date. *Denied 12/17/84.*
24369	Transporte Aereo Rioplatense S.A.C.e.I	14 CFR 91.303	To exempt petitioner from January 1, 1985, noise level compliance date. *Partial Grant 12/17/84.*

DISPOSITIONS OF PETITIONS FOR EXEMPTION—Continued

Docket No.	Petitioner	Regulations affected	Description of relief sought disposition
24359	Arrow Air, Inc	14 CFR 91.303	To exempt petitioner from January 1, 1985, noise level compliance date. *Partial Grant 12/17/84.*
24372	Linea Aerea Nacional-Chile	14 CFR 91.303	To exempt petitioner from January 1, 1985, noise level compliance date. *Partial Grant 12/17/84.*
24361	Florida West Airlines, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Partial Grant 12/17/84.*
24000	Lineas Aereas Costarricenses S.A	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Partial Grant 12/17/84.*
24366	Challenge Air Transport Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date. *Partial Grant 12/17/84.*
24384	Pan Aviation, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Partial Grant 12/21/84.*
23979	Sterling Airways A/S	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Partial Grant 12/21/84.*
24358	Rich Int'l Airways, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, compliance date contained in 14 CFR Part 91, Subpart E. *Granted 12/21/84.*
24362	Fair Air, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, compliance date contained in 14 CFR Part 91, Subpart E. *Partial Grant 12/21/84.*
24053 24364	Fast Air Carrier LTDA	14 CFR 91.303	To allow petitioner to operate one Stage 1 B707 aircraft into Miami International Airport until the aircraft is modified to meet the operating noise limits. *Limited Grant 12/17/84.*
24354	American Contenental	14 CFR 91.307	To allow operation in the United States, under a service to small communities exemption, of specified two-engine airplanes identified by registration and serial number, that have not been shown to comply with the applicable operating noise limits as follows: Until not later than January 1, 1988: 1 BAC 1-11 *Granted 12/13/84.*
24367	Empressa Ecuatoriana De Aviacion	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Granted 12/17/84.*
24351	Surinam Airways Limited	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Granted 12/17/84.*
24360	Lloyd Aereo Boliviano S.A	14 CFR 91.307	To allow operation in the United States, under a service to small communities exemption, of specified two-engine airplanes identified by registration and serial number, that have not been shown to comply with the applicable operating noise limits as follows: Until not later than January 1, 1988: 1 B737-200: N706 *Granted 12/17/84.*
24353	Aviation Management Consortium	14 CFR 91.307	To allow operation in the United States, under a service to small communities exemption, of specified two-engine airplanes identified by registration and serial number, that have not been shown to comply with the applicable operating noise limits as follows: Until not later than January 1, 1988: 4 BAC 1-11. *Granted 12/13/84.*
24375	Helmsley-Spear, Inc	14 CFR 91.307	To allow operation in the United States, under a service to small communities exemption, of specified two-engine airplanes identified by registration and serial number, that have not been shown to comply with the applicable operating noise limits as follows: Until not later than January 1, 1988: 1 BAC 1-11. *Granted 12/13/84.*
20406	Lockheed-California Co., A division of Lockheed Corporation.	14 CFR 25.1303(c)	To permit the amended type certification of the L-1011 aircraft (S/N 193U-1201 & 193U-1203) with an overspeed warning tolerance 6 knots greater than allowed by the FAR and a flight manual whose performance criteria are computed from British Civil Air Regulations criteria rather than FAR criteria. *Granted 12/13/84.*
24257	Empresa Ecuatoriana De Aviaction	14 CFR 92.303	To allow petitioner to operate four Boeing 707's and two Boeing 720's Stage 1 aircraft in noncompliance with the operating noise limits through December 31, 1987, or until it retrofits them with "hush kits" or obtains noise compliant aircraft, whichever period is shorter. *Denied 1/2/85.*
24145	Dominicana De Aviacion, C. POR A	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 707 airplanes in noncompliance with the operating noise limits until December 31, 1987, or one year after the issuance of a Supplemental Type certificate for a quiet nacelle, whichever is later. *Denied 1/2/85.*
24405	National Airlines, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Ganted 1/2/85.*
24395	Hilton Hotels Corp	14 CFR 91.307	To allow operation in the United States, under a service to small communities exemption, of specified two-engine airplanes identified by registration and serial number, that have not been shown to comply with the applicable operating noise limits as follows: Until not later than January 1, 1988: A BAC 1-11. *Granted 12/20/84.*
24371	Global Int'l Airways Corp	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Denied 1/2/85.*
24346	Aeromar, C. por A	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 92, Subpart E. *Granted 1/4/85.*
24371	Global Int'l Airways Corp	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Granted 1/4/85.*
23996	Zantop Int'l Airlines Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Partial Grant 1/4/85.*
24360 24406	Lloyd Aereo Boliviano	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Amended Grant 12/28/84.*
24140	Linea Aerea Del Cobre, S.A	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date comtained in 14 CFR Part 91, Subpart E. *Denied 12/24/84.*
24373	Transportes Aereoe Merchantiles Panamericanos, S.A.	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Granted 12/18/84.*
24202	Bangor International Airport	14 CFR 91.303	To permit the continued operation of Stage 1 aircraft at Bangor Int'l Airport. *Denied 12/27/84.*
24277	ABCO Leasing, Inc	14 CFR 91.303	To allow petitioner to operate one Stage 1 aircraft in noncompliance with operating noise limits until "hush kits" are installed. *Denied 12/24/84.*
24170	Aerocargo. S.A	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Denied 12/24/84.*
24297	RDC Marine, Inc	14 CFR 91.303	To allow petitioner to operate two Stage 1 Boeing 707-441 aircraft until January 1, 1988, in noncompliance with the operating noise limits. *Denied 12/24/84.*
24159	Aeroperu	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Denied 12/24/84.*

DISPOSITIONS OF PETITIONS FOR EXEMPTION—Continued

Docket No.	Petitioner	Regulations affected	Description of relief sought disposition
24221	Japan Air Lines Co. Ltd	14 CFR 91.303	To allow petitioner to operate Stage 1 DC-8 aircraft on charter flights in noncompliance with the operating noise limits until December 31, 1987. *Denied 12/27/84.*
24232	Acromexico	14 CFR 91.303	To allow petitioner to operate five Stage 1 DC-8-51 aircraft in noncompliance with the operating noise limits until December 31, 1987. *Denied 12/27/84.*
24108	Aerolineas Argentinas	14 CFR 91.303	To allow petitioner to operate three Stage 1 Boeing 707 aircraft until January 1, 1988, in noncompliance with the operating noise limits. *Denied 12/27/84.*
24335	stewart Int'l Airport and Eight Supporting Foreign Airlines.	14 CFR 91.303	To permit the continued operation of Stage 1 aircraft at Stewart Airport. *Denied 12/28/84.*
24230	Aeroservicios Ecuatorianos	14 CFR 91.303	To allow petitioner to operate one Stage 1 DC-8-55F aircraft in noncompliance with the operating noise limits until December 31, 1987, or until quiet nacelles are available for its aircraft. *Denied 12/28/84.*
24289	Buffalo Airways, Inc	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 707 in noncompliance with the operating noise limits until June 30, 1985, or until "hush kits" are installed, whichever occurs first. *Granted 12/28/84.*
24308	Skystar International Inc	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 707 airplane in noncompliance with the operating noise limits until "hush kits" are installed. *Denied 12/28/84.*
24326	Hawaiian Airlines, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Partial Grant 12/28/84.*
24090	Spantax, S.A	14 CFR 91.303	To allow petitioner to operate 3 Stage 1 DC-8 aircraft in noncompliance with the operating noise limits until they are retrofitted or until January 1, 1988, whichever is earlier. *Denied 12/28/84.*
24327	Societe Belge de Transports Par Air, S.A	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR part 91, Subpart E. *Denied 12/28/84.*
24055 24347	Ports-of-Call	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 707 aircraft in noncompliance with the operating noise limits for six months after certification of the B707 quiet nacelle or January 1, 1986, whichever occurs sooner. *Partial Grant 1/4/85.*
24086	Airlift International	14 CFR 91.303	To allow petitioner to operate one Stage 1 four engine turbojet aircraft until January 1, 1988, in noncompliance with the operating noise limits. *Partial Grant 1/4/85.*
24289	Buffalo Airways, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Amended Grant 1/3/85.*
24231	Rich Int'l Airways, Inc	14 CFR 91.303	To exempt petitioner from the January 1, 1985, noise level compliance date contained in 14 CFR Part 91, Subpart E. *Amended Partial Grant 1/4/85.*
24293	Trans-Mediterranean Airways, S.A.L	14 CFR 91.303	To allow petitioner to operate stage 1 Boeing 707 aircraft into New York in noncompliance with the operating noise limits until January 1, 1988, or until "hush kits" are installed, or whichever is sooner. *Denied 1/2/85.*
24224	Transbrasil S.A. Linhas Aereas	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 707 aircraft in noncompliance with the operating noise limits until July 1, 1986, or until it retrofits or replaces its aircraft, whichever is earlier. *Partial Grant 1/2/85.*
24222	AVIATECA	14 CFR 91.303	To allow petitioner to operate one Stage 1 Boeing 727 aircraft in noncompliance with the operating noise limits until December 31, 1987. *Denied 1/4/85.*
24122	Dade County, Florida and 49 Supporting U.S. and Foreign Airlines.	14 CFR 91.303	To permit the continued operation, until December 31, 1987, of Stage 1 aircraft at Miami International Airport on international flights. Additionally, the adoption of a rule allowing any airport to elect to permit Stage 1 aircraft to conduct international operations at its facility is requested. The FAA has extended the comment period for this petition to allow detailed and thorough comments. *Denial of Petition and Denial of Petition for Rulemaking 1/2/85.*
24209	Air Caribbean Cargo, Inc	14 CFR 91.303	To allow State 1 aircraft to utilize Borinquen Field, PR, for international cargo and passenger flights. *Denial of Exemption and Denial of Petition for Rulemaking 12/27/84.*

[FR Doc. 1073 Filed 1-15-85; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

The Department of Treasury has submitted the following public information collection requirement(s) to OMB (listed by submitting bureau(s)), for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of these submissions may be obtained by calling the Treasury Bureau Clearance Officer listed under each bureau. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of each bureau's listing and to the Treasury Department Clearance Officer, Room 7221, 1201 Constitution Avenue, NW, Washington, D.C. 20220.

Internal Revenue Service

OMB Number: 1545-0222
Form Number: IRS Form 6047
Type of Review: Extension
Title: Windfall Profit Tax
Clearance Officer: Garrick Shear (202) 566-6254, Room 5571, 1111 Constitution Avenue, NW, Washington, D.C. 20224
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, D.C. 20503.

Customs Service

OMB Number: 1515-0063
Form Number: CF 5129
Type of Review: Revision
Title: Crew Members Declaration
Clearance Officer: Vince Olive (202) 566-9181, U.S. Customs Service, Room 2130, 1301 Constitution Avenue, NW, Washington, D.C. 20229
OMB Reviewer: Judy McIntosh (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, D.C. 20503.

Bureau of the Public Debt

OMB Number: 1535-0031
Form Number: PD 3570
Type of Review: Extension
Title: Request for Reissue of U.S. Retirement Plan or Individual Retirement Bonds to Correct an Error in Registration.

OMB Number: 1535-0032
Form Number: PD 3665
Type of Review: Extension
Title: Application for Disposition of Retirement Plan and/or Individual Retirement Bonds Without Administration of Deceased Owner's Estate.

OMB Number: 1535-0033
Form Number: PD 3564
Type of Review: Extension

Title: Request for Reissue of U.S. Retirement Plan or Individual Retirement Bonds to Change Beneficiary or Reflect Change of Name

Clearance Officer: Paula Spedden (202) 634–5295, Bureau of the Public Debt, Room 420, Vanguard Building, 1111 20th Street, NW, Washington, D.C. 20226

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, D.C. 20503.

Dated: January 11, 1985.

Joseph F. Maty,

Departmental Reports, Management Office.

[FR Doc. 85–1281 Filed 1–15–85; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES INFORMATION AGENCY

Advisory Committee on Public Diplomacy; Meeting

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held on January 16, 1985 in Room 600, 301 4th Street, S.W., Washington.

The Commission will meet Mr. Jorge Mas, Chairman, Advisory Board for Radio Broadcasting to Cuba.

The meeting will be closed to the public because it will involve a discussion of classified information relating to USIA implementation of the Radio Broadcasting to Cuba Act. (5 U.S.C. 552b(c)(1)) Premature disclosure of this information is likely to significantly frustrate implementation of proposed Agency action, because there will be a discussion of future Agency policy and programs. (5 U.S.C. 522b(c)(9)(B))

Dated: January 10, 1985.

Charles Z. Wick,

Director.

Determination to Close Advisory Commission Meeting of January 16, 1985

Based on the information provided to the United States Information Agency by the United States Advisory Commission on Public Diplomacy, I hereby determine that the meeting scheduled by the Commission for January 16, 1985 may be closed to the public.

The Commission has requested that its January 16 meeting be closed because it will involve a discussion of classified information relating to USIA's implementation of the Radio Broadcasting to Cuba Act. (5 U.S.C. 552b(c)(1)) Premature disclosure of this information is likely to frustrate significantly the implementation of proposed Agency action, because there will be a discussion of future Agency policy and programs. (5 U.S.C. 552b(c)(9)B)).

Dated: January 10, 1985.

Charles Z. Wick,

Director.

[FR Doc. 85–1208 Filed 1–15–85; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register
Vol. 50, No. 11
Wednesday, January 16, 1985

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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1

FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission will hold a Closed Meeting on the subject listed below on Friday, January 18, 1985, following the Open Meeting, which is scheduled to commence at 9:30 a.m., in Room 856, at 1919 M Street, NW., Washington, D.C.

Agenda, Item No., and Subject

Hearing—1—Applications for Review, Motion to Expedite Disposition of Applications for Review and three Motions to Enlarge Issues in the Miami, Florida standard broadcast proceeding (Docket Nos. 79-305 and 79-310).

This item is closed to the public because it concerns Adjudicatory Matters (See 47 CFR 0.603(j)).

The following persons are expected to attend:

Commissioners and their Assistants
Managing Director and Members of his staff
General Counsel and Members of his staff
Chief, Office of Public Affairs and Members of his staff

Action by the Commission January 10, 1985. Commissioners Fowler, Chairman; Quello, Dawson, Rivera and Patrick voting to consider this item in Closed Session.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Judith Kurtich, FCC Public Affairs Office, telephone number (202) 254-7674.

Issued: January 11, 1985.

William J. Tricarico,
Secretary, Federal Communications Commission.

[FR Doc. 85-1328 Filed 1-14-85; 12:18 pm]

BILLING CODE 6712-01-M

2

FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Friday, January 18, 1985, which is scheduled to commence at 9:30 am., in Room 856, at 1919 M Street, NW., Washington, D.C.

Agenda, Item No., and Subject

General—1—*Title: Policy Statement and Order* In the Matter of Elimination of Unnecessary Broadcast Regulation, MM Docket 83-842. *Subject:* The Commission will consider whether to eliminate a regulatory policy dealing with certain broadcast announcements.

General—2—*Title: Policy Statement and Order* In the Matter of Elimination of Unnecessary Broadcast Regulation, MM Docket 83-842. *Summary:* The Commission will consider whether to eliminate some six regulatory policy areas dealing with broadcast business practices.

General—3—*Title: Notice of Proposed Rule Making* In the Matter of Elimination of Unnecessary Broadcast Regulation, MM Docket 83-842. *Summary:* The Commission will consider whether to adopt a *Notice of Proposed Rule Making* considering the deletion of three additional regulatory policies dealing with broadcast business practices.

Private Radio—1—*Title:* Amendment of Part 90 of the Commission's Rules and Regulations to eliminate the permissible communications restrictions in the Private Land Mobile Radio Services. *Summary:* The Commission will consider whether to adopt a Report and Order concerning the elimination of the permissible communications restrictions in the Private Land Mobile Radio Services.

Common Carrier—1—*Title:* In the Matter of American Information Technologies, Inc., Bell South, Bell Atlantic, NYNEX, Pacific Telesis, Southwestern Bell, US West Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services. *Summary:* The Commission will consider the capitalization plans for subsidiaries of the seven regional Bell operating companies established pursuant to the Commission's decisions in the *Second Computer Inquiry* and the *BOC Separation Order.*

Common Carrier—2—*Title:* Petitions for Reconsideration and request to stay the Commission's August 5, 1982 Decision affirming the applicability of Computer II internationally; Petition for Rulemaking to develop procedures for the implementation of Computer II internationally. *Summary:* The Commision will consider arguments in response to its determination that the Computer II Decision applies internationally.

Mass Media—1—*Title:* Application for review, filed by Ferris E. Traylor and Irene V. Traylor, of an action of the Mass Media Bureau: (a) Approving the assignment of licenses of commercial television stations, WTVJ, Miami, Florida; KVOS-TV, Bellingham, Washington; WZZM-TV, Grand Rapids, Michigan; WLOS-TV, Ashville, North Carolina; WWHT, Newark, New Jersey; and WSNL-TV, Smithtown, New York, from Wometco Enterprises, Inc. to WBC Broadcasting Corp.; (b) approving the assignment of license of FM station WLOS, Asheville, North Carolina, from Wometco Skyway Broadcasting Co. to WISE Radio, Inc.; and (c) denying Traylor's petition to deny which requested that the applications be denied or designated for hearing. *Summary:* The Commission will consider Traylor's application for review in which it is contended that the Bureau's action violated the Communications Act, Commission precedent and court decisions. Traylor also charges that pending lawsuits against Wometco and WBC Broadcasting raise qualifications issues which should be explored in a hearing. Additionally, Traylor alleges that the principals of WBC Broadcasting Corp., because of their limited financial investment, will not control the operation of these stations once the transaction is consummated.

Mass Media—2—*Title:* License renewal applications of Auburn Broadcasting Co., for KAHI/KHYL(FM), Auburn, California; and Palomar Broadcasters Corp., for KOWN/KOWN-FM, Escondido, California. *Summary:* The Commission will consider a *Memorandum Opinion and Order* addressing a petition to deny filed by the National Black Media Coalition and others (NBMC). NBMC alleges that the licensees have not complied with the Commission's EEO rule.

Mass Media—3—*Title:* License renewal application of KPNX Broadcasting Company for KPNX-TX, Mesa, Arizona; and Meridith Corporation for KPHD-TV, Phoenix, Arizona. *Summary:* The Commission will consider a *Memorandum Opinion and Order* addressing an informal objection filed by the Arizona Center for law in the Public Interest (ACLIP). ACLPI contends that deficiencies existed with respect to the station's ascertainment, public interest programming, and employment practicies.

Mass Media—4—*Title:* Review of technical and Operational Requirements of Part 76, Cable Television. *Summary:* In this Notice

of Proposed Rule Making, the Commission will consider whether to remove the quality performance regulations for cable television systems and whether to relax the signal leakage limits.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Judith Kurtich, FCC Public Affairs Office, telephone number (202) 254-7674.

William J. Tricarico,

Secretary, Federal Communications Commission.

[FR Doc. 85-1329 Filed 1-14-85; 12:18 pm]

BILLING CODE 6712-01-M

3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, Januray 16, 1985.

PLACE: Room 600, 1730 K Street, NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. Jim Walter Resources, Inc., Docket No. SE 84-23. (Issues include whether the administrative law judge erred in vacating a citation alleging non-compliance with a notice of safeguard issued pursuant to 30 CFR 75.1403-5(g)).

2. Monterey Coal Company, Docket No. LAKE 83-61. (Issues include whether the administrative law judge erred in concluding that a violation of 30 CFR 75.316, dealing with ventilation plans, was significant and substantial.)

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Thus, the Commission may, subject to the limitations of 29 CFR 2706.150(a)(3) and 2706.160(e), ensure access for any handicapped person who gives reasonable advance notice.

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653-5632.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 85-1353 Filed 1-14-85; 3:08 pm]

BILLING CODE 6735-01-M

4

FOREIGN CLAIMS SETTLEMENT COMMISSION

[F.C.S.C. Meeting Notice No. 1-85]

Annoucement in Regard to Commission Meetings and Hearings.

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504), and the Government in the Sunshine Act (5 U.S.C.552b), hereby gives notice in regard to the scheduling of open meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

Date, Time, and Subject Matter

Tuesday, January 22, 1985 at 10:30 a.m.
Consideration of Final Decisions on objections, Amended Final Decisions, and Petitions to Reopen claims issued under the Second Czechoslovakian Claims Program.

Wednesday, January 23, 1985 at 10:30 a.m.
Consideration of Claim No. CZ-3474—Claim of Joseph Karel Hasek

Subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

All meetings are held at the Foreign Claims Settlement Commission, 1111 20th Street, NW., Washington, D.C. Requests for information, or advance notices of intention to observe a meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 1111 20th Street, NW., Room 409, Washington, DC 20579. Telephone: (202) 653-6155.

Dated at Washington, D.C., on January 9, 1985.

Judith H. Lock,

Administrative Officer.

[FR Doc. 85-1322 Filed 1-14-85; 11:38 am]

BILLING CODE 4410-01-M

5

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS MEETING

TIME AND DATE: The meeting will commence at 8:30 a.m. on Friday, January 25, 1985 and continue until all official business is completed. (The meeting will recess from 10:00 a.m. to 1:00 p.m.).

PLACE: Capitol Holiday Inn, 550 C Street, SW., Washington, D.C.

STATUS OF MEETING: Open (Portion of meeting is to be closed to discuss personnel, personal, criminal, litigation, and investigatory matters under 45 CFR 1622.5 (a), (d), (e), (f) and (h)).

MATTERS TO BE CONSIDERED:

1. Approval of Agenda
2. Approval of Draft Minutes
   —December 20, 1984
3. Report from the President
4. FY 1986 Budget Mark Impact
   —Report from the Office of Comptroller
   —Report from the Office of Field Services
   —Report from Supplemental Program Representative
   —Report from National and State Support Representative
   —Report from Native American and Migrant Program Representative
5. Additional Funding Sources
   —Report from the Office of Information Management
   —Report from the Field Programs on Additional Funding Sources
   —Report from the IOLTA Representative
   —Report from ACCA Representative

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Opsut, Executive Office, (202) 272-4040.

Dated: January 14, 1985.

Donald P. Bogard,

President.

[FR Doc. 85-1323 Filed 1-14-85; 11:38 am]

BILLING CODE 6820-35-M

6

NATIONAL COUNCIL ON THE HANDICAPPED

TIMES: AND DATES:

9:00 a.m.-5:00 p.m., January 23, 1985.
9:00 a.m.-5:00 p.m., January 24, 1985.
9:30 a.m.-3:30 p.m., January 25, 1985.

PLACE: Saturn/Venus Room, Capitol Holiday Inn, 550 C Street, SW., Washington, DC.

STATUS: Open meeting.

MATTERS TO BE CONSIDERED: General Business including:

Approval of Minutes
Projects With Industry Evaluation Standards
Independent Living Evaluation Standards
NCH Staff Report
Presentation by National Service Providers

Please Note.—Any person requiring an interpreter or other special services, please contact NCH Staff no later than January 22, 1985.

CONTACT FOR MORE INFORMATION: Lex Frieden, Executive Director, NCH, (202) 453-3846.

Lex Frieden,

Executive Director, National Council on the Handicapped.

[FR Doc. 85-1344 Filed 1-14-85; 12:18 pm]

BILLING CODE 6820-BS-M

7

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of January 14, 21, 28, and February 4, 1985.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, D.C.

STATUS: Open and closed.

MATTERS TO BE CONSIDERED:

Week of January 14

Monday, January 14—2:00 p.m.:
Proposed Legislative Package on Regulatory Reform (Public Meeting)

Tuesday, January 15—10:00 a.m.:
Discussion of Adjudication Matters Related to Catawba-1 (Closed—Exemption 10)
Wednesday, January 16—11:00 a.m.:
Affirmation Meeting (Public Meeting) (if needed)
2:00 p.m.:
Discussion of Need For and Impact of Further TMI-1 Hearings (Public Meeting)
Thursday, January 17—10:00 a.m.:
Discussion/Possible Vote on Full Power Operating License for Catawba-1 (Public Meeting)

Week of January 21—Tentative

Wednesday, January 23—10:00 a.m.:
Affirmation Meeting (Public Meeting) (if needed)

Week of January 28—Tenative

Tuesday, January 29—10:00 a.m.:
Discussion of Plant Issues with Regional Administrators (Public Meeting)
1:30 p.m.:
Affirmation/Discussion of San Onofre Order (Public Meeting) (Tentative)
Wednesday, January 30—10:00 a.m.:
Discussion of Management-Organization and Internal Personnel Matters (Closed—Exemptions 2 and 6)
Thursday, January 31—10:00 a.m.:
Discussion of 1985 Policy and Planning Guidance (Public Meeting)
2:00 p.m.:
Affirmation Meeting (Public Meeting) (if needed)

Week of February 4—Tentative

Tuesday, February 5—2:00 p.m.:
Briefing by INPO (Public Meeting)
Thursday, February 7—2:00 p.m.:
Briefing by EPRI on Standard Design Process (Public Meeting)
3:30 p.m.:
Affirmation Meeting (Public Meeting) (if needed)
Friday, February 8—10:00 a.m.:
Periodic Meeting with Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting)

To verify the status of meetings call (recording)—(202) 634-1498.

CONTACT PERSON FOR MORE INFORMATION: Julia Corrado (202) 634-1410.

Dated: January 11, 1985.

George T. Mazuzan,

Office of the Secretary.

[FR Doc. 85-1376 Filed 1-14-85; 3:48 pm]

BILLING CODE 7590-01-M

federal register

Wednesday
January 16, 1985

Part II

Department of Transportation

Office of the Secretary

14 CFR Ch. II, Subchapter B
Transfer of Civil Aeronautics Board Functions to DOT; Procedural Regulations; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Ch. II, Subchapter B

[Docket No. 82; Amdt. No. T-2]

Transfer of Civil Aeronautics Board Functions to DOT; Procedural Regulations

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends 14 CFR Parts 300 through 326, which set forth the procedural regulations of the Civil Aeronautics Board (CAB). On January 1, 1985, the CAB cases to exist and a number of its remaining functions will transfer to DOT consistent with the requirements of the Airline Deregulation Act of 1978 and the Civil Aeronautics Board Sunset Act of 1984. The amendments are necessary to facilitate the efficient transfer of those CAB functions to DOT As indicated in the notice of proposed rulemaking (NPRM) proposing these amendments (Notice 84-17; 49 FR 46006; November 21, 1984), changes will also be required in the CAB's economic regulations to reflect the procedures that will apply to DOT's administration of the transferring functions. The Department, however, is not making substantive changes to the economic regulations governing the transferring CAB functions at this time. Those regulations will be carried over by the Department when the CAB cases to exist.

DATES: This final rule becomes effective on January 1, 1985.

FOR FURTHER INFORMATION CONTACT: Warren Dean, Assistant General Counsel for International Law, (202) 426-2972, or Vance Fort, Director, Special Programs, Office of the Assistant Secretary for Policy and International Affairs, (202) 426-4341, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590.

SUPPLEMENTARY INFORMATION:

Background

The Airline Deregulation Act of 1978 (ADA) mandated regulatory reform for the air transportation industry. As part of the regulatory reform process, the ADA provides for the sunset of the Civil Aeronautics Board (CAB) and the transfer to other agencies, effective January 1, 1985, of those CAB functions that are to continue. As amended by the Civil Aeronautics Board Sunset Act of 1984 (Pub. L. 98-443, October 4, 1984) (Sunset Act), the ADA provides that most of the CAB's remaining functions will transfer to DOT, with certain other functions transferring to the United States Postal Service. This final rule amends the CAB's procedural regulations for DOT consistent with the jurisdictional scheme established by the ADA.

Under the terms of the ADA, as amended, the following CAB functions will transfer to DOT:

- *International aviation,* including participation in bilateral negotiations, selection and certification of U.S. carriers to serve on international routes; granting foreign air carriers authority to serve the United States; regulation of international fares and rates; investigation of unfair or deceptive practices or unfair methods of competition in foreign air transportation; action on unfair, deceptive, or discriminatory practices complaints in foreign air transportation; and regulation of international air mail rates.
- *Essential Air Service Program,* a ten-year subsidy program expiring October 1988, which guarantees a minimum level of air service to all communities that had certificated air carrier service when the ADA was enacted, and to certain other communities.
- *Section 43 Employee Protection,* which provides for the determination of whether the termination of airline employees is due primarily to deregulation, thereby making them eligible for certain Federal financial benefits.[1]
- *Consumer Protection and Air Carrier Fitness,* programs affecting both foreign and domestic air transportation which were specifically transferred to the Department by the Sunset Act.
- *Antitrust authority,* which provides for approval and antitrust immunity for mergers and similar transactions, interlocking relationships, and intercarrier agreements. This authority, except as it relates to agreements in foreign air transportation, expires on January 1, 1989, under the provisions of the Sunset Act.

These and most other functions previously performed by the CAB will be carried out within the Office of the Secretary of Transportation.

International aviation functions, Section 43 labor determinations, air carrier fitness demonstrations, antitrust functions and economic analysis of the airline industry will be performed by the Office of the Assistant Secretary for Policy and International Affairs. The Essential Air Service Program will be carried out within a new office to be established within the Office of the Secretary. Consumer functions will be performed by the Office of the Assistant Secretary for Governmental Affairs. The Department's Research and Special Programs Administration (RSPA) will continue the CAB's information gathering functions. The Department has issued amendments to 49 CFR Part 1 and 14 CFR Part 385 (49 FR; December 31, 1984) making delegations and assigning duties to the various offices within DOT to carry out former CAB functions.

Adoption of Amended CAB Procedural Regulations

In order to succeed to the CAB functions with a minimum of disruption, DOT is adopting the CAB's current procedural regulations (appearing as Parts 300 through 326 of Title 14, Code of Federal Regulations) to carry out these functions with as few changes as possible. As explained below, certain modifications are necessary to reflect the organizational structure of DOT and its operating administrations and as technical corrections to omit references to terminating functions and functions transferring to other agencies. More importantly, DOT is adopting certain additional procedural arrangements to ensure that the administrative decisions of the Department—particularly with respect to the selection of carriers for foreign route authority—will not be subject to improper influence. A more detailed discussion of the issue and the Department's resolution of it appears in the DOT Plan for Sunset of the Civil Aeronautics Board, dated February 1984, a copy of which is in the rulemaking docket. The issue is also covered in the discussion of comments on Notice 84-7, which is set forth later in this preamble.

This final rule and amendments to 49 CFR Part 1 and 14 CFR Part 385, are only the first of several rulemaking documents to be issued by the Department to fully effectuate the transfer of CAB functions to DOT. Under the Sunset Act, the Department

[1] On May 17, 1984, the U.S. District Court for the District of Columbia held section 43 of the Airline Deregulation Act unconstitutional. *Alaska Airlines* v. *Donovan* (Civ. Action No. 84-0485 (D.D.C. May 17, 1984)).

The Department of Justice has filed a notice of appeal from this decision in the U.S. Court of Appeals for the District of Columbia.

In addition, the Civil Aeronautics Board responded to the District Court's decision by issuing orders 84-8-85 (August 17, 1984) and 84-11-54 (November 14, 1984), which stayed all further proceedings in the 10 employee protection cases pending before the Board.

In the event that the Employee Protection Program is reinstated by action of the Courts or of the Congress, responsibility for it will still transfer to the Department of Transportation, which will make its determinations in accord with the final rules adopted pursuant to this notice.

was assigned several additional functions, including the carrying out of the CAB's antitrust authority. The Department is in the process of developing an NPRM proposing regulations to implement this antitrust authority.

The changes being made to the CAB's procedures in this final rule reflect a delegation of the CAB functions by the Secretary to the Assistant Secretary for Policy and International Affairs in most cases. This is consistent with the delegation of most international decisions and other important transportation issues to the DOT Policy Office, to be acted upon on behalf of the Secretary subject to the Secretary's reserved authority (see 49 CFR 1.43) to act in the place of the Assistant Secretary for Policy and International Affairs when the Secretary believes it warranted. A few delegations have been made to other elements of the Department, such as the delegation of data collection to RSPA and the delegation of consumer protection functions to the Assistant Secretary for Governmental Affairs. A new office has been constituted to administer EAS functions, although review of its final actions has been assigned by the Secretary to the Assistant Secretary for Policy and International Affairs. As mentioned previously, these delegations and assignment of functions were prescribed in separate final rules setting forth revisions to 49 CFR Part 1 and 14 CFR Part 385.

This final rule includes one significant departure from routine delegations to assure adequate insulation against potential improper influence on DOT decisions in certain hearing cases. In the case of carrier selection proceedings under section 401 of the Federal Aviation Act, as amended, for international route authority and such other hearing cases as the Secretary deems appropriate, this final rule reflects a special delegation. In those cases, the authority to make final binding decisions will be lodged at the level of the senior career official in the Policy Office, and review of exercises of such delegated authority will be limited to the alternatives of (1) unqualified approval by the Assistant Secretary, or (2) remand to the career official for action consistent with such remand. Any order of remand would be without specific recommendation by the Assistant Secretary for final action, but with a full explanation of the basis for remand. The Secretary [2] could exercise this delegated review authority in place of the Assistant Secretary but would be subject to the same restrictions. The Secretary would exercise the review authority only where the decision involves important national transportation policy issues. As in all cases involving formal evidentiary hearings, this decisionmaking process will be in conformity with the requirements of 5 U.S.C. 556 and other applicable provisions of the Administrative Procedure Act (APA), and decisions will be based solely upon the record of the proceeding. These changes to CAB's regulations are set forth in § 302.22a of the rule. It should be noted that, as adopted, these provisions are more detailed than was proposed in Notice 84-17. The changes are discussed in greater detail below.

One other noteworthy modification to CAB organizational arrangements is made in this final rule. To provide a separate advocate of the public interest in adversarial proceedings, the Department has created a new Office of the Assistant General Counsel for Aviation Enforcement and Proceedings within the General Counsel's office. This office will be supervised by an Assistant General Counsel and the Deputy General Counsel only, and not by the General Counsel who will instead provide counsel to the decisionmakers in the Policy Office and to the Secretary on agency decisions. The public counsel will take responsibility for litigating formal hearing cases and enforcement matters before the administrative law judges (ALJ's) or other duly constituted decisionmakers. The public counsel's participation in the decisionmaking phase will be limited to on-the-record submissions. The actions of this new office will not be reviewable or reversable, except by the Deputy General Counsel. A comparable arrangement was used at the CAB for initiation of enforcement proceedings by the General Counsel's Office. Staff within the Office of the Assistant Secretary for Policy and International Affairs and staff within the Office of the Assistant Secretary for Governmental Affairs that are responsible for assisting the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in the performance of its responsibilities will be strictly prohibited from discussing such cases with staff participating in the decisionmaking process.

An Office of Hearings has been established in the Office of the Assistant Secretary for Administration staffed by administrative law judges who will conduct all formal hearing cases. The CAB docket section functions, with the exception of Sunshine Act functions which are not applicable to DOT proceedings, will be carried out in a newly established Documentary Services Division in the Office of the General Counsel.

A brief summary of the important decisionmaking procedures follows:

Carrier Selection Process at DOT

The carrier selection process for route awards in foreign air transportation will be similar to that now used by the CAB; *i.e.*, a quasi-judicial process subject to the requirements of the APA would apply, including separation of functions, on-the-record decisionmaking, and rules governing *ex parte* contacts. This process and the APA requirements would ensure fairness and integrity in carrier selection decisions.

In hearing cases, the Department will issue an instituting order establishing the public goals, policies, and criteria for the proceeding. DOT staff may appear in such proceedings, as appropriate, in a public counsel role similar to that performed by the CAB's Bureau of International Aviation in the past. The DOT staff position will be prepared for presentation to the ALJ by the Office of the General Counsel's new Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in conjunction with selected staff of the Office of the Assistant Secretary for Policy and International Affairs. Public counsel, airlines, and other interested parties will present their positions to the ALJ. In each hearing case, an ALJ will conduct a formal, on-the-record hearing and normally issue a recommended decision regarding the carrier to be selected. This recommendation will be reviewed by the senior career official in the Office of the Assistant Secretary for Policy and International Affairs who is authorized to render a final decision of the Department pursuant to the procedures described below.

The Assistant Secretary for Policy and International Affairs has discretionary authority, delegated by the Secretary, to review each decision after its adoption by the senior career official, but this authority is limited to approving the decision or remanding it for reconsideration. The Secretary will have discretion to exercise this review authority in place of the Assistant Secretary, subject to the same limitations, in cases involving important national transportation policy issues. More detailed information on the review

[2] Under 49 CFR Part 1, the Deputy Secretary has the authority of the Secretary in all matters, and reference to the Secretary in the rules being adopted here includes the Deputy Secretary.

procedures for hearing cases in carrier selection proceedings is set forth below in the discussion of the comments received and the discussion of changes made to the NPRM.

Presidential review will continue to be limited, under Section 801 of the Federal Aviation Act, to national security and foreign relations considerations. Judicial review will continue to be available to any party dissatisfied with the outcome of the decision, to the same extent as under present law.

Essential Air Service Process at DOT

A new Office of Essential Air Service (EAS) has been established as a separate office within the Office of the Secretary to administer the EAS subsidy program. This new office will conduct negotiations with carriers, set subsidy and service levels, establish community EAS standards, process carrier selection cases, evaluate and monitor air carrier performance, and perform other related EAS functions currently carried out by the CAB. EAS community hearings, conducted by senior staff members from the Office of EAS, the Office of the General Counsel, and the Office of Governmental Affairs, will be instituted when necessary to consider appeals of the essential air transportation service level determinations. The Assistant Secretary for Policy and International Affairs, acting pursuant to authority delegated by the Secretary, will have the discretion to review and adjust service level determinations as well as make decisions on carrier selection and subsidy levels. The Secretary will have discretion to exercise this review authority in place of the Assistant Secretary.

Section 43 Employee Protection Process at DOT

Determinations of whether the termination of airline employees is due primarily to deregulation, thereby making them eligible for certain Federal financial benefits, are the responsibility of the Assistant Secretary for Policy and International Affairs. As indicated below in the discussion of comments to the NPRM, the Department will review the procedures applicable to these cases at such time as the legal status of these cases is clarified.

Discussion of Comments

Ten comments were received in response to Notice 84–17. Due consideration has been given to each comment submitted to the docket. The more important comments are discussed below under descriptive subheadings.

Insulated Decisionmaking Process

A number of comments were received questioning the Secretarial review process as it was proposed in § 302.22a concerning the responsibilities of the DOT decisionmaker in hearing and non-hearing cases. The questions raised included the following: (1) Will the Assistant Secretary, Deputy Secretary or the Secretary perform the review? (2) Who will initiate Secretarial review? (3) Will the parties to the proceeding have any input as to decisions on Secretarial review? (4) What, if any, will be the guidelines and limitations upon Secretarial review? (5) Will there be any time limits on the initiation or completion of Secretarial review? (6) Will the parties be permitted to seek reconsideration of action taken under the Secretarial review process? (7) Will the parties be permitted to seek reconsideration of a determination of the Secretary not to undertake review?

Several commenters expressed the view that to ensure insulation against potential improper influence in hearing cases, Secretarial review should be conducted openly, on the record and within a well defined framework. These comments also noted that the proposed rule, unlike the preamble, did not say that remand would be "without specific recommendation for final action" or that it would be accompanied with "a full explanation of the basis for remand."

The Department has clarified the proposed "review and remand" procedure that will apply in hearing cases subject to the "insulated" decisionmaking process. Under the rule, as adopted herein, decisions of the senior career official in those cases are subject to review at the discretion of the Assistant Secretary before being issued as final decisions of the Department. Either the Assistant Secretary or Secretary may conduct this discretionary review. Given the stringent statutory timeframe within which many hearing cases must be concluded, the procedures do not provide for petitions at this stage by parties for Assistant Secretary or Secretary review of the senior career official's decision. Parties are encouraged, however, to include in their briefs to the senior career official any arguments they may wish to make that discretionary review should be undertaken in a particular case. Further, a party seeking review of a final order of the Department may file a petition for reconsideration under § 302.37 with the Assistant Secretary. If Secretarial reconsideration is requested, the petition would have to state why reconsideration at the Secretarial level is warranted.

If the Assistant Secretary or Secretary undertakes review of a decision of the senior career official before it is issued as a final decision, the notice establishing review will announce the scope and schedule for such review. In most cases review will be based solely upon the record that has been developed in the proceeding. In unusual cases, the notice may provide for further proceedings, including provision for additional briefs or oral agrument if deemed appropriate.

Any party may file a petition for reconsideration of a final order of the Department pursuant to § 302.37. The petition should specify the reasons for requesting such reconsideration, including any questions of national transportation policy that may be involved. The Assistant Secretary will grant or deny the petition unless, because the case is deemed to involve important issues of national transportation policy, the Secretary chooses to grant or deny the petition. If the petition is granted, the decision will be remanded to the senior career official for a new final order consistent with the reasons specified in the notice of remand.

The Secretary may exercise the review or reconsideration authority of the Assistant Secretary when cases involve important national transportation policy issues. Once review is undertaken, however, the Secretary may remand the case based upon any lawful grounds. They include failure to base a decision upon substantial evidence, failure to adhere to Department policy and precedent, erroneous interpretation of law or regulation and any other prejudicial error. The Secretary's review authority in insulated proceedings, like that of the Assistant Secretary for Policy and International Affairs, is limited only by the requirement that the case may not be reversed but only remanded for final action consistent with a written explanation of the basis for such remand.

Non-Insulated Decisionmaking Process

One commenter asked that DOT clarify whether there will be a Secretarial review process in non-hearing cases and whether the Secretary or the Deputy Secretary may act as DOT decisionmaker in non-hearing cases under the proposed rule. Another commenter suggested that the decisionmaking responsibilities in hearing and non-hearing cases should be treated the same and that "hearing

case" and "non-hearing case" be defined.

The Department has added a definition of "hearing cases" to the rule (see § 302.24). The term "hearing cases" was used in the CAB's regulations in the past. The new definition clarifies such usage to make it clear that a hearing case refers to a proceeding involving an oral evidentiary hearing.

The decisionmaking process specified in the rule for non-hearing cases provides that the Assistant Secretary for Policy and International Affairs or his delegate will ordinarily make such decisions, unless the matter concerns the Department's consumer protection functions which are the responsibility of the Assistant Secretary for Governmental Affairs. All hearing cases not assigned to the senior career official will be decided by the Assistant Secretary for Policy and International Affairs. Consistent with the terms of the delegation of authority to these officials, however, the Secretary may make any decision in lieu of these officials (see 49 CFR 1.43). If a person seeks Secretarial review of a final decision by an Assistant Secretary he or she should do so by petition for reconsideration to the deciding official stating the basis for requesting such review. In sum, these rules do not authorize any direct appeals or petitions to the Secretary. The Secretary and Deputy Secretary may review or decide matters whenever they deem it warranted. They will consider requests for review of Department decisions, however, only on the basis of petitions for reconsideration to the Assistant Secretary involved. The scope and procedures for such review will be established in any order granting such reconsideration.

Separation of Functions Under Rules of Conduct

One commenter argued that the existing rule of conduct, which permits a supervisor to advise a decisionmaker about a case in which a staff member, who reports to the supervisor, is participating, should not be transferred to DOT. The Department disagrees. The organization established by the Department will ensure compliance with the separation of functions requirements of the Administrative Procedure Act.

Applicability of Rules of Conduct to Secretary, Deputy Secretary and Assistant Secretary

One commenter suggested that § 300.1 of the rules of conduct be amended to specifically cover the Secretary, Deputy Secretary and Assistant Secretary in the definition of "DOT employee(s)." It was argued that § 300.4(a), mandating separation of functions in hearing cases, be revised to expressly apply to the Secretary, Deputy Secretary, Assistant Secretary and their advisors.

Section 300.1 by its terms covers the Secretary, Deputy Secretary, and the Assistant Secretaries of the Department, and the word "Officials" has been added to make that clear. Section 300.4 dealing with separation of functions, has been amended to make it clear that its provisions apply only after a hearing has been noticed by either an instituting order or a complaint (in enforcement cases).

Number of Copies Required To Be Filed of Docketed Pleadings

Comments were received criticizing the number of copies of docketed pleadings required to be filed. These commenters expressed the view that the requirement for an original and 19 copies is excessive. The Department agrees. Proposed § 302.3 has been changed to require the filing of an original and twelve copies. The number of copies to be filed will be reevaluated in the months ahead to determine whether it should be reduced even further.

International Air Transportation Competition Act Complaints

One commenter requested that DOT establish rules of procedure for handling complaints filed against foreign airlines under sections 9 and 23 of the International Air Transportation Competition Act (IATCA). It was argued that the CAB has dealt with these complaints on an *ad hoc* basis, and that the lack of procedure for handling these complaints makes more difficult the adequate development of a record and the rendering of informed decisions. It was further suggested that the lack of specific regulations raises due process questions under the Administrative Procedure Act and the Constitution.

The Department does not agree that the lack of specific IATCA complaint procedures prejudices the decisionmaking process in these cases. Nevertheless, it may be that regulations in this area might improve the efficiency of these proceedings. The Department will examine this question carefully to determine whether it is appropriate for future rulemaking.

Administration of Employee Protection Program

Two organizations commented on the effect of the proposed rules on employee protection proceedings under section 43 of the Airline Deregulation Act of 1978. One of those commenters expressed concern that the proposed rule did not include any specific provision for expediting those proceedings, in response to the recent court decision in *Air Line Pilots Assn.* v. *CAB* (D.C. Cir., Oct. 30, 1984).

The Department does not believe it is either necessary or appropriate to adopt a specific rule at this time relating to expedition of the section 43 proceedings. The Department believes the regulations being adopted and other related procedures provide sufficient flexibility to expedite any aviation administrative proceedings, including the section 43 cases, where appropriate. In addition, it should be noted that the CAB has stayed the employee protection proceedings, pending the appeal of another court decision (*Alaska Air Lines* v. *Donovan*, D.D.C., May 19, 1984) which held Section 43 to be unconstitutional. The Department believes it would be premature and unwise to determine in this regulatory proceeding, which was intended only to adapt the CAB's general procedural rules to reflect DOT's organizational structure, such specific questions as whether and how the section 43 proceedings should be expedited.

The commenters also questioned whether the proposed rules for the section 43 proceedings would adequately assure due process, in light of prior DOT participation as a party in the proceedings before the Board. The Department appreciates the need to assure due process and proper separation of functions in all of the administrative proceedings that transfer from the CAB, but believes that the proposed regulations provide the necessary safeguards. The regulations assure proper insulation of the decisionmakers from those in advocacy roles: § 300.4 provides that any DOT employee who is participating or who has participated in a hearing as a party shall have no substantive communication with either the administrative law judge or the DOT decisionmaker in the proceeding.

With regard specifically to the section 43 proceedings, the Department has already instituted procedures internally to prevent substantive communications between those DOT employees involved in the cases as a "party" (i.e., those who participated in developing the position expressed to the CAB) and those who would serve as or advise the DOT decisionmaker. The restrictions in these cases are similar to those applicable to enforcement proceedings (see § 300.4 (a) and (c)), and the CAB has commented favorably upon them. CAB Order 84-11-54 (served Nov. 21, 1984) at 3-4.

Participation in the Department's filings with the Board in the section 43 cases has been carefully limited to attorneys reporting only to the Deputy General Counsel and several economic analysts; these employees have had no substantive contacts on the subject with other DOT attorneys or with the DOT officials likely to decide section 43 cases (see § 302.22a). Neither the current Assistant Secretary for Policy and International Affairs nor the current senior career official in that office has had any involvement with the development of the position expressed to the CAB in the DOT filings. Any person who participated in such matters would be disqualified from either serving as, or providing advice to, the DOT decisionmaker.

The Department will continue to require that the separation of function requirements be scrupulously followed in all hearing cases, including the section 43 proceedings. The Department believes the procedures outlined above will assure due process and fair treatment to all parties concerned. Accordingly, the Department does not believe any additional separation or insulation regulations for the employee protection cases are warranted.

Procedures for Essential Air Service (EAS) Determinations

One commenter recommended that procedural criteria for deciding appeals to essential air service determinations be established. That commenter expressed the view that the DOT decisionmaker should only reverse the recommendation of the three-member EAS panel if the panel has failed to adhere to existing policy or has failed to base a recommendation upon substantial evidence.

The Department disagrees with this comment. The EAS panel is not a decisionmaking body. It is convened for the purpose of processing the appeal and obtaining comment on the determination. The final decision on the appeal will be made by the Assistant Secretary for Policy and International Affairs. This procedure is based upon that used by the CAB.

Other Matters

One commenter submitted comments that dealt with the consumer regulations as they apply to the needs of handicapped travelers. These comments were beyond the scope of this rulemaking, but may be relevant to future proceedings.

Another commenter suggested that the transfer of CAB functions to DOT provides an excellent opportunity for closer coordination of aviation economic and safety policy objectives, especially as it applies to EAS. The Department agrees with this comment.

One commenter suggested that the NPRM does not adequately dispose of the delegations of CAB functions set forth in Part 385. As mentioned previously, that was the subject of separate rulemaking.

Another commenter criticized the comment period as being inadequate. The Department regrets the need for a short comment period and will leave this docket open to allow for persons to suggest further improvements to its regulations.

Finally, a commenter suggested that DOT not adopt amendments to Part 302, recently adopted by the CAB, that would relieve foreign air carriers from the requirement to serve notice on other carriers when they apply (a) for permit authority for charter or non-scheduled operations, and (b) for exemption authority for charter or nonscheduled operations when the applications are filed more than 16 days prior to the proposed start of service. This commenter felt that the elimination of this service requirement would make it more difficult for interested U.S. carriers to respond to these permits and exemption requests in a full and timely manner. This comment was beyond the scope of the notice, but the Department will examine this issue carefully to determine whether further action is appropriate.

Changes to the NPRM

Changes to Part 300

Various refinements have been made to Part 300, which establishes rules of conduct that apply to the carrying out of the transferring functions. First, § 300.0 has been modified to include the term "officials" to make clear the Department's intent that these rules apply to the Secretary, Deputy Secretary and Assistant Secretaries.

Several minor changes have been made to proposed § 300.2, which deals with *ex parte* communications. Initially, proposed §§ 300.2(b)(4)(ii) and 300.2(b)(4)(v) have been revised to delete the reference to the handling of *ex parte* communications in informal rulemaking proceedings thereby making the provisions consistent with current DOT policies. Guidelines for the handling of such communications in informal rulemaking proceedings are contained in DOT Order 2100.2. It should be noted, however, that the provisions of § 300.2 continue to apply to exemption proceedings conducted under 14 CFR Chapter II and to any rulemaking proceedings conducted under that Chapter after notice and an opportunity for an oral evidentiary hearing (hearing cases).

A second change that is being made to § 300.2 involves proposed paragraph (c)(9). That paragraph has been revised to make it clear that the *ex parte* rules continue to apply to Federal agencies which choose to participate as parties in a non-hearing proceeding (other than an informal rulemaking) by making filings on the record. The description of a hearing case in § 300.2(b)(4)(i) has been revised to be consistent with § 302.24 and to more closely reflect the kinds of cases covered. Section 300.4, dealing with separation of functions, has been amended to make it clear that its provisions apply only after a hearing has been noticed.

Changes to Part 302

The principal change to Part 302 deals with the scope and procedures for the "insulated" decisionmaking process. This process involves the assignment of a hearing case to the senior career official of the Office of the Assistant Secretary for Policy and International Affairs. That official is authorized to issue a final decision of the Department based upon a recommended decision of the ALJ, and review of the senior career official's decision by superior officials is limited to review and remand authority only.

After reviewing carefully this proposed procedure, public comments and the Department's new responsibilities under the Sunset Act, the Department has further considered the categories of hearing cases that should be assigned to the senior career official and thereby be subject to the insulated decisionmaking process. That process is designed to ensure that improper influence will have no role in hearing cases that involve choices among competing parties. Carrier selection cases constitute the most obvious and important category in this regard. The Sunset Act transferred authority to the Department for several other kinds of proceedings, such as carrier fitness determinations and antitrust determinations which, while frequently the subject of formal hearing procedures, do not raise the same considerations. Further, antitrust proceedings frequently raise important issues of transportation policy and it is appropriate that the most senior officials of the Department have plenary authority over such issues.

Accordingly, it has been determined that at this time only international carrier selection proceedings will be made subject to the "insulated"

decisionmaking process by regulation. The Secretary, however, may assign other hearing cases to the senior career official for "insulated" decisionmaking procedures as appropriate. Such assignments will be made on a case-by-case basis and announced in the order instituting the proceeding.

The procedures applicable to the "insulated" decisionmaking process are specified in more detail in the final rule than in the NPRM. The senior career official is specifically authorized to make final decisions on the basis of a recommended decision of the ALJ. The decision of the senior career official, however, is not issued as a final order of DOT until 14 days after its adoption, during which period the Assistant Secretary for Policy and International Affairs may determine whether review is appropriate. If the Assistant Secretary undertakes review of the senior career official's decision, a "notice of review" will specify the scope, timetable and further procedures, if any, for such review. Petitions for discretionary review during this 14-day period will not be entertained. If any party believes important issues of national transportation policy are raised in a proceeding, they should make such argument in their briefs to the senior career official.

Following issuance of a final decision, any party may file a petition for reconsideration pursuant to § 302.37.[3] If a party seeks reconsideration by the Assistant Secretary for Policy and International Affairs (or the Secretary), the petition should specify the reasons for requesting such reconsideration, including any questions of national transportation policy that may be involved. The Assistant Secretary ordinarily will grant or deny the petition. If the petition is granted, the final order will be remanded to the senior career official for a final order consistent with the reasons specified in such order of remand.

This insulated procedure allows the Assistant Secretary to review decisions of the senior career official and the opportunity for interested parties to request such review either in their briefs to the senior career official or through petitions for reconsideration of final decisions. It minimizes, however, the procedural burdens and delay inherent in such review. As specified in § 302.22a, the Secretary may exercise the authority of the Assistant Secretary to review or reconsider decisions of the senior career official. It is expected that the Secretary will do so only in the most important cases. Parties are free to request Secretarial review in authorized filings before the senior career official or the Assistant Secretary, but unauthorized documents requesting such review will not be entertained by the Department.

Finally, Subpart Q of Part 302, applicable to carrier selection proceedings, has been revised to provide that exceptions to the initial or recommended decisions and briefs in these proceedings must be filed within 7 and 14 days, respectively, of the date that the decision is adopted and served by the administrative law judge. The rules also provide that initial or recommended decisions will be issued by the administrative law judge and be effective 14 days after it is adopted and served. This procedure will allow the record to be complete for consideration by the senior career official at the time the administrative law judge's decision is issued.

In summary, the insulated decisionmaking procedure in carrier selection proceedings for international route authority is as follows. The Department will initiate the proceedings by issuing an instituting order. The administrative law judge will conduct an evidentiary hearing and adopt a recommended decision within 136 days. The decision will be issued by the administrative law judge, and forwarded with any exceptions and briefs filed, 14 days after it is adopted and served. The senior career official will adopt a decision based upon the recommendation of the administrative law judge ordinarily within 45 days after that decision is issued. (This deadline will be specified in the instituting order.) The decision of the senior career official will be transmitted to the President for review under section 801[4] of the Federal Aviation Act not later than 14 days after it is adopted, unless notice of review is issued by the Assistant Secretary or the Secretary. Any such notice of review will be served on the parties and will establish the scope, timetable and further procedures, if any, for review. Upon review, the Assistant Secretary for Policy and International Affairs (or the Secretary in cases involving important national transportation policy issues) may either affirm the decision of the senior career official or reverse and remand the decision for further action consistent with such order of remand. The senior career official will then enter a final decision that will be transmitted to the President for review under section 801.

Upon completion of Presidential review, any interested person may petition the Department for reconsideration of its final order, whether or not review had been conducted by the Assistant Secretary or Secretary previously. Any section 401 certificates associated with the Department's final order will not become effective for 30 days after service of the order to allow time for the Assistant Secretary to consider any petition for reconsideration and answers thereto. The Assistant Secretary (or the Secretary in cases involving important national transportation policy issues) may either grant or deny the petition. If granted, the final order will be remanded to the senior career official for action consistent with such remand, including where appropriate a further stay of any certificates in question.

New Part 303

As mentioned previously in this document, the Department is in the process of developing an NPRM to propose procedures for the CAB's transferring antitrust authority. That rulemaking proceeding, however, will not be completed before January 1, 1985. Accordingly, Subparts L and P of Part 302 and Part 315 will remain in effect on an interim basis, which changes to reflect the transfer of these functions to DOT. These provisions, however, have been consolidated and moved to Part 303, consistent with the format the Department has selected for its upcoming NPRM on antitrust matters.

Other Changes

Several editorial changes to the regulations were made; many of those changes provided consistency in language usage. Changes suggested by the Postal Service were also made to eliminate certain anachronisms in the CAB's rules. For example, the terms "regular mail" and "air mail" were changed to "express mail", "first class mail" and "priority mail"; "Postmaster General" and "Post Office Department"

[3] In cases subject to section 801 of the Federal Aviation Act, the senior career official's decision will not become final until the President's review has been completed. Thus, a petition for reconsideration may not be filed until after completion of the section 801 review process. Because an affected certificate may not be altered without a new proceeding, in order to allow for reconsideration, the senior career official's final order will provide that the associated certificate(s) will not become effective until 30 days after service of the order. Section 302.37 requires reconsideration petitions to be filed within 10 days (rather than 20), with answers due within another 10 days. This will allow 10 days for the Assistant Secretary to stay the effective date of the certificate(s) if additional time is needed.

[4] Decisions transmitted to the President will be served on the parties consistent with the requirements of section 1 of Executive Order No. 11920, which authorizes the classification of these decisions.

were changed to "U.S. Postal Services" or "Postal Service."

Changes made by the CAB to the Procedural Regulations after May 1, 1984 were incorporated. For example, Part 302, Subpart D dealing with "Rules Applicable to Exemption Proceedings" was revised. Also, § 302.1705 dealing with "Service of Documents" was amended. "The Special Operating Authorization of Charter Air Carriers," § 302.1020–27, was eliminated since those provisions are now obsolete.

Subpart G of Part 302 dealing with "Rules Applicable To Adequacy of Service Petitions" is outmoded and was eliminated.

Additionally, changes were made to reflect amendments to the Federal Aviation Act by the CAB Sunset Act of 1984. For example, sections 403, 410, and 417 were repealed. Portions of sections 401 and 407 were also eliminated.

Regulatory Evaluation and Regulatory Flexibility Act Determination

This final rule was evaluated under Executive Order 12291, "Federal Regulation," dated February 17, 1981, and the Department of Transportation's Regulatory Policies and Procedures dated February 26, 1979. The rule is not considered to be "major," as defined by E.O. 12291, because it will not have an annual effect on the economy of $100 million or more; it will not cause a major increase in costs or prices for consumers, individual industries, government agencies, or regions; and it will not have a significant adverse effect on competition or any other aspect of the economy. In fact, the economic impact is expected to be so minimal as not to warrant a full regulatory evaluation. The rule is considered to be significant under DOT's Regulatory Policies and Procedures because it concerns a matter in which there is substantial public interest. The rule should have no environmental impact.

It is certified that this rule will not have a significant economic impact on a substantial number of small entities. The rule merely adapts the CAB procedural rules to reflect the transfer of certain continuing CAB functions to appropriate offices within DOT. Small entities should be virtually unaffected.

The CAB "sunsets" on January 1, 1985, and this final rule must become effective on that date to reflect the new organization and procedures of the Department. Therefore, good cause exists for making the rule effective less than 30 days after publication.

On December 28, 1984, the Civil Aeronautics Board issued a document entitled, "Transfer, Removal and Reissuance of Regulations to Transportation Department," which was to be published in the **Federal Register** on January 4, 1985. This document contained a table of current rules of the Civil Aeronautics Board and gave the disposition of those rules upon transfer to the Department of Transportation. Within that document, in the table listing for Subchapter A regulations, the title for Part 248 should have read "Submission of audit reports," and the entries for Part 255—Carrier-owned computer reservation systems, Part 256—Display of joint operations in carrier-owned computer reservations systems, and Part 271—Guidelines for subsidizing air carriers providing essential air transportation were inadvertently omitted. Parts 255, 256, and 271 remain in effect and have been transferred to DOT.

List of Subjects in 14 CFR Chapter II, Subchapter B

Air carriers, Administrative practice and procedure.

Amendment

Accordingly, 14 CFR Chapter II, Subchapter B is revised to read as set forth below.

(Airline Deregulation Act of 1978 (Pub. L. 95–504, October 24, 1978); Civil Aeronautics Board Sunset Act of 1984 (Pub. L. 98–443, October 4, 1984); Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 *et seq.*), and 49 U.S.C. Subtitle I)

Issued in Washington, D.C., on December 31, 1984.

James Burnley IV,

Acting Secretary of Transportation.

SUBCHAPTER B—PROCEDURAL REGULATIONS

PART 300—RULES OF CONDUCT IN DOT PROCEEDINGS UNDER THIS CHAPTER

Sec.
300.0 Applicability.
300.0a Applicability of 49 CFR Part 99.
300.1 Judicial standards of practice.
300.2 Prohibited communications.
300.3 Reporting of communications.
300.4 Separation of functions in hearing cases.
300.5 Prohibited conduct.
300.6 Practitioners' standards of conduct.
300.7 Conciseness.
300.8 Gifts and hospitality and other conduct affecting DOT employees.
300.9 Permanent disqualification of employees from matters in which they personally participated before joining DOT or the Civil Aeronautics Board.
300.10 Temporary disqualification of employees from matters in which they had official responsibility before joining DOT or the Civil Aeronautics Board.
300.10a Permanent and temporary disqualification of DOT employees.
300.11 Disqualification of Government officers and employees.
300.12 Practice of special Government employees permitted.
300.13 Permanent disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters in which they personally participated.
300.14 Temporary disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters formerly under their official responsibility.
300.15 Opinions or rulings by the General Counsel.
300.16 Waivers.
300.17 Disqualification of partners of DOT employees.
300.18 [Reserved].
300.19 Use of confidential information.
300.20 Violations.

Authority: Secs. 204, 401–419, 901, 903, 1001, 1002, and 1007, Pub. L. 85–726, as amended; 72 Stat. 743, 754, 757, 758, 760, 763, 766, 767, 768, 769, 770, 771, 783, 786, 788, 796; 76 Stat. 145; 91 Stat. 1284; 92 Stat. 1732; (49 U.S.C. 1324, 1371–1389, 1471, 1473, 1481, 1482, and 1487), (18 U.S.C. 20(b)(c); 49 U.S.C. Subtitle I, unless otherwise noted.

§ 300.0 Applicability.

The rules of conduct set forth in this part except as otherwise provided in this or any other DOT regulation shall govern the conduct of the parties and their representatives, and the relationships between the Office of the Secretary of Transportation, the Office of the Assistant Secretary for Policy and International Affairs, and the Office of the General Counsel, including regular personnel, and officials, special Government employees, consultants, or experts under contract to the Department of Transportation (DOT) and administrative law judges (hereinafter referred to as "DOT employee(s)") and all other persons in all DOT matters resulting from the transfer of authority under Section 1601(b)(1) of the Federal Aviation Act of 1958, as amended by the Civil Aeronautics Board Sunset Act of 1984.

§ 300.0a Applicability of 49 CFR Part 99.

(a) Except as provided in paragraph (b) of this section, each DOT employee involved in matters covered by this chapter shall comply with the rules on "Employee Responsibilities and Conduct" in 49 CFR Part 99.

(b) The rules in this Part shall be construed as being consistent with those in 49 CFR Part 99. If a rule in this Part is more restrictive than a rule in 49 CFR Part 99, the more restrictive rule shall apply.

§ 300.1 Judicial standards of practice.

Under the transfer of authority under Section 1601(b)(1) of the Federal Aviation Act of 1958, certain of DOT's functions are similar to those of a court, and parties to cases before DOT and those who represent such parties are expected—in fact and in appearance—to conduct themselves with honor and dignity as they would before a court. By the same token, any DOT employee or administrative law judge carrying out DOT's quasi-judicial functions and any DOT employee making recommendations or advising them are expected to conduct themselves with the same fidelity to appropriate standards of propriety that characterize a court and its staff. The standing and effectiveness of DOT in carrying out its quasi-judicial functions are in direct relation to the observance by DOT, DOT employees, and the parties and attorneys appearing before DOT of the highest standards of judicial and professional ethics. The rules of conduct set forth in this part are to be interpreted in light of those standards.

§ 300.2 Prohibited communications.

(a) *Basic requirement.* Except as provided in paragraphs (c), (d) and (e) there shall be no substantive communication in either direction between any concerned DOT employee and any interested person outside DOT, concerning a public proceeding, until after final disposition of the proceeding, other than as provided by Federal statute or published DOT rule or order.

(b) *Definitions.* For purposes of this part:

(1) A "substantive communication" is any written or oral communication relevant to the merits of the proceeding.

(2) The "DOT decisionmaker" is defined in 14 CFR 302.22a.

(3) A "concerned DOT employee" is a DOT employee who is or may reasonably be expected to be directly involved in a decision which is subject to a public proceeding.

(4) A "public proceeding" is one of the following:

(i) A hearing proceeding (i.e., proceeding conducted on-the record after notice and opportunity for an oral evidentiary hearing as provided in § 302.24)

(ii) A rulemaking proceeding involving a hearing as described in paragraph (b)(4)(i) of this section or an exemption proceeding covered by this chapter. (Other rulemaking proceedings are covered by the ex parte communication policies of DOT Order 2100.2.)

(iii) A tariff filing after DOT has ordered an investigation or a complaint has been filed or docketed.

(iv) A proceeding initiated by DOT show-cause order, after the filing in the docket of an identifiable written opposition to the order's tentative findings.

(v) Any other proceeding initiated by a docket filing, other than a petition for generally applicable rulemaking, after the filing in the docket of an identifiable written opposition to the initiating document.

(c) *General exceptions.* Paragraph (a) of this section shall not apply to the following:

(1) Informal communications between legal counsel, including discussions about stipulations and other communications considered proper in Federal court proceedings.

(2) Information given to a DOT employee who is participating in a hearing case on behalf of an office that is a party, to another DOT employee who is reviewing that work, or to his or her supervisors within that office.

(3) Communications made in the course of an investigation to determine whether formal enforcement action should be begun.

(4) Settlement discussions and mediation efforts.

(5) Information given at the request of a DOT employee acting upon a specific direction of DOT, in a case other than a hearing proceeding as described in paragraphs (b)(4)(i) and (ii) (a "nonhearing case"), where DOT has decided that emergency conditions exist and this rule would otherwise prevent the obtaining of needed information in a timely manner.

(6) Information given at the request of a DOT employee in a tariff matter after a complaint is filed but before an investigation is ordered.

(7) Nonhearing cases that are to be decided within 30 days after the filing of the initiating document.

(8) Nonhearing cases arising under section 419 of the Federal Aviation Act, 49 U.S.C. 1389.

(9) In nonhearing cases, communications with other Federal agencies not exempted by paragraph (e) of this section, provided the agencies have not participated as parties in the proceeding by making filings on-the-record.

(d) *Status and expedition requests.* Paragraph (a) of this section shall not apply to oral or written communications asking about the status, or requesting expeditious treatment, of a public proceeding. However, any request for expeditious treatment should be made in accordance with the Rules of Practice, particularly Rules 14 and 18, §§ 302.14 and 302.18 of this chapter.

(e) *National defense and foreign policy.* In nonhearing cases, paragraph (a) of this section shall not apply to communications concerning national defense or foreign policy matters, including international aviation matters. In hearing cases, any communications on those subjects to or from DOT employees involved in intergovernmental negotiations that would be barred by paragraph (a) are permitted if the communicator's position with respect to those negotiations cannot otherwise be fairly presented, but those communications shall not be considered as part of the record on which decisions must be made.

(f) *Communications not considered.* A communication in violation of this section shall not be considered part of a record, or included as available material, for decision in any proceeding.

§ 300.3 Reporting of communications.

(a) *General.* The following types of substantive communication shall be reported as specified in paragraph (b) of this section:

(1) Any communication in violation of § 300.2(a) of this chapter.

(2) Information given upon determination of an emergency under § 300.2(c)(5) of this chapter.

(3) Information given at the request of a DOT employee in a tariff matter under § 300.2(c)(6) of this chapter.

(4) Communications in nonhearing cases to be decided within 30 days under § 300.2(c)(7) of this chapter.

(5) Communications in nonhearing cases arising under section 419 of the Federal Aviation Act, 49 U.S.C. 1389, made under § 300.2(c)(8).

(b) *Public filing.* (1) A written communication shall be put into the correspondence or other appropriate file of the proceeding, which shall be available for inspection and copying during business hours in the Documentary Services Division.

(2) An oral communication shall be summarized by the DOT employee receiving it. One copy shall be put into a public file as described in paragraph (b)(1) of this section, and another copy shall be mailed to the communicator.

(3) In addition, copies of written communications and oral summaries shall be filed in chronological order in a "Part 300" file maintained in the Documentary Services Division.

(4) Copies of all filings under this part dealing with discontinuances or reductions of air transportation shall be mailed to the directly affected local communities, State agencies, and airport managers.

(c) *Status and expedition requests.* A DOT decisionmaker who receives a communication asking about the status or requesting expeditious treatment of a public proceeding, other than a communication concerning national defense or foreign policy (including international aviation), shall either:

(1) Refer the communicator to the Documentary Services Division.

(2) If the DOT decisionmaker responds by advising on the status, put a memorandum describing the exchange in the public file as described in paragraph (b)(1) of this section.

§ 300.4 Separation of functions in hearing cases.

(a) This section applies after the initiation of a hearing or enforcement case by the Department

(b) A DOT employee who is participating in a hearing case on behalf of an office that is a party, another DOT employee who is in fact reviewing the position taken, or who has participated in developing the position taken in that case, or, in cases involving accusatory or disciplinary issues (including all enforcement cases) such employees' supervisors within that office, shall have no substantive communication with any DOT decisionmaker, administrative law judge in the case, or other DOT employee advising them, with respect to that or any factually related hearing case, except in accordance with a published DOT rule or order. In addition, each bureau or office supervisor of a DOT employee who is participating in a hearing case on behalf of that office when it is a party shall have no substantive communication with any administrative law judge in the case, or DOT employee advising the judge, in that or any factually related hearing case, except in accordance with a published DOT rule or order. For each hearing case, or office heads shall maintain a publicly available record of those employees who are participating or are in fact reviewing the position taken, or who have participated in developing the position taken in that case.

(c) In hearing cases involving fares or rates, or applications for a certificate or permit under sections 401 or 402 of the Act, or applications by a holder for a change in a certificate or permit, a supervisor who would not be permitted to advise the DOT decisionmaker under paragraph (a) may advise the DOT decisionmaker in the following manner: The supervisor's advice must either be made orally in an open DOT meeting or by a memorandum placed in the docket or other public file of such matter. Oral advice must be summarized in writing by the supervisor and placed in the docket or file of the matter. A copy of such written memorandum or summary of oral advice must be served on each party to the proceeding within 3 business days after such advice is given to the concerned DOT decisionmaker. Each of the parties may comment in writing on such advice within 5 business days after service or the summary. In no event, however, may a supervisor advise the DOT decisionmaker if he or she acted as the office's counsel or witness in the matter.

(d) In enforcement cases, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, under the supervision of the Deputy General Counsel, will conduct all enforcement proceedings and related investigative functions, while the General Counsel will advise the DOT decisionmaker in the course of the decisional process. The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings will report to the Deputy General Counsel. To ensure the independence of these functions, this Office and the Deputy General Counsel, for the purpose of this section, shall be considered an "office" as that term is used in paragraph (a), separate from the General Counsel and the rest of the Office of the General Counsel.

§ 300.5 Prohibited conduct.

No person shall: (a) Attempt to influence the judgment of a concerned DOT employee by any unlawful means such as deception or the payment of money or other consideration; or

(b) Disrupt or interfere with the fair and orderly disposition of a DOT proceeding.

§ 300.6 Practitioners' standards of conduct.

Every person representing a client in matters before DOT in all contacts with DOT employees, should:

(a) Strictly observe the standards of professional conduct;

(b) Refrain from statements or other actions designed to mislead DOT or to cause unwarranted delay;

(c) Avoid offensive or intemperate behavior;

(d) Advise all clients to avoid improprieties and to obey the law as the attorney believes it to be; and

(e) Terminate the professional relationship with any client who persists in improprieties in proceedings before DOT.

§ 300.7 Conciseness.

Every oral or written statement made in a DOT proceding shall be as concise as possible. Verbose or redundant presentations may be rejected.

§ 300.8 Gifts and hospitality and other conduct affecting DOT employees.

(a) No person, otherwise than as provided by law for the proper discharge of official duty, shall directly or indirectly give, offer, or promise anything of value to any DOT employee for or because of any official act performed or to be performed by such DOT employee (18 U.S.C. 201).

(b) Subject to 49 CFR Part 99, it is improper for persons interested in the business of DOT to provide hospitality, gifts, entertainment, or favors to any DOT employee.

(c) Persons interested in the business of DOT should familiarize themselves with (49 CFR Part 99), in order that they shall not encourage or cause any violation of the provisions of that Part by any DOT employee.

§ 300.9 Permanent disqualification of employees from matters in which they personally participated before joining DOT or the Civil Aeronautics Board.

Any DOT employee shall permanently disqualify himself or herself from participation in every matter before the Department in which he or she previously personally and substantially participated for an interested person or entity, including other agencies of the United States Government, before joining the DOT or the Civil Aeronautics Board. Such disqualification shall be applicable also if a person is closely related to is a DOT employee as partner, associate, employer, or the like, personally and substantially participated in a matter before DOT prior to the employee's employment by the Department or the Civil Aeronautics Board and the circumstances were such that the DOT employee's subsequent participation in the matter as a DOT employee could fairly be said to create the appearance that his or her participation would be affected by his or her prior relationship. Notwithstanding the foregoing, the disqualification of any DOT employee, including any member of a DOT employee's personal staff or a special Government employee, whose prior personal and substantial participation in a DOT or Civil Aeronautics Board proceeding or whose relationship to one who so participated occurred on behalf of another agency of the United States Government shall only be applicable with respect to issues on which the prior governmental employer took a position in the proceeding unless participation could fairly be said to create the appearance that his or her participation

would be affected by his or her prior relationship.

§ 300.10 Temporary disqualification of employees from matters in which they had official responsibility before joining DOT or the Civil Aeronautics Board.

Any DOT employee shall temporarily disqualify himself or herself from participation in any matter before DOT if he or she represented, was associated with or was employed by an interested person or entity including other agencies of the United States Government before joining DOT or the Civil Aeronautics Board, and, although he or she did not personally and substantially participate in the matter, the matter was within his or her "official responsibility," as that term is defined in § 300.14 of this chapter except that the action referred to therein shall be private action as well as "Government" action. Such disqualification shall be applicable also if a person closely related to the DOT employee as partner, associate, employer, or the like, who, while not personally and substantially participating in the matter, had it within his or her "official responsibility" as that term is defined in § 300.14 of this chapter, and modified above, and the circumstances are such that the DOT employee's subsequent participation in the matter as a DOT employee could fairly be said to create the appearance that his or her participation would be affected by his or her prior relationship. Notwithstanding the foregoing, the disqualification of any DOT employee whose prior "official responsibility" or relationship to one with such responsibility occurred on behalf of another agency of the United States Government shall only be applicable with respect to issues on which the prior governmental employer took a position in the proceeding. The temporary disqualification shall run for a period of one year from the date of the termination of the representation, association, or employment with the interested person or entity.

§ 300.10a Permanent and temporary disqualification of DOT employees.

Due to the transfer of authority under 1601(b)(1) of the Federal Aviation Act of 1958, the terms of §§ 300.9 and 300.10 shall not be construed to apply to DOT employees who previously personally and substantially participated in matters before the Board, which have become the subject of DOT proceedings.

§ 300.11 Disqualification of Government officers and employees.

No officer or employee of the Federal Government, other than a "special government employee" as defined in 18 U.S.C. 202, shall represent anyone, otherwise than in the proper discharge of his or her official duties, in any DOT proceeding or matter in which the United States is a party or has a direct and substantial interest.

(18 U.S.C. 205)

§ 300.12 Practice of special Government employees permitted.

A special Government employee, who qualifies as such under the provisions of 18 U.S.C. 202(a), may participate in DOT proceedings only to the extent and in the manner specified in 18 U.S.C. 205.

§ 300.13 Permanent disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters in which they personally participated.

No former Board member or employee or DOT employee shall act as agent or attorney before DOT for anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or other particular matter, involving a specific party or parties, in which the United States is a party or has a direct and substantial interest and in which he or she participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise as a Board member or employee or DOT employee.

(18 U.S.C. 207(a))

§ 300.14 Temporary disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters formerly under their official responsibility.

Within one year after termination of employment with the Board or DOT, no former Board member or Board employee or DOT employee shall appear personally before DOT on behalf of any person other than the United States in any DOT proceeding or matter in which the United States is a party or has a direct and substantial interest and which was under his or her official responsibility at any time within one year preceding termination of such responsibility. The term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

(18 U.S.C. 202(b), 207(b))

§ 300.15 Opinions or rulings by the General Counsel.

(a) The General Counsel is authorized to render opinions or rulings to the public on the application of the provisions of this part. When written request is made for such opinions and rulings, they shall be transmitted to DOT and shall be available to the public in the Documentary Services Division after any appeal to or review by the Secretary has been completed or after the time for review has expired. Identifying details shall normally be stricken from copies available to the public unless the public interest requires disclosure of such details.

(b) If any person is disqualified from a particular proceeding under the provisions of §§ 300.9, 300.10, 300.13, 300.14, and 300.17 of this chapter by a ruling of the General Counsel, or by such person's own action, such disqualification shall be memorialized in a writing filed in the appropriate file of the matter by the General Counsel or such person.

§ 300.16 Waivers.

(a) A former Board member, Board employee or DOT employee with outstanding scientific or technological qualifications who is disqualified from acting in a representative capacity under the provisions of § 300.13 or § 300.14 of this chapter may nevertheless participate in a proceeding in a scientific or technological field pursuant to the terms of a certificate issued in compliance with the proviso following 18 U.S.C. 207 (a) and (b).

(b) An employee who believes his or her prior employment relationships will not affect the integrity of his or her services may request that the prohibition of § 300.9 or § 300.10 of this chapter be waived by the appropriate Ethics Counselor under 49 CFR 99.735–71.

§ 300.17 Disqualification of partners of DOT employees.

No partner of a DOT employee shall act as agent or attorney for anyone other than the United States in any DOT proceeding or matter in which such employee participates or has participated personally and substantially through decision, approval, disapproval, recommendation, rendering advice, investigation, or otherwise, or which is the subject of his or her official responsibility.

§ 300.18 [Reserved]

§ 300.19 Use of confidential information.

No former CAB member or employee or DOT employee, or any person

associated with him or her, shall ever use or undertake to use in any DOT proceeding or matter any confidential facts or information which came into the possession of such Member or employee or to his or her attention by reason of his or her employment with the CAB or DOT without first applying for and obtaining the consent of the appropriate ethics counselor for the use of such facts or information.

§ 300.20 Violations.

(a) DOT may disqualify, and deny temporarily or permanently the privilege of appearing or practicing before it in any way to, any person who is found by DOT after written notice of charges and hearing to have engaged in unethical or improper professional conduct. Any violation of this part shall be deemed to be such conduct.

(b) When appropriate in the public interest, DOT may deny any application or other request of a party in a proceeding subject to this part where DOT finds after hearing that such party has, in connection with any DOT proceeding, violated any of the provisions of this part or any of the provisions of Chapter 11 of Title 18 of the United States Code. DOT may also condition its further consideration of such party's application or other request or the effectiveness of any order granting such application or other request upon such party's first taking such action as DOT may deem necessary or appropriate to remedy the violation of this part or Chapter 11 of Title 18 of the United States Code to prevent or deter any repetition of such violation. DOT may in addition issue a cease and desist order against any repetition of such or similar misconduct.

(c) The actions authorized by this section may take place within the framework of the matter during or concerning which the violations occur or in a separate matter, as the DOT decisionmaker or the presiding administrative law judge may direct. A complaint alleging that a violation has occurred in the course of a matter shall be filed in the docket or appropriate public file of such matter unless such complaint is made after DOT's decision of the matter has become final, in which event such complaint may be filed pursuant to Part 302, Subpart B of the rules of practice. A violation in the course of a matter which may be attributable to or affect the fitness of a party will ordinarily either be disposed of within the framework of such matter or be considered within the context of any subsequent matter involving the interests of such party. Other violations will ordinarily be disposed of in a separate proceeding.

(d) In the case of any violation of the provisions of this part, the violator may be subject to civil penalties under the provisions of section 901 of the Act. The violator may also be subject to a proceeding brought under section 1002 before the Department and under sections 903 and 1007 of the Act before a U.S. district court to compel compliance with civil penalties which have been imposed.

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§ 302.1 Applicability and description of part.

(a) *Applicability.* This part governs the conduct of all economic proceedings before DOT whether instituted by order of DOT or by the filing with DOT of an application, complaint, petition, or a section 412 contract or agreement. This part also contains delegations to administrative law judges and to the DOT decisionmaker of DOT's function to render the agency decision in certain cases. The decision of administrative law judges is subject to review by the DOT decisionmaker, pursuant to authority delegated by the Secretary. Decisions of the DOT decisionmaker are subject to review at the discretion of the Assistant Secretary for Policy and International Affairs. In appropriate cases, the Secretary may exercise the discretionary review authority. The provisions of Part 263 of this chapter of the Economic Regulations are applicable to participation of air carrier associations in proceedings under this part. Proceedings involving "Alaskan air carriers" are governed by the rules in this part, except as modified by Part 292 of this chapter.

(b) *Description.* Subpart A of this part sets forth general rules applicable to all types of proceedings. Each of the other subparts of this part sets forth special rules applicable to the type of proceedings described in the title of the subpart. Therefore, for information as to applicable rules, reference should be made to Subpart A and to the rules in the subpart relating to the particular type of proceeding, if any. In addition, reference should be made to the Federal Aviation Act, and to the substantive rules, regulations and orders of DOT relating to the proceeding.[1] Wherever there is any conflict between one of the general rules in Subpart A and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern.

§ 302.2 Reference to part and method of citing rules.

This part shall be referred to as the "Rules of Practice". Each section, and any paragraph or subparagraph thereof, shall be referred to as a "Rule". The number of each rule shall include only

[1] The Federal Aviation Act of 1958 may be found at 72 Stat. 731, and at 49 U.S.C. 1301 *et seq.* The Department's substantive rules may be found in its Economic Regulations and Special Regulations (Subchapters A and D of this chapter, respectively).

the numbers and letters at the right of the decimal point. For example, "302.8 *Service of documents*", shall be referred to as "Rule 8". Paragraph (a)(2) of that rule, relating to service documents by the parties, shall be referred to as "Rule 8 (a)(2)".

Subpart A—Rules of General Applicability

§ 302.3 Filing of documents.

(a) *Filing address, date of filing, hours.* Documents required by any section of this part to be filed with DOT shall be filed with the Documentary Services Division of Transportation, Washington, D.C. 20590. Such documents shall be deemed to be filed on the date on which they are actually received by DOT. The hours of DOT for the receipt of filings are from 9:00 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is in effect in the District of Columbia at the time, Monday to Friday, inclusive, except on legal holidays.

(b) *Formal specifications of documents*—(1) *Typewritten documents.* All typewritten documents, except briefs before DOT, filed under this part shall be on strong, durable paper not larger than 8½ by 14 inches, except that tables, charts and other documents may be larger if folded to the size of the document to which they are physically attached. Typewritten briefs before DOT shall be on paper not larger than 8½ by 11 inches except that tables, charts, and maps physically attached to the brief may be on paper not larger than 8½ by 14 inches and folded to the size of the brief. Requirements as to contents and style of briefs are contained in § 302.31. Text shall be double-spaced except for footnotes and long quotations which may be single-spaced. Type not smaller than elite shall be used. The left margin shall be at least 1½ inches; all other margins shall be at least 1 inch. If the document is bound, it shall be bound on the left side.

(2) *Printed documents.* Printed (typeset) documents that are limited as to number of pages under these rules shall be on paper not larger than 6⅛ inches by 9¼ inches, with all margins of at least 1 inch. The text, footnotes, and all physical attachments to any printed document shall be printed in clear and readable type, not smaller than 11 point, adequately leaded.

(3) *Reproduction of documents.* Papers may be reproduced by any duplicating process, provided all copies are clear and legible. Appropriate notes or other indications shall be used, so that the existence of any matters shown in color on the original will be accurately indicated on all copies.

(c) *Number of copies.* Unless otherwise specified, an executed original and twelve (12) true copies of each document required or permitted to be filed under these rules shall be filed with the Documentary Services Division, except that an original and five (5) copies of third party complaints, answers, documents dealing with discovery, and motions addressed to an administrative law judge may be filed in proceedings under Subpart B—Rules Applicable to Enforcement Proceedings. In any route proceeding that affects a point in Alaska, the person filing shall send an additional copy to: Department of Transportation, 701 C Street, Box 27, Anchorage, Alaska 99513. The copies need not be signed but the name of the person signing the document, as distinguished from the firm or organization he or she represents, shall also be typed or printed on all copies below the space provided for signature.

(d) *Table of contents.* All documents filed under this part consisting of twenty or more pages must contain a subject-index of the matter in such document, with page references.

§ 302.4 General requirements as to documents.

(a) *Contents.* In case there is no rule, regulation, or order of DOT which prescribes the contents of a formal application, petition, complaint, motion or other authorized or required document, such document shall contain a proper identification of the parties concerned, a concise but complete statement of the facts relied upon and the relief sought, and, where required by § 312.12 or § 312.14 of this subchapter, such document shall, at the appropriate time, be accompanied by an Environmental Evaluation, a representation and explanation with respect to § 312.9(a)(2) of Part 312, or an Environmental assessment, in conformity with those sections or orders issued thereunder.

(b) *Subscription.* Every application, petition, complaint, motion or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or the attorney-at-law of record of such party, or by any other person; *Provided,* That, if signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person signing the document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the instrument is true and no such statements are misleading; and that it is not interposed for delay.

(c) *Designation of person to receive service.* The initial document filed by a person shall state on its first page the name and post office address of the person or persons who may be served with any documents filed in the proceeding. It is requested, but not required, that the telephone number of that person also be included.

(d) *Prohibition of certain documents.* No document which is subject to the general requirements of this subpart concerning form, filing, subscription, service or similar matters shall be filed with DOT unless:

(1) Such document and its filing by the person submitting it has been expressly authorized or required in the Federal Aviation Act of 1958, any other law, this part, other Department regulations, or any order or other document issued by the DOT decisionmaker, the chief administrative law judge or an administrative law judge assigned to the proceeding, and

(2) Such document complies with each of the requirements of §§ 302.3 and 302.8, and is submitted as a formal application, complaint, petition, motion, answer, pleading, or similar paper rather than as a letter, telegram, or other informal written communication: *Provided, however,* That for good cause shown, pleadings of any public body or civic organization may be submitted in the form of a letter: *Provided further,* That comments concerning tariff agreements, which have not been docketed, may be submitted in the form of a letter.[2]

(e) *Documents improperly filed.* A document which is filed in violation of the prohibition imposed by paragraph (d) of this section, or in violation of a requirement imposed by any other provision of this part, will not be accepted for filing by DOT and will not be physically incorporated in the docket of the proceeding. The sender of such document and all persons who have been served therewith will be notified informally of DOT's action thereon.

(f) *Motions for leave to file otherwise unauthorized documents.* (1) DOT will accept otherwise unauthorized documents for filing only if leave has previously been obtained, from the administrative law judge or the DOT decisionmaker, on written motion and

[2] See Subpart L, § 302.1206 providing for the filing of comments with respect to undocketed agreements.

for good cause shown. The written motion may be incorporated into the otherwise unauthorized document for which admission is sought. In such event, the document filed shall be titled to describe both the motion and the underlying documents.

(2) After the assignment of an administrative law judge to a proceeding and before the issuance of a recommended or initial decision, or the certification of the record to the DOT decisionmaker, these motions shall be addressed to the administrative law judge. At all other times, such motions shall be addressed to the DOT decisionmaker. The administrative law judge or DOT decisionmaker will promptly pass upon such motions.

(3) Such motions shall be filed within seven days after service of any document or order or ruling to which the proposed filing is responsive, and shall be served on all parties to the proceeding. Answers thereto may not be filed.

(4) Such motions shall contain a concise statement of the matters relied upon as good cause and there shall be attached thereto the pleading or other document for which leave to file is sought.

§ 302.5 Amendment of documents and dismissal.

If any document initiating, or filed in, a proceeding is not in substantial conformity with the applicable rules or regulations of DOT as to the contents thereof, or is otherwise insufficient but not subject to rejection under § 302.4(e), DOT, on its own initiative, or on motion of any party, may strike or dismiss such document, or require its amendment. An application may be amended prior to the filing of answers thereto, or, if no answer is filed, prior to its designation for hearing. Thereafter, applications may be amended only if leave is granted pursuant to the procedures set forth in § 302.18. If properly amended, a document and any statutory deadline shall be made effective as of the date of original filing but the time prescribed for the filing of an answer or any further responsive document directed towards the amended document shall be computed from the date of the filing of the amendment.

§ 302.6 Responsive documents.

(a) Answers to applications, complaints, petitions, motions or other documents or orders instituting proceedings may be filed by any party to such proceedings or any person who has a petition for intervention pending. Except as otherwise provided, answers are not required. Protests or memoranda of opposition or support, permitted by statute, shall be filed in lieu of answers or shall be combined with answers.

Note: DOT does not grant formal intervention in nonhearing matters, such as applications for exemption under section 416(b) of the Act, and any interested person may file documents authorized under this part without first obtaining leave.

(b) Further responsive documents: Except as otherwise provided, no reply to an answer, reply to a reply, or any further responsive document shall be filed. Where a reply to an answer or any further responsive document is not fileable, all new matter contained in such answer shall be deemed controverted. A party to a proceeding whose application has been the subject of a protest or memorandum of opposition or support, permitted by statute, may respond thereto before the close of the hearing in the case to which such documents relate, orally, in writing, or by introducing evidence, subject to appropriate rulings by the administrative law judge. Once such response has been made, such party may also discuss the protest or memorandum in his brief to the administrative law judge or the DOT decisionmaker or in his or her oral argument.

(c) *Time for filing.* Except as otherwise provided, an answer or any further responsive document shall be filed within seven days after service of the document to which such responsive filing is directed. Protests or memoranda of opposition or support, permitted by statute, shall be filed before the close of the hearing in the case to which they relate.

§ 302.7 Retention of documents by DOT.

All documents filed with or presented to DOT may be retained in the files of the Documentary Services Division. However, DOT may permit the withdrawal of original documents upon the submission of properly authenticated copies to replace such documents.

§ 302.8 Service of documents.

(a) *Who makes service*—(1) *DOT.* Formal complaints, notices, orders to show cause, other orders, and similar documents issued by DOT will be served by DOT upon all parties to the proceeding.

(2) *The parties.* Answers, petitions, motions, briefs, exceptions, notices, protests, or memoranda, or any other documents filed by any party or other person with DOT shall be served by such party or other person upon all parties to the proceeding in which it is filed: *Provided,* That motions to expedite filed in any proceeding conducted pursuant to sections 401 and 402 of the Act, shall, in addition, be served on all persons who have petitioned for intervention in, or consolidation of applications with, such proceeding. Proof of service shall accompany all documents when they are tendered for filing.

(b) *How service may be made.* Service may be made by express mail, first class mail or priority mail, or by personal delivery. The means of service selected must be such as to permit compliance with section 1005(c) of the Act, which provides for service of notices, processes, orders, rules, and regulations by personal service or registered or certified mail.

(c) *Who may be served.* Service upon a party or person may be made upon an individual, or upon a member of a partnership, or firm to be served, or upon the president or other officer of the corporation, company, firm, or association to be served, or upon the assignee or legal successor of any of the foregoing, or upon any attorney of record for the party, or upon the agent designated by an air carrier under section 1005(b) of the Act, but it shall be served upon a person designated by a party to receive service of documents in a particular proceeding in accordance with § 302.4(c) once a proceeding has been commenced.

(d) *Where service may be made.* Personal service may be made on any of the persons described in paragraph (c) of this section wherever they may be found, except that an agent designated by an air carrier under section 1005(b) of the Act may be served only at his or her office or usual place of residence. Service by regular or registered or certified mail shall be made at the principal place of business of the party to be served, or at his or her usual residence if he or she is an individual, or at the office of the party's attorney of record, or at the office or usual residence of the agent designated by air carrier under section 1005(b) of the Act, or at the post office address stated for a person designated to receive service pursuant to § 302.4(c).

(e) *Proof of service.* Proof of service of any document shall consist of one of the following:

(1) A certificate of mailing executed by the person mailing the document.

(2) An acknowledgment of service signed by a person receiving service personally, or a certificate of the person making personal service.

(f) *Date of service.* Whenever proof of service by mail is made, the date of mailing shall be the date of service.

Whenever proof of service by personal delivery is made, the date of such delivery shall be the date of service.

§ 302.9 Parties.

The term "party" wherever used in this part shall include any individual, firm, partnership, corporation, company, association, joint stock association, or body politic, and any trustee, receiver, assignee or legal successor thereof, and shall include the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings.

§ 302.10 Substitution of parties.

Upon motion and for good cause shown, DOT may order a substitution of parties, except that in case of death of a party, substitution may be ordered without the filing of a motion.

§ 302.11 Appearances; rights of witnesses.

(a) Any party to a proceeding may appear and be heard in person or by attorney. No register of persons who may practice before DOT is maintained and no application for admission to practice is required. Any person practicing or desiring to practice before DOT may, upon hearing and good cause shown, be suspended or barred from practicing.

(b) Any person appearing in person in any proceeding governed by this part, whether in response to a subpena or by request or permission of DOT, may be accompanied, represented and advised by counsel and may be examined by his own counsel after other questioning.

(c) Any person who submits data or evidence in a proceeding governed by this part, whether in response to a subpena or by request or permission of DOT, may retain or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him or a copy of any transcript made of his testimony.

§ 302.12 Consolidation of proceedings.

(a) *Initiation of consolidations.* DOT upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although DOT may, in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and DOT will not undertake to search its docket for all applications which might be consolidated or contemporaneously considered.

(b) *Time for filing.* Unless DOT has provided otherwise in a particular proceeding, a motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. If made at such conference, the motion may be oral. All motions for consolidation or considerations of issues which enlarge, expand and change the nature of the proceeding shall be addressed to the DOT decisionmaker, unless made orally at the prehearing conference, in which event the presiding administrative law judge shall present such motion to the DOT decisionmaker for his or her decision. A motion which is not filed at or prior to the prehearing conference, or within the time prescribed by the DOT decisionmaker in a particular proceeding, as the case may be, shall be dismissed unless the movant shall clearly show good cause for his or her failure to file such motion on time. A motion which does not relate to an application pending at the time of the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, or on the date specifically prescribed by the DOT decisionmaker in a particular proceeding for filing of motions for consolidation or contemporaneous consideration, shall likewise be dismissed unless the movant shall clearly show good cause for his or her failure to file the application within the prescribed period.

(c) *Answer.* If a motion to consolidate two or more proceedings is filed with DOT, any party to any of such proceedings, or any person who has a petition for intervention pending, may file an answer to such motion within such period as the DOT decisionmaker may permit. The administrative law judge may require that answers to such motions be stated orally at the prehearing conference in the proceeding with which the consolidation is proposed.

(Secs. 204, 401, 402, 1001, Federal Aviation Act of 1958, as amended by Pub. L. 95-504, 72 Stat. 743, 754, 757, 788, 92 Stat. 1973, 49 U.S.C. 1324, 1371, 1372, 1481, Administrative Procedure Act (5 U.S.C. 551 *et seq.*))

§ 302.13 Joinder of complaints or complainants.

Two or more grounds of complaints involving substantially the same purposes, subject or state of facts may be included in one complaint even though they involve more than one respondent. Two or more complainants may join in one complaint if their respective causes of complaint are against the same party or parties and involve substantially the same purposes, subject or state of facts. The DOT decisionmaker he or she may separate or split complaints if it finds that the joinder of complaints, complainants, or respondents will not be conducive to the proper dispatch of DOT's business or the ends of justice.

§ 302.14 Participation in hearing cases by persons not parties.

(a) *Requests for expedition.* In any case to which the DOT's principles of practice. Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of or in opposition to such motions. Such motions and answers shall be served as provided in § 302.8 of this part.

(b) *Participation in hearings.* Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the administrative law judge or the DOT decisionmaker, such person may also cross-examine witnesses directly. Such persons may also present to the administrative law judge a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

§ 302.15 Formal intervention in hearing cases.

(a) *Who may intervene.* Petitions for leave to intervene as a party will be entertained only in those cases that are to be decided upon an evidentiary record after notice and hearing. Any person who has a statutory right to be made a party to such proceeding shall be permitted to intervene. Any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of such proceeding may be permitted to intervene. DOT does not grant formal intervention, as such, in nonhearing matters, and any

interested person may file documents authorized under this part without first obtaining leave.

(b) *Considerations relevant to determination of petition to intervene.* In passing upon a petition to intervene, the following factors, among other things, will be considered:

(1) The nature of the petitioner's right under the statute to be made a party to the proceeding;

(2) The nature and extent of the property, financial or other interest of the petitioner;

(3) The effect of the order which may be entered in the proceeding on petitioner's interest;

(4) The availability of other means whereby the petitioner's interest may be protected;

(5) The extent to which petitioner's interest will be represented by existing parties;

(6) The extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and

(7) The extent to which participation of the petitioner will broaden the issue or delay the proceeding.

These criteria will be liberally interpreted to facilitate the effective participation by members of the public in DOT proceedings.

(c) *Petition to intervene*—(1) *Contents.* Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he or she thinks he or she should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

(2) *Time for filing.* Unless otherwise ordered by DOT, any petition for leave to intervene shall be filed within the following time limits:

(i) In a proceeding where DOT issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with DOT prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(iii) A petition to intervene in any Board proceeding filed by a city, other public body, or a chamber of commerce shall be filed with DOT not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his or her failure to file such petition on time.

(3) *Answer.* Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) *Disposition.* The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by DOT that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

§ 302.16 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice, order or regulation of the DOT or DOT decisionmaker the chief administrative law judge or an administrative law judge, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday for DOT, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

§ 302.17 Continuances and extensions of time.

(a) *Generally.* Whenever a party has the right or is required to take action within a period prescribed by this part, by a notice given thereunder, or by an order or regulation, the DOT decisionmaker, the head of the Documenting Services Division or the administrative law judge assigned to the proceeding may: (1) Before the expiration of the prescribed period, with or without notice, extend such period; or (2) upon motion, permit the act to be done after the expiration of the specified period, where the failure to act is clearly shown to have been the result of excusable neglect.

(b) *Procedures.* Except where an administrative law judge has been assigned to a proceeding, requests for continuance or extensions of time, as described in paragraph (a)(1) or (2) of this section, shall be directed to the DOT decisionmaker. Requests for continuances and extensions of time may be directed to the Chief Administrative Law Judge in the absence of the administrative law judge assigned to the proceeding.

§ 302.18 Motions.

(a) *Generally.* An application to the DOT decisionmaker or an administrative law judge for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of an administrative law judge to a proceeding and before the issuance of a recommended or initial decision, or the certification of the record to the DOT decisionmaker, all motions shall be addressed to the administrative law judge. At all other times motions shall be addressed to the DOT decisionmaker. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein.

Note.—This paragraph is not construed as authorizing motions in the nature of petitions for reconsideration.

(a-1) *Motions to disqualify DOT employee in review of hearing matters.* In cases to be determined on an evidentiary record, a party desiring that a concerned DOT employee disqualify himself or herself from participating in a DOT decision shall file a motion supported by an affidavit setting forth the grounds for such disqualification within the periods hereinafter prescribed. Where review of the administrative law judge's decision can be obtained only upon the filing of a petition for discretionary review, such motions shall be filed on or before the date answers are due pursuant to § 302.28. In cases where exceptions are filed to recommended, initial, or tentative decisions or where the DOT decisionmaker orders review of an initial or recommended decision on his or her own initiative, such motions shall be filed on or before the date briefs are due pursuant to § 302.31 or § 302.1755, as applicable. Failure to file a timely motion shall be deemed a waiver of disqualification. Applications for leave to file an untimely motion seeking disqualification of a concerned DOT employee shall be accompanied by an affidavit setting forth in detail why the facts relied upon as grounds for

disqualification were not known and could not have been discovered with reasonable diligence within the prescribed time.

(b) *Form and contents.* Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 202.4, shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers thereto, and rulings thereon, may be made orally on the record unless the administrative law judge directs otherwise. Written motions shall be filed as separate documents, and shall not be incorporated in any other documents, except (1) where incorporation of a motion in another document is specifically authorized by a rule or order of DOT, or (2) where a document is filed which requests alternative forms of relief and one of these alternative requests is properly to be made by motion. In these instances the document filed shall be appropriately entitled and identified to indicate that it incorporates a motion, otherwise the motion will be disregarded.

(c) *Answers to motions.* Within seven days after a motion is served, or such other period as the DOT decisionmaker or the administrative law judge may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon. Unless the DOT decisionmaker or the administrative law judge provides otherwise, no reply to an answer, reply to a reply, or any further responsive document shall be filed. Where a reply to an answer or any other responsive document is not fileable, all new matter contained in such answer shall be deemed controverted.

(d) *Oral arguments; briefs.* No oral argument will be heard on motions unless the DOT decisionmaker or the administrative law judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

(e) *Disposition of motions.* The administrative law judge shall pass upon all motions properly addressed to him or her, except that, if he or she finds that a prompt decision by the DOT decisionmaker on a motion is essential to the proper conduct of the proceeding, he or she may refer such motion to that person for decision. The DOT decisionmaker shall pass upon all motions properly submitted to him or her for decision.

(f) *Appeals to the DOT decisionmaker from rulings of administrative law judges.* Rulings of administrative law judges on motions may not be appealed to the DOT decisionmaker prior to his or her consideration of the entire proceeding except in extraordinary circumstances and with the consent of the administrative law judge. An appeal shall be disallowed unless the administrative law judge finds, either on the record or in writing, that the allowance of such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party. If an appeal is allowed, any party may file a brief with the DOT decisionmaker within such period as the administrative law judge directs. No oral argument will be heard unless the DOT decisionmaker directs otherwise. The rulings of the administrative law judge on motion may be reviewed by the DOT decisionmaker in connection with his or her final action in the proceeding irrespective of the filing of an appeal or any action taken on it.

(g) *Effect of pendency of motions.* The filing or pendency of a motion shall not automatically alter or extend the time fixed by this part (or any extension granted thereunder) to take action.

(Secs. 204, 401, 402, 1001, Federal Aviation Act of 1958, as amended by Pub. L. 95–504, 72 Stat. 743, 754, 757, 788, 92 Stat. 1973 (49 U.S.C. 1324, 1371, 1372, 1481) Administrative Procedure Act, 5 U.S.C. 551 *et seq.*)

§ 302.19 Subpenas.

(a) An application for a subpena requiring the attendance of a witness or the production of documentary evidence at a hearing may be made without notice by any party to the administrative law judge designated to preside at the reception of evidence or, in the event that an administrative law judge has not been assigned to a proceeding or the administrative law judge is not available, to the chief administrative law judge, for action by himself or herself or by the DOT decisionmaker.

(b) A subpena for the attendance of a witness shall be issued on oral application at any time.

(c) An application for a subpena for documentary or tangible evidence shall be in duplicate except that if it is made during the course of a hearing, it may be made orally on the record with the consent of the administrative law judge. All such applications, whether written or oral, shall contain a statement or showing of general relevance and reasonable scope of the evidence sought, and shall be accompanied by two copies of a draft of the subpena sought which shall describe the documentary or tangible evidence to be subpenaed with as much particularity as is feasible.

(d) The administrative law judge or DOT decisionmaker considering any application for a subpena shall issue the subpena requested if the application complies with this section. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpena, and no detailed or burdensome showing shall be required as a condition to the issuance of a subpena. It is the purpose of this section, on the one hand, to make subpenas readily available to parties, and, on the other hand, to prevent the improvident issuance of subpenas to secure evidence which is unrelated to the issues of the proceeding or wholly unreasonable in its scope.

(e) Where it appears at a hearing that the testimony of a witness or documentary evidence is relevant to the issues in a proceeding, the administrative law judge or chief administrative law judge may issue on his or her own motion a subpena requiring such witness to attend and testify or requiring the production of such documentary evidence.

(f) Subpenas issued under this section shall be served upon the person to whom directed in accordance with § 302.8(b). Any person upon whom a subpena is served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpena with the administrative law judge designated to preside at the reception of evidence or, in the event an administrative law judge has not been assigned to a proceeding or the administrative law judge is not available, to the chief administrative law judge for action by himself or herself or by the DOT decisionmaker. If the person to whom the motion to modify or quash the subpena has been addressed or directed, has not acted upon such a motion by the return date, such date shall be stayed pending his or her final action thereon. The DOT decisionmaker may at any time review, upon his or her own initiative, the ruling of an administrative law judge or the chief administrative law judge denying a motion to quash a subpena. In such cases, the DOT decisionmaker may at any time order that the return date of a subpena which he or she has elected to review be stayed pending action thereon.

(g) The provisions of this section are not applicable to the attendance of DOT employees or the production of

documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the administrative law judge in writing and shall set forth the need of the moving party for such evidence and the relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with § 302.18 except that a grant of such motion by an administrative law judge, in whole or in part, shall be immediately reviewed by the DOT decisionmaker on his or her own initiative and shall be subject to his or her final action. No application will be required for the attendance of DOT personnel or the production of records in their custody when requested by an enforcement attorney. Where a DOT employee has testified in an enforcement proceeding that he or she used documents in his or her custody, or parts thereof, to refresh his or her recollection, a ruling by the administrative law judge for their production shall be final in the absence of an objection by the enforcement attorney. In the event of such objection, the DOT decisionmaker's review will be limited to the documents, or portions thereof, to which objection is taken by the enforcement attorney.

§ 302.20 Depositions.

(a) For good cause shown, the DOT decisionmaker or administrative law judge assigned as a hearing officer in a proceeding may order that the testimony of a witness be taken by deposition and that the witness produce documentary evidence in connection with such testimony. Ordinarily an order to take the deposition of a witness will be entered only if (1) the person whose deposition is to be taken would be unavailable at the hearing, or (2) the deposition is deemed necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to a party and will not result in an undue burden to other parties or in undue delay.

(b) Any party desiring to take the deposition of a witness shall make application therefor in duplicate to an administrative law judge designated to preside at the reception of evidence or, in the event that a hearing officer has not been assigned to a proceeding or is not available, to the DOT decisionmaker setting forth the reasons why such deposition should be taken, the name and residence of the witness, the time and place proposed for the taking of the deposition, and a general description of the matters concerning which the witness will be asked to testify. If good cause be shown, the DOT decisionmaker or the administrative law judge may, in his or her discretion, issue an order authorizing such deposition and specifying the witness whose deposition is to be taken, the general scope of the testimony to be taken, the time when, the place where, and the designated officer (authorized to take oaths) before whom the witness is to testify, and the number of copies of the deposition to be supplied. Such order shall be served upon all parties by the person proposing to take the deposition a reasonable period in advance of the time fixed for taking testimony.

(c) Witnesses whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to them. Each question propounded shall be recorded and the answers shall be taken down in the words of the witness.

(d) Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon, but no transcript filed by the officer shall include argument or debate. Objections to questions or evidence shall be noted by the officer upon the deposition, but he or she shall not have power to decide on the competency or materiality or relevance of evidence, and he or she shall record the evidence subject to objection. Objections to questions or evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(e) The testimony shall be reduced to writing by the officer, or under his or her direction, after which the deposition shall be subscribed by the witness unless the parties by stipulation waived the signing or the witness is ill or cannot be found or refuses to sign, and certified in usual form by the officer. If the deposition is not subscribed to by the witness, the officer shall state on the record this fact and the reason therefor. The original deposition and exhibits shall be forwarded to the Documentary Services Division and shall be filed in the proceedings.

(f) Depositions may also be taken and submitted on written interrogatories in substantially the same manner as depositions taken by oral examination. Ordinarily such procedure will only be authorized if necessary to achieve the purposes of an oral deposition and to serve the balance of convenience of the parties. The interrogatories shall be filed in quadruplicate with two copies of the application and a copy of each shall be served on each party. Within seven (7) days after service any party may file with the person to whom application was made two copies of his or her objections, if any, to such interrogatories and may file such cross-interrogatories as he or she desires to submit. Cross-interrogatories shall be filed in quadruplicate, and a copy thereof together with a copy of any objections to interrogatories, shall be served on each party, who shall have five (5) days thereafter to file and serve his or her objections, if any, to such cross-interrogatories. Objections to interrogatories or cross-interrogatories, shall be served on the DOT decisionmaker or the administrative law judge considering the application. Objections to interrogatories shall be made before the order for taking the deposition issues and if not so made shall be deemed waived. When a deposition is taken upon written interrogatories, and cross-interrogatories, no party shall be present or represented, and no person other than the witness, a stenographic reporter, and the officer shall be present at the examination of the witness, which fact shall be certified by the officer, who shall propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness' own words. The provisions of paragraph (e) of this section shall be applicable to depositions taken in accordance with this paragraph.

(g) All depositions shall conform to the specifications of § 302.3 except that the filing of three copies thereof shall be sufficient. Any fees of a witness, the stenographer, or the officer designated to take the deposition shall be paid by the person at whose instance the deposition is taken.

(h) The fact that a deposition is taken and filed in a proceeding as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the proceeding. Only such part or the whole of a deposition as is received in evidence at a hearing shall constitute a part of the record in such proceeding upon which a decision may be based.

§ 302.21 Attendance fees and mileage.

(a) *Where tender of attendance fees and mileage is a condition of compliance with subpena.* No person whose attendance at a hearing or whose deposition is to be taken shall be obliged to respond to a subpena unless upon a service of the subpena he or she is tendered attendance fees and mileage by the party at whose instance he or she is called in accordance with the requirements of paragraph (b) of this section: *Provided,* That a witness summoned at the instance of DOT or

one of its employees, or a salaried employee of the United States summoned to testify as to matters related to his or her public employment, need not be tendered such fees or mileage at that time.

(b) *Amount of mileage and attendance fees to be paid.* (1) Witnesses who are not salaried employees of the United States, or such employees summoned to testify on matters not related to their public employment, shall be paid the same fees and mileage paid to witnesses for like service in the courts of the United States, as provided in paragraphs (b)(1) (i) through (iii) of this section: *Provided,* That no employee, officer, or attorney of an air carrier who travels under the free or reduced rate provisions of section 403(b) of the Act shall be entitled to any fees or mileage: *And provided further,* That the amounts hereinafter set forth for fees and mileage shall not be applicable for witnesses summoned to testify in Alaska.

(i) *Per diem for attendance.* There shall be tendered $20 for each day of expected attendance at a hearing or place where deposition is to be taken, and for the time necessarily occupied in going to and returning from the place of attendance.

(ii) *Allowance for subsistence.* In addition to per diem for attendance, when attendance is required at a point so far removed from the witness' residence as to prohibit daily return thereto, there shall be tendered an additional sum of $16 per day for expenses of subsistence for each day of expected attendance and including the time necessarily occupied in going to and returning from the place of attendance.

(iii) *Mileage.* There shall be tendered an amount equal to 10 cents per mile for the round trip distance between the witness' place of residence and the place where attendance is required. Regardless of the mode of travel employed, computation of mileage shall be made on the basis of a uniform table of distances adopted by the Attorney General where the travel is covered by such table: *Provided,* That in lieu of this mileage allowance witnesses who are required to travel between the territories and possessions, or to and from the continental United States or between two foreign points shall be tendered a ticket for such transportation at the coach rate available at the time of reservation plus the required per diem attendance fees: *And provided further,* That in Alaska where permitted by section 403(b) of the Federal Aviation Act of 1958, as amended, the witness may, at his option, accept a pass for travel by air.

(2) Witnesses who are not salaried employees of the United States, or such employees summoned to testify on matters not related to their public employment, who are summoned to testify at the instance of DOT or one of its employees or the United States or one of its agencies shall be paid in accordance with the provisions of paragraph (b)(1) of this section. Such witnesses shall be furnished appropriate forms and instructions for the submission of claims for attendance fees, subsistence and mileage from the Government before the close of the proceedings which they are required to attend. Only persons summoned by subpena shall be entitled to claim attendance fees, subsistence or mileage from the Government.

(3) Witnesses who are salaried employees of the United States and who are summoned to testify on matters relating to their public employment, irrespective of at whose instance they are summoned, shall be paid in accordance with applicable Government regulations.

(4) Whenever the sums tendered to a witness are inadequate for reimbursement under the requirements of this section, and such witness has complied with the summons, he or she shall upon request within a reasonable period of time be entitled to such additional sums as may be due him or her under the provisions of this section. Whenever the sums tendered and paid to a witness are excessive under the above requirements, either because the witness traveled under the free or reduced rate provisions of section 403(b) of the Act, or for any other reasons, the witness shall upon request within a reasonable period of time refund such sums as may be excessive under the provisions of this section.

§ 302.22 Administrative law judges.

(a) *Defined.* The term "administrative law judge" as used in this part includes presiding officers, administrative law judges, or any other DOT employee assigned to hold a hearing in a proceeding.

(b) *Disqualification.* An administrative law judge shall withdraw from the case if at any time he or she deems himself or herself disqualified. If, prior to the initial or recommended decision in the case, there is filed with the administrative law judge, in good faith, an affidavit of personal bias or disqualification with substantiating facts and the administrative law judge does not withdraw, the DOT decisionmaker shall determine the matter, if properly presented by exception or brief, as a part of the record and decision in the case. The DOT decisionmaker shall not otherwise consider any claim of bias or disqualification. The DOT decisionmaker, in his or her discretion, may order a hearing on a charge of bias or disqualification.

(c) *Powers.* An administrative law judge shall have the following powers, in addition to any others specified in this part:

(1) To give notice concerning and to hold hearings;

(2) To administer oaths and affirmations;

(3) To examine witnesses;

(4) To issue subpenas and to take or cause depositions to be taken;

(5) To rule upon offers of proof and to receive relevant evidence;

(6) To regulate the course and conduct of the hearing;

(7) To hold conferences before or during the hearing, for the settlement or simplification of issues;

(8) To rule on motions and to dispose of procedural requests or similar matters;

(9) To make initial or recommended decisions as provided in § 302.27;

(10) To take any other action authorized by this part, by the Administrative Procedure Act, or by the Federal Aviation Act.

The administrative law judge's authority in each case will terminate either upon the certification of the record in the proceeding to the DOT decisionmaker, or upon the issuance of an initial or recommended decision, or when he or she shall have withdrawn from the case upon considering himself or herself disqualified.

(d) *Certification to the DOT decisionmaker for decision.* At any time prior to the close of the hearing, the DOT decisionmaker may direct the administrative law judge to certify any question or the entire record in the proceeding to the DOT decisionmaker for decision. In cases where the record is thus certified, the administrative law judge shall not render an initial decision but shall recommend a decision to the DOT decisionmaker as required by section 8(a) of the Administrative Procedure Act unless, in rulemaking or determining applications for initial licenses, the office advises him or her that it intends to issue a tentative decision.

§ 302.22a DOT decisionmaker.

(a) *Definition.* As used in this Subchapter, the DOT decisionmaker is the official authorized to issue final decisions of the Department.

(b) *Hearing cases assigned to the senior career official.* In hearing cases assigned to the senior career official in the Office of the Assistant Secretary for Policy and International Affairs, that official is the DOT decisionmaker. In all such cases, the Administrative Law Judge shall render a recommended decision to the senior career official, who shall have all the powers of an administrative law judge and those additional powers delegated by the Secretary.

(1) Decisions of the senior carrier official are subject to review by, and at the discretion of, the Assistant Secretary for Policy and International Affairs. A notice of review by the Assistant Secretary will establish the procedures for review. Unless a notice of review is issued, a decision of the senior career official will be issued as a final order of the Department and be served 14 days after it is adopted by the senior career official. Petitions for discretionary review of decisions of the senior career official will not be entertained.

(2) Final decisions of the senior career official may be reviewed upon a petition for reconsideration filed pursuant to § 302.37. Such a petition shall state clearly the basis for requesting reconsideration and shall specify any questions of national transportation policy that may be involved. The Assistant Secretary will either grant or deny the petition.

(3) Upon review or reconsideration, the Assistant Secretary may either affirm the decision or remand the decision to the senior career official for further action consistent with such order of remand.

(4) Carrier selection proceedings for international route authority and such other hearing cases as the Secretary deems appropriate will be assigned to the senior career official.

(c) *Other Hearing Cases.* In other hearing cases, the Assistant Secretary for Policy and International Affairs is the DOT decisionmaker. The Assistant Secretary shall have all the powers of an Administrative Law Judge and those additional powers delegated by the Secretary.

(d) *Nonhearing cases.* In all other proceedings, the Assistant Secretary for Policy and International Affairs or, in consumer protection matters, the Assistant Secretary for Governmental Affairs is the DOT decisionmaker. The Assistant Secretaries may delegate this authority in appropriate cases to subordinate officials.

(e) *Secretary and Deputy Secretary.* The Secretary or Deputy Secretary may exercise the authority of the Assistant Secretary whenever he or she believes a decision involves important questions of national transportation policy.

§ 302.23 Prehearing conference.

(a) *Purpose and scope of conference.* Prior to any hearings there will ordinarily be a prehearing conference before an administrative law judge, although in economic enforcement proceedings where the issues are drawn by the pleadings such conference will usually be omitted. Written notice of the prehearing conference shall be sent by the chief administrative law judge to all parties to a proceeding and to other persons who appear to have an interest in such proceeding. The purpose of such a conference is to define and simplify the issues and the scope of the proceeding, to secure statements of the positions of the parties with respect thereto and amendments to the pleadings in conformity therewith, to schedule the exchange of exhibits before the date set for hearing, and to arrive at such agreements as will aid in the conduct and disposition of the proceeding. For example, consideration will be given to:

(1) Matters which the DOT decisionmaker can consider without the necessity of proof;

(2) Admissions of fact and of the genuineness of documents;

(3) Requests for documents;

(4) Admissibility of evidence;

(5) Limitation of the number of witnesses;

(6) Reducing of oral testimony to exhibit form;

(7) Procedure at the hearing, etc.

The administrative law judge may require further conference, or responsive pleadings, or both. If a party refuses to produce documents requested by another party at the conference, the administrative law judge may compel the production of such documents prior to a hearing by subpena issued in accordance with the provisions of § 302.19 as though at a hearing. Applications for the production prior to hearing of documents in DOT's possession shall be addressed to the administrative law judge, in accordance with the provisions of § 302.19(g), in the same manner as provided therein for production of documents at a hearing. The administrative law judge may also on his or her own motion or on motion of any party, direct any party to the proceeding (air carrier or non-air carrier) to prepare and submit exhibits setting forth studies, forecasts, or estimates on matters relevant to the issues in the proceeding.

(b) *Report of prehearing conference.* The administrative law judge shall issue a report of prehearing conference, defining the issues, giving an account of the results of the conference, specifying a schedule for the exchange of exhibits and rebuttal exhibits, the date of hearing, and specifying a time for the filing of objections to such report. The report shall be served upon all parties to the proceeding and any person who appeared at the conference. Objections to the report may be filed by any interested person within the time specified therein. The administrative law judge may revise his or her report in the light of the objections presented. The revised report, if any, shall be served upon the same persons as was the original report. Exceptions may be taken on the basis of any timely written objection which has not been met by a revision of the report if they are filed within the time specified in the revised report. Such report shall constitute the official account of the conference and shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to protect the public interest or to prevent injustice.

§ 302.24 Hearing cases.

(a) *Definition.* A hearing case means any proceeding (including an enforcement case) that the Department has noticed will be conducted on the record after oral evidentiary hearing subject to 5 U.S.C. 556 and 557.

(b) *Notice.* The administrative law judge to whom the case is assigned or the DOT decisionmaker shall give the parties reasonable notice of a hearing or of the change in the date and place of a hearing and the nature of such hearing.

(c) *Evidence.* Evidence presented at the hearing shall be limited to material evidence relevant to the issues as drawn by the pleadings or as defined in the report of prehearing conference, subject to such later modifications of the issues as may be necessary to protect the public interest or to prevent injustice and shall not be unduly repetitious. Evidence shall be presented in written form by all parties wherever feasible, as the administrative law judge may direct.

(d) *Objections to evidence.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections relied upon, and the transcript shall not include argument or debate thereon except as ordered by the administrative law judge. Rulings on such objections shall be a part of the transcript.

(e) *Exceptions.* Formal exceptions to the rulings of the administrative law judge made during the course of the hearing are unnecessary. For all purposes for which an exception

otherwise would be taken, it is sufficient that a party, at the time the ruling of the administrative law judge is made or sought, makes known the action he or she desires the administrative law judge to take or his or her objection to an action taken, and his or her grounds therefor.

(f) *Offers of proof.* Any offer of proof made in connection with an objection taken to any ruling of the administrative law judge rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony, and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(g) *Exhibits.* When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and two copies to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed a time for the exchange of exhibits, the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing or, at the latest, at the commencement of the hearing.

(h) *Substitution of copies for original exhibits.* In his or her discretion, the administrative law judge may permit a party to withdraw original documents offered in evidence and substitute true copies in lieu thereof.

(i) *Designation of parts of documents.* When relevant and material matter offered in evidence by any party is embraced in a book, paper, or document containing other matter not material or relevant, the party offering the same shall plainly designate the matter so offered. The immaterial and irrelevant parts shall be excluded and shall be segregated insofar as practicable. If the volume of immaterial or irrelevant matter would unduly encumber the record, such book, paper, or document will not be received in evidence, but may be marked for identification, and, if properly authenticated, the relevant or material matter may be read into the record, or, if the administrative law judge so directs, a true copy, of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the book, paper, or document, and to offer in evidence in like manner other portions thereof.

(j) *Records in other proceedings.* In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(1) The portion is specified with particularity in such manner as to be readily identified; and

(2) The party offering the same agrees unconditionally to supply such copies later, or when required by the DOT decisionmaker; and

(3) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any portion offered by any other party may be incorporated by like reference upon compliance with paragraphs (i) (1) and (2) of this section; and

(4) The administrative law judge directs such incorporation or waives the above requirement with the consent of the parties.

(k) *Receipt of documents after hearing.* No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the administrative law judge.

(l) *Transcripts of hearings.* (1) Hearings shall be recorded and transcribed, under supervision of the administrative law judge, by the reporting firm under contract with DOT. Copies of the transcript shall be supplied to the parties to the proceeding by said reporting firm, at the contract price for copies.

(2) The administrative law judge shall determine whether "ordinary transcript" or "daily transcript" (as those terms are defined in the contract) will be necessary and required for the proper conduct of the proceeding and DOT will pay the reporting firm the full cost of reporting its proceedings at the contract price for such type of transcript. If the administrative law judge has determined that ordinary transcript is adequate, and has notified the parties of such determination (in the notice of hearings, or otherwise), then any party may request reconsideration of such determination and that daily transcript be required. In determining what is necessary and required for the proper conduct of the proceeding, the administrative law judge shall consider, among other things:

(i) The nature of the proceeding itself; (ii) the DOT decisionmaker's needs as as well as the reasonable needs of the parties; and (iii) the requirements of a fair hearing.

(3) If the administrative law judge has determined that ordinary transcript is adequate, or, upon reconsideration, has adhered to such determination, then any party may request the reporting firm to provide daily transcript. In that case, pursuant to its contract with DOT, the reporting firm will be obligated to furnish to the DOT daily transcript upon the agreement by the requesting party to pay to the reporting firm an amount equal to the difference between the contract prices for ordinary transcript and daily transcript, provided that the requesting party makes such agreement with the reporting firm at least twenty-four (24) hours in advance of the date for which such transcript is requested.

(4) Any party may obtain from the Office of the Assistant Secretary for Administration, the name and address of the private reporting company with which DOT currently has a contract for transcripts and copies, as well as the contract prices then in effect for such services.

(5) Copies of transcripts ordered by parties other than DOT shall be prepared for delivery to the requesting person at the reporting firm's place of business, within the stated time for the type of transcript ordered. The requesting party and the reporting firm may agree upon some other form or means of delivery (mail, messenger, etc.) and the reporting firm may charge for such special service, provided that such charge shall not exceed the reasonable cost of such service.

(m) *Corrections to transcript.* Changes in the official transcript may be made only when they involve errors affecting substance. A motion to correct a transcript shall be filed with the Documentary Services Division, within ten (10) days after receipt of the completed transcript by DOT. If no objections to the motion are filed within ten (10) days thereafter, the transcript may, upon the approval of the administrative law judge, be changed to reflect such corrections. If objections are received, the motion and objections shall be submitted to the official reporter by the administrative law judge together with a request for a comparison of the transcript with the stenographic record of the hearing. After receipt of the report of the official reporter an order shall be entered by the administrative law judge settling the record and ruling on the motion.

(n) *Official notice of facts contained in certain documents.* (1) Without limiting, in any manner or to any extent,

the discretionary powers of the DOT decisionmaker and its administrative law judges to notice other matters or documents properly the subject of official notice, facts contained in any document within the categories enumerated in this subdivision are officially noticed in all formal economic proceedings except those subject to Subpart B of this part. Each such category shall include any document antedating final DOT decision in the proceeding where such notice is taken. The matters officially noticed under the provisions of this paragraph are:

1. Official Guide of the Airways for each month prior to and including April 1943; Universal Airline Schedules for each month from May 1943 to September 1944, inclusive; American Aviation Air Traffic Guide for each month from October 1944 to August 1948, inclusive; and Official Airline Guide.

2. Official Guide of the Railways and Russell's Official National Motor Coach Guide.

3. Book of Official CAB Airline Route Maps and Airport to Airport Mileages published by Air Transport Association of America.

4. Shuler Guide and Official Airline Guide Quick Reference Edition.

5. All schedules and amendments thereof, and all tariffs and amendments thereof, of all carriers, on file with DOT.

6. Air Carrier operating certificates or applications therefor, of all carriers, together with any requests for amendment thereof.

7. Monthly reports, Forms 2380 and 2780, for each month through December 1946, and monthly and quarterly reports, Forms 41 and 41(a) (including monthly and annual reports required to be filed by all carriers in connection therewith), filed with DOT.

8. Recurrent Reports of Mileage and Traffic Data of all Domestic Airline Carriers from 1945 and all similar reports issued by the Civil Aeronautics Board. or DOT.

9. Certified Air Carrier Traffic Statistics from 1955, prepared by the Office of Carrier Accounts and Statistics, Civil Aeronautics Board, and all such other similar compilations of statistics issued by the Civil Aeronautics Board. or DOT.

10. Recurrent Reports of Financial Data of all Domestic Airline Carriers from 1947 through the quarter ended September 30, 1953; issued by the Civil Aeronautics Board, and all such other similar recurrent reports issued by the Civil Aeronautics Board. or DOT.

11. Certificated Air Carrier Financial Data from the quarter ended December 31, 1953; prepared by the Office of Carrier Accounts and Statistics, Civil Aeronautics Board, and all such other similar compilations of data issued by the Civil Aeronautics Board. or DOT.

12. Annual Airline Statistics, Domestic Carriers, fiscal years 1936–1941; Annual Airline Statistics, Domestic Carriers, calendar years 1938–1947; prepared by the Bureau of Pricing and Domestic Aviation Civil Aeronautics Board; and all such other similar compilations of statistics issued by the Civil Aeronautics Board. or DOT.

13. Quarterly Report of Air Carrier Operating Factors, for the quarter ended September 30, 1953; prepared by the Office of Carrier Accounts and Statistics, Civil Aeronautics Board, and all such other reports for quarterly periods as may be made available to the public by the Civil Aeronautics Board or DOT.

14. Passenger, mail, express, and freight data submitted to the Board on Form 2787 by all carriers for any months subsequent to March 1955 and any similar data submitted to DOT.

15. Airline Traffic Surveys, compiled by the Civil Aeronautics Board, from September 1946, and any other such surveys made available to the public by the Civil Aeronautics Board or DOT.

16. The publication Competition Among Domestic Air Carriers, March 1–14, 1955, compiled by the Civil Aeronautics Board and published by the Air Transport Association of America, and any other compilations of similar data made available to the public by the Civil Aeronautics Board or DOT.

17. Service Mail Pay and Subsidy for United States Certificated Air Carriers from 1955, published by the Civil Aeronautics Board, and any supplemental data and subsequent issues published by the Civil Aeronautics Board or DOT.

18. Airport Activity Statistics of Certificated Air Carriers, from December 31, 1955; compiled by the Civil Aeronautics Board, and published by Air Transport Association of America, and any subsequent issues thereof published by DOT.

19. Enplaned Airline Traffic, by community, by year, 1948–1951; Air Commerce Traffic Pattern, fiscal years 1953–1955 and calendar years 1952–1955, published by the Civil Aeronautics Administration, U.S. Department of Commerce, and any subsequent editions thereof published by the Federal Aviation Administration.

20. Population Volumes I and II of the Eighteenth (1960) Census of the United States, issued by the Census Bureau, Department of Commerce; and similar publications of the Census Bureau relating to the Seventeenth (1950) Census.

21. The Rand McNally Commercial Atlas and Marketing Guide, from 1958, and the Rand McNally Road Atlas, United States, Canada, and Mexico, from 1956.

22. Survey of Buying Power, from 1955, published by Sales Management Magazine.

23. Volumes II and III of the Census of Manufacturers, 1954, issued by the Bureau of Census of the U.S. Department of Commerce; and similar publications of the Bureau of the Census relating to the 1947 and 1958 Census of Manufacturers.

24. Volumes II, IV and VI of the Census of Business, 1954, issued by the Bureau of the Census of the U.S. Department of Commerce; and similar publications of the Bureau of the Census relating to the 1948 and 1958 Census of Business.

25. Federal Airways Air Traffic Activity, from 1953–1956 (fiscal year) issued by the Civil Aeronautics Administration, U.S. Department of Commerce, and subsequent editions thereof issued by the Federal Aviation Administration.

26. National Airport Plan, from 1956, Civil Aeronautics Administration, U.S. Department of Commerce and subsequent editions thereof issued by the Federal Aviation Administration.

27. Record of Airport Facilities, Form ACA-29A, issued by the Civil Aeronautics Administration, U.S. Department of Commerce and by the Federal Aviation Administration.

28. International Section, Airline Traffic Surveys prepared by the Civil Aeronautics Board from March and September 1959, and any such surveys issued or otherwise made available to the parties by the Civil Aeronautics Board or published privately.

29. The ABC World Airways Guide, Thomas Skinner and Co., Ltd., from June 1950.

30. ICAO Statistical Summary, Preliminary Issue and Nos. 1 through 14, and Digest of Statistics, Nos. 15 through 71, prepared by the International Civil Aviation Organization, Montreal, Canada, with all changes and additions.

31. Foreign-Commerce Yearbook, from 1951, U.S. Department of Commerce, office of International Trade.

32. Statistical Abstract of the United States, from 1953, U.S. Department of Commerce, Bureau of Census.

33. Yearbook of International Trade Statistics, from 1956.

34. Annual Reports of the Immigration and Naturalization Service, U.S. Department of Justice, from fiscal year ended June 30, 1945.

35. Official Steamship and Airways Guide International Transportation Guides, Inc., from June 1945.

36. The Airman's Guide, from 1950, issued by the Civil Aeronautics Administration, U.S. Department of Commerce, and any subsequent editions thereto, issued by the Federal Aviation Administration.

37. Plant and Product Directory of the 500 Largest U.S. Industrial Corporations, from 1961, published by Time Inc.

38. Thomas' Register of American Manufacturers, from 1955, published by Thomas Publishing Company.

39. First and Second Class Post Offices, July 1, 1939–July 1, 1946 and Receipts and Classes of Post Offices, from July 1, 1947, issued by the U.S. Post Office Department.

40. Quarterly Report on Federal Aid to Highways, from March 1960, issued by the Bureau of Public Roads of the U.S. Department of Commerce.

41. All forms and reports required by the Post Office Department to be filed by air carriers certificated to transport mail.

42. All orders of the Postmaster General designating schedules for the transportation of mail.

43. Handbook of Airline Statistics from 1961, prepared by the Bureau of Accounts and Statistics, Civil Aeronautics Board or DOT.

44. CAB Forms 242, 243, 244, and 244A (including all monthly, quarterly, semiannual, and annual reports required to be filed by carriers in connection therewith), filed with the Board or DOT.

(2) Any fact contained in a document belonging to a category enumerated in

paragraph (m)(1) of this section shall be deemed to have been physically incorporated into and made part of the record in such proceedings. However, such taking of official notice shall be subject to the rights granted to any party or intervener to the proceeding under section 7(d) of the Administrative Procedure Act.

(3) The decisions of the Department and its administrative law judges may officially notice any appropriate matter without regard to whether or not such items are contained in a document belonging to the categories enumerated in paragraph (m)(1) of this section. However, where the decision rests on official notice of a material fact or facts, it will set forth such items with sufficient particularity to advise interested persons of the matters which have been noticed.

§ 302.25 Argument before the administrative law judge.

(a) The administrative law judge shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the administrative law judge.

(b) When, in the opinion of the administrative law judge, the volume of the evidence or the importance or complexity of the issues involved warrants, he or she may, either of his or her own motion, or at the request of a party, permit the presentation of oral argument. He or she may impose such time limits on the argument as he or she may determine, having regard for other assignments for hearing before him or her. Such argument shall be transcribed and bound with the transcript of testimony and will be available to the DOT decisionmaker for consideration in deciding the case.

§ 302.26 Proposed findings and conclusions before the administrative law judge or the DOT decisionmaker.

Within such limited time after the close of the reception of evidence fixed by the administrative law judge, any party may, upon request and under such conditions as the administrative law judge may prescribe, file for his or her consideration briefs to include proposed findings and conclusions of law which shall contain exact references to the record and authorities relied upon. The provisions of this section shall be applicable to proceedings in which the record is certified to the DOT decisionmaker without the preparation of an initial or recommended decision by the administrative law judge.

§ 302.27 Delegation to administrative law judges and action by administrative law judges after hearing.

(a) *Delegation of authority to make the agency decision subject to discretionary review.* Pursuant to the authority conferred on DOT under Section 1601(b)(1) of the Federal Aviation Act of 1958, as amended, there is hereby delegated to each administrative law judge assigned to a particular case subject to this part the DOT decisionmaker's function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of the hearing in such case, except that this delegation does not apply in cases where the record is certified to the DOT decisionmaker, with or without a recommended decision by the administrative law judge, or in cases requiring Presidential approval under section 801 of the Act. This delegation does not apply to the review of rulings by the administrative law judge on interlocutory matters which have been appealed to the DOT decisionmaker in accordance with the requirements of § 302.18. The term "initial decision," as used in this part, shall encompass the administrative law judge's decision pursuant to this delegation of authority on the merits of the proceeding and on all ancillary procedural issues remaining for disposition at the close of the hearing.

(b) *Action by administrative law judge after hearing.* (1) Every initial or recommended decision issued shall state the names of the persons who are to be served with copies of it, the time within which exceptions to, or petitions for review of, such decision may be filed, and the time within which briefs in support of the exceptions may be filed. In addition, every initial decision shall recite that it is made under delegated authority, and contain notice of the provisions of paragraph (c) of this section. In the event the administrative law judge certifies the record to the DOT decisionmaker without an initial or recommended decision, he or she shall notify the parties of the time within which to file proposed findings and conclusions with the DOT decisionmaker and supporting briefs.

(2) Except where the DOT decisionmaker directs otherwise, after the taking of evidence and the receipt of proposed findings and conclusions, if any, the administrative law judge shall take the following action:

(i) *Cases subject to section 801 of the Act.* In cases where the action of the Department is subject to the approval of the President pursuant to section 801 of the Act, the administrative law judge shall render a recommended decision orally on the record or in writing.

(ii) *Other matters.* If the proceeding relates to any matter not provided for in paragraph (b)(2)(i) of this section, the administrative law judge shall render an initial decision in writing.

(c) *Effect of initial decision.* Unless a petition for discretionary review is filed pursuant to § 302.28, exceptions are filed pursuant to § 302.1754, or the DOT decisionmaker issues an order to review upon his or her own initiative, the initial decision shall become effective as the final order of the Department 30 days after service thereof. If a petition for discretionary review or exceptions are timely filed or action to review is taken by the DOT decisionmaker upon his or her own initiative, the effectiveness of the initial decision is stayed until the further order of the DOT decisionmaker.

§ 302.28 Petitions for discretionary review of initial decisions or recommended decisions; review proceedings.

(a) *Petitions for discretionary review.* (1) Review by the DOT decisionmaker pursuant to this section is not a matter of right but of the sound discretion of the DOT decisionmaker. Any party may file and serve a petition for discretionary review by the DOT decisionmaker of an initial decision or recommended decision within 21 days after service thereof, except that the DOT decisionmaker may fix a different period in any decision involving a foreign air carrier where the action of DOT is subject to the approval of the President pursuant to section 801 of the Act. Such petitions shall be accompanied by proof of service on all parties.

(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(i) A finding of a material fact is erroneous;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, DOT rules, or precedent;

(iii) A substantial and important question of law, policy or discretion is involved; or

(iv) A prejudicial procedural error has occurred.

(3) Each issue shall be separately numbered and plainly and concisely stated. Petitioners shall not restate the same point in repetitive discussions of an issue. Each issue shall be supported by detailed citations of the record when objections are based on the record, and by statutes, regulations or principal authorities relied upon. Any matters of fact or law not argued before the

administrative law judge, but which the petitioner proposes to argue on brief to the DOT decisionmaker, shall be stated.

(4) Petitions for discretionary review shall be self-contained and shall not incorporate by reference any part of another document. Except by permission of the DOT decisionmaker or the Chief Administrative Law Judge, petitions shall not exceed 20 pages including appendices and other papers physically attached to the petition. Petitions of more than 10 pages shall contain a subject index with page references.

(5) Requests for oral argument on petitions for discretionary review will not be entertained by the DOT decisionmaker.

(b) *Answer.* Within 15 days after service of a petition for discretionary review, any party may file and serve an answer of not more than 15 pages in support of or in opposition to the petition. If any party desires to answer more than one petition for discretionary review in the same proceeding, he or she shall do so in a single document of not more than 20 pages.

(c) *Orders declining review.* DOT orders declining to exercise the discretionary right of review will specify the date upon which the administrative law judge's decision shall become effective as the final decision of DOT. A petition for reconsideration of a DOT order declining review will be entertained only when the order exercises, in part, the DOT decisionmaker's discretionary right of review, and such petition shall be limited to the single question of whether any issue designated for review and any issue not so designated are so inseparably interrelated that the former cannot be reviewed independently or that the latter cannot be made effective before the final decision of DOT in the review proceeding.

(d) *Review proceedings.* (1) The DOT decisionmaker may exercise his or her right of review upon petition for review or on his or her own initiative. The DOT decisionmaker will issue a final order upon such review without further proceedings on any or all the issues where he or she finds that matters raised do not warrant further proceedings.

(2) Where the DOT decisionmaker desires further proceedings, he or she will issue an order for review which will:

(i) Specify the issues to which review will be limited. Such issues shall constitute one or more of the issues raised in a petition for discretionary review, and/or matters which the DOT decisionmaker desires to review on his or her own initiative. Only those issues specified in the order shall be argued on brief to the DOT decisionmaker, pursuant to § 302.31, and considered by the DOT decisionmaker.

(ii) Specify the portions of the administrative law judge's decision, if any, which are to be stayed as well as the effective date of the remaining portions thereof.

(iii) Designate the parties to the review proceeding.

§ 302.29 Tentative decision of DOT.

(a) Except as provided in paragraph (b) of this section, whenever the administrative law judge certifies the record in a proceeding directly to the DOT decisionmaker without issuing an initial or recommended decision in the matter, the DOT decisionmaker shall, after consideration of any proposed findings and conclusions submitted by the parties, prepare a tentative decision and serve it upon the parties. Every tentative decision of the DOT decisionmaker shall state the names of the persons who are to receive copies of it, the time within which exceptions to such decision may be filed, the time within which briefs in support of the exceptions may be filed, and the date when such decision will become final in the absence of exceptions thereto. If no exceptions are filed to the tentative decision of the DOT decisionmaker within the period fixed (which in no event shall be less than 10 days), it shall become final at the expiration of such period unless the DOT decisionmaker orders otherwise.

(b) Notwithstanding the provisions of paragraph (a) of this section, in rule making proceedings or proceedings determining applications for initial licenses, the DOT decisionmaker may omit a tentative decision in any case in which he or she finds upon the record that due and timely execution of DOT's functions imperatively and unavoidably so requires. The DOT decisionmaker may also, in his or her discretion, omit a tentative decision in proceedings under Subpart Q. Final decisions of the DOT decisionmaker are subject to review as provided in § 302.22a.

(Secs. 204, 401, 402, 1001, Federal Aviation Act of 1958, as amended by Pub. L. 95-504, 72 Stat. 743, 754, 757, 788, 92 Stat. 1973 (49 U.S.C. 1324, 1371, 1372, 1481 (Administrative Procedure Act) 5 U.S.C. 551 *et seq.*))

§ 302.30 Exceptions to tentative decisions of DOT.

(a) *Time for filing.* Within ten (10) days after service of any tentative decision of the DOT decisionmaker, any party to a proceeding may file exceptions to such decision with the DOT decisionmaker.

(b) *Form and contents of exceptions.* Each exception shall be separately numbered and shall be stated as a separate point, and appellants shall not restate the same point in several repetitive exceptions. Each exception shall state, sufficiently identify, and be limited to, an ultimate conclusion in the decision to which exception is taken (such as, selection of one carrier rather than another to serve any point or points; points included in or excluded from a new route; imposition or failure to impose a given restriction; determination of a rate at a given amount rather than another). No specific exception shall be taken with respect to underlying findings or statements, but exceptions to an ultimate conclusion shall be deemed to include exceptions to all underlying findings and statements pertaining thereto. *Provided, however,* That exceptions shall specify any matters of law, fact or policy which were not argued before the administrative law judge but will be set forth for the first time on brief to the DOT decisionmaker.

(c) *Effect of failure to file timely and adequate exceptions.* No objection may be made on brief or at a later time to an ultimate conclusion which is not expressly made the subject of an exception in compliance with the provisions of this section. *Provided, however,* That any party may file a brief in support of the decision and in opposition to the exceptions filed by any other party.

§ 302.31 Briefs before decisionmaker.

(a) *Time for filing.* Within such period after the date of service of any tentative decision by the DOT decisionmaker as may be fixed therein, any party may file a brief addressed to the DOT decisionmaker in support of his or her exceptions to such decision or in opposition to the exceptions filed by any other party. Briefs to the DOT decisionmaker on initial decisions or recommended decisions of administrative law judges shall be filed only in those cases where the DOT decisionmaker grants discretionary review and orders further proceedings, pursuant to § 302.28(d)(2), and only upon those issues specified in the order. Such briefs shall be filed within 30 days after date of service of the order granting discretionary review. In cases where, because of the limited number of parties and the nature of the issues, the filing of opening, answering, and reply briefs will not unduly delay the proceeding and will assist in its proper disposition, the

DOT decisionmaker or the administrative law judge (where the administrative law judge's decision was not made under delegated authority) may direct that the parties file briefs at different times rather than at the same time.

(b) *Effect of failure to restate objections in briefs.* In determining the merits of an appeal, the DOT decisionmaker will not consider the exceptions or the petition for discretionary review but will consider only the brief. Each objection contained in the exceptions or each issue specified in the DOT decisionmaker's order exercising discretionary review must be restated and supported by a statement and adequate discussion of all matters relied upon, in a brief filed pursuant to and in compliance with the requirements of this section.

(c) *Formal specifications of briefs*—(1) *Contents.* Each brief shall discuss every point of law, fact or precedent which the party submitting it is entitled to raise and which it wishes the DOT decisionmaker to consider. Each brief shall include a summary of the argument not to exceed 5 pages. Support and justification for every point raised shall include itemized references to the pages of the transcript of hearing, exhibit or other matter of record, and citations of the statutes, regulations or principal authorities relied upon. If a brief or any point discussed in the brief is not in substantial conformity with the requirement for such support and justification, no motion to strike or dismiss such document shall be made but the DOT decisionmaker may disregard the points involved.

(2) *Incorporation by reference.* Briefs to the DOT decisionmaker shall be completely self-contained and shall not incorporate by reference any portion of any other brief or pleading: *Provided, however,* That instead of submitting a brief to the DOT decisionmaker a party may adopt by reference specifically identified pages or the whole of his or her prior brief to the administrative law judge if the latter complies with all requirements of this section. In such cases, the party shall file with the Documentary Services Division a letter exercising this privilege and serve all parties in the same manner as a brief to the DOT decisionmaker.

(3) *Length and index.* Briefs shall comply with the formal specifications set forth in § 302.3(b). Except by permission or direction of the DOT decisionmaker, briefs shall not exceed 50 pages including pages contained in any appendix, table, chart, or other document physically attached to the brief, but excluding maps and the summary of the argument. In this case "map" means only those pictorial representations of routes, flight paths, mileage, and similar ancillary data that are superimposed on geographic drawings and contain only such text as is needed to explain the pictorial representation. Any brief that exceeds 10 pages shall contain a subject index of its contents, including page references.

§ 302.32 Oral argument before the DOT decisionmaker.

(a) If any party desires to argue a case orally before the DOT decisionmaker, he shall request leave to make such argument in his exceptions or brief. Such request shall be filed no later than the date when briefs before the DOT decisionmaker are due in the proceeding. The DOT decisionmaker will rule on such request, and if oral argument is to be allowed, all parties to the proceeding will be advised of the date and hour set for such argument and the amount of time allowed to each party. Requests for oral argument on petitions for discretionary review will not be entertained.

(b) Pamphlets, charts, and other written data may be presented to the DOT decisionmaker at oral argument only in accordance with the following rules: All such material shall be limited to facts in the record of the case being argued. All such material shall be served on all parties to the proceeding and eight copies transmitted to the Documentary Services Division at least five (5) calendar days in advance of the argument. As used herein "material" includes, but is not limited to, maps, charts included in briefs, and exhibits which are enlarged and used for demonstration purposes at the argument, but does not include the enlargements of such exhibits.

§ 302.33 Waiver of procedural steps after hearing.

The parties of any proceeding may agree to waive any one or more of the following procedural steps provided in §§ 302.25 through 302.32: Oral argument before the administrative law judge, the filing of proposed findings and conclusions for the administrative law judge or for the DOT decisionmaker, a recommended decision of the administrative law judge, a tentative decision of the DOT decisionmaker, a petition for discretionary review of or exceptions to an initial decision or recommended decision, and the filing of briefs with the DOT decisionmaker, or oral argument before the DOT decisionmaker.

§ 302.35 Shortened procedure.

In cases where a hearing is not required by law, §§ 302.23 through 302.33, relating to prehearing, hearing, and post-hearing procedures, shall not be applicable except to the extent that DOT shall determine that the application of some or all of such rules in the particular case will be conducive to the proper dispatch of its business and to the ends of justice.

§ 302.36 Final decision of DOT.

When a case stands submitted to the DOT decisionmaker for final decision on the merits, he or she will dispose of the issues presented by entering an appropriate order which will include a statement of the reasons for his or her findings and conclusions. Such orders shall be deemed "final orders" within the purview of § 302.37(a), in the manner provided by § 302.22a.

§ 302.37 Petitions for reconsideration or review by the DOT decisionmaker.

(a) *DOT orders subject to reconsideration; time for filing.* Unless an order or a rule of the Department specifically provides otherwise, any interested person may file a petition for reconsideration, of any interlocutory order issued by the Department which institutes a proceeding. Any party to a proceeding unless an order or rule of the Department specifically provides otherwise, may file a petition for reconsideration, rehearing, or reargument of (1) final orders issued by the Department, or (2) an interlocutory order which defines the scope and issues of a proceeding or suspends a provision of a tariff on file with the Department. Unless the time is shortened or enlarged by the Department, petitions for reconsideration shall be filed, in the case of a final order, within twenty (20) days after service thereof, and, in the case of an interlocutory order, or a final decision described in § 302.1757 within ten (10) days after service. However, neither the filing nor the granting of such a petition shall operate as a stay of such final or interlocutory order unless specifically so ordered by the DOT decisionmaker. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition. Motions for extension of time to file a petition or answer, and for leave to file a petition or answer after the time for the filing has expired, will not be granted except on a showing of unusual and exceptional circumstances, constituting

good cause for movant's inability to meet the established procedural dates.

(b) *Contents of petition.* A petition for reconsideration, rehearing, or reargument shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, the ground relied upon, and the relief sought. If a decision by the Secretary or Deputy Secretary is requested, the petition should describe in detail the reasons for such request and specify any important national transportation policy issues that are presented. If the petition is based, in whole or in part, on allegations as to the consequences which would result from the final order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision. Unless otherwise directed by the DOT decisionmaker upon a showing of unusual or exceptional circumstances, petitions for reconsideration, rehearing or reargument or answers thereto which exceed twenty-five (25) pages (including appendices) in length shall not be accepted for filing by the Office of the Documentary Services.

(c) *Successive petitions.* A successive petition for rehearing, reargument, reconsideration filed by the same party or person, and upon substantially the same ground as a former petition which has been considered or denied will not be entertained.

§ 302.38 Petitions for rulemaking.

Any interested person may petition DOT for the issuance, amendment, modification and repeal of any regulation, subject to the provisions of Part 5, Rulemaking Procedures, of the Office of the Secretary regulations (49 CFR 5.1 et seq.)

§ 302.39 Objections to public disclosure of information.

(a) *General.* Part 7 of the Office of the Secretary regulations, Public Availability of Information, governs the availability of records and documents of DOT to the public. (49 CFR 7.1 et seq.)

(b) *Information contained in paper to be filed.* Any person who objects to the public disclosure of any information contained in any paper filed in any proceeding, or in any application, report, or other document filed pursuant to the provisions of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order of the DOT thereunder, shall segregate, or request the segregation of, such information into a separate paper and shall file it, or request that it be filed, with the administrative law judge or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed, separately in a sealed envelope, bearing the caption of the enclosed paper, and the notation "Classified or Confidential Treatment Requested Under § 302.39." At the time of filing such paper. or when the objection is made by a person not himself or herself filing the paper, application, report or other document, within five (5) days after the filing of such paper, the objecting party shall file a motion to withhold the information from public disclosure, in accordance with the procedure outlined in paragraph (e) of this section, or in accordance with the procedure outlined in paragraph (d) of this section if objection is made by a Government department or a representative thereof. Notwithstanding any other provision of this section, copies of the filed paper and of the motion need not be served upon any other party unless so ordered by the DOT.

(c) *Information contained in oral testimony.* Any person who objects to the public disclosure of any information sought to be elicited from a witness or deponent on oral examination shall, before such information is disclosed, make his or her objection known. Upon such objection duly made, the witness or deponent shall be compelled to disclose such information only in the presence of the administrative law judge or the person before whom the deposition is being taken, as the case may be, the official stenographer and such attorneys for and lay representative of each party as the administrative law judge or the person before whom the deposition is being taken, as the case may be, shall designate, and after all present have been sworn to secrecy. The transcript of testimony containing such information shall be segregated and filed in a sealed envelope, bearing the title and docket number of the proceeding, and the notation "Classified or Confidential Treatment Requested Under § 302.39 Testimony Given by (name of witness or deponent)." Within five (5) days after such testimony is given, the objecting person shall file a motion, except as hereinafter provided in paragraph (d) of this section, in accordance with the procedure outlined in paragraph (e) of this section, to withhold the information from public disclosure. Notwithstanding any other provision of this section, copies of the segregated portion of the transcript and of the motion need not be served upon any other party unless so ordered by the DOT.

(d) *Objection by Government departments or representative thereof.* In the case of objection to the public disclosure of any information filed by or elicited from any United States Government department, or representative thereof, under paragraph (b) or (c) of this section, the department making such objection shall be exempted from the provisions of paragraphs (b), (c), and (e) of this section insofar as said paragraphs require the filing of a written objection to such disclosure. However, any department, or person representing said department, if it so desires, may file a memorandum setting forth the reasons on the basis of which it is claimed that a public disclosure of the information should not be made. If such a memorandum is submitted, it shall be filed and handled as is provided by this section in the case of a motion to withhold information from public disclosure.

(e) *Form of motion to withhold information from public disclosure.* Subject to the exception of paragraph (d) of this section, no information covered by paragraphs (b) and (c) of this section need be withheld from public disclosure unless written objection to such disclosure is filed with the DOT in accordance with the following procedure:

(1) The motion shall be headed with the title and docket number of the proceeding and shall be signed by the objecting person, any duly authorized officer or agent thereof, or by counsel representing such person in the proceeding.

(2) The motion shall include (i) a description of the information sought to be withheld, sufficient for identification of the same; (ii) a statement explaining how and why the information falls within the exemptions from the Freedom of Information Act (5 U.S.C. 552(b)(1)–(9); and (iii) and a statement explaining how and why public disclosure of the information would adversely affect the interests of the objecting persons and is not required in the interest of the public.

(3) Such motion shall be filed with the administrative law judge or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed.

If such motion relates to contracts, agreements, understandings, or arrangements an executed original copy and two copies of such motion shall be filed.

(f) *Motions referred to DOT.* The order of DOT containing its ruling upon each such motion will specify the extent to which, and the conditions upon which, the information may be disclosed to the parties and to the public, which order shall become effective upon the date stated therein, unless, within five (5) days after the date of the entry of the DOT 's order with respect thereto, a petition is filed by the objecting person requesting reconsideration by DOT, or a written statement is filed indicating that the objecting person in good faith intends to seek judicial review of the DOT's order.

(g) *Objections in proceeding before the DOT.* Notwithstanding any of the provisions of this section, whenever the objection to disclosure of information shall have been made, in the first instance, before the DOT itself, the written motion of objection contemplated by paragraphs (b), (c), and (e) of this section shall not be necessary but may be submitted if the parties so desire or if the DOT, in a particular case, shall so direct.

§ 302.40 Saving clause.

Repeal, revision or amendment of any Economic Regulation of the DOT shall not affect any pending enforcement proceeding or any enforcement proceeding initiated thereafter with respect to causes arising or acts committed prior to said repeal, revision or amendment, unless the act of repeal, revision or amendment specifically so provides.

Subpart B—Rules Applicable to Enforcement Proceedings

§ 302.200 Applicability of this subpart.

(a) *In general.* This subpart contains the specific rules that apply to DOT proceedings to enforce the act and the rules, regulations, orders and other requirements issued by DOT. Subpart A of this part contains other rules that apply to these proceedings.

(b) *Informal complaints.* Informal complaints may be made in writing with respect to anything done or omitted to be done by any person in contravention of any provision of the act or any requirement established pursuant thereto without compliance with this part. Matters so presented may, if their nature warrants, be handled by correspondence or conference with the appropriate persons. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this subpart. The filing of an informal complaint shall not bar the subsequent filing of a formal complaint.

§ 302.201 Formal complaints.

Any person may make a formal complaint to the Assistant General Counsel for Aviation Enforcement and Proceedings about any violation of the economic regulatory provisions of the act or of DOT's rules, regulations, orders, or other requirements. Every formal complaint shall conform to the requirements of § 302.3, concerning the form and filing of documents. The filing of a complaint shall result in a formal enforcement proceeding only if the Assistant General Counsel for Aviation Enforcement and Proceedings issues a notice instituting an enforcement proceeding as to all or part of the complaint under § 302.206(a) or the Deputy General Counsel does so under § 302.206(b). A formal complaint may be amended at any time before service of an answer to the complaint. After service of an answer but before institution of an enforcement proceeding, the complaint may be amended with the permission of the Assistant General Counsel for Aviation Enforcement and Proceedings. After institution of an enforcement proceeding, the complaint may be amended only on grant of a motion filed under § 302.18.

§ 302.202 [Reserved]

§ 302.203 Insufficiency of formal complaint.

In any case where the Assistant General Counsel for Aviation Enforcement and Proceedings is of the opinion that a complaint does not sufficiently set forth the material required by any applicable rule, regulation or order of the DOT, or is otherwise insufficient, he or she may advise the party filing the same of the deficiency and require that any additional information be supplied by amendment.

§ 302.204 Third-party complaints.

(a) A third-party complaint, and any amendments thereto, submitted pursuant to § 302.201 shall be served by the person filing such documents upon each party complained of, upon the Deputy General Counsel, and upon the Assistant General Counsel for Aviation Enforcement Proceeding.

(b) Within fifteen (15) days after the date of service of a third-party complaint, each person complained of shall file an answer in conformance with and subject to the requirements of § 302.207(b). Extensions of time for filing an answer may be granted by the Assistant General Counsel for Aviation Enforcement and Proceedings for good cause shown.

(c) A person complained against in a third-party complaint may offer to satisfy the complaint through submission of facts, offer of settlement or proposal of adjustment. Such offer shall be in writing and shall be served, within fifteen (15) days after service of the complaint, upon the same persons and in the same manner as an answer. The submittal of an offer to satisfy the complaint shall not excuse the filing of an answer.

(d) Motions to dismiss a third-party complaint shall not be fileable prior to the filing of a notice instituting an enforcement proceeding with respect to such complaint or a portion thereof.

§ 302.205 Procedure when no enforcement proceeding is instituted.

(a) Within a reasonable time, but not more than 60 days, after an answer to a formal third-party complaint is filed, or such extension of that 60-day period as may be granted pursuant to § 302.206(b), the Assistant General Counsel for Aviation Enforcement and Proceedings shall either issue a notice instituting a formal enforcement proceeding in accordance with § 302.206(a) or issue a notice dismissing the complaint in whole or in part, stating the reasons for such dismissal.

(b) A notice dismissing a complaint issued pursuant to paragraph (a) of this section shall become effective as a final order of DOT 30 days after service thereof.

§ 302.206 Commencement of enforcement proceeding.

(a) Whenever in the opinion of the Assistant General Counsel for Aviation Enforcement and Proceedings, there are reasonable grounds to believe that any provision of the Act, or any rule, regulation, order, limitation, condition, or other requirement established pursuant thereto, has been or is being violated, that, in the case of third-party complaints, efforts to satisfy a complaint insofar as required by § 302.204 have failed, and that the investigation of any or all of the alleged violations is in the public interest, the Assistant General Counsel for Aviation Enforcement and Proceedings may issue a notice instituting a formal enforcement proceeding. The notice shall incorporate by reference a formal complaint submitted pursuant to § 302.201 or shall be accompanied by a complaint by an attorney from the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings. The notice and accompanying complaint, if any, shall be formally served upon each respondent and each complainant. The

proceedings thus instituted shall be processed in regular course in accordance with this part. However, nothing in this part shall be construed to limit the authority of the Department to institute or conduct any investigation or inquiry within its jurisdiction in any other manner or according to any other procedures which it may deem necessary or proper.

(b) The Assistant General Counsel for Aviation Enforcement and Proceedings may at any time move, upon a showing of good cause, for an extension of the time within which to act upon a third-party complaint. Whenever the Assistant General Counsel for Aviation Enforcement and Proceedings has failed to act on a third-party complaint within 60 days of the date when the answer is due, or within such extension of that period as may have been granted, the following motions may be addressed to the Deputy General Counsel:

(1) By the complainant to institute a proceeding by docketing the complaint upon a showing that it is in the public interest to do so; and

(2) By the respondent to dismiss the complaint upon a showing that it is in the public interest to do so.

(c) The Deputy General Counsel may grant, deny, or defer any of the motions, in whole or in part, and take appropriate action to carry out his or her decision.

§ 302.206a Assessment of civil penalties.

(a) Whenever the Assistant General Counsel for Aviation Enforcement and Proceedings seeks an assessment of civil penalties in an enforcement proceeding, the Deputy General Counsel shall serve on all parties to the proceeding a notice of the violations alleged and the amount of penalties for which the respondent may be liable. The notice may be included in the notice instituting an enforcement proceeding or in a separate document.

(b) Within 15 days after service of a notice proposing assessment of civil penalties, the respondent shall file a response specifically presenting any matters he or she intends to rely on in opposition to or mitigation of such civil penalties. The response may be contained in an answer filed under § 302.207.

(c) In any proceeding in which civil penalties are sought, the initial and final decisions shall state the amount of any civil penalties assessed upon a finding of violation, and the time and manner in which payment shall be made to the United States.

§ 302.207 Answer.

(a) Within 15 days after the date of service of a notice issued pursuant to § 302.206, the respondent shall file an answer to the complaint attached thereto or incorporated therein unless an answer has already been filed in accordance with § 302.204. Any requests for extension of time for filing of an answer to a complaint attached to or incorporated in a notice instituting an enforcement proceeding shall be filed with DOT in accordance with § 302.17.

(b) All answers shall conform to the requirements of § 302.8(a)(2) and shall fully and completely advise the parties and the Department as to the nature of the defense and shall admit or deny specifically and in detail each allegation of the complaint unless the person complained of is without knowledge, in which case, his or her answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be controverted.

§ 302.208 Default.

Failure of a respondent to file and serve an answer within the time and in the manner prescribed by this part shall be deemed to authorize the Department, in its discretion, to find the facts alleged in the complaint incorporated in or accompanying the notice instituting an enforcement proceeding to be true and to enter such orders as may be appropriate without notice or hearing, or, in its discretion, to proceed to take proof, without notice, of the allegations or charges set forth in the complaint or order, provided that the DOT decisionmaker or administrative law judge may permit late filing of an answer for good cause shown.

§ 302.209 Reply.

The DOT decisionmaker (or the administrative law judge) may, in his or her discretion, require or permit the filing of a reply in appropriate cases, otherwise no reply shall be filed.

§ 302.210 Parties.

The parties to an enforcement proceeding shall be the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, the respondent, any person whose formal complaint alleged violations that were later covered by the notice of enforcement, and any other person permitted to intervene under § 302.15.

§ 302.210a Consolidation of proceedings.

The DOT decisionmaker or Chief Administrative Law Judge, upon his or her own initiative, or upon motion of any party, may consolidate for hearing or for other purposes, or may contemporaneously consider, two or more enforcement proceedings which involve substantially the same parties, or issues which are the same or closely related, if he or she finds that such consolidation or contemporaneous hearing will be conducive to the dispatch of business and to the ends of justice and will not unduly delay the proceedings.

§ 302.211 Prehearing conference.

A prehearing conference may be held in an enforcement proceeding whenever the DOT decisionmaker or the administrative law judge believes that the fair and expeditious disposition of the proceeding requires one. If a prehearing conference is held, it shall be conducted in accordance with § 302.23.

§ 302.212 Admissions as to facts and documents; motions to dismiss and for summary judgment.

(a) At any time after answer has been filed, any party may file with DOT and serve upon the opposing side a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request or for the admission of the truth of any relevant matters of fact stated in the request with respect to such documents. Each of the matters of which an admission is requested shall be deemed admitted unless within a period designated in the request, not less than ten (10) days after service thereof, or within such further time as the DOT decisionmaker or the administrative law judge may allow upon motion and notice, the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he or she cannot truthfully either admit or deny such matters. Service of such request and answering statement shall be made as provided in § 302.8. Any admission made by a party pursuant to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement or any order entered therein, and shall not constitute an admission by him or her for any other purpose or be used against him or her in any other proceeding or action.

(b) At any time after answer has been filed, any party may file with the DOT decisionmaker or the administrative law judge a motion to dismiss or a motion for summary judgment, including supporting affidavits. The procedure on such motions shall be in accordance

with the Federal Rules of Civil Procedure (28 U.S.C.), particularly Rules 6(d), 7(b), 12, and 56, except that answers and supporting papers to a motion to dismiss or for summary judgment shall be filed within 7 days after service of the motion.

(c) Parties may petition the DOT decisionmaker to review action by the administrative law judge granting summary judgment or dismissing an enforcement proceeding under the procedure established for review of an initial decision in § 302.28.

§ 302.213 Hearing.

After the issues have been formulated, whether by the pleadings or otherwise, the administrative law judge or the DOT decisionmaker shall give the parties reasonable written notice of the time and place of the hearings.

§ 302.214 Appearances by persons not parties.

With consent of the administrative law judge or the DOT decisionmaker, appearances may be entered without request for or grant of permission to intervene by interested persons who are not parties to the proceeding. Such persons may, with consent of the administrative law judge or the DOT decisionmaker, cross-examine a particular witness or suggest to any party or counsel therefor questions or interrogations to be propounded to witnesses called by any party, but may not otherwise examine witnesses and may not introduce evidence or otherwise participate in the proceeding. However, such persons may present to both the administrative law judge and the DOT decisionmaker an oral or written statement of their position on the issues involved in the proceeding.

§ 302.215 Settlement of proceedings.

(a) The Deputy General Counsel and the respondent may agree to settle all or some of the issues in an enforcement proceeding at any time before a final decision. The Deputy General Counsel shall serve a copy of any proposed settlement on each party and shall submit the proposed settlement to the administrative law judge for approval. The submission of a proposed settlement shall not automatically delay the proceeding.

(b) Any party to the proceeding may submit written comments supporting or opposing the proposed settlement within 10 days from the date of service.

(c) The administrative law judge shall approve the proposed settlement, as submitted, if it appears to be in the public interest, or otherwise shall disapprove it.

(d) Information relating to settlement offers and negotiations will be withheld from public disclosure if the Deputy General Counsel determines that disclosure would interfere with the likelihood of settlement of an enforcement proceeding.

§ 302.216 Evidence of previous violations.

Evidence of previous violations by any person or of any provision of the act or any requirement thereunder found by DOT or a court in any other proceeding or criminal or civil action may, if relevant and material, be admitted in any enforcement proceeding involving such person.

§ 302.217 Motions for immediate suspension of operating authority pendente lite.

All motions for the suspension of the economic operating authority of an air carrier during the pendency of proceedings to revoke such authority shall be filed with, and decided by the DOT decisionmaker. Proceedings on the motion shall be in accordance with § 302.18. In addition, the DOT decisionmaker shall afford the parties an opportunity for oral argument on such motion.

§ 302.218 Modification or dissolution of enforcement actions.

Whenever any party to a proceeding in which an order of DOT has been issued pursuant to section 1002(c) of the Act, or an injunction or other form of enforcement action has been issued by a court of competent jurisdiction pursuant to section 1007, believes that changed conditions of fact or law, or the public interest, require that said order or judicial action be modified, or set aside, in whole or in part, such party may file with DOT a motion requesting that DOT take such administrative action or join in applying to the appropriate court for such judicial action, as the case may be. The motion shall state the changes desired and the changed circumstances warranting such action, and shall include the materials and argument in support thereof. The motion shall be served on each party to the proceeding in which the enforcement action was taken. Within thirty (30) days after the service of such motion, any party so served may file an answer thereto. DOT shall dispose of the motion by such procedure as it deems appropriate.

Subpart C—Rules Applicable to Mail Rate Proceedings

§ 302.300 Applicability of this subpart.

This subpart sets forth the special rules applicable to proceedings for the establishment of mail rates by DOT for foreign air transportation and air transportation between points in Alaska. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act, and to the substantive rules, regulations, and orders of DOT.

§ 302.301 Parties to the proceeding.

The parties to the proceeding shall be the air carrier or carriers for whom rates are to be fixed, the Postal Service, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings and any other person whom DOT permits to intervene. (See § 302.15.)

Final Mail Rate Proceedings

§ 302.302 Participation by persons other than parties.

In addition to participation in hearings in accordance with § 302.14, persons other than parties may, within the time fixed for filing notice of objections to an order to show cause in a mail rate proceeding as provided in § 302.305, submit a memorandum of opposition to, or in support of, the position taken in the petition or order. Such memorandum shall not be received as evidence in the proceeding.

§ 302.303 Institution of proceedings.

Proceedings for the determination of rates of compensation for the transportation of mail may be commenced by the filing of a petition by an air carrier whose rate is to be fixed, or the Postal Service, or upon the issuance of an order by DOT.

(a) The petition shall set forth the rate or rates sought to be established, a statement that they are believed to be fair and reasonable, the reasons supporting the request for a change in rate, and a detailed economic justification sufficient to establish the reasonableness of the rate or rates proposed.

(b) In any case where a carrier is operating under a final mail rate uniformly applicable to an entire rate-making unit as established by the Department, a petition must clearly and unequivocally challenge the rate for such entire rate-making unit and not only a part of such unit.

(c) All petitions, amended petitions, and documents relating thereto shall be served upon the Postal Service by sending a copy to the Assistant General Counsel, Transportation, by registered or certified mail, postpaid, prior to the filing thereof with the Department. Proof of service on the Postal Service shall consist of a statement in the document

that the person filing it has served a copy on the Assistant General Counsel, Transportation, as required by this section. The petition need not be accompanied by any further proof of service, but upon setting any petition down for public hearing, the Department will cause notice of such hearing to be given to such interested persons as it deems appropriate in a particular case.

(d) Answers to petitions shall be filed within 20 days after service of the petition.

Procedure When an Order To Show Cause Is Issued

§ 302.304 Order to show cause.

Whether the proceeding is commenced by the filing of a petition or upon the Department's own initiative, the DOT may issue an order directing the respondent to show cause why it should not adopt such provisional findings and conclusions, and such rates, as may be specified in the order to show cause.

§ 302.305 Objections and answer to order to show cause.

(a) Any person having objections to the provisional rates specified in such order shall file with the Department a notice of objection within ten (10) days after the date of service of such order.

(b) If such notice is filed as aforesaid, written answer and any supporting documents shall be filed within thirty (30) days after the service of the order to show cause. The Department may specify different times for filing a notice of objection or an answer. An answer to an order to show cause shall contain specific objections, and exhibits in support thereof, and shall set forth the findings and conclusions, the rates, and the supporting exhibits which would be substituted for the corresponding items in the Statement of Provisional Findings and Conclusions, if such objections were found valid.

(c) A notice or answer filed by a person who is neither a party nor a person ultimately permitted to intervene shall be treated as a memorandum filed under § 302.302.

§ 302.306 Effect of failure to timely file notice and answer raising material issue of fact.

If no notice, or, if after notice, no answer is filed within the designated time, all parties shall be deemed to have waived the right to a hearing and all other procedural steps short of a final decision of the Department fixing rates, and, in such case, or if an answer timely filed raises no material issue of fact, the Department may thereupon, upon the basis of all of the documents filed in the proceeding, enter a final order fixing the fair and reasonable rate or rates as specified in the order to show cause.

§ 302.307 Procedure when material issue of fact is timely raised.

If an answer raising a material issue of fact is filed within the time designated in the Department's order, a prehearing conference and hearing shall be held unless waived by all parties. The issues shall be limited to those specifically raised by the answer, except that at the prehearing conference, the administrative law judge may permit the parties to raise such additional issues as he or she deems necessary to a full and fair determination of a fair and reasonable rate. (Reference should be made to Subpart A of this part for rules applicable to hearings.)

§ 302.308 Evidence.

All direct evidence shall be in writing and shall be filed in exhibit form in advance of the hearing unless, for good cause shown, the administrative law judge otherwise directs.

Procedure When No Order To Show Cause Is Issued

§ 302.309 Hearing to be ordered.

When no order to show cause is to be issued by the Department, the Department will order a hearing before an administrative law judge similar to that provided for in §§ 302.307 and 302.308, except that the issues at such hearing shall be formulated initially at a prehearing conference.

Temporary Rate Proceedings

§ 302.310 Procedure for fixing temporary service and subsidy mail rates.

(a) At any time during the pendency of a proceeding for the determination of final mail rates, the Department, upon its own initiative, or on petition by the carrier whose rates are in issue or the Postal Service, may fix temporary rates of compensation for the transportation of mail subject to downward or upward adjustment upon the determination of final mail rates.

(b) Temporary service mail rates: The procedure for determining temporary mail rates involving an issue as to the service mail rates payable by the Postal Service pursuant to section 406(c) of the Act shall be the same as for the determination of final mail rates, except that:

(1) Notice of objections to the Department's show cause order proposing temporary service mail rates must be filed by any party or petitioner for intervention within 8 days, and an answer within 15 days, of the time such order is served;

(2) Failure to file notice of objections within the 8-day period shall be deemed to be a waiver of all further procedural steps before final decision, including hearing and initial or tentative decision, and the proceeding will stand submitted to the DOT decisionmaker for final decision.

(3) In the absence of a convincing showing that it will result in substantial prejudice to any party or delay the proceeding, the administrative law judge shall require the parties to submit all their testimony in writing and shall closely limit cross-examination to the essential issues (bearing in mind the purpose and urgency of fixing temporary mail rates together with the fact that such temporary rates are subject to downward or upward adjustment upon the fixing of final rates), and shall in all other respects urgently expedite the proceeding.

Informal Mail Rate Conference Procedure

§ 302.311 Invocation of procedure.

Conferences between DOT employees, representatives of air carriers, the Postal Service and other interested persons may be called by DOT employees for the purpose of considering and clarifying issues and factual material in pending proceedings for the establishment of rates for the transportation of mail.

§ 302.312 Scope of conferences.

The mail rate conferences shall be limited to the discussion of, and possible agreement on, particular issues and related factual material in accordance with sound rate-making principles. The duties and powers of DOT employees in rate conferences essentially will not be different, therefore, from the duties and powers the Department has in the processing of rate cases not involving a rate conference. The employee function in both instances is to present clearly to the DOT decisionmaker the issues and the related material facts, together with recommendations. The DOT decisionmaker will make an independent determination of the soundness of the employee's analyses and recommendations.

§ 302.313 Participants in conferences.

The persons entitled to be present in mail rate conferences will be the representatives of the carrier whose rates are in issue, the staff of the Postal Service, and the authorized DOT employees. No other person will attend unless the DOT employees deems his or

her presence necessary in the interest of one or more purposes to be accomplished, and in such case his or her participation will be limited to such specific purposes. No person, however, shall have the duty to attend merely by reason of invitation by the authorized DOT employees.

§ 302.314 Conditions upon participation.

(a) *Nondisclosure of information.* As a condition to participation, every participant, during the period of the conference and for 90 days after its termination, or until the Department takes public action with respect to the facts and issues covered in the conference, whichever is earlier:

(1) Shall, except for necessary disclosures in the course of employment in connection with conference business, hold the information obtained in conference in absolute confidence and trust; (2) shall not deal, directly or indirectly, for the account of himself or herself, his or her immediate family, members of his or her firm or company, or as a trustee, in securities of the carrier involved in the rate conference except that under exceptional circumstances special permission may be obtained in advance from the Department; and (3) shall adopt effective controls for the confidential handling of such information and shall instruct personnel under his or her supervision, who by reason of their employment come into possession of information obtained at the conference, that such information is confidential and must not be disclosed to anyone except to the extent absolutely necessary in the course of employment, and must not be misused. The word "information", as used in paragraph (b) of this section, shall refer only to information obtained at the conference regarding the future course of action or position of the Department or its employees with respect to the facts or issues discussed at the conference.

(b) *Signed statement required.* Every representative of a carrier actually present at any conference shall sign a statement that he or she has read this entire instruction and promises to abide by it and advise any other participant to whom he or she discloses any confidential information of the restrictions imposed above. Every representative of the Postal Service actually present at any conference shall, on his or her own behalf, sign a statement to the same effect.

(c) *Presumption of having conference information.* A director of any carrier, which has had a representative at the conference, who deals either directly or indirectly for himself or herself, his or her immediate family, members of his or her firm or company, or as a trustee, in securities of the air carrier involved in the conference, during the restricted period set forth above, shall be presumed to have come into possession of information obtained at the conference knowing that such information was subject to the restrictions imposed above; but such presumption can be rebutted.

(d) *Compliance report required.* Within ten (10) days after the expiration of the time specified for keeping conference matters confidential every participant, as defined in this section, shall file a verified compliance report with the Documentary Services Division stating that he or she has complied in every respect with the conditions of this section, or if he or she has not so complied, stating in detail in what respects he or she has failed to comply.

(e) *Persons subject to the provisions of this section.* For the purposes of this section, participants shall include (1) any representative of any carrier and any representative of the Postmaster General actually present at the conference; (2) the carrier and the officers of any carrier which has had a representative at the conference; (3) the directors of any carrier, which has had a representative at the conference, the members of any firm of attorneys or consultants, which has had a representative at the conference, and the members of the Postmaster General's staff, who come into possession of information obtained at the conference, knowing that such information is subject to the restrictions imposed in this section.[3]

§ 302.315 Information to be requested from carrier.

With respect to the rate for the future period, the carrier will be requested to submit detailed estimates as to traffic, revenues and expenses by appropriate periods and the investment which will be required to perform the operations for a full future year. Full and adequate support shall be presented for all estimates, particularly where such estimates deviate materially from the carrier's past experience. With respect to the rate for a past period, essentially the same procedure shall be followed. Other information or data likewise may be requested by the DOT employees. All data submitted by the carrier shall be certified by a responsible officer.

[3] Restrictions on disclosure of confidential information and dealing in air carrier securities are imposed upon the DOT employees pursuant to applicable law.

§ 302.316 DOT analysis of data for submission of answers thereto.

After a careful analysis of these data, the DOT employees will, in most cases, send the carrier what might be termed a statement of exceptions showing areas of differences. Where practicable, the carrier may submit its answer to these exceptions. Conferences will then be scheduled to work out a clear understanding and resolution of the issues and facts from the standpoint of sound ratemaking principles.

§ 302.317 Availability of data to Postal Service.

The representatives of the Postal Service shall have access to all conference data and, insofar as practicable, shall be furnished copies of all pertinent data prepared by the DOT employees and the carrier, and a reasonable time shall be allowed to get acquainted with the facts and issues and to make any presentation deemed necessary. *Provided,* That in cases other than those involving an issue as to the service mail rates payable by the Postal Service pursuant to section 406(c) of the Act representatives of the Postal Service shall be furnished with copies of data under this provision only upon their written request.

§ 302.318 Post-conference procedure.

The rate conferences not being in the nature of proceedings, no briefs, or argument, or any formal steps, will be entertained by the Department. The form, content and time of the staff's presentation to the Department are entirely matters of internal procedure. Any party to the mail rate proceeding may, through an authorized DOT employee, request the opportunity to submit a written or oral statement to the DOT decisionmaker on any unresolved issue. The Department will grant such requests whenever it deems such action desirable in the interest of further clarification and understanding of the issues. The granting of an opportunity for such further presentation shall not, however, impair the rights that any party might otherwise have under the act and the rules of practice.

§ 302.319 Effect of conference agreements.

No agreements or understanding reached in rate conferences as to facts or issues shall in any respect be binding on the Department or any participant. Any party to mail rate proceedings will have the same rights to file an answer and take other procedural steps as though no rate conference had been held. The fact, however, that rate conferences were held and certain

agreements or understandings may have been reached on certain facts and issues renders it proper to provide that upon the filing of an answer by any party to the rate proceeding all issues going to the establishment of a rate shall be open, except insofar as limited in prehearing conference in accordance with § 302.23.

§ 302.320 Waiver of §§ 302.313 and 302.314.

After the termination of a mail rate conference hereunder, the carrier, whose rates were in issue, may petition the Department for a release from the obligations imposed upon it and all other persons by §§ 302.313 and 302.314. The Department will grant such petition only after a detailed and convincing showing is made in the petition and supporting exhibits and documents that there is no reasonable possibility that any of the abuses sought to be prevented will occur or that the Department's processes will in any way be prejudiced. There will be no hearing or oral argument on the petition and the Department will grant or deny the request without assigning reasons therefor.

§ 302.321 Time of commencing and terminating conference.

At the commencement of an informal mail rate conference pursuant to this section, the authorized DOT employees conducting such conferences shall issue to each person present at such conference a written statement to the effect that such conference is being conducted pursuant to this section and stating the time of commencement of such conference; and at the termination of such conference the DOT employees conducting such conference shall note in writing on such statement the time of termination of such conference.

Subpart D—Rules Applicable to Exemption Proceedings

§ 302.400 Applicability.

This subpart sets forth the rules applicable to proceedings for exemptions under sections 101(3), 416(b)(1), 416(b)(3), and 416(b)(7) of the Federal Aviation Act. It also provides for the granting of emergency exemptions. The provisions of Subpart A of this part also apply to such proceedings where not inconsistent with this subpart. Proceedings for the issuance of exemptions by regulation are subject to the provisions governing rulemaking.

§ 302.401 Filing of application.

(a) Except as provided in paragraphs (b) and (c) of this section, applications for exemption shall conform to the requirements of §§ 302.3 and 302.4.

(b) Applications for exemption from section 401 or 402 of the Act (and section 403 of the Act if accompanying the former) which involve 10 or fewer flights may be submitted to the Licensing Division, Office of Aviation Operations on CAB Form 302 or the DOT replacement form. However, that form may not be used for:

(1) Applications filed under section 416(b)(7) of the Act;

(2) Applications by persons who do not have either:

(i) An effective air carrier certificate or foreign air carrier permit from DOT, or

(ii) A properly completed application for such a certificate or permit, and an effective exemption from the DOT for operations similar to those proposed;

(3) Successive applications for the same or similar authority that would total more than 10 flights; or

(4) Any other application for which the DOT decides the requirements of §§ 302.3 and 302.4 are more appropriate. Upon a showing of good cause, an application may be filed by cablegram, telegram, or telephone. All telephone requests must be confirmed by written application within three business days of the original request.

(c) Applications for exemption from section 403 of the Act, tariffs (except for waivers filed under Subpart Q of Part 221 of this Chapter), or DOT regulations concerning tariffs may be submitted by letter. Three copies of such applications shall be sent to the Documentary Services Division, Office of the General Counsel. Upon a showing of good cause, the application may also be filed by cablegram, telegram, or telephone. All telephone requests must be confirmed by written application within three business days of the original request.

(d) Applications filed under paragraph (a) of this section shall be docketed and any additional documents filed shall be identified by the assigned docket number.

(e) Applications filed under paragraph (b) or (c) of this section will normally not be docketed. The DOT may require such applications to be docketed if appropriate. The DOT will list the names and addresses of all persons filing such applications, and will briefly describe the authority sought, in its weekly list of applications filed.

§ 302.402 Contents of application.

(a) *Title.* An application filed under § 302.401(a) shall be entitled "Application for Exemption," and shall state if the application involves renewal and/or amendment of existing exemption authority.

(b) *Factual statement.* Each application shall state:

(1) The section(s) of the Act or the rule, regulation, term, condition, or limitation from which exemption is requested;

(2) The proposed effective date and duration of the exemption;

(3) A description of how the applicant proposes to exercise the authority (for example, applications for exemption from section 401 or 402 of the Act should include at least: places to be served; equipment types, capacity and source; type and frequency or service; and other operations which the proposed service will connect with or support); and

(4) Any other facts the applicant relies upon to establish that the proposed service will be consistent with the public interest.

(c) *Supporting evidence.* (1) Each application shall be accompanied by:

(i) A statement of economic data, or other matters or information that the applicant desires the DOT to officially notice;

(ii) Affidavits, or statements under penalty of perjury, establishing any other facts the applicant wants the Board to rely upon; and

(iii) Information showing the applicant is qualified to perform the proposed services.

(2) In addition to the information required by paragraph (c)(1) of this section, an application for exemption from section 401 or 402 of the Act (except exemptions under section 416(b)(7)) shall state whether the authority sought is governed by a bilateral agreement or by principles of comity and reciprocity. Applications by foreign carriers shall state whether the applicant's homeland government grants U.S. carriers authority similar to that requested. If so, the application shall state whether the fact of reciprocity has been establishing by the DOT and cite the pertinent finding. If the fact of reciprocity has not been established by the DOT, the application shall include documentation to establish such reciprocity.

(d) *Emergency cabotage.* Applications under section 416(b)(7) of the Act shall, in addition to the information required in paragraphs (b) and (c) of this section, contain evidence showing that:

(1) Because of an emergency created by unusual circumstances not arising in the normal course of business, traffic in the markets requested cannot be accommodated by air carriers holding certificates under section 401 of the Act;

(2) All possible efforts have been made to accommodate the traffic requested by using the resources of such air carriers (including, for example, the use of foreign aircraft, or sections of foreign aircraft, that are under lease or charter to such air carriers, and the use of such air carriers' reservation systems to the extent practicable);

(3) The authority requested is necessary to avoid undue hardship for the traffic in the market that cannot be accommodated by air carriers holding certificates under section 401 of the Act; and

(4) In any case where in inability to accommodate traffic in a market results from a labor dispute, the grant of the requested exemption will not result in an undue advantage to any party to the dispute.

(e) *Renewal applications.* An application requesting renewal of an exemption that is intended to invoke the automatic extension provisions of 5 U.S.C. 558(c) shall comply with, and contain the statements and information required by, Part 377 of this chapter.

(f) Record of service. An application shall list the parties served as required by § 302.403.

§ 302.403 Service of application.

(a) *Manner of service.* An application for exemption shall be served as provided by § 302.8.

(b) *General requirements.* Except for an application for exemption from sections 403 and 404 of the Act, an applicant shall serve on the persons listed in paragraph (c) of this section a notice that the application has been filed, and, upon request, shall promptly provide those persons with copies of the application and any supporting documents. (Applicants filing CAB Form 302, or the DOT replacement form may serve a copy of the form instead of a notice.) The notice must clearly state the authority sought, the due date for responsive pleadings, and that copies of the application will be supplied upon request. Responsive pleadings shall be filed in accordance with paragraph (c) of this section.

(c) *Persons to be served.* (1) Applicants for scheduled interstate or overseas air transportation authority shall serve (1) all U.S. air carriers (including commuter air carriers) that publish schedules in the "Official Airline Guide" or the "Air Cargo Guide" for the city-pair market(s) specified in the application, (ii) local airport authorities at each point specified in the application, and (iii) any other person who has filed a pleading in a related proceeding under section 401 or 416 of the Act.

(2) Applicants for scheduled foreign air transportation authority shall serve (1) all U.S. air carriers (including commuter air carriers) that publish schedules for the country-pair market(s) specified in the application in the "Official Airline Guide" or in the "Air Cargo Guide" and (ii) any other person who has filed a pleading in a related proceeding under section 401, 402, or 416 of the Act.

(3) Applicants for charter-only or nonscheduled-only authority shall serve any person who has filed a pleading in a related proceeding under section 401, 402, or 416 of the Act. However, applicants that file less than 16 days prior to the proposed start of service must also serve (i) those U.S. carriers (including commuter carriers) that are known to be operating in the general market(s) at issue and (ii) those persons who may be presumed to have an interest in the subject matter of the application.

(d) *Additional service.* The DOT may, in its discretion, order additional service made on any other person.

§ 302.404 Posting of application.

A copy of every application for exemption shall be posted in the Documentary Services Division and listed in the DOT's weekly list of applications filed.

§ 302.405 Dismissal or rejection of incomplete application.

(a) Dismissal or rejection. The DOT may dismiss or reject any application for exemption that does not comply with the requirements of this part.

(b) Additional data. The DOT may require the filing of additional data with respect to any application for exemption, answer, or reply.

§ 302.406 Answers to applications for exemption.

Within 15 days after the filing of an application for exemption, any person may file an answer in support of or in opposition to the grant of a requested exemption. Such answer shall set forth in detail the reasons why the exemption should be granted or denied. An answer shall include a statement of economic data or other matters the DOT is requested to officially notice, and shall be accompanied by affidavits establishing any other facts relied upon.

§ 302.407 Replies to answers.

Within seven days after the last day for filing an answer, an applicant may file a reply to one or more answers.

§ 302.408 Request for hearing.

The DOT will not normally conduct formal hearings concerning applications for exemption. However, the DOT may, in its discretion, order a hearing on an application. Any applicant, or any party opposing an application, may request a hearing. Such a request shall set forth in detail the reasons why the filing of affidavits or other written evidence will not permit the fair and expeditious disposition of the application. A request relying on factual assertions shall be accompanied by affidavits establishing such facts. If the DOT orders a hearing, the procedures in Subpart A of this part shall apply.

§ 302.409 Exemptions on the Department's initiative.

The DOT may grant exemptions on its own initiative when it finds that such exemptions are required by the circumstances and consistent with the public interest.

§ 302.410 Emergency exemptions.

(a) *Applicability.* When required by the circumstances and consistent with the public interest, the DOT may take action, without notice, on exemption applications prior to the expiration of the normal period for filing answers and replies. When required in a particular proceeding, the DOT may specify a lesser time for the filing of answers and replies, and notify interested persons of this time period.

(b) *Applications.* (1) Applications for emergency exemption need not conform to the requirements of Subparts A and D of this part (except as provided in this section and in § 302.402(d) concerning emergency cabotage requests). However, an application for emergency exemption must normally be in writing and must state in detail the facts and evidence that support the application, the grounds for the exemption, and the public interest basis for the authority sought. In addition, the application shall state specific reasons that justify departure from the normal exemption application procedures. The application shall also identify those persons notified as required by paragraph (c) of this section. The DOT may require additional information from any applicant before acting on an application.

(2) The DOT will consider oral requests, including telephone requests, for emergency exemption authority under this section in circumstances that do not permit the immediate filing of a written application. All oral requests must, however, provide the information required in paragraph (b)(1) of this section, except that actual evidence in support of the application need not be tendered when the request is made. All

oral requests must be confirmed by written application, together with all supporting evidence, within three business days of the original request.

(c) Notice. Except when the DOT decides that no notice need be given, applicants for emergency exemption shall notify, as appropriate, those persons specified in §302.403(c) of this subpart. Such notification shall be made in the same manner, contain the same information, and be dispatched at the same time, as the application made to the DOT.

Subpart E—Rules Applicable to Proceedings with Respect to Rates, Fares and Charges

§ 302.500 Applicability of this subpart.

This subpart sets forth the special rules applicable to proceedings with respect to rates, fares and charges in foreign air transportation. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act, and to the substantive rules, regulations and orders of DOT.

§ 302.501 Institution of proceedings.

A proceeding to determine rates, fares, or charges for the foreign air transportation of persons or property by aircraft, or the lawful classification, rule, regulation, or practice affecting such rates, fares or charges, may be instituted by the filing of a petition or complaint by any person, or by the issuance of an order by DOT.

§ 302.502 Contents and service of petition or complaint.

(a) If a petition or complaint is filed it shall state the reasons why the rates, fares, or charges, or the classification, rule, regulation, or practice complained of are unlawful and shall support such reasons with a full factual analysis.

(b) A petition or complaint shall be served by the petitioner or complainant upon the carrier against whose tariff provision the petition or complaint is filed.

§ 302.503 Dismissal of petition or complaint.

If DOT is of the opinion that a petition or complaint does not state facts which warrant an investigation or action on its part, it may dismiss such petition or complaint without hearing.

§ 302.504 Order of investigation.

The Department on its own initiative, or if it is of the opinion that the facts stated in a petition or complaint warrant it, may issue an order instituting an investigation of the lawfulness of any present or proposed rates, fares, or charges for the transportation of persons or property by aircraft or the lawfulness of any classification, rule, regulation, or practice affecting such rates, fares, or charges, and assigning the proceeding for hearing before an administrative law judge. (Reference should be made to Subpart A of this part for rules applicable to hearings.)

§ 302.505 Complaints requesting suspension of tariffs—answers to such complaints.

(a) Formal complaints seeking suspension of tariffs pursuant to section 1002(j) of the Act shall fully identify the tariff and include reference (1) to the issued or posting date, (2) to the effective date, (3) to the name of the publishing carrier or agent, (4) to the DOT number, and (5) to specific items or particular provisions protested or complained against. The complaint should indicate in what respect the tariff is considered to be unlawful, and state what complainant suggests by way of substitution.

(b) A complaint requesting suspension of a tariff ordinarily will not be considered unless made in conformity with this section and filed no more than ten (10) days after the issued date contained within such tariff.

(c) A complaint requesting suspension, pursuant to section 1002(j) of the Act, of an existing tariff for foreign air transportation may be filed at any time. However, such a complaint must be accompanied by a statement setting forth compelling reasons for not having requested suspension within the time limitations provided in paragraph (b) of this section.

(d) In an emergency satisfactorily shown by complainant, and within the time limits herein provided, a telegraphic complaint may be sent to the Department and to the carrier against whose tariff provision the complaint is made. Such a telegraphic complaint shall state the grounds relied upon, and must immediately be confirmed by complaint filed and served in accordance with this part.

(e) Answers to complaints shall be filed within six (6) working days after the complaint is filed.

§ 302.506 Burden of going forward with the evidence.

At any hearing involving a change in a rate, fare, or charge for the transportation of persons or property by aircraft, or the lawful classification, rule, regulation, or practice affecting such rate fare, or charge, the burden of going forward with the evidence shall be upon the person proposing such change to show that the proposed changed rate, fare, charge, classification, rule, regulation or practice is just and reasonable, and not otherwise unlawful.

§ 302.508 Computing time for filing complaints.

In computing the time for filing formal complaints pursuant to § 302.505, with respect to tariffs which do not contain a posting date, the first day preceding the effective date of the tariff shall be the first day counted, and the last day so counted shall be the last day for filing unless such day is a Saturday, Sunday, or legal holiday for DOT, in which event the period for filing shall be extended to the next successive day which is neither a Saturday, Sunday, nor holiday. The computation of the time for filing complaints as to tariffs containing a posting date shall be governed by § 302.16.

Subpart F—[Reserved]

Subpart G—[Reserved]

§ 302.705 Hearing.

In the event a hearing is ordered by the Department, Subpart A of this part shall govern the proceeding.

Subpart H—[Reserved]

Subpart I—Rules Applicable to Route Proceedings under Sections 401 and 402 of the Act

General Provisions

§ 302.901 Applicability.

This subpart sets forth the special rules applicable to proceedings for conferment and/or modification of route authority under sections 401 and 402 of the Federal Aviation Act of 1958. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act, and to the substantive rules (Parts 201 and 211 for the form of applications) and orders of DOT.

§ 302.909 [Reserved]

Initiation of Route Proceedings

§ 302.915 Initiation of route proceedings by DOT order.

(a) *Purpose and policy.* The purpose of this section is to establish a procedure for the initiation of proceedings involving particular routes or geographic areas, in addition to existing procedures under Subpart A, so that the Department may select the one best suited to the efficient and expeditious disposition of route proceedings.

(b) *Order instituting proceedings.* The Department may initiate a route proceeding by issuing an order of

investigation or an order to show cause which, respectively, defines the scope of the issues in the proceeding, or consolidates pending applications and proceedings for simultaneous hearing, or institutes investigations under section 401(g) or 402(f) of the Act directed to the amendment of outstanding certificates of public convenience and necessity and foreign air carrier permits, and specifies other matters included in the proceeding.

(c) *Pleadings in response to Department order instituting proceedings.* Any person having a substantial interest may respond to the Department's order instituting a proceeding by filing with the Department a written answer, or a motion pursuant to § 302.12, or both, within the period of time specified in said order. Such answer or motion shall set forth all objections and proposals which such persons may have with respect to the geographic scope of the proceeding or the scope of the issues, as respectively defined in such order. Such answer or motion shall be in lieu of petitions for reconsideration of said order under § 302.37. Any such objection or proposal which is not set forth in such answer or motion shall be deemed to have been waived. Any person who fails to file a timely answer or motion in response to the Department's order shall also be deemed to have waived his or her right to have his or her own application consolidated or contemporaneously considered with those falling within the geographic scope of the proceeding or the scope of the issues therein, as respectively defined in said order: *Provided, however,* That where any further order of the Department adds to the geographic scope of a proceeding or the scope of the issues therein beyond that defined in the Department's order instituting such proceeding, failure to file an answer or motion addressed to the Department's first order shall not preclude the filing of a petition under § 302.37, or of a motion under § 302.12, addressed exclusively to the additional scope or issues.

(d) *Answers to motions.* Answers in support of or in opposition to motions as mentioned in paragraph (c) of this section may be filed within seven (7) days after service of such motions or within such other period as may be specified in the Department's order.

Conduct of Route Proceedings

§ 302.930 Evidence in route proceedings.

Route authority not specifically applied for. Applicants for certificate authority under section 401 of the Act may not introduce, in support of awards to them of such authority, evidence that does not support service to the points, routes, or areas specifically described in their applications.

Subpart J—Rules Applicable to Proceedings Involving Charter Air Carriers

§ 302.1001 Applicability.

This subpart sets forth procedural rules specifically applicable to certain proceedings involving charter air carriers. For information as to other applicable rules, reference should be made to Subparts A and B of this part, to the Federal Aviation Act of 1958, as amended, and to the substantive rules and orders of the Department. See especially Part 208 of this chapter (Economic Regulations).

§ 302.1002 Definition.

As used in this part, "charter air carrier" means a person holding operating authority issued pursuant to section 401(d)(3) or 417 of the Federal Aviation Act of 1958, as amended.

Immediate Suspension of Operating Authority

§ 302.1011 Rules governing proceedings.

Proceedings for suspension, modification or revocation of a charter air carrier certificate pursuant to section 401(n)(5) of the Act, shall be governed by §§ 302.1012 to 302.1017 and, as to matters not provided for in said sections, by Subparts A and B of this part.

Note: Secs. 302.1012 to 302.1017 do not apply to proceedings for modification, suspension or revocation not initiated under, or by reference to, the provisions of section 401(n)(5) of the Act.

§ 302.1012 Order of suspension.

In any case in which the Department determines that the failure of a charter air carrier to comply with the provisions of paragraphs (q) or (r) of section 401 of the Act or regulations or orders of the Department thereunder requires, in the interest of the rights, welfare or safety of the public immediate suspension of such carrier's certificate or other operating authority as the case may be, the Department will issue, without notice or hearing, an order of suspension which will set forth:

(a) The duration of the suspension, which initially will be for not more than 30 days;

(b) The specific provision or provisions of section 401 (q) or (r), or of the regulations or orders of the Department thereunder with which the carrier has failed to comply together with the manner of such failure;

(c) A determination that such failure requires the immediate suspension, in whole or in part as the case may be, of the carrier's operating authority in the interest of the rights, welfare, or safety of the public;

(d) A statement that the order shall constitute a complaint instituting a formal economic proceeding on which a hearing shall be held to determine whether the charter air carrier's operating authority should be modified, suspended or revoked;

(e) A statement as to which attorneys of the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings are to be made a party to the proceeding.

§ 302.1013 Answer of carrier.

(a) *Time for filing, and contents.* Within 7 days of service of the order of suspension, the carrier may file and serve on all parties an answer to the order of suspension. No objections or affirmative defenses not plainly raised in the answer may be raised subsequently in the proceeding, except if based on grounds of newly discovered evidence or supervening events. Late filing of an answer shall be permitted only for good cause shown.

(b) *Failure to file an answer.* In case of the carrier's failure to file and serve an answer to the order within the time and in the manner prescribed, the right to all further procedural steps before final decision, including hearing, briefs, and recommended and tentative decisions, shall be deemed waived, and the Department will proceed immediately to disposition of the case.

§ 302.1014 Motions.

(a) *Motions for termination of suspension and/or proceeding.* (1) The charter air carrier may at any time file and serve on all parties to the proceeding, a motion addressed to the Department asking that the suspension be lifted, on the ground (i) that suspension, pending completion of the proceeding, is not required in the interest of the rights, welfare or safety of the public; or (ii) that the carrier has come into compliance with the provision or provisions with which it had failed to comply. Such motions may be combined with a motion to terminate the proceeding. Such motions shall be made in lieu of petitions for reconsideration of the Department's initial order, or of motions to dismiss.

(2) Motions made pursuant to paragraph (a)(1) of this section will be submitted to the DOT decisionmaker for determination. The DOT decisionmaker may grant motions for termination of

suspension in proper cases without waiting for expiration of the time for answers but parties may submit informal written or telegraphic statements of position on such motions which will be considered if received prior to DOT action. Such communications need not be served separately but shall be copied in full in a timely answer filed and served pursuant to the provisions of this part.

(b) *Motions directed to pleadings.* No motion for more definite statement shall be made but the substance thereof may be stated in the answer. The administrative law judge may permit or require a more definite statement or other amendment to any pleading at the hearing upon just and reasonable terms.

(c) *Motions for extension of time.* Substantial extensions of procedural dates shall be granted only when required in the interest of justice, unless the respondent air carrier stipulates that it will refrain from operating the suspended service until the Department's adjudication on the merits of the proceedings becomes final even though the Department has exhausted its emergency suspension power. The filing of motions for extension shall not operate to excuse failure of timely compliance with any procedural requirement.

(d) *Other motions.* The provisions of § 302.18 shall govern the above mentioned motions in respects not provided for in this section, and shall govern any other motions, except that answers to written motions shall be filed and served within 5 days of service of such motions.

§ 302.1015 Additional suspension.

Pending the completion of proceedings hereunder, the Department, upon motion or its own initiative, may further extend the period of suspension of the charter carrier's operating authority for an additional period or periods aggregating not more than 60 days.

§ 302.1016 Expedited hearing.

The administrative law judge shall set the date of hearing not later than 15 days after the issuance of the DOT decisionmaker's suspension order. He or she may postpone the date of the hearing, or grant continuations of the hearing, only to the extent necessary in the interest of justice. The administrative law judge shall urgently expedite the proceeding and shall fix all procedural dates on the basis of maximum acceleration consistent with justice. Proposed findings and conclusions and supporting reasons shall be stated orally on the record. The delegation of § 302.27(a) shall not be applicable and the administrative law judge shall, upon termination of the hearing, make his or her initial decision orally on the record. Requests for a written initial decision may be granted on the same condition as substantial extensions of procedural dates (§ 302.1014(c)).

§ 302.1017 Final decision.

The parties may appeal from the initial decision by filing with the Department and serving upon all other parties a notice of appeal within two days after the rendering of the initial decision if it is made orally, or the service of a written initial decision, as the case may be. No exceptions shall be filed but within 10 days of the notice of appeal each party may file one brief (§ 302.31(c)) with the Department. The DOT decisionmaker will give three days' notice of oral argument, where granted. If no notice of appeal is filed, or if no brief is filed by the party or parties having filed a notice of appeal, within the times herein provided, the initial decision shall without further proceedings become the final decision of the Department five days after expiration of the time for filing notice of appeal or brief, as the case may be unless the DOT decisionmaker has issued an order to review upon his or her own initiative.

Subpart K-N—[Reserved]

Subpart O—Procedure for Processing Contracts for Transportation of Mail by Air in Foreign Air Transportation

§ 302.1501 Applicability.

This subpart sets forth the rules applicable to certain contractual arrangements between the Postal Service and certificated air carriers for the transportation of mail by air entered into pursuant to 39 U.S.C. 5402(a), 84 Stat. 772. Such contracts must be for the transportation of at least 750 pounds of mail per flight, and no more than 5 percent, based on weight, of the international mail transported under any such contract may consist of letter mail. Any such contract is required by the statute to be filed with the Department not later than 90 days before its effective date, and unless the Department disapproves the contract not later than 10 days prior to its effective date, the contract automatically becomes effective.

§ 302.1502 Filing.

Any air carrier which is a party to a contract to which this subpart is applicable shall file eight copies of the contract in the Documentary Services Division, Department of Transportation, Washington, D.C. 20590, not later than 90 days before the effective date of the contract. A copy of such contract shall be served upon the persons specified in § 302.1504 and the certificate of service shall specify the persons upon whom service has been made. One copy of each contract filed shall bear the certification of the Secretary or other duly authorized officer of the filing carrier to the effect that such copy is a true and complete copy of the original written instrument executed by the parties.

§ 302.1503 Explanation and data supporting the contract.

Each contract filed pursuant to this subpart shall be accompanied by economic data and such other information in support of the contract upon which the filing air carrier intends that the Department rely, including, in cases where pertinent:

(a) Estimates of the costs of performing the contract, and an explanation of the basis for the estimates which clearly sets forth the methodology involved in the assignment of direct and all allocated costs and the investment related thereto (including, where available and relevant, data as to costs of performing past contracts for the transportation of mail by air);

(b) Estimates of the effect of the contract upon such carrier's revenues, and an explanation of the basis for the estimates (including, where available and relevant, data as to effects upon revenues resulting from past contracts for the transportation of mail by air); and

(c) Estimates of the annual volume of contract mail (weight and ton-miles) under the proposed contract, the nature of such mail (letter mail, parcel post, third class, etc.), together with a statement as to the extent to which this traffic is new or diverted from existing classes of air and surface mail services and the priority assigned to this class of mail.

§ 302.1504 Service.

A copy of each contract filed pursuant to § 302.1502, and a copy of all material and data filed pursuant to § 302.1503, shall be served upon each of the following persons:

(a) Each certified route air carrier, other than the contracting carrier, which is authorized to carry mail between any pair of points between which mail is to be transported pursuant to the contract;

(b) Each commuter air carrier (as defined in § 298.2 of Part 298 of this chapter) which serves between any pair of points between which mail is to be

transported pursuant to the contract; and

(c) The Assistant General Counsel, Transportation Division, U.S. Postal Service, Washington, D.C. 20260–1124.

§ 302.1505 Complaints.

Within 15 days of the filing of a contract, any interested person may file with the Department a complaint against the contract setting forth the basis for such complaint and all pertinent information in support of same. A copy of the complaint shall be served upon the air carrier filing the contract and upon each of the persons served with such contract pursuant to § 302.1504.

§ 302.1506 Answers to complaints.

Answers to the complaint may be filed within 10 days of the filing of the complaint, with service being made as provided in § 302.1505.

§ 302.1507 Further procedures.

(a) In any case where a complaint is filed, the Department shall issue either an order dismissing the complaint, or an order disapproving the contract, or such other order as may be appropriate. Any such order shall be issued not later than 10 days prior to the effective date of the contract.

(b) In cases where no complaint is filed, the Department may issue an order directing the parties to the contract to show cause why the contract should not be disapproved, or such other order as may be appropriate. Unless otherwise specified by the Department, written answer to the order and supporting document shall be filed within 10 days of the date of service of the order to show cause. A final order containing the Department's determination as to whether the contract should be disapproved, shall be issued not later than 10 days prior to the effective date of the contract.

§ 302.1508 Petitions for reconsideration.

Except in the case of a Board determination to disapprove a contract, no petitions for reconsideration of any DOT determination pursuant to this subpart shall be entertained.

Subpart P—[Reserved]

Subpart Q—Expedited Procedures for Processing Licensing Cases

§ 302.1701 Applicability.

This subpart sets forth the rules applicable to proceedings on

(a) Applications for certificates of public convenience and necessity and renewals, amendments, modifications, suspensions and transfers of certificates under sections 401(d)(1), 401(d)(2), 401(d)(3), 401(g), and 401(h) of the Act;

(b) Applications under section 401(e)(7)(B) of the Act for the removal or modification of a term, condition, or limitation attached to a certificate; and

(c) Applications for foreign air carrier permits, and renewals, alterations, amendments, modifications, suspensions, and transfers of such permits under sections 402(c) and 402(f) of the Act.

§ 302.1702 Subpart A governs.

Except as modified by this Subpart, the provisions of Subpart A of this part continue to apply.

§ 302.1703 Filing of applications.

Any person may file an application of the type described in § 302.1701. Applications for foreign air carrier permits shall be filed as specified in § 211.2 of this chapter. The Department will publish in the **Federal Register** a weekly list of applications filed under this subpart.

§ 302.1704 Contents of applications.

(a) Applications under this subpart (including applications filed under § 302.1720(c) or conforming applications filed under § 302.1720(e) or § 302.1730(c)) shall indicate on the cover page how the applicant proposes that its application be processed (See § 302.1750). Certificate applications shall contain the information required by Part 201 of this chapter and foreign air carrier permit applications shall contain the information required by Part 211 of this chapter. Applications shall also include:

(1) A statement of economic data and other matters that the applicant desires the Department to notice officially;

(2) Written evidence establishing the facts that the applicant relies on to establish its fitness and to show that the grant of the relief requested is consistent with or required by the public convenience and necessity, or is in the public interest, as applicable; and

(3) The applicant's opening argument.

(b) Each application shall be accompanied by an Environmental Evaluation in conformity with Parts 312 and 313 of this chapter unless a waiver or exemption has been granted under § 312.6.

(c) Later filed competing applications shall conform to the base and forecast years used by the original applicant and need not contain traffic and financial data for markets for which data have already been submitted by another person.

(d) Applications shall include a list of the names and addresses of all persons that have been served.

§ 302.1705 Service of documents.

(a) *General requirements.* (1) Applicants shall serve on the persons listed in paragraph (b) of this section a notice that an application has been filed, and upon request shall promptly provide those persons with copies of the application and supporting documents. The notice must clearly state the authority sought and the due date for other pleadings. Persons shall file responsive pleadings in accordance with paragraph (b).

(2) After the order establishing further procedures under § 301.1750 has been issued, persons need only serve documents on those listed in the service list accompanying the order.

(3) In the case of an application sought to be consolidated, the applicant shall serve the notice required in paragraph (a) of this section on all persons served by the original applicant.

(b) *Persons to be served.* (1) *U.S. air carriers.* (i) In certificate proceedings described in §§ 302.1701(a) and 302.1701(b) (except for those proceedings under section 401(d)(3) of the Act):

(A) applicants for certificates to engage in interstate or overseas air transportation, and other persons, shall serve: (*1*) the airport authority of each airport that the applicant proposes to serve, and (*2*) any other person who has filed a pleading in the docket.

(B) applicants for certificates to engage in foreign air transportation or other persons shall serve: (*1*) all U.S. air carriers (including commuter air carriers) that publish schedules for the country-pair market(s) specified in the application in the "Official Airline Guide" or in the "Air Cargo Guide," (*2*) the airport authority of each U.S. airport that the applicant proposes to serve, and (*3*) any other person who has filed a pleading in the docket.

(ii) In certificate proceedings under section 401(d)(3) of the Act, applicants and other persons are not required to serve any person, except as the DOT may direct.

(2) *Foreign air carriers.* (1) In foreign air carrier permit proceedings described in § 302.1701(c) (except for those proceedings involving charter-only authority), applicants and other persons shall serve: (A) all U.S. air carriers (including commuter air carriers) that publish schedules for the country-pair market(s) specified in the application in the "Official Airline Guide" or the "Air Cargo Guide," (B) the U.S. Departments of State, and (C) any other person who has filed a pleading in the docket.

(ii) In foreign air carrier permit proceedings for charter-only authority,

applicants shall serve the U.S. Department of State and any other person who has filed a pleading in the docket.

(c) *Additional service.* The Department may, in its discretion, order additional service upon such persons as the facts of the situation warrant. Where only notices are required, parties are encouraged to serve copies of their actual pleadings where feasible.

§ 302.1706 Computation of time.

All time periods prescribed in this subpart are stated in terms of calendar days. Intermediate Saturdays, Sundays and holidays shall be included in the computation. In all other respects, § 302.16 applies.

§ 302.1707 Verification.

The facts asserted in any pleading filed under this subpart shall be attested to by persons having knowledge of them and this attestation shall be stated in an affidavit in support of the pleading. Such persons shall be those who will appear as witnesses to substantiate the facts asserted if an oral hearing becomes necessary.

§ 302.1708 Joint pleadings.

Parties having common interests shall, to the extent practicable, arrange for the joint preparation of pleadings.

§ 302.1709 Definition of parties.

Notwithstanding the provisions of §§ 302.14 and 302.15, any person may participate in proceedings under this subpart. Petitions for leave to intervene are not required. Any person may become a party by filing a pleading in the docket before the issuance of the order establishing further procedures.

§ 302.1710 Economic data and other facts.

Whenever economic data and other facts are provided, such information shall include enough detail so that final results can be obtained, without further clarification. Sources, bases, and methodology used in constructing exhibits, including any estimates or judgments, shall be provided.

§ 302.1711 Continuances and extensions of time.

The procedures described in § 302.17 will apply to proceedings under this subpart. The filing deadlines in certificate proceedings will be strictly enforced and extensions will be granted only in extraordinary circumstances. Extensions in foreign air carrier permit cases will be granted for good cause shown.

§ 302.1712 Oral presentation; initial or recommended decision.

(a) *Cases to be decided on written submissions.* Applications under this subpart will be decided on the basis of written submissions unless the DOT decisionmaker, on petition or on his or her own initiative, determines that an oral presentation or an administrative law judge's decision is required.

(b) *Petitions for oral presentation or judge's decision.* Any party may file a petition for oral evidentiary hearing, oral argument, an initial or recommended decision, or any combination of these. Petitions shall demonstrate that one or more of the criteria set forth in § 302.1770 are applicable to the issues for which an oral presentation or judge's decision is requested. Such petitions shall be supported by a detailed explanation of the following:

(1) Why the evidence or argument to be presented cannot be submitted in the form of written evidence or briefs, including an estimate of the time required for the oral presentation and the number of witnesses whom the petitioner would present;

(2) Which issues should be examined by an administrative law judge and why such issues should not be presented directly to the DOT decisionmaker for decision; and

(3) If cross-examination of any witness is desired, the name of the witness, if known, the subject matter of the desired cross-examination or the title or number of the exhibit to be cross-examined, what the petitioner expects to establish by the cross-examination, and an estimate of the time needed for it.

(c) *Time for filing petitions.* Petitions for an oral hearing, oral argument, or a judge's decision shall be filed as soon as practicable, but in no event later than: (1) 52 days after the filing of the original application in proceedings governed by § 302.1720; (2) 35 days after the filing of the original application in proceedings governed by § 302.1730; and (3) 14 days after the due date for answers in proceedings governed by § 302.1740.

(d) *Stipulations.* Where a stipulation of disputed facts would eliminate the need for an oral presentation or judge's decision, parties shall include in their petitions an offer to withdraw the request should the stipulation be made.

§ 302.1713 Preliminary procedures for rejection or deferral of nonconforming applications.

Within 21 days after the filing of any application under this subpart (including an application which is sought to be consolidated or a conforming application), the DOT decisionmaker may, on behalf of the Department, (a) reject any application that does not comply with this subpart, or (b) defer further processing of the application until information necessary to process the application is submitted. Applications will not be processed, and the time periods contained in this subpart shall not begin to run, until the application is complete. In addition, the DOT decisionmaker may, on behalf of the Department, defer action on a foreign air carrier permit application for foreign policy reasons. Petitions for review of the staff action taken under this section may be filed in accordance with Subpart C of Part 385 of this chapter.

§ 302.1720 Procedures in certificate cases.

(a) *Applicability.* This section applies to the certificate cases described in § 302.1701(a).

(b) *Notice on cover page.* Applications to which this section applies shall include a notice on the cover page stating that any person that wishes to support or oppose the application must file an answer indicating briefly that person's position, and serve that answer on all persons served with the application. The notice shall also state the due date for answers.

(c) *Conforming applications or motions to modify scope.* Any person may file an application for the same authority as sought in an application filed under § 302.1701(a). Requests to modify the issues to be decided and to consolidate applications filed in other dockets, shall be filed as a "motion to modify scope." Motions and applications under this section shall include economic data, other facts, and any argument in support of the person's position and must be filed within 28 days after the original application is filed.

(d) *Answers to applications.* Any person may file an answer in support of or in opposition to any application. Answers shall set forth the basis for the position taken, including any economic data or other facts relied on. Answers to the original application shall be filed within 28 days after the filing of the original application. Answers to applications filed in accordance with paragraph (c) of this section shall be filed within 42 days after the filing of the original application.

(e) *Answers to motions to modify scope.* Any person may file an answer to a motion to modify scope within 42 days after the filing of the original application. Answers shall set forth the

basis for the support of or opposition to the motion, including any economic data or other facts relied on. Answers may argue that an application should be dismissed. Answers may also seek to consolidate an application filed in another docket if that application conforms to the scope of the proceeding proposed in the motion to modify scope and include the information prescribed in § 302.1704. Answers and applications shall not, however, propose the consideration of additional markets.

(f) *Order establishing further procedures.* Within 90 days after the filing of the original application, the DOT decisionmaker will issue an order establishing further procedures for processing the case.

§ 302.1730 Procedures in restriction removal cases.

(a) *Applicability.* This section applies to the certificate cases described in § 302.1701(b).

(b) *Applications.* Each application to which this section applies shall be limited to a single city-pair market or a single restriction unless a waiver of this requirement has first been obtained under § 302.1790. All restriction removal applications (including conforming applications under paragraph (c) of this section) shall include a notice on the cover page that any person wishing to support or oppose the application must file an answer briefly describing its position, and serve a copy of the answer on all persons served with the application. The notice shall also state the due date for answers. Any application that does not conform with this paragraph will be rejected unless a waiver has been granted before the application is filed.

(c) *Conforming applications.* The issues in any proceeding under this section will be limited to those raised in the original application. Motions to modify the scope of the proceeding will not be entertained. Any person may file an application conforming to the scope of the proceeding within 14 days after the filing of the original application. Conforming applications are automatically consolidated. Nonconforming applications will be rejected under § 302.1713.

(d) *Answers to applications.* Any person may file an answer in support of or in opposition to any application. Answers to the original application shall be filed within 14 days after the filing of that application. Answers to conforming applications shall be filed within 28 days after the filing of the original application.

(e) *Order establishing further procedures.* Within 60 days after the filing of the original application, the DOT decisionmaker will issue an order establishing further procedures for processing the case.

§ 302.1740 Procedures in foreign air carrier permit cases.

(a) *Applicability.* This section applies to the foreign air carrier permit cases described in § 302.1701(c).

(b) *Notice on cover page.* Applications to which this section applies shall include a notice on the cover page stating that any person may support or oppose the application by filing an answer and serving a copy of the answer on all persons served with the application. The notice shall also state the due date for answers. Time limits shall be calculated from the date of filing with the Documentary Services Division. Amendments to applications will be considered new applications for the purpose of calculating the time limitations of this subsection.

(c) *Answers to applications.* Any person may file an answer in support of or in opposition to any application. Answers shall be filed within 28 days after the filing of the application and shall include any economic data, other facts, and argument upon which the person relies to support its position.

(d) *Executive departments.* The views of the Department of State and the Federal Aviation Administration's evaluation of the applicant's operational fitness shall be filed not later than the due date for answers to applications.

(e) *Order establishing further procedures.* As soon as possible after the date that answers are due, the DOT decisionmaker will issue an order establishing further procedures for processing the case.

§ 302.1750 Disposition of applications—Orders establishing further procedures.

(a) *General requirements.* Within the time limits established in § 302.1720(f), § 302.1730(e), or § 302.1740(e), as applicable, the DOT decisionmaker will issue an order establishing further procedures in each case. The order will establish the scope of the issues to be considered and the procedures to be employed, and will indicate whether one or more attorneys from the office of the Assistant General Counsel for Aviation Enforcement and Proceedings will participate as a party. With respect to all or any portion of each application, the DOT decisionmaker will take one of the following actions:

(1) Set the application for oral evidentiary hearing. In this event, all of the procedures set forth in §§ 302.1751 through 302.1755 will apply unless the DOT decisionmakers decides otherwise. The DOT decisionmaker may limit the scope of the issues to be decided in an oral evidentiary hearing. In that event, the procedures set forth in §§ 302.1751 through 302.1755 will apply to the oral evidentiary hearing phase of the case, and the DOT decisionmaker will indicate what procedures will be employed in deciding the other issues in the case.

(2) Dismiss the application. This action constitutes a final DOT order subject to judicial review. Petitions for reconsideration of such an order will be entertained. This option will not be used in restriction removal cases under § 302.1730.

(3) Announce that the Department has begun to make a determination with respect to the application under simplified procedures without oral evidentiary hearing. In this event, the DOT decisionmaker will indicate which, if any, of the procedural steps set forth in §§ 302.1752 through 302.1756 will be employed. The DOT decisionmaker may also indicate that other non-oral evidentiary hearing procedures will be employed.

(4) Announce that the Department will decide the case by show cause procedures or issue an Order to Show Cause why the application should not be granted.

(b) *Additional evidence.* The order establishing further procedures may provide for the filing of additional evidence.

(c) *Petitions for reconsideration of an order establishing further procedures.* Petitions for reconsideration of an order establishing further procedures will not be entertained except to the extent that the order dismissed all or part of an application. If a petition for reconsideration results in the reinstatement of all or part of an application, the deadline for final Department decision established in § 302.1757 will be calculated from the date of the order reinstating the application.

§ 302.1751 Oral evidentiary hearing.

If the Department determines under § 302.1750(a) that an oral evidentiary hearing should be held, the application or applications will be set promptly for oral hearing before an administrative law judge. The issues will be those set forth in the order establishing further procedures.

§ 302.1752 Briefs to the administrative law judge.

Briefs to the administrative law judge shall be filed within the following periods, as applicable:

(a) 14 days after the close of the oral evidentiary hearing established under § 302.1750(a)(1), unless the administrative law judge determines that, under the circumstances of the case, briefs are not necessary or that the parties will require more time to prepare briefs; or

(b) 14 days after the filing of additional evidence called for in the order establishing further procedures if no oral evidentiary hearing is called for, unless the Department determines that some other period should be allowed.

§ 302.1753 Administrative law judge's initial or recommended decision.

(a) In a case that has been set for oral evidentiary hearing under § 302.1750(a)(1), the administrative law judge shall adopt and serve an initial or recommended decision within 136 days after the issuance of the order establishing further procedures unless:

(1) The Department, having found extraordinary circumstances, has by order delayed the initial or recommended decision by a period of not more than 30 days; or

(2) An applicant has failed to meet the procedural schedule adopted by the judge or the DOT decisionmaker. In this case the administrative law judge may, by notice, extend the due date for the issuance of an initial or recommended decision for a period not to exceed the period of delay caused by the applicant.

(b) In a case in which some of the issues have not been set for oral hearing under § 302.1750(a)(1), the administrative law judge shall issue an initial or recommended decision within the time established by the DOT decisionmaker in the order establishing further procedures, except that that due date may be extended in accordance with paragraph (a)(2) of this section.

(c) The initial or recommended decision shall be issued by the administrative law judge 14 days after it is served. Unless exceptions are filed under § 302.1754 or the DOT decisionmaker issues an order to review on its own initiative, an initial decision shall become effective as the final order of DOT the day it is issued. Where exceptions are timely filed or the DOT decisionmaker takes action to review on his or her own initiative, the effectiveness of the initial decision is stayed until further order of the DOT decisionmaker.

(d) In all other respects, the provisions of § 302.27 shall be applicable.

§ 302.1754 Exceptions to administrative law judge's initial or recommended decision.

(a) *Time for filing.* Within 7 days after service of any initial or recommended decision of an administrative law judge, any party may file exceptions to the decision with the Department.

(b) *Form and content of exception.* Exceptions shall comply with § 302.30(b).

(c) *Effect of failure to file timely and adequate exceptions.* The provisions of § 302.30(c) shall apply.

(d) *Review is automatic.* If timely and adequate exceptions are filed, review of the initial or recommended decision is automatic.

§ 302.1755 Briefs.

The provisions of § 302.31 shall apply, except that:

(a) In a case in which an initial or recommended decision has been served and exceptions have been filed, any party may file a brief in support of or in opposition to any exceptions. Such briefs shall be filed within 14 days after service of the initial or recommended decision.

(b) In a case in which an initial or recommended decision has been issued and no exceptions have been filed, briefs shall not be filed unless the DOT decisionmaker has taken review on his or her own initiative and specifically provided for the filing of briefs to the DOT decisionmaker.

(c) In a case in which an initial or recommended decision will not be issued, briefs to the DOT decisionmaker may be filed only if specifically provided for in the order establishing further procedures, and only upon the issues specified in that order. Such briefs may be filed by any party within 21 days after the service date of the order establishing further procedures, unless that order established a different due date.

§ 302.1756 Oral argument before the DOT decisionmaker.

If the order establishing further procedures provides for an oral argument, or if the DOT decisionmaker otherwise decides to hear oral argument, all parties will be advised of the date and hour set for that argument and the amount of time allowed each party. The provisions of § 302.32(b) shall also apply.

§ 302.1757 Final decision of the Department.

In addition to the provisions of § 302.36, the following provisions shall apply:

(a) In the case of a certificate application that has been set for oral evidentiary hearing under § 302.1750(a)(1), DOT will issue its final order within 90 days after the initial or recommended decision is issued. If an applicant has failed to meet the procedural schedule established by the Department, the DOT decisionmaker may, by notice, extend the date for a final decision for a period equal to the period of delay caused by the applicant.

(b) If the DOT decisionmaker does not act in the time period established in paragraph (a) of this section in the case of an application for a certificate to engage in foreign air transportation, the initial or recommended decision shall be transmitted to the President under section 801 of the Act.

(c) In the case of a certificate application that has been processed under § 302.1750(a)(3) or (4), the Department will issue its final order within 180 days after the order establishing further procedures. If an applicant has failed to meet the procedural schedule established by the Department, the DOT decisionmaker may, by notice, extend the due date for a final decision for a period equal to the period of delay caused by the applicant.

§ 302.1758 Petitions for reconsideration.

The provisions of § 302.37 shall apply to petitions for reconsideration.

§ 302.1760 Internal procedures.

(a) In deciding which of the procedures set forth in § 302.1750 will be used for each case under this subpart, the DOT decisionmaker will receive a recommendation from the Director, Office of Aviation Operations. That recommendation will be coordinated with the General Counsel and the Chief Administrative Law Judge, or their designees. If there is disagreement in that group, separate recommendations will be promptly submitted to the extent necessary to reflect their views.

(b) In deciding each case under this subpart on the merits, the DOT decisionmaker will receive a recommendation from the Director, Office of Aviation Operations, and the Assistant General Counsel for International Law. If there is disagreement among these employees, separate recommendations will be promptly submitted to the extent necessary to reflect those views.

§ 302.1770 Criteria for use of oral evidentiary hearing procedures and assignment of a case to an administrative law judge.

The Department will assign applications made under §§ 302.1701,

302.1720 (c) and (e), 302.1730(c) and 302.1740 for consideration under the expedited procedures of this subpart and order the record presented directly to the DOT decisionmaker for final decision unless it determines that:

(a) Use of expedited procedures will prejudice a party;

(b) Material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures; or

(c) Assignment of an application for oral evidentiary hearing procedures or an initial or recommended decision by an administrative law judge is otherwise required by the public interest.

§ 302.1780 Standards for deciding cases in which expedited, simplified procedures are employed.

The standards employed in deciding cases under § 302.1750(a)(3) or (4) shall be the same as the standards applied in cases decided under § 302.1750(a)(1). These are the standards set forth in the Federal Aviation Act of 1958, as amended, as interpreted and expanded upon under the Act.

§ 302.1790 Waivers.

Upon the filing of a motion, the DOT decisionmaker or the Assistant General Counsel for International Law, as appropriate, may, on behalf of the Department, grant such waivers from the terms and limitations contained in this subpart as it shall find to be consistent with the public interest and the proper dispatch of DOT's business. Petitions for review of the staff action taken under this section may be filed in accordance with Subpart C of Part 385 of this chapter.

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PART 303—REVIEW OF AIR CARRIER AGREEMENTS AND 408 APPLICATIONS

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Authority: 49 U.S.C. Subtitle I, 1378, 1379, 1382, 1384, 1386 and 1551.

Subpart A—Procedure for the Processing of Undocketed Section 412 Contracts and Agreements [1]

§ 303.1 Applicability.

This subpart sets forth the specific rules applicable to the processing of section 412 contracts and agreements which have not been docketed. After receipt by DOT of any such contract or agreement, the Docket Clerk, Documentary Services Division, shall assign a DOT contract number to such document. The processing of a docketed section 412 contract or agreement shall, to the extent applicable be governed by the other subparts of this part and Part 302 of this chapter. An undocketed agreement which is subsequently docketed shall thereafter be processed as a docketed proceeding. The provisions of this subpart shall not apply to contracts or agreements which are processed pursuant to the provisions of Subpart B of this part.

§ 303.2 Public file.

The Docket Clerk, Documentary Services Division, shall maintain a public file with respect to every undocketed section 412 contract or agreement. The public file shall be available for inspection in the Documentary Services Division. If a section 412 contract or agreement is thereafter docketed with the Documentary Service Division, the public file thereon, if any, shall thereupon be consolidated into the docket which shall be available for public inspection at the Documentary Services Division of the DOT (see § 303.7).

§ 303.3 Notice to the public.

Notice of the filing of section 412 contracts and agreements is provided in a weekly publication of DOT entitled "Agreements Filed with the Department of Transportation under section 412(a)." Subscription to this publication may be obtained by complying with the provisions of Part 389 of this chapter (DOT Organization Regulations). In the event that an undocketed section 412 contract or agreement is thereafter docketed, notice of such docketing is given in a weekly publication of DOT entitled "Applications and/or amendments thereto filed with the Department of Transportation during the week ending ———." Subscription to this publication also may be obtained as outlined above in this section.

§ 303.4 General requirements.

The requirements of Part 261 of this chapter shall apply to all section 412 contracts and agreements.

§ 303.5 Service requirements.

Except as the DOT decisionmaker may otherwise prescribe in particular cases, there is no requirement that section 412 contracts or agreements be served on other parties. The provisions of Subpart A of Part 302 with respect to service shall be computed with to the extent applicable.

§ 303.6 Filing of comments.[2]

Interested persons may file comments and/or reply comments with respect to undocketed section 412 contracts or agreements. In particular cases where the DOT decisionmaker, may prescribe, comments and/or reply comments shall be served upon each party to a section 412 contract or agreement to which the comments appertain, and the service provisions of Subpart A of Part 302 shall be complied with. In the absence of a DOT order prescribing time limits, comments and/or reply comments in undocketed cases may be filed at any time prior to approval or disapproval of the agreement.

§ 303.7 Procedure for docketing.

When the Assistant Secretary for Policy and International Affairs, or the DOT decisionmaker determines that a section 412 contract or agreement should be docketed, the Assistant Secretary for Policy and International Affairs shall transmit the public file thereon to DOT's Documentary Services Division to be incorporated in the docket (see § 303.2).

§ 303.8 Staff action.

When the DOT decisionmaker takes action under delegated authority approving or disapproving an undocketed section 412 contract or agreement, and, thereafter, a petition for review of staff action is filed pursuant to Subpart C of Part 385 of this chapter (DOT Organization Regulations), he or she shall concurrently with the receipt of a duly filed petition for review, forward the public file on such contract or agreement to DOT's Documentary Services Division.[3]

§ 303.9 DOT action.

When DOT issues an order taking final action with respect to any undocketed, section 412 contract or agreement, petition, for reconsideration of such order may be filed by interested persons by following the procedure set forth in § 302.37.

Subpart B—Procedure for Processing Section 412 Contracts and Agreements Submitted for Prior Approval

§ 303.11 Applicability.

This subpart sets forth the particular rules applicable to the processing of section 412 contracts or agreements which are, by their terms, to become effective only upon or after DOT's approval: *Provided, however,* That the provisions of this subpart shall not apply to traffic conference resolutions of the International Air Transport Association.

§ 303.12 Filing.

An agreement or contract submitted by an air carrier association, as defined in Part 263 of this chapter, on behalf of its members, or by an air carrier, which is, by its terms, to become effective only upon or after DOT's approval, shall be filed in accordance with the provisions of Part 261 of this chapter, except to the extent that such provisions are inconsistent with this subpart, and shall be accompanied by an application seeking such approval. Such application shall conform to the formal requirements of Subpart A of Part 302. Such application shall be assigned a docket number and any additional documents filed in connection with such contract or agreement shall be identified by the assigned docket number.

[1] Certain section 412 contracts and agreements are docketed immediately upon receipt by DOT, e.g., IATA rate conference agreements and amendments thereto.

[2] See § 302.4(d)(2), as to form of comments.

[3] See § 385.13(p) of the Board's Organization Regulations (14 CFR 385.13(p).)

§ 303.13 Title.

The application shall be entitled "Application for Prior DOT Approval of an Agreement."

§ 303.14 Contents of application.

The application shall contain the contract or agreement, and shall explain the nature and purpose of the agreement, and how it changes any practice existing under a previously approved contract or agreement. One copy of the contract or agreement shall be certified and verified as required by § 261.5 of Part 261 of this chapter. The application shall contain economic data or other material which the applicant desires DOT to officially notice. The application may also contain argument in support of the application, provided that with respect to an application filed by an air carrier association, as defined in Part 263 of this chapter, the requirements of said Part 263 are met. The application shall also contain the names of the persons served, and a notice that any party in interest may, within twenty-one (21) days of the date the application was filed, file and serve an answer in support of, or in opposition to, the application.

§ 303.15 Service of application.

An application for prior DOT approval of an agreement shall be served as provided by § 302.8. With regard to an application filed by an air carrier association, as defined in Part 263 of this chapter, a copy of the application shall be served on the following parties who shall be presumed to have an interest in the subject matter of the application:

(a) Travel agent associations known or believed to the applicant to be comprised of members who would be affected by the agreement;

(b) Consumer representatives who have previously advised the applicant of their desire for service of such agreement(s); and

(c) The Department of Justice, Antitrust Division. The Assistant Secretary for Policy and International Affairs or the DOT decisionmaker may order additional service made on such person or persons as the facts of the situation warrant.

§ 303.16 Posting of application.

DOT shall cause a copy of every application under this paragraph filed with it to be posted promptly on a public bulletin board at its principal offices in Washington, D.C.

§ 303.17 Additional data.

The Assistant Secretary for Policy and International Affairs or the DOT decisionmaker may request the filing of additional data with respect to any application under this paragraph or any answer or reply filed by a party in interest in connection therewith.

§ 303.18 Answers and reply.

Within 21 days after filing of an application, any person may file an answer to that application. Within 14 days after the last date for filing an answer under this section, the applicant may file a reply to one or more answers. Service of answers and replies shall be made upon the person whose previous filing is the subject of the responsive filing and upon the other persons who were served with that previous filing. Service shall be effected according to § 302.8

Subpart C—Information Submitted in Section 408 Applications

§ 303.21 Purpose and applicability.

This rule sets forth the form and content of applications that must be submitted to DOT under section 408(b)(1) of the Act. It applies to any proposed consolidation or acquisition of control that is not exempt from section 408 and that directly or indirectly involves two or more air carriers, an air carrier and a foreign air carrier, or an air carrier and an intrastate air carrier, including transactions involving persons in control of such carriers.

§ 303.22 Definitions.

As used in this part, "documents" means (1) all written, recorded, transcribed or graphic matter including letters, telegrams, memoranda, reports, studies, forecasts, lists, directives, tabulations, logs, or minutes and records of meetings, conferences, telephone or other conversations or communications; and (2) all information contained in data processing equipment or materials. The term does not include daily or weekly statistical reports in whose place an annual or monthly summary is submitted.

§ 303.23 Filing of applications.

(a) Each person required to file an application under section 408(b)(1) of the Act for DOT approval of transactions described in § 303.21 shall file 12 copies of a complete application as required by §§ 303.28 through 303.38 of this part in the Documentary Services Division, except that only two copies of the information required by §§ 303.11 and 303.37(f) must be filed.

(b) For each consensual transaction covered by this part, all the information required by §§ 303.30 through 303.38 shall be submitted, as part of the application, for each party to the section 408 transaction. The parties to the section 408 transaction may file either separate applications or one joint application.

(c) For each non-consensual transaction covered by this part, the applicant shall also provide the information required by §§ 303.30 through 303.38 for its target company to the extent that such information is available to it. DOT may order the target company or other persons to submit some or all of the information required by §§ 303.30 through 303.38, or other information.

(d) The application shall be indexed to correspond to the individual sections of 303.30 through 303.38. Each page of the application and each document submitted with the application shall be marked with the name, initials, or some other identifying symbol of the applicant. The application shall also indicate the date of preparation and the name and corporate position of the preparer and recipient of each document submitted.

(e) Where the required information is in data processing equipment, on microfilm or is otherwise not eye-readable, the applicant shall provide such information in eye-readable form.

(f) Evidence that applicants wish DOT to consider in addition to that required by §§ 303.30 through 303.38 shall also be filed with the application. This evidence shall include all exhibits, data, and testimony on which the applicant intends to base its direct case and the names and addresses of all witnesses whom it will seek to call in the event that an oral evidentiary hearing is held. An applicant is not precluded from later filing answers, replies, or rebuttal exhibits or testimony.

(g) Within 10 days after a section 408 application is filed, any interested person may file a motion with DOT asking that the application be dismissed on the grounds that it is incomplete. An application is complete if it is not in substantial compliance with §§ 303.30 through 303.38.

(h) If an application is found to be incomplete, DOT may dismiss it without prejudice to refiling. If the application is dismissed, the statutory time period will not begin until a completed application if filed.

(i) After the 10-day period provided in § 303.23(g) has elapsed or after DOT has disposed of all motions filed during that period seeking dismissal of the application on the grounds of incompleteness, the application will not later be dismissed unless there is a finding that there is an omission so substantial that DOT cannot reasonably act on it or do so within the statutory time period.

(j) The information provided by the applicant shall be updated in a timely fashion throughout the period of consideration of the application.

(k) If any information or documents required by §§ 303.30 through 303.38 are not available, the applicants shall file an affidavit executed by the individual responsible for the search explaining why they cannot be produced.

(l) The DOT decisionmaker or the administrative law judge may order the applicant(s) to submit information in addition to that required by §§ 303.30 through 303.38.

(m) An applicant may withhold a document required by this part on the grounds that it is privileged but each document so withheld shall be identified and a brief description of the nature of the document, a statement indicating the basis of the privilege claimed, and the names of the preparers and recipients of the document shall be supplied. If any interested party contests the assertion of privilege, the document shall be promptly submitted to the DOT decisionmaker or the administrative law judge for *in camera* inspection.

§ 303.24 Confidentiality.

(a) An applicant may request that any part of its section 408 application be withheld from the public by filing a motion for confidentiality under § 302.39(d) of this chapter. In cases assigned to an administrative law judge, that judge will rule on motions for confidential treatment.

(b) No person shall have access to the confidential information except (1) attorneys of record and their experts who file affidavits promising not to disclose the information and to use it only in connection with the section 408 proceedings to which the information is directed, and (2) DOT personnel working on the proceeding. Inspection of confidential documents may begin as soon as the affidavits are filed.

(c) That portion of a section 408 application for which confidential treatment has been requested shall be considered received for purposes of filing only. It shall not be part of the public record or an in camera record of the case until it has been admitted into evidence.

§ 303.25 Copies to interested persons.

(a) A copy of the complete application shall be filed with the Department of Justice at the same time it is filed with the DOT.

(b) Upon request, the complete application shall be promptly made available to any person who has petitioned to intervene under § 302.14 or § 302.15 of this chapter. The applicant shall have copies of the complete application for distribution and shall, if requested, be responsible for expeditiously providing the application to any requesting party.

§ 303.26 Conformity with Subpart A of Part 302.

Except where they are inconsistent, the provisions of Subpart A of Part 302 of this chapter shall apply to this part.

§ 303.27 Exemptions.

Any person may petition DOT to exempt any transaction from all or part of the requirements of this part.

§ 303.30 Background information.

The application shall contain the following information:

(a) The names and mailing addresses of the parties to the transaction and the names, titles, and duties of the officers and directors of each corporation;

(b) A description of the transaction, including the exchange ratio, the terms of any tender offer, and the form of financing;

(c) A copy of the final or most recent draft agreement between the parties relating to the transaction;

(d) The percentage of the outstanding voting securities of either corporation that is owned or controlled by the other corporation or by its officers or directors. The application shall also set forth the consideration paid for these securities, the date and method of their purchase, and the form of payment;

(e) A list of all offices and directorships held in any other corporation which is a common carrier or is substantially engaged in the business of aeronautics by officers or directors of any party to the transaction;

(f) A list of all other financial relationships between the parties to the transaction, or between their officers, directors or major shareholders;

(g) All studies, reports and analyses regarding the proposed transaction or the other party to the transaction made by or for an applicant within 3 years preceding the application. These materials shall include, but not be limited to, any discussion of the proposed transaction or other party to the proposed transaction with respect to:

(1) Competition, markets, market shares, actual competitors, or potential entrants;

(2) Potential for sales growth or expansion into new markets;

(3) Efficiencies or costs of the proposed transaction; or

(4) The financial condition or operating strengths or weaknesses of the proposed partner or target company.

(h) If the applicant is relying for approval of the proposed transaction on a claim that that transaction would meet significant transportation needs of the public and that these needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects, all studies, reports and analyses made within 2 years preceding the filing of the application regarding other possible mergers, consolidations, or acquisitions that it had considered.

§ 303.31 Financial information.

The application shall contain the following:

(a) The following reports filed with the United States Securities and Exchange Commission within three years prior to the date of the application:

(1) All reports filed on Form 10K;

(2) All registration statements and all reports filed on Forms 10–Q and 8–K;

(3) All proxy statements; and

(4) All schedules 14 D–1 with all amendments.

(b) Annual reports to shareholders for the 3 years preceding the application;

§ 303.32 Equipment information.

The application shall include the following:

(a) A list of aircraft owned or leased by the applicant by aircraft type and age;

(b) If the aircraft is leased from others, the owner of the aircraft and the terms of the lease; if the applicant leases aircraft to others, the lessee and the terms of the lease;

(c) A detailed description of all plans and orders for the acquisition, lease or major modifications of flight equipment, including the price and projected delivery date of any aircraft; and

(d) A detailed description of all plans and agreements for the sale or lease of aircraft.

§ 303.33 Competitive information.

The application shall contain the following:

(a) Separate lists of all non-stop city-pairs (1) that are served by the applicant, (2) that are served by the other party to the proposed transaction, and (3) into which the applicant or the other party to the proposed transaction is considering entry;

(b) All studies, reports, and analyses that were submitted to the applicant's chief executive, financial, marketing, or operating officer, its Board of Directors, its executive committee, or any financial institution, within 2 years prior to the filing of the application, that discuss route development, internal expansion, service expansion or the marketing plans or strategies of the applicant;

(c) All documents prepared by or for the company within 2 years prior to the filing of the application that discuss any

of the following subjects in relation to any area served by both parties (whether the area discussed in the document is one or more cities, city-pairs, routes, hubs, regions, states, tiers, service to foreign points or any other geographical area):

(1) Competition;

(2) The possibility of new entry;

(3) Profitability or yield;

(4) Fare levels or availability of discount fares;

(5) Capacity or scheduling;

(6) Load factors or break-even levels;

(7) Identity of potential entrants; or

(8) Possible responses to new entry or to changes in a competitor's fares, scheduling, capacity or number of discount seats offered.

(d) All documents prepared by or for the company within 2 years prior to the filing of the application that discuss any of the topics listed in § 303.33(c) in relation to any area served by the other party to the proposed transaction (whether the area discussed in the document is one or more cities, city-pairs, routes, hubs, regions, states, tiers, service to foreign points or any other geographical area).

(e) All documents prepared by or for the company within 2 years prior to the filing of the application that discuss the effect of changes in conditions in any area served by one party to the proposed transaction on traffic, fares, profitability or availability of discount fares in any area served by the other party.

§ 303.34 Availability of resources.

For each airport served by both parties to the proposed transaction, the applicant(s) shall supply a detailed description of the following:

(a) The availability of fuel and the policy of fuel suppliers as to the supply and price of fuel to new entrants;

(b) The availability of landing slots at any of the airports that have access allocated by the FAA;

(c) The environmental constraints on each airport that limit or regulate additional service, whether of new entrants to the airport or of expanded service by incumbents. The report on environmental constraints shall include a description of any regulation that affects airport use, including but not limited to noise, air, and surface pollution;

(d) Airport constraints as to the size or type of aircraft that can be operated at that airport, including, but not limited to, such considerations as runway length, availability of ramp space, and safety considerations; and

(e) Any constraints with respect to terminal facilities, including but not limited to counter or ticketing space, gate space, baggage or cargo consolidation space, and ramp space.

§ 303.35 Potential public benefits of the proposed transaction.

(a) If the applicant intends to rely on public benefits to justify approval of its proposed transaction, the applicant shall decribe those benefits in detail and include all documents submitted to its chief executive, financial, marketing, or operating officer, its Board of Directors, its executive committee, or any financial institution, that discuss the following subjects:

(1) Any decrease in operating costs or increase in operating efficiencies. This should include an estimate of when the savings will be realized;

(2) Service benefits and proposed changes in price/quality options;

(3) Any enhancement of competition and the regions where that enhancement will occur; or

(4) Any changes in employment opportunities.

(b) The applicant shall provide all data, and set forth the method of calculation, upon which its claims of benefits rely. Any categories of cost savings provided shall be consistent with the financial data filed in CAB Form 41 or DOT replacement form.

(c) In describing the public benefits, the applicant shall distinguish between a one-time cost saving or benefit resulting from the transaction and continuing operational efficiencies or benefits.

§ 303.36 Potential adverse impact of the proposed transaction.

The application shall include all documents that were submitted to the applicant's chief executive, financial, marketing, or operating officer, its Board of Directors, its executive committee, or any financial institution, that discuss the following in relation to the proposed transaction:

(a) Any increase in the operating costs of the applicant with an estimate of when the increased cost will be incurred:

(b) Any decrease in the quantity or quality of air service;

(c) Any lessening of competition as a result of the proposed merger; and

(d) Any costs that would result from labor protective provisions that are necessary to complete the transaction.

§ 303.37 Labor relations.

Applicants shall provide the following information:

(a) Whether the surviving carrier will accept DOT's standard labor protective provisions as a condition of DOT approval of the transaction;

(b) The number of employees, by each class or craft, employed by each party to the transaction, and the number of employees by class or craft in their employ but on furlough. With respect to those employees on furlough, they shall indicate the reasons for such furlough. They should also indicate the order of recall (and the basis thereof) of these employees;

(c) Whether any plans exist for the dismissal, displacement, transfer, reduction of flying time or furlough of any employees in any class or craft as a result of operating changes which would flow from the proposed merger. If so, applicants shall list for each such class or craft the number of employees affected, the type of action (*e.g.*, dismissal, transfer, furlough, etc.) anticipated, and the manner in which the plans would be implemented;

(d)–(e) [Reserved]

(f) Copies of the collective bragaining agreements they have with the different classes of employees.

§ 303.38 Fuel consumption.

(a) The applicant shall estimate the amount of fuel that would be consumer by:

(1) The consolidated or commonly controlled entities during the next calendar year following the approval; and

(2) Each carrier individually during the next calendar year following disapproval.

(b) With both estimates in paragraph (a), the applicant shall include a statement as to the availability of the required fuel.

PART 305—RULES OF PRACTICE IN INFORMAL NONPUBLIC INVESTIGATIONS

Sec.

305.1 Applicability.
305.2 Definition.
305.3–305.4 [Reserved]
305.5 Initiation of investigation.
305.6 Appearance of witnesses.
305.7 Issuance of investigation subpenas.
305.8 [Reserved]
305.9 Rights of witnesses.
305.10 Nonpublic character of proceedings.
305.11 Procedures after investigation.
305.12 Motions to quash or modify an investigation subpena.

Authority: Secs. 202, 204, 411, 415, 1001, 1002, 1004, 1007, Pub. L. 85–726, as amended; 72 Stat. 742, 743, 770, 771, 788, 792, 796 (49 U.S.C. 1322, 1324, 1381, 1385, 1481, 1482, 1484, 1487; 5 U.S.C. 555, 556).

§ 305.1 Applicability.

The provisions of this part shall govern informal nonpublic investigations, as distinguished from

formal investigations and adjudicatory proceedings, undertaken by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings with a view to obtaining information from any person. While the Department seeks and encourages voluntary cooperation and believes that it is in the best interest of all parties concerned, it will utilize the procedures provided by this part to compel the disclosure of information by any person where DOT wishes to determine whether such person, or any other person, has been or is violating any provisions of Title IV or sections 101(3), 1002, 1003, or 1108(b) of the Act, or any rule, regulation, order, certificate, permit, or letter or registration issued pursuant thereto by DOT and when the information appears to be relevant to the matter under investigation. This part shall not apply to employees or records of other agencies of the United States Government, the District of Columbia, or the several States and their political subdivisions.

§ 305.2 Definition.

For the purpose of, and as used in this part, the term "investigation" means a non-adjudicatory, informal nonpublic investigation for the purpose of determining whether formal enforcement action should be instituted with respect to alleged violations of law.

§§ 305.3—305.4 [Reserved]

§ 305.5 Initiation of investigation.

An investigation may be initiated by order of the Department. Attorneys of the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings shall conduct such investigations pursuant to the provisions of this part and they shall be designated Investigation Attorneys. Investigation Attorneys, administrative law judges and the DOT decisionmaker are hereby authorized to exercise and perform their duties and functions under this part in accordance with the provisions of the Act and the rules and regulations of the Department.

§ 305.6 Appearance of witnesses.

Witnesses may be required to appear before any administrative law judge for the purpose of receiving their testimony or receiving from them documents or other data relating to any subject under investigation. Such testimony shall be mechanically or stenographically recorded, and a transcript thereof shall be made and incorporated in the record of the investigation.

§ 305.7 Issuance of investigation subpenas.

(a) The Deputy General Counsel, the DOT decisionmaker, the chief administrative law judge or the administrative law judge designated to preside at the reception of evidence, may issue a subpena directing the person named therein to appear before a designated administrative law judge at a designated time and place to testify or to produce documentary evidence relating to any matter under investigation, or both. Each such subpena shall briefly advise the person required to testify or submit documentary evidence of the purpose and scope of the investigation, and a copy of the order initiating the investigation shall be attached to the subpena.

(b) Witnesses subpenaed to appear shall be paid the fees and mileage prescribed in § 302.21 of the Rules of Practice (14 CFR 302.21). Service of such subpenas shall be made in accordance with the provisions of § 302.8 of the Rules of Practice (14 CFR 302.8).

§ 305.8 [Reserved]

§ 305.9 Rights of witnesses.

Any person required to testify or to submit documentary evidence shall be entitled to procure, on payment of lawfully prescribed costs, a copy of any document produced by such person and of his or her own testimony as stenographically reported. Any person compelled to testify or to produce documentary evidence may be accompanied, represented, and advised by counsel.

§ 305.10 Nonpublic character of proceedings.

Investigations shall be attended only by the witnesses and their counsel, the administrative law judge, the Investigation Attorney, other DOT personnel concerned with the conduct of the proceeding and the official stenographer. All orders initiating investigations, motions to quash or modify investigation subpenas, orders disposing of such motions, documents, and transcripts of testimony shall be part of the record in the investigation. Unless DOT determines otherwise, all orders initiating investigations which do not disclose the identity of the particular persons of firms under investigation shall be published in the **Federal Register**. Except as otherwise required by law, the remainder of the record of such proceedings shall constitute internal DOT documents which shall not be available to the general public. The use of such records in DOT proceedings subject to Part 302 of the Rules of Practice shall be governed by §§ 302.19(g) and 302.39 and by the law of evidence applicable to DOT proceedings.

§ 305.11 Procedures after investigation.

Upon completion of the investigation, where the Deputy General Counsel, determines that no corrective action is warranted, the investigation will be closed, and any documentary evidence obtained in the investigation will be returned to the persons who produced it. Where remedial action is indicated by the investigation, the Deputy General Counsel will proceed pursuant to Subpart B of Part 302 of the Rules of Practice or will take such other action as may be appropriate.

§ 305.12 Motions to quash or modify an investigation subpena.

Any person upon whom an investigation subpena is served may, within seven (7) days after such service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify such subpena with the administrative law judge who issued such subpena, or in the event the administrative law judge is not available, with the chief administrative law judge for action by himself or herself or by the DOT decisionmaker. Such motions shall be made in writing in conformity with Rules 3 and 4 of the Rules of Practice (Part 302 of this subchapter); shall state with particularity the grounds therefor and the relief sought; shall be accompanied by the evidence relied upon and all such factual matter shall be verified in accordance with the provisions of Rule 202 of the aforesaid Rules of Practice. Written memoranda or briefs may be filed with the motions, stating the points and authorities relied upon. No oral argument will be heard on such motions unless the chief administrative law judge, the administrative law judge or the DOT decisionmaker directs otherwise. A subpena will be quashed or modified if the evidence whose production is required is not reasonably relevant to the matter under investigation, or the demand made does not describe with sufficient particularity the information sought, or the subpena is unlawful or unduly burdensome. The filing of a motion to quash or modify an investigation subpena shall stay the return date of such subpena until such motion is granted or denied. The DOT decisionmaker may at any time review, upon his or her own initiative, the ruling of an administrative law judge or the chief administrative law judge denying a

motion to quash a subpena. In such cases, the DOT decisionmaker may order that the return date of a subpena which he or she has elected to review be stayed pending DOT action thereon.

PART 310—INSPECTION AND COPYING OF DOT OPINIONS, ORDERS, AND RECORDS

Sec.
310.1 General.
310.2 Records available.
310.3 Exempted records.
Appendix A—Description and Location of Records Generally Available
Appendix B—Types of Records Generally Excluded From Availability

Authority: Sec. 204(a), 72 Stat. 743; 49 U.S.C. 1324; 81 Stat. 54; 5 U.S.C. 552.

§ 310.1 General.

The provisions of Part 7 of the regulations of the Office of the Secretary shall apply to the inspection and copying of DOT opinions, orders, and records under this chapter. (49 CFR Part 7)

§ 310.2 Records available.

For the guidance and convenience of the public, a list is attached to this part designated Appendix A, which describes various records which are available for inspection and copying. Records which do not fall within one of the described categories nevertheless may be open to inspection and copying. Conversely a record listed in Appendix A to this part may be withheld from general inspection and copying because all or part of it may be an exempted record. By way of example, records otherwise normally available may be exempted where they consist of docket materials withheld from public disclosure under § 302.39 of the Procedural Regulations in this chapter, certain carrier reports received on a confidential basis, or records relating to exempted personnel and classified matters. Exempted records are described in § 310.3.

§ 310.3 Exempted records.

(a) As used herein, "exempted records" include those records which, pursuant to 5 U.S.C. 552(b) or other applicable law or regulation, are not required to be made available generally for inspection or copying.

(b) Appendix B to this part lists various kinds of records which are "exempted records" and therefore may be excluded from public availability. Appendix B to this part is for the convenience and guidance of the public and is not an exhaustive listing; other records not listed therein may be subject to withholding as "exempted records." Any "exempted record" will be withheld from public disclosure only where it is determined that the release of the record would be inconsistent with the purpose of the exemption.

APPENDIX A—DESCRIPTION AND LOCATION OF RECORDS GENERALLY AVAILABLE

[NOTE: Any item may be withheld from disclosure if exempted, whether or not the item is listed herein]

Agreements filed under section 412 of Federal Aviation Act: Copies of, and filings and records in connection therewith.	(To be determined).
Air freight forwarder applications and operating authorizations, and filings in connection therewith.	
Aircraft lease or purchase transactions under Part 299, Economic Regulations: Filings in connection therewith.	
Applications of foreign charter carriers for approval of charter flights, as required by specific DOT or Board Order.	
Blind sector applications: Part 216—Copies of applications and authorizations in connection therewith.	
DOT Manual: Instructions to staff and index thereof.	
Charters: Requests for waivers of DOT or Board regulations.	
Civil penalty compromise records filed under Subpart H of the Department's rules of practice.	
Conferences between DOT or Civil Aeronautics Board and other persons, transcripts of.	
Consumer complaint files, as distinguished from investigation files.	
Contracts of the DOT or Civil Aeronautics Board: Contracts awarded; invitations to bid.	
Correspondence relating to items listed in Appendix A.	
Dockets and related material:	
Agents: File showing agents designated for service under section 1005(b) of Federal Aviation Act.	
Applications sent to the President under section 801 of Federal Aviation Act: Card record of.	
Docket binders: Containing material of record in docketed proceedings, and correspondence in connection therewith.	
Docket indexes: Listing by docket number, the filings in each docket and DOT or Board issuances in same.	
By name of applicant or petitioner, each application, petition, etc. bearing a new docket number.	
By name of city, applications for service to said city and disposition thereof.	
By name of carrier and by docket number, a description of pending applications.	
Documents served by Docket Section: Daily record of.	
Oral arguments: List of, by date order.	
Parties to individual docketed proceedings: Lists of, with addresses.	
Foreign aircraft permits: Copies of applications (Form 272), permits, reports of cargo operations (Form 321), and other filings in connection therewith.	
Forms used in dealing with the public:	
Copies of forms	
List of forms showing number and title.	
Inclusive tours: Tour prospectuses and other documents relating to inclusive tour charters under Part 378.	
International Air Transport Association (IATA) resolutions, minutes, and other IATA material.	
Mail compensation:	
Air carrier claims for mail pay (Forms 398 and 545).	
Carrier payments memoranda (instructions regarding billing).	
Class rate information on Form 548 (local service carriers).	
Monthly listings of summarized passenger loads by flight stages (Schedule T-5), except subsidy ineligible portion.	
Summary of obligations and disbursements to air carriers (Form 470).	
Mileage records: Official DOT or Board records of mileages.	
Minutes of the DOT or Civil Aeronautics Board: Approved minutes of the Board on matters that are not pending.	
Opinions of the General Counsel	
Orders and Opinions of the DOT or Civil Aeronautics Board:	
Copies of, including published bound volumes "Civil Aeronautics Board Reports.".	
Index of, by subject, summarizing action taken.	
Index-Digest of opinions and precedential orders, and citation file.	
Weekly summaries of orders.....	
Overseas military personnel charter applications and authorizations, and filings in connection therewith.	
Policy Statements of the DOT or Civil Aeronautics Board; and index thereof.	
Postal Service: Contracts for the transportation of mail filed pursuant to 39 U.S.C. 5005.	
Public index.....	
Published DOT or Board documents.	
Regulations of the DOT or Civil Aeronautics Board; Table of contents of codified regulations.	
Reports of air carriers and related material:	
Accounting and reporting directives to supplement the Uniform System of Accounts and Reports.	
ADP instruction directives to supplement Traffic and Capacity Data Collection ADP Manual.	
Air carrier Form 41 reports, consisting of various financial and statistical schedules filed at various frequencies by each certificated air carrier under Part 241.	
Air carrier passenger origin-destination survey reports (Form 2787), domestic only. (Subject to prior staff use. Cost of separation and deletion of confidential international data for account of requestor.).	
Air taxi operator reports required by various DOT or Board orders.	
Air taxi operators: Commuter air carrier reports of scheduled services (Form 298-C), except Schedule F-1.	
Air taxi operators: Registration for exemption under Part 298 (Form 298-A).	
Air taxi operators: Interests in and operations with large aircraft.	
Carrier officers and directors reports of ownership of stock and other interests.	
Extension of credit to political candidates report (Form 183).	

Extensions of time for report filing.
Foreign air carriers reports of civil aircraft charters (Form 217).
Insurance certificates and notices:
Air freight forwarders certificates of insurance (Form 350).
Air taxi operators certificates of insurance (Form 257) and standard endorsements (Form 262).
Supplemental air carriers: Certificates of insurance and endorsements (Forms 606, 607 and 608).
Notice of cancellation of insurance by insurer (Form 609A).
Notice of cancellation of insurance by carrier (Form 609B).
International Civil Aviation Organization statistical report (ICAO Form C).
Local service carrier summarized passenger loads by flight schedule (Schedule T-5), except subsidy ineligible portions.
Magnetic tapes prepared by the DOT or Board from reports filed by air carriers.
Manual of ADP instructions for traffic and capacity data collection and related materials.
Manuals of air carrier accounts and reporting instructions prescribed by the DOT or Board.
Manual of instructions to air carriers for passenger origin-destination survey statistics and related materials.
National Air Carrier Association (NACA), commercial charter exchange activity, membership roster and flight data (Form 492).
Origin-destination survey of airline passenger traffic, domestic data and outputs.
Observations of the Director to air carriers, requesting or transmitting specific information to supplement or amplify reports.
Passengers denied confirmed space (Form 251).
Passenger origin-destination directives, to supplement Passenger O&D Manual.
Public accountants reports.
Reports of a miscellaneous nature filed pursuant to DOT or Board order.
Unaccommodated passenger reports (Form 250).
Waivers of accounting and reporting requirements and record retention.
Route and service authorizations: (Airport-to-Airport Mileages)
Certificates of public convenience and necessity.
Foreign air carrier permits.....
Historic and current records and indexes of points served, airports, dates of service inauguration, service deletions, suspensions and restorations, and DOT or Board actions affecting carrier service authorizations.
Settlement documentation filed under Rule 215 of the DOT's or Board's rules of practice.
Statements of authorization for off-route charter trips by foreign air carriers (Part 212): Copies of applications for, filings in connection therewith and copies of authorizations.
Study group charters: Tour prospectuses and other documents relating to study group charters under Part 373.
Tariff matters:
Agent matters:
Alternate agents' affidavits as to disability of principal tariff publishing agent.
Corporate tariff agents' designation of issuing officer.
Powers of attorney (issued by carriers to tariff publishing agents).
Tariff publishing instructions (from carriers to agents).
Certifications of tariff publications and requests for copies.
Concurrences (issued by carriers to tariff publishing carriers).
Correspondence with carriers or agents requesting correction of Part 221 violations in tariffs.
Free or reduced-rate transportation:
Access to aircraft or free-transportation requests (SF 160).
Application for, under § 223.8 of Economic Regulations.
Carrier manuals containing instructions, rules, regulations and practices governing issuance and interchange of passes.
Reports by carriers of free transportation of technical representatives of aircraft manufacturers (§ 223.2 (c), (d) of Economic Regulations).
Postponed Board actions: Notices of, on tariffs filed on 45 days' notice, and not acted upon by Board 15 days prior to effective date, under § 399.36 of Policy Statements.
Rejection notices.....
Special tariff permissions.
Tariffs and tariff transmittal letters.
Tariff embargo notices.
Trade agreements filed under Part 225 of Economic Regulations.
Waivers from Part 221 of Economic Regulations.
Trade association manuals.....
Travel group charters: Filings and other documents relating to travel group charter filings under Part 372a (excluding names, addresses and phone numbers of TGC participants).
Unpublished statistical compilations.
Votes of Board members: Final votes of Board members in Board proceedings.

Appendix B—Types of Records Generally Excluded From Availability

The following list contains by way of example those records which are "exempted records" under this part. The examples of exempted records are listed according to the applicable subsections of 5 U.S.C. 552(b).

(1) *Documents classified pursuant to Executive Order No. 10501.* Classified minutes and classified exhibits in formal proceedings.

(2) *Personnel rules and practices.* Files pertaining to personnel.

Technical manuals and instructions pertaining to the audit of carrier accounts.

(3) *Material exempted by statute.* Matter which heretofore has been exempted from public disclosure under sections 902(f) and 1104 of the Federal Aviation Act, or by specific order will continue to be exempt. Such matters include carrier audit papers and correspondence relating thereto, and matters on which DOT has granted a motion for nondisclosure pursuant to § 302.39 of its rules of practice.

(4) *Trade secrets and commercial or financial information.* Past or future matter submitted in confidence but for which no formal request under § 302.39 of the rules of practice has been made and granted will be held in confidence to the extent deemed allowable. This provision refers solely to unpublished materials the disclosure of which would be inconsistent with the intent of the Freedom of Information Act. No assurance of withholding material is implied by this, however, and affected persons should formally request withholding under § 302.39 where they deem it necessary to protect their interests.

Examples of confidential matters under this subsection include: local service carrier passenger loads by flight schedules (Schedule T-5, subsidy ineligible portion); origin-destination survey of airline passenger traffic (international); MAC charter rate information submitted in advance of MAC rate proceedings; financial data (Schedule F-1, Form 98-c); materials related to informal subsidy conferences; air carrier service segment data submitted under Part 241; air carrier or air carrier organization letters, information or views used in developing U.S. positions in international aviation matters; and names, addresses, and phone numbers of TGC participants listed in Travel Group Charter filings under Part 372a.

(5) *Inter/intra-agency memoranda.*

Copies of decisions awaiting Presidential action except as provided in § 399.101 of the DOT 's Policy Statements.

Notation, calendar, and for information memoranda.

Budget, management, program evaluation, records disposal, research planning and program files.

Internal memoranda on the Administrative Conference of the United States.

Staff analyses not published by DOT.

Files regarding requisitions, equipment, and space.

Memoranda regarding interagency committees.

Intergovernmental communications on loan guarantee matters.

Research and legislative reference files of the General Counsel.

Memoranda and studies regarding positions in international aviation matters.

Developmental files, research materials, and workpapers.

(6) *Invasion of personal privacy.* Correspondence and inquiries regarding personnel. Individual personnel files and records.

(7) *Law enforcement investigatory files.* Formal and informal internal investigatory files regarding alleged violations of the Federal Aviation Act or requirements thereunder; and names, addresses, and phone numbers of TGC participants listed in Travel Group Charter filings under Part 372a.

PART 310a—ACCESS TO SYSTEMS OF RECORDS—REGULATIONS AND EXEMPTIONS IMPLEMENTING THE PRIVACY ACT OF 1974

§ 310a.1 General.

The provisions of Part 10 of the regulations of the Office of the Secretary shall apply to the maintenance of an access to systems of records pertaining to individuals. (49 CFR Part 10)

PART 311—CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL

§ 311.1 General.

The provisions of Part 8 of the regulations of the Office of the Secretary shall apply to the classification and declassification of national security information. (49 CFR Part 8)

PART 313—IMPLEMENTATION OF THE ENERGY POLICY AND CONSERVATION ACT

Sec.

313.1 Purpose, scope, and authority.
313.2 Policy.
313.3 Definitions.
313.4 Major regulatory actions.
313.5 Energy information.
313.6 Energy statements.
313.7 Integration with environmental procedures.

Authority: Secs. 204, Pub. L. 85-726, as amended, 72 Stat. 743, 49 U.S.C. 1324. Pub. L. 84-163, 89 Stat. 940, 42 U.S.C. 6362(b).

§ 313.1 Purpose, scope, and authority.

(a) The Energy Policy and Conservation Act (42 U.S.C. 6201 et seq., hereinafter "EPCA") authorizes and directs certain actions to conserve energy supplies through energy conservation programs and where necessary, the regulation of certain energy uses, and to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products. In furtherance of these purposes, section 382 of EPCA requires several transportation regulatory agencies, including DOT, to submit a number of reports to the Congress with respect to energy conservation and efficiency, and where practicable and consistent with the exercise of DOT's authority under other law, to include in any major regulatory action a statement of its probable impact on energy efficiency and energy conservation. Section 382(b) of EPCA directs DOT to define the term "major regulatory action" by rule.

(b) Section 204(a) of the Federal Aviation Act of 1958, as amended (hereinafter "Act"), authorizes DOT to establish such rules, regulations, and procedures as are necessary to the exercise of its functions and are consistent with the purposes of the Act.

(c) The purpose of these regulations is to establish procedures and guidelines for the implementation of DOT's responsibility under EPCA to include in any major regulatory action taken by DOT a statement of the probable impact on energy efficiency and energy conservation.

(d) These regulations apply to all proceedings before DOT, as provided herein.

§ 313.2 Policy.

(a) *General.* It is the policy of DOT to view the conservation of energy and the energy efficiency improvement goals of EPCA as part of DOT's overall mandate, to be considered along with the several public interest and public convenience and necessity factors enumerated in section 102 of the Federal Aviation Act (49 U.S.C. 1302). To the extent practicable and consistent with DOT's authority under the Act and other law, energy conservation and efficiency are to be weighed in the decisionmaking process just as are DOT's traditional policies and missions.

(b) *Implementation.* Implementation of this policy is through the integration of energy findings and conclusions into decisions, opinions, or orders in proceedings involving a major regulatory action, as defined in this part.

(c) *Proceedings in progress.* The provisions of this part are intended primarily for prospective application. Proceedings in progress on the effective date of this part, in which an application has been docketed but no final decision made public, shall adhere to § 313.6(a) of this part, provided that the fair, efficient, and timely administration of DOT's regulatory activities is not compromised thereby. Nothing herein shall imply a requirement for new or additional hearings, a reopening of the record, or any other procedures which would tend to delay a timely decision in proceedings in progress.

(d) *Hearings.* Public hearings will not normally be held for the purpose of implementing EPCA, particularly in connection with proposed actions which do not require notice and hearing as a prerequisite to decision under the Act. Hearings may be ordered in exceptional circumstances where the proposed action is of great magnitude or widespread public interest and, in addition, presents complex issues peculiarly subject to resolution through evidentiary hearings and the process of cross examination.

§ 313.3 Definitions.

As used in this part: (a) "Act" means the Federal Aviation Act of 1958, as amended.

(b) "Energy efficiency" means the ratio of the useful output of services in air transportation to the energy consumption of such services.

(c) "Energy statement" is a statement of the probable impact of a major regulatory action on energy efficiency and energy conservation, contained in a decision, opinion, order, or rule.

(d) "EPCA" means the Energy Policy and Conservation Act.

(e) "Major regulatory action" is any decision by the DOT decisionmaker or administrative law judge requiring an energy statement pursuant to § 313.4 of this part.

(f) "NEPA" means the National Environmental Policy Act of 1969.

§ 313.4 Major regulatory actions.

(a) Any initial, recommended, tentative or final decision, opinion, order, or final rule is a major regulatory action requiring an energy statement, if it:

(1) May cause a near-term net annual change in aircraft fuel consumption of 10 million (10,000,000) gallons or more, compared to the probable consumption of fuel were the action not to be taken; or

(2) Is specifically so designated by DOT because of its precedential value, substantial controversy with respect to energy conservation and efficiency, or other unusual circumstances.

(b) Notwithstanding paragraph (a)(1) of this section, the following types of actions shall not be deemed as major regulatory actions requiring an energy statement:

(1) Tariff suspension orders under section 1002(j) of the Act, temporary suspensions under section 401(j) of the Act, emergency exemptions or temporary exemptions not exceeding 24 months under sections 101(3) or 416(b) of the Act and other proceedings in which timely action is of the essence;

(2) Orders instituting or declining to institute investigations or rulemaking, setting or declining to set applications for hearing, on reconsideration, or on requests for stay;

(3) Other procedural or interlocutory orders;

(4) Actions taken under delegated authority; and

(5) Issuance of a certificate where no determination of public convenience and necessity is required.

(c) Notwithstanding paragraph (a)(1) of this section, DOT may provide that an energy statement shall not be prepared

in a proceeding which may result in a major regulatory action, if it finds that:

(1) The inclusion of an energy statement is not consistent with the exercise of DOT's authority under the Act or other law;

(2) The inclusion of an energy statement is not practicable because of time constraints, lack of information, or other unusual circumstances; or

(3) The action is taken under laws designed to protect the public health or safety.

§ 313.5 Energy information.

(a) It shall be the responsibility of applicants and other parties or participants to a proceeding which may involve a major regulatory action to submit sufficient information about the energy consumption and energy efficiency consequences of their proposals or positions in the proceeding to enable the administrative law judge or the DOT decisionmaker, as the case may be, to determine whether the proceeding will in fact involve a major regulatory action for purposes of this part, and if so, to consider the relevant energy factors in the decision and prepare the energy statement.

(b) In proceedings involving evidentiary hearings, the energy information shall be submitted at such hearings pursuant to DOT's usual procedural regulations and practices, under control of the administrative law judge or other hearing officer.

(c) In proceedings not involving evidentiary hearings, the energy information shall be submitted at such time as other materials in justification of an application are submitted. Where an application itself is intended as justification for DOT action, the energy information shall be submitted with the application. In rulemakings not involving hearings, the energy information shall normally be submitted along with comments on the notice of proposed rulemaking, or as directed in any such notice or any advance notice.

§ 313.6 Energy statements.

(a) Each major regulatory action shall include, to the extent practicable, consideration of the probable impact of the action taken or to be taken upon energy efficiency and conservation. The administrative law judge or the DOT decisionmaker, as the case may be, shall normally make findings and conclusions about:

(1) The net change in energy consumption;

(2) The net change in energy efficiency; and

(3) The balance struck between energy factors and other public interest and public convenience and necessity factors in the decision.

(b) Energy findings and conclusions contained in any initial or recommended decision are a part of that decision and thus subject to discretionary review by DOT.

(c) In the case of orders to show cause initiated by DOT, energy findings and conclusions may be omitted if adequate information is not available. In such instances, the energy statement shall be integrated into the final decision.

§ 313.7 Integration with environmental procedures.

(a) In proceedings in which an environmental impact statement or a detailed environmental negative declaration is prepared by a responsible official pursuant to DOT's Procedural Regulations implementing the National Environmental Policy Act of 1969 (NEPA), the energy information called for by this Part may be included in that statement or declaration in order to yield a single, comprehensive document. In such instances, the procedures of DOT's NEPA regulations shall govern the submission of the energy information. However, it shall remain the responsibility of the administrative law judge or the DOT decisionmaker, as the case may be, to make the findings and conclusions required by § 313.6(a) of this part.

(b) A determination that a major regulatory action within the meaning of EPCA and this Part may be involved in a proceeding is independent from any determination that the proceeding is a "major Federal action significantly affecting the quality of the human environment" within the meaning of NEPA, and vice versa.

PART 314—EMPLOYEE PROTECTION PROGRAM

Subpart A—General

Sec.
314.1 Applicability.
314.2 Definitions.
314.3 Conformity with Subpart A of Part 302.
314.4 Information requirements.
314.5 Major contractions.
314.6 Qualifying dislocation.

Subpart B—Determination of Qualifying Dislocation

314.10 Beginning of proceeding.
314.11 Applications.
314.12 Answers.
314.13 Disposition of applications.
314.14 Show-cause order.
314.15 Oral proceedings.
314.16 Final determination.

Subpart C—Major Contractions

314.20 Regular monthly computation.
314.21 Advance determinations.
314.22 Notice of major contraction.

Authority: Secs. 204, 407, Pub. L. 85-726, as amended, 72 Stat. 743, 766, 49 U.S.C. 1324, 1377; sec. 43, Pub. L. 95-504, 92 Stat. 1750 (49 U.S.C. 1552).

Note.—The reporting requirements contained in Part 314 have been approved by the Office of Management and Budget under control number 3024-0053.

Subpart A—General

§ 314.1 Applicability.

Section 43 of the Airline Deregulation Act of 1978, Pub. L. 95-504, establishes an employee protection program. After a determination by DOT that an air carrier has undergone a qualifying dislocation, the Secretary of Labor gives financial assistance to certain employees of the carrier. This part sets out procedures for the Department to determine whether a qualifying dislocation has occurred.

§ 314.2 Definitions.

As used in this part:

"Bankruptcy" means an adjudication of bankruptcy under Title 11 of the United States Code.

"Carrier" means an air carrier that on October 24, 1978, held a certificate issued under section 401 of the Federal Aviation Act of 1958.

§ 314.3 Conformity with Subpart A of Part 302.

Except where they are inconsistent with this part, the provisions of Subpart A of Part 302 of this chapter shall apply to proceedings under this part.

§ 314.4 Information requirements.

The Department may require any carrier to submit any information that it considers necessary to carry out its functions under this part.

§ 314.5 Major contractions.

A major contraction is a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period, and includes an advance determination of major contraction as set forth in § 314.21. The method by which DOT determines whether a carrier has undergone a major contraction is set forth in Subpart C.

§ 314.6 Qualifying dislocation.

A qualifying dislocation is a bankruptcy or major contraction of a carrier, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978.

Subpart B—Determination of Qualifying Dislocation

§ 314.10 Beginning of proceeding.

A proceeding to determine whether a bankruptcy or major contraction is a qualifying dislocation begins either with an application filed with the Department or an investigation on DOT's own initiative. Proceedings that begin with an application are governed by §§ 314.11 through 314.16. DOT-initiated proceedings are governed by §§ 314.14 through 314.16.

§ 314.11 Applications.

(a) *Who may file.* An application may be filed by an employee who has been deprived of employment or adversely affected with respect to compensation, or by a representative of one or more such employees.

(b) *Title and contents.* Applications shall be titled "Application for Determination of Qualifying Dislocation," and shall contain, with respect to at least one employee:

(1) Name and address of the employee;

(2) Number of years employed by carrier as of October 24, 1978;

(3) Name and address of the applicant, if different from paragraph (b)(1);

(4) Name of carrier-employer;

(5) Position held by employee immediately before being deprived of employment or adversely affected with respect to compensation;

(6) Date on which employee was deprived of employment or adversely affected with respect to compensation; and

(7) An explanation of the applicant's basis for claiming that a qualifying dislocation has occurred, including all supporting evidence available to the applicant.

(c) *Service.* The Department will serve a copy of each application on the affected carrier, the collective bargaining representatives of that carrier's employees, the Secretary of Labor, and any State agencies that are acting as agents of the Secretary of Labor to administer the Employee Protection Program.

(Approved by the Office of Management and Budget under control number 3024-0053)

§ 314.12 Answers.

Any person may file an answer to an application within 15 days after the application is served.

§ 314.13 Disposition of applications.

(a) After the due date for answers, the Department will dismiss the application or begin an investigation to determine whether a qualifying dislocation has occurred.

(b) The Department will dismiss an application if it does not name an employee who, on October 24, 1978, had been employed by a carrier for at least 4 years.

(c) The Department will dismiss an application if the carrier has neither become bankrupt nor undergone a major contraction.

(d) The Department will dismiss an application even though the carrier has become bankrupt or undergone a major contraction, if it finds that the bankruptcy or major contraction clearly did not have as its major cause the change in regulatory structure provided by the Airline Deregulation Act.

(e) A DOT order dismissing an application will announce the reasons for the dismissal.

§ 314.14 Show-cause order.

When the Department makes a preliminary determination of whether the major cause of the bankruptcy or major contraction was the change in regulatory structure provided by the Airline Deregulation Act of 1978, it will issue an order announcing a tentative decision that a qualifying dislocation has, or has not, occurred. The order will direct all interested persons to show cause why the tentative decision should not be made final, and will allow 30 days for objections to be filed. The Department will publish a summary of the order in the **Federal Register** and serve a copy of the order on each of the following:

(a) The applicant and the applicant's representative, if any;

(b) The affected carrier;

(c) The collective bargaining representatives of the carrier's employees; and

(d) The Secretary of Labor;

(e) State agencies that are acting as agents of the Secretary of Labor to administer the Employee Protection Program.

§ 314.15 Oral proceedings.

The Department will provide for an oral evidentiary hearing, with notice published in the **Federal Register** and served on the persons listed in § 314.14, if there are material issues of decisional fact that cannot otherwise be adequately resolved. The DOT decisionmaker may in his or her discretion hear oral argument before making a final determination.

§ 314.16 Final determination.

The Department will publish in the **Federal Register** a summary of an order announcing its final determination and, within 3 business days after the determination, serve a copy of the order on the persons listed in § 314.14.

Subpart C—Major Contractions

§ 314.20 Regular monthly computation.

(a) The Department will monitor the number of full-time employees of each carrier, including employees deprived of employment because of a strike, as reported monthly by carriers in accordance with Part 241 of this chapter.

(b) The DOT does not require monthly reporting of the number of positions that are vacant as a result of terminations for cause and, except as set forth in paragraph (c)(3) of this section, will not account for those positions in computing major contractions. In the cases set forth in paragraphs (c)(1) and (c)(2) of this section, the DOT presumes that the number of employment positions vacant as a result of terminations for cause is small enough that accounting for them would not change the result.

(c) Each month, with respect to each carrier:

(1) If the carrier's current reported full-time employment level is 92 percent or less of any of the carrier's preceding 12 monthly levels, DOT will find that the carrier has undergone a major contraction.

(2) If the current reported level is 93 percent or more of each of the carrier's preceding 12 monthly levels, the Department will not find that the carrier has undergone a major contraction.

(3) If neither of the conditions described in paragraphs (c)(1) and (c)(2) of this section is present, the Department will ascertain by special report from the carrier, and add to the reported employment levels, the number of positions that were vacant in each of the relevant months as a result of terminations for cause. If the resulting figure for the current month is 92.5 percent or less of the resulting figure for any of the preceding 12 months, the Department will find that the carrier has undergone a major contraction. Otherwise, the Department will not make such a finding.

§ 314.21 Advance determinations.

(a) If circumstances indicate that a major contraction will occur, the Department may make an advance determination of a major contraction without waiting for the regular monthly computation set forth in § 314.20. The Department will consider whether to make an advance determination either on its own initiative or upon receipt of an application from an employee who has been deprived of employment or

adversely affected with respect to compensation, or a representative of one or more such employees.

(b) An application under this section shall be titled "Application for Advance Determination of Major Contraction." It shall contain the information set forth in § 314.11 (b)(1) through (b)(6) and an explanation of the applicant's basis for claiming that a major contraction will occur, including all supporting evidence available to the applicant. A person may consolidate an application under this section with an application under § 314.11 for determination of a qualifying dislocation.

(c) The Department will terminate an advance determination of major contraction whenever it finds that the predicted major contraction has not occurred or will not occur.

§ 314.22 Notice of major contraction.

Upon finding a major contraction under §314.20, or making or terminating an advance determination under § 314.21, the Department will publish the finding in the **Federal Register** and send written notice of it to the persons listed in § 314.14.

PART 316—COLLECTION OF CLAIMS OWED THE UNITED STATES

Sec.

316.1 Purpose.
316.2 Applicability.
316.3 Notice of claim.
316.4 Interest, penalty charges, and collection fees.
316.5 Collection by offset.
316.6 Settlement of claims.
316.7 Referral for litigation.
316.8 Disclosure to consumer reporting agency.
316.9 DOT claims agent.

Authority: Secs. 204, 401, 402, 407, 416, Pub. L. 85–726, as amended, 72 Stat. 740, 754, 757, 758, 771; 49 U.S.C. 1324, 1371, 1372, 1377, 1386. Secs. 3 and 5, Pub. L. 89–308, as amended, 89 Stat. 308, 96 Stat. 1754–1758, 31 U.S.C. 3701–3719.

Note: The information collection requirements contained in this part have been approved by the Office of Management and Budget under number 3024–0070.

§ 316.1 Purpose.

This part implements the Federal Claims Collection Act, as amended by the Debt Collection Act and interpreted by the General Accounting Office and Department of Justice. It provides procedures under which the Department will collect claims owed to the United States arising from activities under its jurisdiction. The part further sets forth the procedures for the Department to determine and collect interest and other charges on those claims under the Debt Collection Act and for referral of unpaid claims for litigation.

§ 316.2 Applicability.

The part applies to all claims due the United States under the Federal Claims Collection Act as amended by the Debt Collection Act, arising from activities under the jurisdiction of the DOT under the responsibilities transferred to it by section 1601(b)(1) of the Federal Aviation Act of 1958, is amended, including amounts due the United States from fees, overpayments, fines, civil penalties, damages, interest, and other sources.

§ 316.3 Notice of claim.

(a) DOT will send a written notice to any person who owes payment to the United States under this part, stating the basis for the claim, the possible interest and penalty charges under this part for non-payment, additional consequences of non-payment, and the date full payment is due. That payment will normally be due 30 days from the date notice under this part is mailed. The notice of claim will be sent return receipt requested.

(b) If the claim is disputed, the debtor shall respond to the notice in writing and state whether and when full payment is to be made, and the reasons for non-payment. If full payment is not made by the date asked in the notice, the debtor shall also state the reasons for the inability to make full payment and how and when payments are to be made.

(c) If no response to the notice is received by the date asked in the notice, the Department may take further action under this part or under 4 CFR Parts 101–105, and the Federal Claims Collection Act, as amended. These actions may include reports to credit bureaus, contracts with collection agencies, revocation of licensing or offset of Federal salary or other administrative offset, as authorized in 31 U.S.C. 3701–3719.

§ 316.4 Interest, penalty fees, and collection charges.

(a) DOT will assess interest on unpaid claims. The interest rate used by the Department is set by the Secretary of the Treasury. DOT will further charge penalty fees of not more than 6 percent per year of the unpaid claim for failure to pay a part of a debt more than 90 days past due. DOT will also impose collection charges to cover the costs of processing and handling overdue claims, based on the costs incurred.

(b) Interest on debts will be charged and will run from the date the notice of claim is mailed if the amount of the debt is not paid within 30 days from that date. The Department may extend the 30-day period when in the public interest. Interest will be calculated only on the principal of the debt. The rate of interest charged is the rate in effect on the date from which interest begins to run. The rate will remain fixed for the duration of the indebtedness.

(c) The Department may waive interest, collection charges or penalty fees if it finds that:

(1) The debtor is unable to pay any significant sum within a reasonable period of time;

(2) Collection of interest or charges jeopardizes collection of the principal of the claim; or

(3) It is otherwise in the best interests of the United States, including, under such circumstances, where an offset or installment payment agreement is in effect.

§ 316.5 Collection by offset.

(a) Whenever feasible, DOT will collect claims under this part by means of administrative offset against obligations of the United States to the debtor. Collection by Federal salary will be under the procedures in 4 CFR Part 102.

(b) The Department will notify the debtor in writing of its intent to use offset procedures to collect the debt unless the debtor agrees to repayment. The Department will ask other Federal agencies to help in the offset whenever possible. The notice to the debtor shall also include the type and amount of the claim and an explanation of the debtor's rights for records and review under 31 U.S.C. 3716(a).

§ 316.6 Settlement of claims.

(a) DOT may not waive the principal of any debt owed the United States.

(b) DOT may settle claims not exceeding $20,000 by compromise at less than the principal of the claim if:

(1) The debtor shows an inability to pay the full amount within a reasonable time;

(2) The Government would be unable to enforce collection in full through litigation or administrative means within a reasonable time;

(3) The cost of collecting the full amount is not justified by the amount of the claim; or

(4) With respect to enforcement debts, DOT's enforcement policy would be served by settlement of the claim for less than the full amount.

§ 316.7 Referral for litigation.

Claims that cannot be settled under § 316.6 or for which collection action

cannot be ended or suspended under 4 CFR Parts 103 and 104 will be referred to the General Accounting Office for litigation.

§ 316.8 Disclosure to consumer reporting agency.

DOT may disclose delinquent debts to consumer reporting agencies under the Federal Claims Collection Act, as amended. If, after a report has been made under this section, the status or amount of the claim substantially changes, DOT will notify the reporting agency in writing within 15 days of the change. Any request for verification information will be given to the reporting agency by the Department within 30 days of receipt of the request. Before disclosure to a reporting agency, the Department will obtain in writing a statement by the agency that it will comply with the Fair Credit Reporting Act and other applicable Federal statutes.

§ 316.9 DOT claims agent.

(a) The Assistant Secretary for Administration is the Claims Collection Agent for all claims under this part. The Assistant Secretary for Administration will take action as delegated under Part 385 of this chapter to carry out this part and the requirements of 4 CFR Parts 101–105.

(b) All action for the collection of claims under this part will be the responsibility of the Assistant Secretary for Administration. All DOT offices shall send documents supporting claims under this part to the Assistant Secretary for Administration for action. Delegated waivers or compromise under this part shall be with the concurrence of the General Counsel. Any action taken by the Assistant Secretary for Administration under this Part involving air carriers receiving subsidy will be in consultation with the appropriate Office director(s).

PART 320—PROCEDURES FOR AWARDING JAPANESE CHARTER AUTHORIZATIONS

Subpart A—General Provisions

Sec.
320.1 Purpose.
320.2 Applicability.
320.3 Definitions and terminology.
320.4 Charter authorizations.
320.5 Related carriers counted as one.

Subpart B—Specific Procedures

320.10 Transfer of charter authorizations.
320.11 Unused charter authorizations.
320.12 Reallocation of authorizations.
320.13 Notice of intent to use charter authorizations.
320.14 Report of charter authorizations used.

Authority: Secs. 204, 401, 407, 1102, Pub. L. 85–726, as amended, 72 Stat. 743, 754, 766, 797 (49 U.S.C. 1324, 1371, 1377, 1502).

Subpart A—General Provisions

§ 320.1 Purpose.

This part sets out procedures governing the transfer or reallocation of authority to perform the charter flights authorized by the September 7, 1982, Memorandum of Understanding concerning bilateral aviation relations between the United States and Japan. That memorandum provides that each country's direct air carriers may perform 300 one-way charter flights between the two countries each year in accordance with country-of-origin rules. Charter authorizations were awarded in 1982 by grandfather allotments and initial lottery.

§ 320.2 Applicability.

This part applies to United States direct air carriers with respect to charter flights between the U.S. and Japan beginning on October 1, 1982.

§ 320.3 Definitions and terminology.

(a) "Authorization" means the authority to perform one of the 300 annual one-way charter flights between the United States and Japan authorized in the Memorandum of Understanding described in § 320.1.

(b) A charter authorization is "used" when the flight is performed.

(c) An "allocation year" runs from October 1 through September 30 and is used as a reference for reporting requirements and reallocation of forfeited authorizations.

§ 320.4 Charter authorizations.

(a) No charter flights between the United States and Japan shall be operated except in accordance with a charter authorization awarded or acquired under this part.

(b) A charter flight award obtained through the grandfather allotment or the initial lottery shall entitle the holder to authorizations for each of the three years beginning October 1, 1982, with the following exceptions:

(1) A charter flight authorization for an allocation year that has not been used by September 30 of that year will result in a penalty of a forfeiture of two charter flight authorizations for the remaining allocation years, as provided in § 320.15;

(2) A charter flight authorization obtained by request under § 320.15 shall be for one allocation year.

§ 320.5 Related carriers counted as one.

Two or more air carriers that are related will be considered as a single air carrier for the purposes of this part. One carrier is related to another carrier if it controls, is controlled by, or is under common control with the other carrier.

Subpart B—Specific Procedures

§ 320.10 Transfer of charter authorizations.

(a) Any air carrier holding a charter authorization awarded or acquired by it under this part may transfer it, for any consideration, to any other air carrier that meets the criteria set forth in § 320.12(a) as of the time of transfer.

(b) There shall be no penalty for the transfer of a charter authorization obtained in an initial lottery.

(c) An air carrier may transfer up to 10 percent of its grandfather authorizations for a given year without penalty. The base number shall not include any grandfather authorizations declined under § 320.11(c). A carrier's charter flight authorization for the remaining allocation years shall be reduced on a one-to-one basis for each flight beyond the 10 percent figure that it transfers.

(d) A transfer of a charter authorization shall not become effective until the transferring air carrier files a notice in duplicate with the DOT decisionmaker. The notice shall be labeled "Notice of Transfer of Japan Charter Authorization," and identify the transferred charter authorization by the flight authorization number(s) assigned under § 320.3(d). It shall be filed within 15 days after the date of the transaction, but in any event before departure of the authorized flight, whether the flight is performed by the transferee or by any subsequent transferee. The notice shall indicate the number of charter authorizations transferred and the date of the transaction, and shall be signed by both the transferor and the transferee.

(e) An air carrier that transfers a charter authorization to another carrier shall retain for at least 1 year after the conclusion of the allotment year for which it was awarded a record of the consideration received for the transfer.

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§ 320.11 Unused charter authorizations.

(a) Any carrier that fails to use its charter flight authorization by September 30 of an allocation year shall be penalized in the remaining allocation years at the rate of two charter flight authorizations for each unused authorization. If this penalty results in a negative number, the carrier's allotment will be zero. The flight authorizations

forfeited under this section shall be reallocated as provided in § 320.16.

(b) Notwithstanding paragraph (a) of this section, any carrier may without penalty return any of its allocated authorizations to the DOT.

For any subsequent year covered by this rule, until October 31, of that year.

(c) Returns shall be made by written notice to the Office of the Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Washington, D.C. 20590, and shall be considered made as of the date the notice is received by that Office. The notice shall identify the air carrier and the number of authorizations returned, and shall be labeled "Return of Japan Charter Authorizations."

(d) The DOT decisionmaker reserves the right, on his or her own motion, to assess a forfeiture of authorizations on a carrier, and/or bar the carrier's requests for authorizations for a specified period, if he or she finds that the carrier has unreasonably requested and received authorizations without using them, or has transferred authorizations to another carrier that had no intention of operating under them.

§ 320.12 Reallocation of authorizations.

(a) Any authorizations forfeited under § 320.14 or §320.15, or returned to DOT under § 320.15(b), shall be reallocated according to the procedures of this section.

(b) The Department will maintain an up-to-date list of authorizations, outstanding authorizations returned, and the number currently available on request. This information is available to the public.

(c) An eligible carrier, as defined in § 320.12(a), may request authorizations from the Office of the Assistant Secretary for Policy and International Affairs. Each authorization shall be for one allocation year. The request shall be in writing, and labeled, "Request for Japan Charter Authorizations."

(d) Except as provided in this paragraph and paragraph (e) of this section, a request for authorizations may be made at any time. A particular carrier may make more than one request during any calendar month, but the total number of authorizations requested during any month shall be not more than 30. Requests made before October 1 for the allocation year beginning on that date, or a year after that date, shall be included in that carrier's "October request(s)," and when the number of flights requested is equal to 30, that carrier may not make another such request until November 1.

(e) A carrier that has been assessed a penalty under § 320.14 or § 320.15 with respect to a given allocation year (beginning on or after October 1, 1983) shall not make a request for authorizations for a subsequent year until April 1 of the subsequent year.

(f) DOT will accept requests for authorizations continuously during business hours, beginning at 9:00 a.m. on the first business day of the Department following the last day of the turn-back period specified in § 320.15 (b)(1) and (b)(2). Requests will be filled from the pool of returned authorizations in the order they are received by the Office of the Assistant Secretary for Policy and International Affairs. If the requests at any time exceed the number of returned authorizations, a stand-by list will be established. However, all requests received on the above opening date will be considered as having been received simultaneously, and if they exceed the number of returned authorizations, their order will be established by random selection under procedures agreed to by the requestors or set forth in an order of the DOT decisionmaker.

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§ 320.13 Notice of intent to use charter authorization.

An air carrier shall file in duplicate with the Office of the Assistant Secretary for Policy and International Affairs a notice of its intention to use a charter authorization at least 7 days before departure of the flight. The notice shall be labeled "Notice of Intent To Use Japan Charter Authorization," and include the flight authorization number(s).

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§ 320.14 Report of charter authorizations used.

Within 15 days after any month in which an air carrier uses a charter authorization, it shall file in duplicate a report with the Office of the Assistant Secretary for Policy and International Affairs. The report shall be labeled "Report of Japan Charter Authorizations Used." It shall include identification numbers of the authorizations, flight itineraries, flight dates, aircraft type, and the number of passengers or cargo tons transported. Passenger and cargo figures may be aggregated for the month.

(Approved by the Office of Management and Budget under control number 3024–0055)

PART 323—TERMINATIONS, SUSPENSIONS, AND REDUCTIONS OF SERVICE

Sec.

323.1 Applicability.
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323.3 Who shall file notices.
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323.14 Temporary suspension authority for involuntary interruption of service.
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323.16 Listings in schedule publications.
323.17 Delays in discontinuing service.
323.18 Carriers' obligations when terminating, suspending, or reducing air service.

Authority: Secs. 204, 401, 407, 411, and 419, Pub. L. 85–726, as amended, 72 Stat. 743, 754, 766, 769, 92 Stat. 1732; 49 U.S.C. 1324, 1371, 1377, 1381, 1389.

§ 323.1 Applicability.

This part applies to certificated air carriers who terminate or suspend service to a point, or in a market, and to all air carriers who terminate, suspend, or reduce service below the level of essential air transportation under section 419 of the Act.

§ 323.2 Definitions.

As used in this part:

"Act" means the Federal Aviation Act of 1958, as amended.

"Certificated carrier" means a direct air carrier holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board (CAB) or DOT under section 401 of the Act, authorizing scheduled route service.

"Eligible point" means:

(1) Any point in the United States to which any certificated carrier was authorized under its section 401 certificate to provide service on October 24, 1978, whether or not such service was actually provided;

(2) Any point in the United States that was deleted from a section 401 certificate between July 1, 1968 and October 24, 1978, inclusive, and that the CAB designated as an eligible point under the Act; or

(3) Any other point in Alaska or Hawaii that the CAB or DOT designated as an eligible point under the Act.

"Essential air transportation" means the level of air transportation determined by the CAB or DOT for any eligible point under section 419(a)(2) or 419(b)(4) of the Act.

"FAA-designated hub" means any airport serving a small, medium, or large air traffic hub listed in the Department of Transportation publication, "Airport

Activity Statistics of Certificated Route Carriers."

"United States" includes the several States, the District of Columbia, and the several territories and possessions of the United States. "State" includes any of the individual entities comprising the United States.

§ 323.3 Who shall file notices.

(a) *Terminations, suspensions, or reductions by certificated carriers.* The notice described in § 323.4(a) shall be filed by any certificated carrier that intends to:

(1) Terminate or suspend all passenger air transportation that it is providing to any eligible point in the United States when that termination or suspension will leave no certificated carriers serving that point. Service shall be considered to be terminated or suspended whenever it is operated less than 5 days per week, with three or more intermediate stops, or in one direction only between the two points;

(2) Reduce passenger air transportation so that any eligible point receives less than the level of essential air transportation determined by CAB or DOT;

(3) Terminate or suspend all passenger air transportation that it is providing to any eligible point in the United States for which CAB or DOT has not issued an essential air service determination under either § 325.5 or § 325.7 of this chapter, when that termination or suspension will leave only one certificated carrier serving that point. Service shall be considered to be terminated or suspended whenever it is operated less than 5 days per week, with three or more intermediate stops, or in one direction only between the two points;

(4) Reduce passenger air transportation to any eligible point in Alaska for which CAB or DOT has not determined the level of essential air transportation so that the service between that point and every other point served by a certificated carrier is either:

(i) Less than two round trip flights per week, or

(ii) Less than the average weekly number of round trip flights actually provided during calendar year 1976, or

(iii) Less than the number of flights specified under an agreement between CAB or DOT and the State of Alaska; or

(5) Terminate, suspend, or reduce passenger air transportation at an eligible point for which CAB or DOT has issued, or is required to issue, an essential air transportation determination under section 419(a)(2) or section 419(b)(4) of the Act so that the total available seats of all the carriers linking that point to FAA-designated hubs will be reduced by 33 percent or more during a 90-day period. Service to a hub shall be considered to be terminated or suspended whenever it is operated less than 5 days per week, with three or more intermediate stops, or in one direction only between two points.

(b) [Reserved]

(c) *Uncertificated carriers.* The notice described in §323.4(a) shall be filed by any uncertificated carrier that intends to terminate, suspend, or reduce:

(1) Air transportation so that any eligible point receives less than the level of essential air transportation determined by the CAB or DOT;

(2) Passenger air transportation to any eligible point for which CAB or DOT has not determined the level of essential air transportation, other than a point in Alaska, so that there is no FAA-designated hub from which the point receives at least two round trip flights per day, 5 days per week; or

(3) Passenger air transportation to any eligible point in Alaska, for which CAB or DOT has not determined the level of essential air transportation, so that the service between that point and every other point served by a certificated carrier is either:

(i) Less than two round trip flights per week, or

(ii) Less than the average number of weekly round trip flights actually provided during calendar year 1976, or

(iii) Less than the number of flights specified under an agreement between CAB or DOT and the State of Alaska.

(d) For the purpose of this section, in ascertaining the level of air transportation being provided to a point or between two points, air transportation that has been the subject of a notice filed under this section shall be considered not in operation for the duration of the notice period.

(e) If a certificated carrier was, before October 24, 1978, granted authority to suspend air transportation, and that authority ends on a stated date, the carrier shall comply with the requirements of this part before continuing the suspension beyond that date.

(f) If a certificated carrier was, before October 24, 1978, granted authority to terminate or suspend air transportation, but has not suspended service, the carrier shall comply with the requirements of this part before terminating or suspending service.

§ 323.4 Contents of notices.

(a) The notice required under § 323.3 (a) and (c) shall contain:

(1) Identification of the carrier, including address and telephone number.

(2) Statement whether the carrier is a certificated carrier or an uncertificated carrier.

(3) Names of all other air carriers serving the point at the time of filing.

(4) Description of the service to be terminated, suspended, or reduced, including:

(i) Arrival and departure times at the affected points of the flights to be discontinued;

(ii) Aircraft type used,

(iii) Routes of the flights to be discontinued, and a statement of which routes, if any, will be left without nonstop or single-plane service from a certificated carrier by the intended change, and

(iv) Date of intended termination, suspension, or reduction of service.

(5) A statement whether CAB or DOT has determined the level of essential air transportation for the point, and

(i) If such a determination has been made, a statement whether the intended termination, suspension, or reduction will reduce air transportation to the point below the essential level; or

(ii) If such a determination has not been made, and the point is an eligible point, a statement whether the intended termination, suspension, or reduction reasonably appears to deprive the point of essential air transportation, and an explanation.

(6) If the point is an eligible point, the calendar date when objections are due under § 323.10.

(7) Proof of service upon all persons specified in § 323.7(a). The proof of service shall include the names of all carriers served and the names and addresses of all other persons served.

(b) [Reserved]

(c) DOT may require any carrier filing notice to supply additional information.

(Approved by the Office of Management and Budget under control number 3024–0030)

§ 323.5 Time for filing notices.

(a) Except as specified by paragraph (b) of this section, a notice required by § 323.3 shall be filed at least:

(1) 90 days before the intended termination, suspension, or reduction, if it is filed by a certificated carrier or by an uncertificated carrier receiving compensation under section 419 of the Act for service to the point;

(2) 30 days before the intended termination, suspension, or reduction, if it is filed by an uncertificated carrier not receiving compensation under section 419 of the Act for service to the point.

(b) The notice required by §323.3(a)(3) shall be filed at least 30 days, and the notice required by § 323.3(a)(1) shall be filed at least 60 days, before the intended termination or suspension.

§ 323.6 General requirements for notices.

(a) Each notice filed under this part shall, unless otherwise specified, conform to the procedural rules of general applicability in Subpart A of Part 302 of this chapter.

(b) Each notice filed under this part shall be titled to indicate the point(s) involved, and to indicate whether it is a 30-, 60-, or 90-day notice and whether it involves a termination, a suspension, or a reduction of air transportation.

§ 323.7 Service of notices.

(a) A copy of each notice required by § 323.3 shall be served upon:

(1) The chief executive of the principal city or other unit of local government at the affected point. The principal city is the one named, or previously named, in the section 401 certificate by virtue of which the point qualifies as an eligible point. For points in Alaska or Hawaii that are designated as eligible points without having been listed on a section 401 certificate, the principal city is the most populous municipality at the point.

(2) [Reserved]

(3) The State agency with jurisdiction over transportation by air in the State containing any community required to be served under paragraph (a)(1) of this section. If there is no such State agency, the notice shall be sent to the governor of that State.

(4) The manager of, or other individual with direct supervision over and responsibility for, the airport at any community required to be served under paragraph (a)(1) of this section.

(5) The Postmaster General (marked for the attention of the Assistant General Counsel, Transportation), if the carrier filing the notice is authorized to transport United States mail to or from any community required to be served under paragraph (a)(1) of this section.

(6) Each air carrier providing scheduled service to a non-hub or FAA-designated small hub that is directly affected by the notice.

(7) The DOT Regional Office for the region in which the affected point is located.

(8) Any other person designated by DOT.

(b) [Reserved]

(c) Local communities, State agencies, and airport managers shall be served personally or by registered or certificated mail. All other persons may be served by ordinary mail.

§ 323.8 Exemptions.

Carriers are exempted from the following provisions of the Act or this part:

(a) Section 401(j) of the Act to the extent that that provision would otherwise require them to file a notice when terminating, suspending, or reducing service in foreign air transportation;

(b) Paragraphs (a)(1), (a)(3), and (a)(5) of § 323.3 to the extent that those provisions require them to file a notice when terminating or suspending the domestic leg of an international flight (fill-up service); and

(c) Sections 401(j) and 419 of the Act and all the provisions of this part to the extent that those provisions would otherwise require them to file a notice when terminating or suspending service at an eligible point at which they have been replaced under Part 326 of this chapter. This exemption shall apply only if the carrier terminates or suspends service on, or within 90 days after, the date that the new carrier begins service.

§ 323.9 Objections to notices.

(a) Any person may file an objection requesting DOT to prohibit any termination, suspension, or reduction of air transportation to an eligible point that is the subject of a notice filed under this part.

(b) Objections shall contain:

(1) Identification of the objector, including address and telephone number.

(2) A statement of DOT action requested.

(3) The schedules, routes, carriers, and aircraft types for all air transportation to the affected point other than that proposed to be terminated, suspended, or reduced.

(4) A suggested reasonable level of essential air transportation to the affected point.

(5) [Reserved]

(6) A justification of the suggested level of essential air transportation.

(7) Proof of service on the carrier filing the notice objected to, on all airport managers and State and local governments on whom the notice was filed, and any other person designated by DOT. The proof of service shall include the names of all carriers served and the names and addresses of all other persons served.

(c) Objectors are strongly urged to include in their objections facts to support the suggested level of essential air transportation (e.g., traffic and enplanement data, other market studies, facts descriptive of the point's isolation or dependence on air transportation).

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§ 323.10 Time for filing objections.

(a) Objections shall be filed not later than:

(1) 12 days from the date of filing of a 30-day notice;

(2) 15 days from the date of filing of a 60-day notice; or

(3) 20 days from the date of filing of a 90-day notice.

(b) The Department may accept late-filed objections, upon motion, for good cause shown.

(c) Whenever a notice has been filed earlier than required under § 323.5, the Department may extend the time for filing an objection to that notice.

§ 323.11 Answers to objections.

(a) Any person may file an answer to an objection filed under this part.

(b) An answer must be filed not later than 7 business days after the filing of the objection to which it responds. Late-filed answers may be allowed, and extensions of filing time granted, by the Department for the same reasons as for objections.

(c) An answer may contain the same type of facts and discussion permitted for objections under this part, and must contain:

(1) Proof of service on the objector, on all persons on whom the objection was required to be served, and on any other person designated by the Department. The proof of service shall include the names and addresses of all persons served.

(2) Identification of the answering party, including address and telephone number.

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§ 323.12 General requirements for objections and answers.

(a) Each objection and answer filed under this part shall, unless otherwise specified, conform to the procedural rules of general applicability in Subpart A of Part 302 of this chapter.

(b) Each objection shall be titled "Objection to Termination, Suspension, or Reduction of Air Service," and shall identify the notice to which it responds. Each answer shall be titled "Answer to Objection to Termination, Suspension, or Reduction of Air Service," and shall identify the objection to which it responds.

§ 323.13 DOT actions.

(a) If an objection has been filed under this part, DOT will dispose of the objection by order.

(b) If no objection has been filed within the time allowed by § 323.10(a), DOT may:

(1) By order prohibit a termination, suspension, or reduction that reasonably appears to deprive any eligible point of essential air transportation;

(2) Issue a notice or a final order that it will take no action on a notice filed under § 323.3; or

(3) Take no action.

§ 323.14 Temporary suspension authority for involuntary interruption of service.

(a) Any air carrier may temporarily suspend service without filing a notice under § 323.3 for any interruption of service that the carrier cannot reasonably be expected to foresee or control, such as rules, standards, or other action, or inaction, of the Administrator of the Federal Aviation Administration or of a foreign government, emergency measures, strikes, weather conditions, construction work on airports, or disasters. However, the provisions of this paragraph shall apply to interruptions due to airport inadequacies only if the carrier is unable to serve the point through any airport convenient to the point with the type of equipment last regularly used to serve the point.

(b) In the case of an interruption of service caused by a strike, the carrier shall give immediate notice of the interruption to DOT. Suspension authority under this section due to a strike shall expire 90 days after employees return to work.

(c) If service to a point is interrupted for more than 3 consecutive days for reasons beyond the carrier's control other than a strike, the holder shall give notice to DOT within 3 days following the date of first interruption, setting forth the date of first interruption and a full statement of the reasons for the interruption.

(d) The notice required by paragraph (b) or (c) of this section shall be marked for the attention of the Director, Office of Essential Air Service.

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§ 323.15 Report to be filed after strikes.

(a) Within 15 days following resumption of service after a strike, an air carrier shall file a report with DOT containing a list of all flights that were canceled, the date they were canceled, and the date service was resumed.

(b) The report shall be marked for the attention of the Director, Office of Essential Air Service.

(Approved by the Office of Management and Budget under control number 3024–0030)

§ 323.16 Listings in schedule publications.

Each air carrier filing a notice under paragraphs (a)(2), (a)(4), (a)(5), or (c) of § 323.3 shall continue to list the affected flights in all generally-distributed schedule publications in which the flight was listed before the notice. The listings shall continue until DOT permits the flights to be discontinued. The listings may include a notice stating that the flights are "to be discontinued as of (date) subject to government approval."

§ 323.17 Delays in discontinuing service.

If transportation that is the subject of a notice under this part is not discontinued within 90 days of the intended date stated in the notice, a new notice must be filed before the service may be discontinued. However, if DOT requires the carrier to provide service beyond the stated date, the carrier need not file a new notice if it discontinues the service within 90 days after DOT permits it to do so.

§ 323.18 Carriers' obligations when terminating, suspending, or reducing air service.

Any air carrier that terminates, suspends, or reduces air service, whether or not subject to the notice requirements of this part, shall make reasonable efforts to contact all passengers holding reservations on the affected flights to inform them of the flights' cancellation.

PART 324—PROCEDURES FOR COMPENSATING AIR CARRIERS FOR LOSSES

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324.10 Liability of carrier for excess payments.
324.11 Conformity with Subpart A of Part 302.

Authority: Secs. 204, 407, and 419 of Pub. L. 85–726, as amended, 72 Stat. 743, 766, 92 Stat. 1732, 49 U.S.C. 1324, 1377, 1389.

§ 324.1 Applicability.

This part applies to proceedings, under sections 419(a)(7)(B) and 419(a)(7)(C) of the Act, for compensating an air carrier for losses incurred in complying with a DOT or CAB order to continue service.

§ 324.2 Application for compensation for losses.

(a) To receive compensation for its losses incurred in complying with a DOT or CAB order to continue to provide essential air service, an air carrier shall file in the Documentary Services Division an application titled "Application for Compensation for Losses."

(b) The application may be filed after the first 30-day compulsory service period, but shall not be filed later than 90 days after the carrier is allowed to suspend, terminate, or reduce service. It shall include:

(1) The dates of the compulsory service period covered by the application.

(2) The amount of compensation that is sought.

(3) Detailed information as to traffic, revenues, and expenses during the compulsory service period, and any investments that were required to perform the operations during that period.

(4) Full support for all information.

(5) The assurances required by § 379.4 of this chapter.

(6) A certification by a responsible officer of the air carrier that the information submitted is true and accurate to the best of his or her knowledge.

(7) A statement acknowledging that any compensation paid in advance under § 324.9 or periodically under § 324.3 is subject to adjustment by DOT.

(c) All information supplied by an air carrier in its application is subject to verification by DOT and DOT authorized auditors.

(d) DOT may dismiss an application if it does not contain the information required by this section and may close the case if a complete application is not filed within 90 days after the prior application was dismissed.

(Approved by the Office of Management and Budget under control number 3024–0034)

§ 324.3 Procedures after receipt of application.

(a) When the application is received *before* the air carrier has been permitted to institute its intended suspension, termination, or reduction in service, the procedure is as follows:

(1) DOT will issue an order setting an interim rate of compensation to be paid periodically to the carrier. This amount will be subject to DOT's final adjustment after the carrier is allowed to suspend, terminate, or reduce service as it requested.

(2) If the carrier seeks an increase in the amount of the periodic payments, it

must submit another application. DOT may revise the amount of the periodic payments on its own initiative in order to avoid paying excessive interim compensation.

(3) Within 90 days after the carrier is allowed to institute its suspension, termination, or reduction in service, it shall submit another application under § 324.2 so that DOT can make a final adjustment of that carrier's claim.

(b) When the application is received *after* the air carrier has been permitted to suspend, terminate, or reduce service, the procedure is as follows:

(1) If DOT finds the application adequate to support the compensation requested, it will issue a show-cause order proposing an amount of payment to the carrier.

(2) If DOT finds the application insufficient to support the compensation requested, it may seek more information. If DOT does not agree to the compensation requested, it will send the applicant a statement describing the areas in which it disagrees or finds the information presented insufficient, and will refer the matter to an informal conference under § 324.4.

(3) The applicant may file an answer to the statement of disagreement not later than 15 days after it is received.

(c) Any payment will be considered to be made on the first day that losses compensated by that payment were incurred.

§ 324.4 Informal conference procedures.

(a) When there is disagreement on the amount of compensation that should be paid, DOT will arrange a conference with representatives of the air carrier applicant for the purpose of understanding and resolving the issues and facts in proceedings under this part.

(b) The conference shall be limited to the discussion of, and possible agreement on, the fair and reasonable amount of compensation for losses that should be paid to the air carrier required to continue service under DOT order.

(c) When DOT takes public action on the matter, a written summary of the conference discussion will be filed in the Documentary Services Division and sent to the carrier involved.

§ 324.5 Participants in the conference.

Other than DOT's staff and representatives of the carrier whose losses are in issue, no person may attend unless DOT's staff considers their presence necessary to resolve one or more of the issues under discussion. In such case, their participation shall be limited to such specific issues. No person, however, is required to attend.

§ 324.6 Statement of confidentiality.

All persons in an informal conference, during the period of the conference and until DOT takes public action on the matter, shall strictly protect information obtained in the conference from disclosure except to DOT's and the applicant's concerned employees and counsel. All persons participating in the conference other than DOT staff shall sign a statement in which they agree to so protect the information.

§ 324.7 Post-conference procedure.

(a) If any pertinent issues are not resolved at the conference, the air carrier may request a hearing or the opportunity to submit a written or oral statement to the Department. DOT will grant the request if such action is needed for further clarification and understanding of the issues. Granting of the request will not, however, limit the rights that the carrier might otherwise have under the Act and the rules of practice.

(b) If the carrier has not previously received compensation under this part for providing essential service to the point involved in its application, DOT shall issue a show-cause order proposing an amount of payment to the carrier.

(c) If the carrier has been receiving advance payments under § 324.9 or periodic payments under § 324.3(a)(2), DOT shall issue a show-cause order proposing the final adjustment of the carrier's claim, setting forth DOT's tentative findings of the amount it owes the carrier or the amount the carrier owes DOT.

§ 324.8 Effect of conference agreements.

(a) No agreement or understanding on a rate of compensation that is reached in the conference shall be binding on DOT or any participant.

(b) The carrier will have the right to take other procedural steps, including requesting a hearing, as if no conference had been held.

§ 324.9 Procedure for making advance payments.

(a) At any time after a carrier is ordered to continue service, DOT may, upon its own initiative or on petition by the carrier, order advance payments for a carrier's future losses subject to adjustment upon determination of the final rate.

(b) A carrier's petition shall be titled "Petition for Advance Compensation for Losses."

(c) The carrier shall include with its petition, or will be required by DOT to submit, estimates of the information required under § 324.2(b) and a full explanation of why it needs compensation in advance. The explanation shall include evidence of the carrier's financial condition and cash-flow prospects which taken together establish the need for an immediate cash infusion in order for service to be continued.

(d) Carriers receiving payments under this section may, absent a filing under § 324.2 of this part, continue to receive the amount of compensation ordered by the CAB or DOT under paragraph (a) of this section. DOT may revise the amount of these payments in order to avoid paying the carrier excessive compensation.

(Approved by the Office of Management and Budget under control number 3024–0034)

§ 324.10 Liability of carrier for excess payments.

(a) If the payments to a carrier exceed the amount authorized by CAB or DOT in its final adjustment, the affected air carrier shall be liable for repayment of the amount of such excess.

(b) If the carrier fails to make the repayment under paragraph (a) of this section, any future payment due that carrier under this chapter shall be applied to such indebtedness or DOT shall use any other means authorized by law to ensure repayment.

(c) Compliance with the provisions of this section shall not deprive a carrier of any right it would otherwise have to contest DOT's final adjustment.

§ 324.11 Conformity with Subpart A of Part 302.

The provisions of Subpart A of Part 302 of this chapter, except for § 302.8 of this chapter and any other provisions that are inconsistent with this part, shall apply to proceedings under this part.

PART 325—ESSENTIAL AIR SERVICE PROCEDURES

Sec.

325.1 Purpose.
325.2 Applicability.
325.3 Definitions.
325.4 State and local participation.
325.5 Determinations and designations.
325.6 Periodic reviews.
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325.12 Service of documents.
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Authority: Secs. 204, 419, Pub. L. 85–726, as amended, 72 Stat. 743, 92 Stat. 1732; 49 U.S.C. 1324, 1389.

§ 325.1 Purpose.

The purpose of this part is to establish procedures to be followed in designating eligible points and in determining essential air transportation levels for eligible points, and in the appeals and periodic reviews of these determinations, under section 419 of the Act.

§ 325.2 Applicability.

This part applies to essential air service determinations for communities designated as eligible under section 419(a) of the Act and to eligible point designations and essential air service determinations for communities that qualify under section 419(b) of the Act. It applies to the gathering of data by the Department, and to the participation of State, local, and other officials and other interested persons in the designation and determination processes.

Note.—Criteria for designating eligible points under section 419(b) are contained in Part 270 of this chapter. Guidelines for deciding essential air service levels are contained in Part 398 of this chapter.

§ 325.3 Definitions.

As used in this part, "eligible point" means:

(a) Any point in the United States, the District of Columbia, and the several territories and possessions of the United States to which any direct air carrier was authorized, under a certificate issued by CAB under section 401 of the Act, to provide air service on October 24, 1978, whether or not such service was actually provided;

(b) Any point in the United States and the several territories and possessions of the United States that was deleted from a section 401 certificate between July 1, 1968 and October 24, 1978, inclusive, and that has been designated as an eligible point under the Act; or

(c) Any other point in Alaska or Hawaii that has been designated as an eligible point under the Act.

§ 325.4 State and local participation.

(a) DOT, on a periodic basis, will send a questionnaire to each eligible point that is served by not more than one certificated air carrier, or is designated as an eligible point under section 419(b) of the Act, or for which DOT is reviewing its essential air service needs. The questionnaire will be addressed to:

(1) The chief executive of the principal city, or other unit of local government at the affected point, that is named or has been previously named in a qualifying section 401 certificate. For points in Alaska or Hawaii that are named DOT as eligible points without having been listed on a section 401 certificate, the principal city is the most populous municipality at the point;

(2) The individual or entity with direct supervision over and responsibility for the airport at the eligible point; and

(3) The State agency with jurisdiction over air transportation in the State containing the eligible point. If there is no such State agency, the questionnaire will be sent to the governor of that State.

(b) Within 60 days after receipt of the questionnaire, five copies of the response shall be filed in the Documentary Services Division, unless the Department specifies another date. If no response is received within the period, essential air service for that eligible point may temporarily be set at the minimum level prescribed in section 419(f) of the Act.

(c) Any other interested person may, during the 60-day response period, submit information relevant to the essential air service level of that eligible point by filing in the Documentary Services Division, five copies of a document titled with the name of the point involved.

(d) As necessary, the DOT may request additional information to supplement the questionnaire.

(Approved by the Office of Management and Budget under control number 3024–0037)

§ 325.5 Determinations and designations.

(a) Not later than October 24, 1979, after reviewing all information submitted, CAB issued determinations of the essential level of air service for eligible points that, on October 24, 1978, were served by not more than one direct air carrier holding a certificate under section 401 of the Act for scheduled service to the point.

(b) DOT will issue a determination of the essential level of air service for a point within 6 months after each of the following events:

(1) A notice is received that service to an eligible point will be reduced to only one carrier that holds a section 401 certificate;

(2) A point is designated as an eligible point under section 419(b) of the Act and either paragraph (c) of this section, paragraph (d) of this section, or § 325.7(e); or

(3) A review was conducted of essential air service of that point under § 325.6.

(c) Not later than January 1, 1982, CAB designated the communities described in § 270.2(a) and (b) as eligible points or as ineligible.

(d) After January 1, 1982, DOT may designate communities in Alaska or Hawaii as eligible points if they apply for such designation.

§ 325.6 Periodic reviews.

(a) The Department will start a periodic review of essential air service within 1 year of the date of the previous determination of essential air service for eligible points receiving subsidized service, within 2 years of the date of the previous determination for eligible points in Alaska, and within 3 years of the date of the previous determination for eligible points without subsidized air service.

(b) The review shall be conducted in accordance with the procedures in §§ 325.4, 325.5 and 325.7.

(c) The Department may review the designation under section 419(b) of a community as an eligible point to determine whether that point continues to meet the criteria in part 270 of this chapter.

§ 325.7 Appeal of the determination or designation.

(a) Any person objecting to an essential air service determination may within 60 days after its issuance file in the Documentary Services Division a document titled "Appeal of Essential Service Determination." The appeal shall:

(1) Contain specific objections to the essential air service determination, including support for all such objections;

(2) State how the essential air service determination departs from the guidelines in Part 398 of this chapter or what extraordinary factors justify deviating from those guidelines; and

(3) Describe the level of air service that the appellant believes is essential for that community.

(b) Any person objecting to the designation of a point as ineligible under section 419(b) of the Act may within 60 days after the designation is issued file in the Documentary Services Division a document titled "Appeal of Eligible Point Designation."

(c) The Department shall appoint an appeal panel consisting of three senior employees, to be drawn from the Office of Essential Air Service, the Office of the General Counsel, and the Asistant Secretary for Governmental Affairs. No office shall be represented on an appeal panel by more then one employee. The three-member panel will process the appeal and make a recommendation to the Assistant Secretary for Policy and International Affairs.

(d) An informal conference may be held, or more information may be requested, before the three-member panel makes its recommendation.

(e) The DOT decisionmaker shall decide the appeal after receiving a recommendation from the three-member panel.

(f) If no appeal is filed within the 60-day period, a determination or designation will become final, unless stayed by the Department.

(g) Pending the outcome of an "Appeal of Essential Service Determination," the essential air service for the eligible point involved shall be the level set by the determination issued under § 325.5.

(Approved by the Office of Management and Budget under control number 3024-0037)

§ 325.8 Informal conferences.

(a) If an appeal raises an issue that cannot be satisfactorily resolved on the basis of written submissions, the Department may order that an informal conference be held.

(b) The informal conference will be conducted by a senior DOT employee designated by the Assistant Secretary for Policy and International Affairs.

(c) Any interested person may attend the informal conference.

§ 325.9 Oral arguments.

If some appeals raise issues common to several communities so that expression of diverse viewpoints on these issues would help the Department dispose of them, the parties may be invited to participate in an oral argument at its offices in Washington, D.C.

§ 325.10 Modification of the designated level of essential air service.

(a) Any person may file with DOT a petition titled "Petition for Modification of Essential Air Service Level," asking to modify the essential air service level at a point.

(b) The petition shall identify the point affected, and specifically state the reasons why the petitioner believes the designated essential level is inadequate. It should contain any facts and arguments that support its requests, and describe the level of essential air service that should be substituted.

(c) Any person may, within 30 days after the filing of a petition for modification, file an answer to that petition titled "Answer to Petition for Modification."

(d) After review, the Department may seek more information and the procedures of §§ 325.5 and 325.7 will be followed.

(Approved by the Office of Management and Budget under control number 3024-0037)

§ 325.11 Form of documents.

All documents filed under this part shall be filed in the Documentary Services Division, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590, and on their front page state:

(a) The title of the document;

(b) The name of the affected community;

(c) The name, address, and telephone number of a person who can be contacted for further information concerning the subject of the document; and

(d) In the case of a responsive document, the docket number of the document to which it responds.

§ 325.12 Service of documents.

Any person, except one filing individually as a consumer, who files a document under this part, including responses to the questionnaire, shall serve that document upon those listed in § 325.4(a) of this part and upon the following:

(a) The governor of the State in which the eligible point is located;

(b) Each air carrier providing scheduled service to the affected eligible point;

(c) In the case of a responsive document, the one who filed the document to which it responds; and

(d) The U.S. Postal Service, Assistant General Counsel, Transportation Division, Law Department, Washington, D.C. 20260.

§ 325.13 Environmental evaluations and energy information not required.

Notwithstanding any provision of Part 312 or Part 313 of this chapter, a person filing a petition or appeal under this part is not required to file an environmental evaluation or energy information with the application.

§ 325.14 Conformity with Subpart A of Part 302.

Except where they are inconsistent, the provisions of Subpart A of Part 302 of this chapter shall apply to proceedings under this part.

PART 326—PROCEDURES FOR BUMPING SUBSIDIZED AIR CARRIERS FROM ELIGIBLE POINTS

Sec.

326.1 Purpose.
326.2 Definitions.
326.3 Application to bump an incumbent carrier.
326.4 Answers and replies to bumping applications.
326.5 Service of applications and answers.
326.6 Department action.
326.7 Standards for decision.
326.8 Transition from the incumbent carrier to the applicant.
326.9 Conformity with Subpart A of Part 302.

Authority: Secs. 204, 401, 407, 419, and 1001, Pub. L. 85-726, as amended, 72 Stat. 743, 754, 763, 766, 788, 92 Stat. 1732; 49 U.S.C. 1324, 1371, 1376, 1377, 1389, 1481.

§ 326.1 Purpose.

The purpose of this part is to establish procedures for an air carrier applying under section 419(a)(11) or (b)(8) of the Act to provide essential air transportation to an eligible point, where it would be displacing another carrier that is providing essential air transportation under a subsidy rate previously established under section 419 of the Act. This part applies even if the applicant is not applying for a subsidy for itself but is merely seeking to terminate the incumbent carrier's subsidy.

§ 326.2 Definitions.

As used in this part:

(a) "Applicant" means an air carrier that files a bumping application.

(b) "Bumping application" means an application by an air carrier proposing to provide essential air transportation at an eligible point and requesting the Department to terminate the subsidy paid to an incumbent carrier for providing essential air transportation at that eligible point. The application may also request a subsidy to provide essential air transportation to that point.

(c) "Eligible point" means:

(1) Any community in the United States, the District of Columbia, and the several territories and possessions of the United States to which any direct air carrier was authorized, under a certificate of public convenience and necessity issued by the Board under section 401 of the Act, to provide passenger air transportation on October 24, 1978, whether or not such service was actually provided;

(2) Any point in the United States and its several territories and possessions that was deleted from a section 401 certificate between July 1, 1968 and October 24, 1978, that has been designated as eligible under the criteria in Part 270 of this chapter; or

(3) Any other point in Alaska or Hawaii that has been designated as an eligible point under Part 270 of this chapter.

(d) "Essential air transportation" means the level of air service that is guaranteed an eligible point under section 419 of the Act and the guidelines in Part 398 of this chapter.

(e) "Hub" means a point annually enplaning more than 0.05 percent of the total annual enplanements in the United States or listed as such by the Department of Transportation

publication "Airport Activity Statistics of Certificated Route Carriers."

(f) "Incumbent carrier" means the air carrier serving an eligible point with subsidy at the time a bumping application is filed.

(g) "Subsidy under section 406" means payments made under section 406 of the Federal Aviation Act, Pub. L. 97-276, or any other appropriation act or continuing resolution that authorizes payments to air carriers based upon rate orders issued under section 406 of the Act.

§ 326.3 Application to bump an incumbent carrier.

(a) To replace an incumbent carrier at an eligible point, an air carrier shall file a bumping application in the Documentary Services Division.

(b) If the incumbent carrier is receiving its subsidy under section 406 of the Act, the application may be filed at any time after January 1, 1983.

(c) If the incumbent carrier is receiving its subsidy under section 419 of the Act, the application may not be filed until the incumbent carrier has been serving the eligible point for at least 2 years.

(d) The application shall include:

(1) The name and address of the carrier filing the application;

(2) The name of the incumbent carrier;

(3) The name of the eligible point involved;

(4) Fitness information, as follows:

(i) If the applicant has already been found by the Department or CAB to be fit, willing, and able to provide scheduled service, it shall cite the most recent order establishing the finding.

(ii) If the applicant has not yet been found by the Department or CAB to be fit, willing, and able to provide a scheduled service, it shall include the fitness information required by Part 204 of this chapter to support such a finding. In making this showing, the applicant may incorporate by reference material submitted in a prior proceeding before the CAB or DOT.

(5) The information required by § 204.6(c) (2) and (3) of this chapter, even if the applicant is not seeking subsidy for itself;

(6) The service pattern proposed, including the hub and hubs to be served from the eligible point, the number of flights to be provided, whether the flights will be nonstop, and the type of aircraft to be employed. If the applicant is basing its application on improved service at the eligible point, it shall state how its proposed service represents an improvement over the incumbent carrier's service;

(7) If the applicant is seeking a subsidy, the assurances required by §§ 379.4 and 382.21 of this chapter;

(8) The earliest date or season that the applicant is prepared to begin service; and

(9) The availability of slots at the hub airport it proposes to serve.

(e) All information supplied by an air carrier in its application is subject to verification by DOT and DOT authorized auditors.

(Approved by the Office of Management and Budget under control number 3024-0063)

§ 326.4 Answers and replies to bumping applications.

(a) Any person may file an answer to an application filed under this part.

(b) To be considered by DOT, an answer should be filed not later than 30 days after the filing of the application to which it responds.

(c) An answer by the incumbent carrier may refute the fitness and reliability of the applicant to provide the essential air transportation, refute its ability to provide the service at the amount of compensation requested, deny that the applicant's proposed service represents a substantial improvement, and/or offer a counterproposal to that offered by the applicant. If the incumbent desires a hearing, it should request it at this time.

(d) An answer by representatives of the eligible point should state whether they consider the service pattern proposed by the applicant to be a substantial improvement in service and the reasons for their views.

(e) Any other carrier may submit a bumping application during the answer period. Such an application should include the information required by § 326.3(d).

(f) Any person may submit a reply to a counterproposal filed under paragraph (c) of this section or to another application filed under paragraph (e) of this section within 15 days of the end of the answer period.

(Approved by the Office of Management and Budget under control number 3024-0063)

§ 326.5 Service of applications and answers.

(a) The application shall be served upon:

(1) The chief executive of the principal city or other unit of local government of the eligible point. The principal city is the one named, or previously named, in the section 401 certificate by virtue of which the point qualifies as an eligible point. For points in Alaska or Hawaii that are named as eligible points without having been listed on a section 401 certificate, the principal city is the most populous municipality at the point.

(2) The agency of the State, territory, or possession with jurisdiction over transportation by air in the area containing the eligible point. If there is no such agency, the application shall be served on the Governor of the State, territory, or possession.

(3) The manager of, or other individual with direct supervision over and responsibility for, the airport at the eligible point.

(4) Each air carrier providing scheduled passenger service at the eligible point.

(5) The DOT Regional Office for the region in which the eligible point is located.

(6) Any other person designated by the Department.

(b) Answers to applications and replies to answers shall be served on the persons listed in paragraph (a) of this section, on the applicant, and on the person that filed the answer to which the reply is directed.

§ 326.6 Department action.

(a) After an application is filed under this part and the answer and reply period has elapsed, a rate conference will be held with the applicant or applicants and with the incumbent carrier, if it has filed a counter proposal, to determine the reasonableness of the compensation requested. One or more of the following actions may also be taken:

(1) A conference may be held with the eligible point concerned to determine its view on the relative merits of the present and proposed service pattern.

(2) Additional information may be requested.

(3) The application may be consolidated with the incumbent carrier's rate renegotiation proceeding if the incumbent's rate term is close to expiration.

(4) Additional service and subsidy proposals may be solicited.

(b) After the Department completes its reviews and conferences, and obtains any necessary information, it will take one or more of the following actions:

(1) Issue an order to show cause proposing to grant the application;

(2) Deny the application if the applicant fails to meet the criteria set forth in § 326.7;

(3) Set the application for an oral evidentiary hearing under the following circumstances:

(i) There are material facts in dispute;

(ii) These facts are of decisional significance; and

(iii) The Department finds that the disputed facts can best be resolved in an oral evidentiary hearing.

(4) Set the application for oral arguments before the Department.

§ 326.7 Standards for decision.

(a) DOT will not grant an application under this part unless;

(1) It finds, or previously found, that the applicant is fit, willing, and able to provide scheduled air transportation;

(2) It finds that the applicant will provide the essential air transportation at the eligible point in a reliable manner; and

(3) If the incumbent carrier is receiving its subsidy under section 419 of the Act, the applicant shows by a preponderance of the evidence that its proposal will result in either of the following:

(i) A substantial improvement in the air service being provided the eligible point with no increase in subsidy; or

(ii) A substantial decrease in the amount of subsidy that will be required to provide essential air transportation at the eligible point.

(b) To be considered substantial, the proposed decrease in the amount of subsidy should be at least $50,000 per year or 10 percent of the incumbent carrier's subsidy rate, whichever is greater.

(c) In deciding whether a proposed service pattern represents a substantial improvement in air service, DOT will consider the following factors:

(1) Which hub or hubs the applicant proposes to serve from the eligible point;

(2) The number of stops that the applicant will make between the designated hub and the eligible point;

(3) The size and type of aircraft, including whether they are pressurized, that the applicant intends to use at the eligible point;

(4) An increase in the number of flights or seats that the applicant proposes to provide at the eligible point, if:

(i) The increased frequencies are combined with a change in aircraft so as not to result in the Department paying a subsidy for more than essential air transportation; or

(ii) A petition has been filed under § 325.10 of this chapter to raise the eligible point's essential air transportation level.

(5) Service-related advantages held by the applicant such as computerized reservation systems or joint fares.

(d) In addition to the factors described above, the Department, in evaluating an application, will consider the following:

(1) The desirability of developing an integrated linear system of air transportation whenever such a system most adequately meets the air transportation needs of the eligible point involved;

(2) The experience of the applicant in providing scheduled air service in the vicinity of the eligible point involved;

(3) The relative efficiency of the aircraft that the competing carriers use or propose to use;

(4) The relative financial strength of the competing carriers;

(5) The time necessary for the applicant to begin providing the service it proposes;

(6) The performance of the incumbent carrier in serving the eligible point involved;

(7) The amount of time that the incumbent carrier was on the subsidy rate to question;

(8) The effect of granting the bumping application on other points in the incumbent carrier's system;

(9) The availability of slots for the applicant at the hub or hubs that it proposes to serve; and

(10) In Alaska, the experience of the applicant in providing scheduled air service, or significant patterns of nonscheduled air service under Part 298 of this chapter, in that State.

(e) In evaluating the standards described above, the Department will give great weight to the views of representatives of the eligible point involved.

§ 326.8 Transition from the incumbent carrier to the applicant.

(a) If an applicant is successful in its bid to replace an incumbent carrier and receive a subsidy for serving the eligible point, it shall notify DOT and the incumbent carrier of the date that it is prepared to begin service at the eligible point. It shall allow the incumbent 45 days to close down its operation at the eligible point, unless another date is agreed on.

(b) The incumbent carrier shall continue service at the eligible point until the successful applicant begins service there.

(c) The Department will continue to pay the subsidy to the incumbent carrier for at least 45 days after it grants the bumping application, unless the two carriers agree to a different date for the transfer of service. DOT will continue to pay the subsidy to the incumbent carrier thereafter until the successful applicant begins service at the eligible point.

§ 326.9 Conformity with Subpart A of Part 302.

Except where they are inconsistent, the provisions of Subpart A of Part 302 of this chapter shall apply to proceedings under this part.

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January 16, 1985

Part III

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1952

Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; 12 States; Request for Comments and Opportunity to Request Public Hearing

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

[Docket No. T-007]

Arizona State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity To Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request an informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Arizona State occupational safety and health plan, as administered by the Industrial Commission of Arizona, for a determination under Section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted; and (2) the proposed revision of the compliance staffing benchmarks applicable to the Arizona plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall,* 570 F.2d 1030 (D.C. Cir. 1978). If an affirmative determination under section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Arizona plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised compliance staffing benchmarks for Arizona should be approved and final State plan approval granted; and, that interested persons may request an informal public hearing on the question of final State plan approval.

DATE: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-007, Room S6212, 200 Constitution Avenue NW., Washington, D.C. 20210 (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et. seq.,* (the "Act") provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied.

An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall,* C.A. No. 74-406), pursuant to a U.S. Court of Appeals decision, that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Arizona Plan and of its Proposed Revised Benchmarks

Arizona Plan

On September 5, 1972, Arizona submitted an occupational safety and health plan in accordance with section 18(b) of the Act and 29 CFR Part 1902, Subpart C. Initial OSHA review of the plan raised several significant concerns which would have precluded approval of the plan. Among these issues were the lack of first instance sanctions for serious and non-serious violations and the lack of an informal review procedure if compliance action was not taken following an employee complaint. Because of these and other OSHA concerns, the State was notified that its plan would be subject to disapproval. Following this notice, on October 11, 1973, the State requested an opportunity to correct the deficiencies and requested that the Assistant Secretary postpone his decision on the disapproval of the plan. These requests were granted. On August 6, 1974, the State resubmitted its plan and addressed the Assistant Secretary's concerns. The State of Arizona amended its State plan sections on sanctions, enabling legislation, standards, response to employee complaints through inspection, advance notice, employee participation in the review process, and the designee's right to compel entry.

On August 23, 1974, a notice was published in the **Federal Register** (39 FR 30559) concerning the resubmission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments concerning the plan. No written comments were received concerning the revised plan and there were no requests for an informal hearing.

On November 5, 1974, the Assistant Secretary published a notice granting initial approval of the Arizona plan as a developmental plan under section 18(b) of the Act (39 FR 39037). The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration.

The plan covers all issues except private sector maritime employment, smelter operations and employees on Indian reservations. The Industrial Commission of Arizona is designated as having responsibility for administering the plan throughout the State. The day-to-day administration of the plan is directed by the Arizona Division of Occupational Safety and Health. The plan provides for the adoption by Arizona of standards which are identical to Federal occupational safety and health standards. The plan requires employers to furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the agency. Employees are required to comply with all standards and regulations applicable to their conduct. The plan contains provisions similar to Federal procedures governing emergency temporary standards; imminent danger proceedings; variances; safeguards to protect trade secrets; protection of employees against discrimination for exercising their rights under the plan; and employer and employee rights to participate in inspection and review proceedings. Appeals of citations and penalties are heard by the Arizona Occupational Safety and Health Review Board. Decisions of the Board may be appealed to the Arizona Court of Appeals.

The Assistant Secretary's initial approval of Arizona's developmental plan, a general description of the plan, a schedule of required developmental steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart CC; 39 FR 39037 (November 5, 1974)).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and submitted for OSHA approval during the period ending November 30, 1977. These "developmental steps" included legislative amendments; a management information system; a merit staffing system; a safety and health poster for private and public employees; regulations for inspections, citations and proposed penalties; review procedures; recordkeeping and reporting regulations; and interagency agreements between the designated agency and the Arizona Department of Health Services' laboratory.

These submissions were carefully reviewed by OSHA; and, after opportuntiy for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of Section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Arizona subpart of 29 CFR Part 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.354).

By 1975, OSHA had determined that the State occupational safety and health program of Arizona was developed sufficiently to justify suspension of concurrent Federal enforcement activity. OSHA therefore entered into an operational status agreement with the State of Arizona on October 13, 1975 (as amended on December 17, 1981, and published in the **Federal Register**, June 11, 1982, 47 FR 25323), whereby concurrent Federal enforcement authority is not initiated with regard to Federal occupational safety and health standards in the issues covered by the State plan.

On September 18, 1981, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Arizona had satisfactorily completed all developmental steps (46 FR 46320). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Arizona plan—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with Section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Arizona Benchmarks

In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) pursuant to a U.S. Court of Appeals decision, to calculate for each State plan state the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Arizona to allocate 24 safety and 33 health compliance personnel to conduct inspections under the plan.

In September 1984 the Arizona State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Arizona. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for individual State revision of the

benchmarks, Arizona reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents, of a revised compliance staffing benchmark of 9 safety and 6 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 9 hours on such inspections, and each State safety inspector is able to devote 1888 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Arizona.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 20 hours on such inspections, and each health compliance officer is able to devote 1888 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Arizona.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Arizona plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's findings that:

(1) The Arizona plan has been monitored in actual operation for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report of the Arizona Plan,* which has been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the *1980 Report to the Court* in *AFL-CIO* v. *Marshall,* Arizona proposed to revise its fully effective benchmarks to 9 safety and 6 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the court order in *AFL-CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Arizona has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* in which the State has committed itself to funding the State share of salaries for 12 safety and 6 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Arizona participates and has assured its continued participation in the unified management information system developed by OSHA.

Issues for Determination in the 18(c) Proceedings

Approval of Proposed Revised Benchmarks

As discussed in the "History of the Arizona Plan and of its Proposed Revised Benchmarks" section of this notice, Arizona has proposed revised compliance staffing benchmarks of 9 safety and 6 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to ensure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the *1980 Report to the Court.*

As part of the present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Arizona, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Arizona submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process in set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.

Final State Plan Approval Determination

The Arizona plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Arizona plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in section 18(c) of the Act, indicate that the regulatory indices and criteria are being

met, and the Assistant Secretary accordingly has made an initial determination that the Arizona plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Arizona. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4 (a) and (b). The Arizona plan provides for adoption of standards which are identical to Federal standards. For OSHA standards requiring State action during the evaluation period, Arizona's adoption process met with the six month time frame for all standards with the exception of the Employee Access to Medical Records standard. The State properly requested and was granted an extension on adoption of this standard and adopted the standard on August 23, 1984. The requested extension and late adoption did not negatively affect the program's effectiveness (Evaluation Report p. I).

Where a State adopts Federal standard, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal Standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1902.4(a), and 1902.4(b)(2). As already noted, the Arizona plan provides for adoption of standards identical to Federal standards. Arizona likewise adopts standards interpretations which are identical to Federal standards.

The State is required to take the necessary administrative judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from the Federal standard or developed by the State. See § 1902.37(b)(5). No such challenge to identical State standards has ever occurred in Arizona.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the variance has not been granted. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). Arizona had not requests for variances during the 18(e) evaluation period (Evaluation Report, p. II).

Where a temporary variance is granted, the State must ensure that the employer complies with the standard as soon as possible and provides appropriate interim employee protection. See §§ 1902.37(b)(7) and 1902.4(b)(2(iv). The Arizona Occupational Safety and Health Act requires that any employer or owner granted a temporary variance must have an effective program for coming into compliance with the standard as soon as possible. During the 18(e) evaluation period no temporary variance requests were received or granted (Evaluation Report, p. I).

Past years experience indicates that the State's adherence to procedures is proper when granting permanent and temporary variances.

(b) *Enforcement.* Section 18 (c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all workplaces at least as effective as that in section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to designated target industries while providing adequate protection to all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Data contained in the 18(e) evaluation indicate that 96.7% of State programmed safety inspections and 93.7% of programmed health inspections are conducted in high hazard industries (Evaluation Report, p. VII-I).

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3(e) and 1902.4(c)(2)(i) and (ix). The Arizona Occupational Safety and Health Act authorizes the Office of the Chief Counsel of the Industrial Commision of Arizona to petition for an order to permit entry into such establishment that has refused entry for the purpose of inspection or investigation. The evaluation report notes that Arizona has 22 denials of entry and obtained warrants for all but 6 of these. Entry into the remaining 6 establishments was obtained voluntarily and, therefore, warrants were not needed (Evaluation Report, p. X).

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2).

Arizona has adopted an Operations Manual, and thus follows inspection procedures, including documentation procedures, which are similar to Federal. The Evaluation Report notes adherence by Arizona to these procedures.

Comparison of Federal and State data showed a somewhat lower percentage of State serious safety violations (15.6%) and serious health violations (9.3%). These deviations can be attributed to the fact that Arizona inspects relatively smaller sized firms than OSHA, especially construction firms, and the average worksite is inspected at more frequent intervals (Evaluation Report, page VII-2-5). It should be noted that Arizona's violation classification system is the same as Federal OSHA's (Evaluation Report, page XII-2).

State plans must include a prohibition on advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Arizona has adopted procedures for advance notice similar to the Federal procedures. There were 14 instances of advance notice. In all 14 instances, advance notice was properly given in accord with procedures as required for the effective conduct of inspections (Evaluation Report, page XI).

State plans must provide for inspections in response to employee complaints, and must provide opportunity for employee participation in State inspections. See § 1902.4(c)(2) (i) through (iii). Arizona follows the Federal OSHA complaint policy. Although more complaints are responded to by inspection and fewer are responded to by letter than Federal OSHA (safety complaints: 72.4% health complaints: 64.0%), the percent of complaint inspections not-in-compliance conducted in Arizona (safety=63.2%; health=50%) is somewhat higher than OSHA's. Considering this fact, OSHA

does not consider this an unreasonable allocation of resources and considers this performance to be acceptable (Evaluation Report, p. VIII). Arizona conducted a high percentage of initial inspections (33.6%) with employees or employee representatives accompanying the inspector on the walkaround.

State plans must also provide protection for employees against discrimination similar to that found in section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). The Arizona Act, approved as part of the initial approval and certification process, contains such protection. Nine complaints of discrimination were investigated during the evaluation period. Five were found meritorious and settled administratively. Four were investigated and properly dismissed (Evaluation Report, p. XVI).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), 1902.4(c)(2) (x) and (xi). The State's lapse time from inspection to issuance of citation was timely and averaged 10.4 days for safety and 8.9 days for health (Evaluation Report, p. XVII).

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c) (x) and (xi). Arizona's procedures for penalty calculation and adjustment are considered satisfactory. The 18(e) Evaluation Report indicates that Arizona proposes and assesses appropriate penalties. The average penalty for serious safety violations was $269.20, the average serious health penalty was $490.90, both of which were higher than Federal penalty levels.

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). Historically, Arizona officials have insisted that the State verify abatement of all serious hazards which are not abated at the time of the inspection. Accordingly, 8% of Arizona's inspections were follow-up. This policy had minimal impact on the State's ability to conduct programmed inspections (Evaluation Report, p. XIII-1).

Abatement periods are generally shorter than those set Federally (4.5. days average for safety; 9.7 days average for health). Arizona attempts to document abatement within 30 days for all serious, willful and repeat violations, and the evaluation report indicates effective performance in this area (Evaluation Report, pp. XIII-1 and 2).

Wherever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902-37(b)(14) and 1902.3 (d) and (g). The Evaluation Report for Arizona noted no adverse adjudications.

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to adminstration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). The Arizona plan provides for 12 safety and six health compliance officers as set forth in the Arizona FY 1984 grant. This staffing level meets the "fully effective" revised benchmarks of nine safety and six health compliance officers proposed for Arizona for health and safety staffing. The proportion or resources for enforcement is 57.2% and the average cost per inspection is $333 (Evaluation Report, p. XVIII-I).

Arizona provides its safety and health personnel adequate formal training. The average time spent, per person, in formal training was as follows: Safety Inspectors, 52.8 hours; Industrial Hygienists, 225.3 hours; Safety Consultants, 43.6; and Health Consultants, 98.0 hours. OSHA considers the amount of hours spent in formal training to be appropriate.

(d) *Other Requirements.* States which have approved plans must maintain a safety and health program for State and local government employees which must be effective as the State's plan for the private sector. See section 18(c)(6) of the Act and § 1902.3(j). The Arizona plan provides a program in the public sector which is identical to that in the private sector. While the injury and illness all case rate is somewhat higher (10.7 per 100 full-time workers) than in the private sector, the lost workday case rate is lower (3.1) (Evaluation Report, p. IV).

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics (BLS) Annual Occupational Safety and Health Survey, and other available Federal and State measurements of program impact on worker safety and health, indicate that trends in worker safety and health injury and illness incidence rates under the State program compare favorably with those under the Federal program. See § 1902.37(b)(15).

The 1981 and 1982 BLS rates (all case rates and lost workday case rates) for Arizona were only slightly higher than rates in States where Federal OSHA provides enforcement coverage and the 1982 all case rate in the private sector of 8.8 declined from the 1981 rate of 10.0 cases per 100 full time workers (−13.6%). Historically, this is the lowest rate ever recorded in Arizona since the first BLS survey was conducted in 1972 (Evaluation Report, p. XIX-2).

State plans must assure that employers in the State sumit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurance that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.3(1). Arizona employer recordkeeping requirements are identical to those of Federal OSHA, and the State participates in the BLS Annual Survey of Occupational Illness and Injuries. As noted above, the State participates and has assured its continuing participation with OSHA in the Unified Management Information System as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. Training programs for both the State's staff and the public sector have been established and are ongoing. In the public sector, 152 employer and supervisors and 1,534 employees participated in training programs totalling 112 training sessions. Four hundred and sixty-five private sector employers and supervisors and 1,383 employees participated in training programs totalling 139 training sessions (Evaluation Report, p. IV). In Arizona, private sector on-site consultation is provided under the State plan rather than by OSHA under section 7(c)(1) of the Federal Act. The State made a total of 2,070 consultation visits during the evaluation period. Of that total, 1,612 were visits made through the Continuous Consultation Program for Construction. The program consisted of monthly consultation visists to prime contractors and subcontractors, upon request, and specific worksites until completion of the project and included such things as identifying hazards,

recommending corrective action for their elimination, and assuring abatement of all hazards both serious and non-serious. In all, there 2,000 initial visits to high hazard establishments (96.6% of all visits) and 2,018 initial visits were firms with 1-99 employees (97.5% of all visits). An average of 6.6 days was needed for correction of serious safety hazards and 23.8 days for health hazards. (Evaluation Report, p. IV).

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Arizona plan, as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Arizona has excluded from its plan: safety and health coverage in private sector maritime activities (enforcement of occupational safety and health standards comparable to 29 CFR Parts 1915, shipyard employment; 1917, marine terminal; 1918, longshoring; and 1919, gear certification; as well as provisions of general industry standards (29 CFR Part 1910) appropriate to hazards found in these employments), in copper smelters, and does not enforce its standards within Indian reservations. Thus, Federal coverage of these issues would be unaffected by an affirmative 18(e) determination. In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43. The notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is a least as effective as the Federal, or that if the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart CC of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Arizona plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Arizona 18(e) proceeding and the proposed revised compliance staffing benchmarks for Arizona have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S-6212, Docket No. T-007, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator—Region IX, U.S. Department of Labor, OSHA, 11349 Federal Building, 450 Golden Gate Avenue, P.O. Box 36017, San Francisco, California 94102

Arizona Division of Occupational Safety and Health, Industrial Commission of Arizona, 1624 West Adams, Room 201, Phoenix, Arizona 85005.

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan, including notices of plan submission, initial Federal approval, certification of completion of development steps, codification of the State's operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing; the State's FY 1984 Federal grant; and, the 18(e) Evaluation Report. The record on Arizona's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T-018) containing background information relevant to the benchmark issue in general and the current benchmark revision process. The content of this record is available for inspection and copying at the following location: Docket Office, Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983-1984 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity to Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Arizona of the requirements of Section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b)(1-15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Arizona and the public in relation to the proposed revised benchmarks for Arizona also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Arizona, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Arizona State plan, are available to Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received on or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T-007, Rm S-6212, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, D.C. 20210. Written submissions must clearly indentify the issues which are addressed and the positions taken with respect to each issue. The State of Arizona will be

afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985, and should be submitted in quadruplicate to the Docket Officer, Docket T-007, at at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Arizona as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T-007, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Arizona and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register**. All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et. seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Arizona under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1111 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-014]

Indiana State Plan; Proposed Revision to State Staffing Benchmarks; Comment Period

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed revision to State compliance staffing benchmarks; request for written comments.

SUMMARY: This document gives notice of the proposed revision of the compliance staffing benchmarks applicable to the Indiana State plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir., 1978). OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised benchmarks for Indiana should be approved.

DATE: Written comments must be received by February 20, 1985.

ADDRESS: Written comments should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-014, Room S6212, 200 Constitution Avenue NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue NW., Washington, D.C. 20210, (202) 534-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970 (the "Act", 29 U.S.C. 651 et seq.) provides that States which desire to assume responsibility for developing and enforcing occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Section 18(c) of the Act sets forth the statutory criteria for plan approval, and among these criteria is the requirement that the State's plan provide satisfactory assurances that the State agency or agencies responsible for implementing the plan have "* * * the qualified personnel necessary for the enforcement of * * * standards," 29 U.S.C. 667(c)(4).

A 1978 decision of the U.S. Court of Appeals and the resultant implementing order issued by the U.S. District Court for the District of Colbumia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) interpreted this provision of the Act to require States operating approved State plans to have sufficient compliance personnel necessary to assure a "fully effective" enforcement effort. The Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) was directed to establish "fully effective" compliance staffing levels, or benchmarks, for each State plan.

In 1980, OSHA submitted a *Report to the Court* containing these benchmarks and requiring Indiana to allocate 81 safety and 140 health compliance personnel to conduct inspections under the plan. Attainment of the 1980 benchmark levels or subsequent revision thereto is a prerequisite for State plan final approval considertion under section 18(e) of the Act.

Both the 1978 Court Order and the 1980 *Report to the Court* explicitly contemplate subsequent revision to the benchmarks in light of more current data, including State-specific information, and other relevant considerations. In August 1983 OSHA together with State plan representatives initiated a comprehensive review and revision of the 1980 benchmarks. The State of Indiana participated in this benchmark revision process and has proposed to the Assistant Secretary revised compliance staffing levels for a "fully effective" program responsive to the occupational safety and health needs and circumstances in the State. (A complete discussion of both the 1980 benchmarks and the present revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.)

The Indiana plan which was granted initial State plan approval on March 6, 1974 (39 FR 8612) is administered by the State Division of Labor. The plan was certified as having satisfactorily completed all its developmental commitments on October 6, 1981 (46 FR

49116). Concurrent Federal enforcement jurisdiction was suspended on October 22, 1981 with the signing of an Operational Status Agreement (June 11, 1982, 47 FR 25324).

Proposed Revision of Benchmarks

In September 1984 the Indiana Division of Labor (the designated agency or "designee" in the State) in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Indiana. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for revision to individual State benchmarks, Indiana reassessed the staffing necesary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal, contained in comprehensive documents, of revised compliance staffing benchmarks of 47 safety and 23 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 20 hours on such inspections, and each State safety inspector is able to devote 1,642 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Indiana.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 30 hours on such inspections, and each health compliance officer is able to devote 1,642 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Indiana.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Effect of Benchmark Revision

Consistent with the 1978 Court Order in *AFL-CIO* v. *Marshall* and the procedures for implementation of benchmarks described by OSHA in the 1980 *Report to the Court*, if the proposed revised benchmarks are approved by OSHA, the State must allocate a sufficient number of safety and health enforcement staff to meet the revised benchmarks in order to be eligible for final approval under section 18(e) of the Act. Approval of the revised benchmarks would be accompanied by an amendment to 29 CFR Part 1952, Subpart Z, which generally describes the Indiana plan, setting forth the State's revised safety and health benchmark levels.

Documents of Record

A comprehensive document containing the proposed revision to Indiana's benchmarks, including the State's narrative submission and supporting statistical data has been made part of the record in this proceeding and is available for public inspection and copying at the following locations:

Docket Office Rm S-6212, Docket No. T-014, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitutional Avenue NW., Washington, D.C. 20210

Regional Administrator—Region V, U.S. Department of Labor—OSHA, 230 S. Dearborn Street—Room 3244, Chicago, Illinois 60604

Indiana Division of Labor, 1013 State Office Building, 100 North Senate Avenue, Indianapolis, Indiana 46204

In additional, to facilitate informed public comment, an informational record has been established in a separate docket, Docket T-018, containing background information relevant to the benchmark issue in general and the current benchmark revision process. This informational docket includes, among other material, the 1978 Court of Appeals decision in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 *Report to the Court*, and a report describing the 1983-84 benchmark revision process. It is also available for public inspection and copying at the following location: Docket Office Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 201 Constitution Avenue NW., Washington, D.C. 20210.

Public Participation

OSHA is soliciting public participation in its consideration of the approval of the revised Indiana benchmarks to assure that all relevant information, views, data and arguments are available to the Assistant Secretary during this proceeding. Members of the public are invited to submit written comments in relation to whether the proposed revised benchmarks will provide for a fully effective enforcement program for Indiana in accordance with the Court Order in *AFL-CIO* v. *Marshall*. Comments must be received on or before February 20, 1985, and be submitted in quadruplicate to the Docket Office, Docket No. T-014, Room S-6212, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210. Written submissions must be directed to the specific benchmarks proposed for Indiana and must clearly identify the issues which are addressed and the positions taken with respect to each issue.

All written submissions as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and all material submitted in response to this notice, will

be made part of the record and will be available for public inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law Enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); Secretary of Labor's Order No. 9-83 (43 FR 35736)).

Signed at Washington, D.C. this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1106 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-008]

Iowa State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity To Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA) Labor.

ACTION: Proposed State plan final approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Iowa State occupational safety and health plan, as administered by the Iowa Bureau of Labor, for a determination under Section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Iowa plan, which were established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir., 1978). If an affirmative determination under Section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Iowa plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised compliance staffing benchmarks for Iowa should be approved and final approval granted, and that interested persons may request an informal public hearing on the question of final State plan approval.

DATES: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-008, Room S6212, 200 Constitution Avenue NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the "Act"), provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by Section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied. An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406), pursuant to a U.S. Court of Appeals Decision, that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement

staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Iowa Plan and of its Proposed Revised Benchmarks

Iowa Plan

On October 4, 1972, Iowa submitted an occupational safety and health plan in accordance with section 18(b) of the Act and 29 CFR Part 1902, Subpart C, and October 21, 1972, a notice was published in the **Federal Register** (37 FR 22780) concerning submission of the plan, announcing that initial Federal approval was at issue and offering interested persons an opportunity to submit data, views and arguments concerning the plan. Comments were received from the American Federation of Labor-Congress of Industrial Organizations (AFL–CIO) and the Master Builders of Iowa. These comments involved concerns regarding the effectiveness of the State's enforcement program. No other written comments were received and no requests for an informal hearing were made. In response to these comments, as well as to OHSA's review of the plan submission, the State made changes in its plan which were discussed in the notice of initial approval. On July 20, 1973, the Assistant Secretary published a notice granting initial approval of the Iowa plan as a developmental plan under section 18(b) of the Act (38 FR 19368). The plan covers all safety and health issues in the State except safety and health in private sector maritime employment.

The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration. The Iowa Bureau of Labor is the State agency designated by the Governor to administer the plan throughout the State. The plan provides for the adoption by Iowa of standards which are identical to the Federal occupational safety and health standards. The Iowa Act, section 88.5.1.a., authorizes the Commissioner to adopt and promulgate occupational safety and health standards which result in improved safety and health for employees, provided that the Commissioner shall adopt no standard unless the same has been adopted and promulgated by the Secretary in accordance with procedures set forth in the Federal law. The plan requires employers to furnish employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the agency. Employees are required to comply with all standards and regulations applicable to their conduct. The plan contains provisions similar to Federal procedures governing emergency temporary standards; imminent danger proceedings; employee discrimination protection; variances; safeguards to protect trade secrets; and employer and employee rights to participate in inspection and review proceedings. Appeals of citation and penalty are heard by the Iowa Occupational Safety and Health Review Commission. Decisions of the Review Commission may be appealed to the State District Court.

The notice of initial approval noted some of the following distinctions between the Federal and Iowa program. The State plan does not cover safety and health in private sector maritime employment. The State plan provides for special variances from the standards, rules or regulations promulgated under the Act when they are in conflict with standards, rules or regulations promulgated by any Federal agency other than the U.S. Department of Labor; however, it does not provide for a special variance when the conflict is with a standard promulgated by a State agency (a special variance ceases to exist upon resolution of the conflict by conflicting Federal agencies). The Iowa Act provides for monetary penalty assessment in both the private and public sectors.

The Assistant Secretary's initial aproval of Iowa's developmental plan, a general descripton of the plan, a schedule of required developmental steps and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart J (38 FR 19368), July 20, 1973).

In accordance with the State's developmental schedule all major structural components of the plan were put in place and submitted for OSHA approval during the period ending July 20, 1976. These "developmental steps" included the following: Amendments to the Iowa Occupational Safety and Health Act; adoption of Federal standards; development of a program for education and training of employees and employers; hiring of additional safety and health personnel; and, completion of basic training for State personnel.

These submissions were carefully reviewed by OSHA and after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Iowa subpart of 29 CFR 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.164).

In 1975, OSHA entered into an operational agreement with the State of Iowa. A **Federal Register** notice was published on October 31, 1975 (40 FR 50715), announcing the signing of the agreement. Under the terms of that agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement authority with regard to Federal occupational safety and health standards in all issues covered by the Iowa plan. However, in 1977, due to the temporary loss by Iowa of a significant number of health enforcement staff and replacement of more experienced hygienists with trainees, OSHA published an amended operational agreement (42 FR 37810) on July 25, 1977, resuming concurrent Federal enforcement authority with respect to occupational health issues for as long as necessary to assure occupational health protection to employees. In 1981, OSHA determined that Iowa's industrial hygiene staff had again achieved sufficient capability to effectively enforce State health standards. Effective July 1, 1981, Federal OSHA ceased health inspections in the State of Iowa and, on June 11, 1982, (47 FR 25324) OSHA published an amended operational agreement indicating that Federal enforcement authority in Iowa would no longer be initiated with regard to Federal occupational safety and health standards in the issues covered by the Iowa occupational safety and health plan.

On September 14, 1976, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Iowa had satisfactorily completed all developmental steps (41 FR 39027). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Iowa plan—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or

conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Iowa Benchmarks

In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) pursuant to a U.S. Court of Appeals decision, to calculate for each State plan State the number of enforcement personnel needed to asssure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Iowa to allocate 39 safety and 56 health compliance personnel to conduct inspections under the plan.

In September 1984 the Iowa State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Iowa. Pursuant to an initiative begun in August 1983 by the State plan designee as a group with OSHA and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Iowa reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents, of a revised compliance staffing benchmark of 16 safety and 13 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Cases Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 12.8 hours on such inspections, and each State safety inspector is able to devote 1536 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites; response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Iowa.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private section manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 36 hours on such inspections, and each health compliance officer is able to devote 1696 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites; response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Iowa.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the compliance staffing levels proposed appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Iowa plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's findings that:

(1) The Iowa plan has been monitored in actual operations for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an *18(e) Evaluation Report of the Iowa Plan*, which together with all other post-certification reports have been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the *1980 Report to the Court* in *AFL-CIO* v. *Marshall*, Iowa proposed to revise its fully effective benchmarks to 16 safety and 13 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the court order in *AFL-CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Iowa has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* (as amended) in which the State has committed itself to funding the State share of salaries for 16 safety inspectors and 13 health compliance officers. The FY 1984 application has been part of the records in the present proceeding.

(3) Iowa participates and has assured its continued participation in the unified management information system developed by OSHA.

Issues for Determination in the 18(e) Proceedings

Approval of Proposed Revised Benchmarks

As discussed in the "History of the Iowa Plan and of its Proposed Revised Benchmarks" section of this notice, Iowa has proposed revised compliance staffing benchmarks of 16 safety and 13 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to ensure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the *1980 Report to the Court*. As part of the

present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Iowa, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Iowa submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.

Final State Plan Approval Determination

The Iowa plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Iowa plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in section 18(c) of the Act, indicate that the regulatory indices and criteria are being met, and the Assistant Secretary accordingly has made an initial determination that the Iowa plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Iowa. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3); 1902.3(c); 1902.4 (a) and (b). The Iowa State plan provides for adoption of standards identical to Federal standards. During this report period, the State adopted in a timely manner all standards and amendments required under its approved State plan except one. The one delinquency was a correction to OSHA's March 1983 Hearing Conservation Amendment to the Noise Standard, § 1910.95, which has now been adopted by the State (Evaluation Report, p. 8.)

When a State adopts Federal standards, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1902.4(a), and 1902.4(b)(2). As already noted, the Iowa State plan provides for adoption of standards identical to the Federal standards. Iowa likewise adopts standards interpretations, which are identical to Federal.

The State is required to take the necessary administrative, judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from Federal standards or developed by the State. See § 1902.37(b)(5). No such challenge to State standards occurred during this report period.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if a permanent variance had not been granted. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). Section 88.5(6) of the Iowa Occupational Safety and Health Act provides authority for granting of permanent variances in terms equivalent to the Federal Act. The one permanent variance granted by the State during this report period assured equivalent employee safety and health protection.

Where a temporary variance is granted, the State must ensure that the employer complies with the standard as soon as possible and provides appropriate interim protection. See §§ 1902.37(b)(7) and 1902.4(b)(2)(iv). Section 88.5(3) of the Iowa Occupational Safety and Health Act requires that any employer or owner granted a temporary variance must have an effective program for coming into compliance with the standard as soon as possible. Iowa's one granted temporary variance during this period properly specified interim protection, was for the shortest period feasible and was granted prior to the effective date of the standard.

Iowa's Act also allows for a special variance from the standards, rules or regulations promulgated under the Act when they are in conflict with standards, rules, or regulations promulgated by any Federal agency other than the U.S. Department of Labor. No special variances have been granted under the Iowa program.

(b) *Enforcement.* Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is a least as effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all workplaces at least as effective as that in section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to desingated target industries while providing adequate protection to all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Data contained in the 18(e) Evaluation Report indicate that 97.8% of Iowa State programmed (general schedule) safety inspections 52% of programmed health inspections are conducted in high hazard industries (18(e) Evaluation Report, p. 32). Additionally, the State has an expanded accident investigation program in safety which includes investigation of selected amputations and other serious accidents. The State devoted 8.4% of its time during the report period to accident investigations.

In cases of refusal of entry, the State must exercise its authority through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902(e) and 1902.4(c)(2)(i) and (ix). The Iowa State Regulations, 530–3.2(88), (1), (2), and (3), authorize the Commissioner to seek compulsory process, if necessary, to permit entry into such establishment that has refused entry for the purpose of inspection or investigation. Iowa applied for warrants for all 152 denials of entry during April 1983 to March 1984 (18(e) Evaluation Report, p. 41). Warrants were granted for 85 of these requests, or in 56% of cases. The State was able to gain entry in 30 of the 152 denials of entry without having to obtain warrants.

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire

information adequate to support any citation issued. See §§1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2). Iowa cited 54% of its safety and 38% of its health violations as serious. Iowa has adopted the Federal OSHA Field Operations Manual, and thus follows inspection procedures, including documentation procedures, which are substantially identical to Federal.

State plans must include a prohibitation on advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). The State of Iowa has adopted procedures for advance notice which are comparable to OSHA's. There were two instances of advance notice during the current evaluation period. In both instances the notices were given appropriately in accordance with approved procedures in order conduct an effective inspection. The State used advance notice in only .1% of its inspections (Evaluation Report, p. 44).

State plans must provide for inspections in response to employee complaints, and must provide opportunity for employee participation in State inspections. See § 1902.4(c)(2) (i) through (iii). Iowa has adopted Federal OSHA's compliant policy. However, the State responded to more safety (68.6%) and health (66.2%) compliants by inspection that Federal OSHA because it received a higher percentage of formal complaints. Complaint response was timely (Evaluation Report, p. 38). All State inspections during the current evaluation period included an employee representative on the walkaround or interviews with employees (Evaluation Report, p. 43).

State plans must also provide protection for employees against discrimination similar to that found in section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). Section 88.9(3) of the Iowa Act contains discrimination protection in terms similar to Federal. The State investigated 36 compliants out of 36 compliants received. The State settled administratively 5 (62.5%) meritorious complaints out of 8 complaints found initially meritorious. The three remaining discrimination complaints initially found meritorious were being evaluated for a final determination. Average lapse time between receipt of a complaint and the notification to the complainant of the investigation results for the State is 109.4 days (Evaluation Report, p. 80).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.4(c)(2) (x) and (xi). The State's lapse time from inspection to issuance of citation has averaged 11.6 days for safety and 7.9 days for health (Evaluation Report, p. 82).

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c)(2) (x) and (xi). The State has adopted and follows Federal procedure in proposing penalties. The 18(e) evaluation indicates that the State of Iowa's average penalty for serious safety violations was $297.00 and $445.00 for health; other-than-serious safety was $93.00, and health was $123.20 (Evaluation Report, pp. 55–59).

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). During this report period the State conducted one follow-up inspection that resulted in failure-to-correct citations out of eight follow-up inspections. During the evaluation period 12.5% of safety and 69.3% of health cases with serious, willful and repeat violations remained open more than 30 days after the abatement date. Midway through the evaluation period the State initiated improved administrative controls to address the relatively high percentage of open health cases, and on-site review by OSHA disclosed that the necessary changes had been implemented. State abatement periods average 9.5 for safety and 24.1 for health. The State grants Petitions for the Modification of Abatement (PMA) only when appropriate and reasonable. (PMA's were granted in 1.6% of total violations cited.) The State sets few abatement periods beyond 30 days (Evaluation Report, p. 54).

Wherever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g).

The Iowa Bureau of Labor has appealed to the State District Court two Review Commission decisions which could potentially have a negative impact on the State's program. One decision limited the scope of an inspection warrant requested as a result of a workplace complaint. The second decision held that the State must have sufficient probable cause to trigger either a warrantless or warrant inspection. This interpretation could hold State inspections invalid unless the State showed probable cause to conduct the inspections, as defined in *Marshall* v. *Barlow Inc.*, even if the employer consents to the inspection or the violation is in plain view. This case has not been relied on as precedent, and therefore, there has been no adverse effect on overall State plan administration. By appealing these decisions, the State has sought judicial review of adverse adjudications as required by § 1902.37(b)(14) (Evaluation Report, pp. 76–79).

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i).

Iowa meets the proposed revised benchmark levels of 16 safety compliance officers and 13 health compliance officers as set forth in the amended Fiscal Year 1984 grant. The State devotes 73.1% of the total program cost to enforcement and 75.6% of compliance officer time is devoted to enforcement. Iowa's safety compliance officers had an average of 82.0 hours of formal training and health compliance officers an average of 93.5 formal training hours during this report period.

(d) *Other Requirements.* States with approved plans must maintain a safety and health program for State and local government employees which is as effective as the State's plan for the private sector. See section 18(c)(6) of the Act and § 1902.3(j). The State of Iowa plan provides a program in the public sector which has inspection procedures identical to the private sector. Although Bureau of Labor Statistics (BLS) incidence rates are generally comparable between the public and private sector in Iowa, the 18(e) Evaluation Report indicates that the change between 1981 and 1982 in the lost workday case rate in State and local government was higher than in the private sector (+6.7% vs. −8.3%). This difference in the incidence rates is attributable to changes in employment patterns between 1981 and 1982, during which period there were declines in both private and public sector employment. However, private sector employment decreases were mostly in hazardous industry divisions while there

was no corresponding decline in hazardous employment in the public sector.

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics annual occupational safety and health survey and other available Federal and State measurements of program impact on worker safety and health, indicate that trends in worker safety and health injury and illness incidence rates under the State program compare favorably with those under the Federal program. See §1902.37(b)(15).

In 1982, the all industry all case rate for Iowa (7.8) was slightly higher than in the Federal States and the all industry lost workday case rate for that year was slightly lower (3.3) than in the Federal States. From 1981 to 1982, the percent of reduction in all industry (−8.3), manufacturing (−15.3), and construction (−3.0) lost workday case rates was greater than percent of reduction for the same rates in Federal States. The overall trend in worker safety and health injury and illness rates in Iowa since initial plan approval compares favorably to that under the Federal program.

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.3(1).

Iowa employer recordkeeping requirements are substantially identical to those of Federal OSHA, and the State participates in the BLS Annual Survey of Occupational Illness and Injuries. As noted above, the State participates and has assured its continuing participation with OSHA in the unified management information system as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. The State provides occupational safety and health training to a substantial number of employers and employees which adequately addresses the needs of both the public and private sector. The Evaluation Report, p.22, indicates that the safety and health training in the State is directed primarily toward employees in the high hazard industries. Forty-six percent of employers and supervisors, and 70% of employees who attended training sessions were in high hazard industries.

The evaluation report notes that the State conducts a training and education program covering the private and public sectors. Although on-site consultation is not a requirement for a State plan, Iowa in conducting an on-site consultation program covering the public sector (18(e) Evaluation Report, pp. 11–19). (The State's on-site consultation program for the private sector is conducted apart from the State plan under an agreement with OSHA under section 7(c)(1) of the Act.)

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Iowa plan as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Iowa has excluded from its plan safety and health coverage in private sector maritime activities (enforcement of occupational safety and health standards comparable to 29 CFR Parts 1915, shipyard employment; 1917, marine terminals; 1918, longshoring; 1919, gear certification; as well as provisions of general industry standards (29 CFR Part 1910) appropriate to hazards found in these employments). In addition, the Iowa plan excludes coverage of Federal Government owned, contractor operated establishments; and bridge construction projects spanning the Mississippi and Missouri Rivers between Iowa and other States. Thus, Federal coverage of these issues would be unaffected by an affirmative 18(e) determination. In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43; the notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that if the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart J of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Iowa plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Iowa 18(e) proceeding and the proposed revised compliance staffing benchmarks for Iowa have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S–6212, Docket No. T–008, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210

Regional Administrator—Region VII, U.S. Department of Labor, OSHA, 911 Walnut Street, Room 406, Kansas City, Missouri 64106

Iowa Bureau of Labor, State House, 307 East Seventh Street, Des Moines, Iowa 50319.

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps, codification of the State's operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing; the State's FY 1984 Federal grant; and the October 1982 through March 1984 Evaluation Report and all previous, post-certification reports. The record on Iowa's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T–018) containing background information relevant to the benchmark issue in general and the

current benchmark revision process. The contents of this record are available for inspection and copying at the following location: Docket Office, Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshal*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983-1984 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity to Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Iowa of the requirements of section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b) (1-15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Iowa and the public in relation to the proposed revised benchmarks for Iowa also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement for Iowa, in accordance with the Court Order in *AFL-CIO.* v. *Marshall.* OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Iowa State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T-008, Rm S-6212, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Iowa will be affored the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985 and should be submitted in quadruplicate to the Docket Officer, Docket T-008, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Iowa as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T-008, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Iowa and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register.** All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et. seq.*) that this determination will not have a significnt economic impact on a substantial number of small entities. Final approval would not place small employers in Iowa under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental Relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1103 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-009]

Kentucky State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity to Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request an informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Kentucky State occupational safety and health plan, as administered by the Kentucky Labor Cabinet, for a determination under Section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Kentucky plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall,* 570 F.2d 1030 (D.C. Cir. 1978). If an affirmative determination under Section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Kentucky plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not revised compliance staffing

benchmarks for Kentucky should be approved and final State plan approval granted; and, that interested persons may request an informal public hearing on the question of final State plan approval.

DATES: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-009, Room S6212, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.*, (the "Act") provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied.

An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406), pursuant to a U.S. Court of Appeals Decision, that directed the Assistant Secretary to calculate for each State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Kentucky Plan and of Its Proposed Revised Benchmarks

Kentucky Plan

On November 27, 1972, Kentucky submitted an occupational safety and health plan in accordance with Section 18(b) of the Act and 29 CFR Part 1902, Subpart C, and on March 5, 1973, a notice was published in the **Federal Register** (38 FR 5955) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments in writing and to request an informal hearing concerning the plan.

Comments were received from the United States Steel Corporation. In response to these comments as well as the OSHA's review of the plan submission, the State made changes in its plan, which were discussed in the notice of initial approval (38 FR 20322). Because the comments did not indicate that the plan failed in any material way to meet the criteria for acceptability as set forth in section 18(c) of the Act and 29 CFR, Part 1902, no hearing was held.

On July 31, 1973, the Assistant Secretary published a notice granting initial approval of the Kentucky plan as a developmental plan under section 18(b) of the Act (38 FR 20322). The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration.

The Kentucky State plan covers all safety and health issues, including public and private sector maritime employers. The Kentucky Labor Cabinet (formerly the Kentucky Department of Labor) is designated as having responsibility for administering the plan throughout the State. The day-to-day administration of the plan is directed by the Kentucky Division of Occupational Safety and Health. The plan provides for the adoption by Kentucky of standards which are at least as effectice as Federal occupational safety and health standards. The plan requires employers

to furnish employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the agency. Employees are required to comply with all standards and regulations applicable to their conduct. The plan contains provisions similar to Federal procedures governing emergency temporary standards; imminent danger proceedings; variances; safeguards to protect trade secrets; protection of employees against discrimination for exercising their rights under the plan; and employer and employee rights to participate in inspection and review proceedings. Appeals of citations and penalties are heard by the Kentucky Occupational Safety and Health Review Commission, whose decisions may be appealed to the Franklin Circuit Court.

The notice of initial approval noted one major distinction between the Federal and Kentucky program. Under the Kentucky program, employees have the right to contest terms and conditions of citations as well as abatement dates whereas Federally employees may only object to the established abatement periods. The Assistant Secretary's initial approval of Kentucky's developmental plan, a general description of the plan, a schedule of required developmental steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart Q; 38 FR 20322, July 31, 1973).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and submitted for OSHA approval during the period ending July 31, 1976. These "developmental steps" included amendments to the Kentucky Occupational Safety and Health Act, promulgation of State occupational safety and health standards and program regulations, and development of a public employee program and an affirmative action program. In completing these developmental steps, the State developed and submitted for Federal approval all components of its program including, among other things, legislative amendments, management information system, a merit staffing system, and a safety and health poster for private and public employees. These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of Section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Kentucky subpart of 29 Part 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.234).

On November 18, 1974, an operational status agreement was entered into between Federal OSHA and Kentucky. A **Federal Register** notice announcing the operational status agreement was published on January 8, 1975 (40 FR 1512). Under the terms of that agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement authority with regard to Federal occupational safety and health standards in all issues covered by the Kentucky plan.

On February 8, 1980, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Kentucky had satisfactorily completed all developmental steps (45 FR 8596). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Kentucky plan—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Kentucky Benchmarks

In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL–CIO* v. *Marshall*, C.A. No. 74–406) pursuant to a U.S. Court of Appeals decision to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Kentucky to allocate 35 safety and 53 health compliance personnel to conduct inspections under the plan.

In September 1984 the Kentucky State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Kentucky. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Kentucky reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents, of a revised compliance staffing benchmark of 23 safety and 14 health compliance officers.

The proposed revised safety benchmark contemplate biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 12.2 hours on such inspections, and each State safety inspector is able to devote 1276 hours annually to actual inspection activity based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Kentucky.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS) as published in 1977 which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 26.7 hours on such inspections, and each health compliance officer is able to devote 1364 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and

other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites; response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Kentucky.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to insure a "fully effective" enforcement program.

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Kentucky plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's findings that:

(1) The Kentucky plan has been monitored in actual operation for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report of the Kentucky Plan,* which has been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the *1980 Report to the Court,* Kentucky proposed to revise its fully effective benchmarks to 23 safety and 14 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the Court Order in *AFL-CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Kentucky has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* in which the State has committed itself to funding the State share of salaries for 25 safety and 14 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Kentucky participates and has assured its continued participation in the unified management information system developed by OSHA.

Issues for Determination in the 18(e) Proceedings

Approval of Proposed Revised Benchmarks

As discussed in the History of the Kentucky Plan and of Its Proposed Revised Benchmarks section of this notice, Kentucky has proposed revised compliance staffing benchmarks of 23 safety and 14 health compliance officers. OSHM believes, based on the State's submission, that this is sufficient compliance staff to insure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the *1980 Report to the Court.*

As part of the present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Kentucky, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Kentucky submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.

Final State Plan Approval Determination

The Kentucky plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(e) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b).

OHSA believes that the results of its evaluation of the Kentucky plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in section 18(c) of the Act, indicate that the regulatory indices and criteria are being met, and the Assistant Secretary accordingly has made an initial determination that the Kentucky plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Kentucky. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4 (a) and (b). The Kentucky plan provides for adoption of standards that are at least as effective as Federal standards. The State has generally adopted standards which are identical to Federal standards and additionally has adopted State standards for conditions, not covered by Federal standards, such as Changing and Charging Automotive Batteries, Receiving and Unloading Bulk Hazardous Liquids. For OSHA standards requiring State action during the 18(e) evaluation period, Kentucky's adoption process met the six month time frame for all standards (Evaluation Report, p. 3).

Where a State adopts Federal standards, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be least as effective as the Federal standards. See §§ 1092.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1903.4(a), and 1902.4(b)(2). As already noted, the Kentucky plan provides for adoption of at least as effective as Federal standards. Kentucky likewise adopts standards interpretations, which are equivalent to Federal interpretations.

The State is required to take the necessary administrative judicial or legislative action to correct any deficiency in its progam caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from the Federal standards or developed by the State. See § 1902.37(b)(5). No such challenge to State standards has ever occurred in Kentucky.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the standards were in effect. See §§ 1902.37(b)(6) and 1902.4(b)(iv). Kentucky had no requests for variances during the 18(e) evaluation period (Evaluation Report, p. 3).

Where a temporary variance is granted, the State must ensure that the employer complies with the standard as soon as possible and provides appropriate interim employee protection. See §§ 1902.37(b)(7) and 1902.4(b)(2)(iv). The Kentucky Occupational Safety and Health Act requires that any employer granted a temporary variance must have an effective program for coming into compliance with the standard as soon as possible. During the 18(e) evaluation period no temporary variance requests were received (Evaluation Report, p. 3).

Past years' experience indicates that the State's adherence to procedures were proper when granting permanent and temporary variances.

(b) *Enforcement.* Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all work places at least as effective as that in section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to designated target industries while providing adequate protection to all other work places covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Data contained in the 18(e) evaluation report indicates that 99.4% of State programmed safety inspections and 89.5% of programmed health inspections are conducted in high hazard industries (Evaluation Report p. 7).

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3(e) and (f), and 1902.4(c)(2) (i) and (ix). The Kentucky Occupational Safety and Health Act authorizes the Labor Cabinet Secretary to petition the Franklin Circuit Court for an order to permit entry into such establishments that have refused entry for the purpose of inspection or investigation. Kentuckty had 41 denials of entry during the 18(e) evaluation period and obtained warrants for all but 3 of these. (Evaluation Report—Appendix A, p. 20).

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspections acquire information adequate to support any citation issued. See §§ 1902.37(b)(1), 1902.3(d)(1), and 1902.4(c)(2).

Kentucky has adopted an Operations Manual, and thus folows inspection procedures, including documentation procedures, which are similar to Federal. The Evaluation Report notes adherence by Kentucky to these procedures.

Comparison of Federal and State data showed a somewhat lower percentage of State serious safety violations (7.9%) and serious health violations (7.9%). However, more recent monitoring data indicate substantial increases in the percent of serious violations cited for both safety (23%) and health (13.7%) (Evaluation Report, pp. 11 and 12).

State plans must include a prohibition of advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Kentucky adopted approved procedures for advance notice. There were 5 instances of advance notice. No problem with its use was noted during the evaluation period.

State plans must provide for inspections in response to employee complaints, and must provide opportunity for employee participation in State inspections. See §§ 1902.4(c)(2) (i) through (iii). Kentucky follows a policy of responding to all employee complaints by conducting an inspection. Historically, Kentucky has properly provided employee representation in all inspections.

State plans must also provide protection for employees against discrimination similar to that found in section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). The Kentucky law and regulations provide for discrimination protection which is at least as effective as the Federal. Twenty (20) complaints of discrimination were investigated during the evaluation period. Three were found meritorious and settled administratively. (Evaluation Report, p 17).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.2(4)(c)(2) (x) and (xi). The State's lapse time from inspection to issuance of citation has averaged 22 days for safety and 35 days for health (Evaluation Report, p. 19).

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c) (x) and (xi). Kentucky's procedures for penalty calculation and adjustment are substantially identical to OHSA's. The 18(e) evaluation report indicates that Kentucky proposes appropriate penalties. The average penalty for serious safety violation is $289; the average serious health penalty is $74 (Evaluation Report, p. 15).

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). Kentucky's policy regarding follow-up inspections and abatement periods differs from the Federal program. In Kentucky, all serious, willful or repeat violations result in follow-up inspection. The 18(e) evaluation report indicates that follow-up inspections accounted for 20% of Kentucky's total not-in-compliance inspections (Evaluation Report, p. 13). The results of these follow-ups indicate that abatement is being achieved. Abatement periods are generally shorter than those set Federally (10.6 days average for safety; 16.9 days average for health). Kentucky attempts to document abatement within 30 days for all serious, willful and repeat violations, and the evaluation report indicates effective performance (Evaluation Report, p. 13).

Whenever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g). The Evaluation Report for Kentucky noted no adverse adjudications.

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1); and 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration

and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). The Kentucky plan provides for 25 safety compliance officers and 14 industrial hygienists as set forth in the Kentucky FY 1984 grant. This staffing level meets the "fully effective" revised proposed benchmarks established for Kentucky for health and safety staffing. The proportion of resources for enforcement is 53.2% as compared to the Federal of 51.3%; and the average cost per inspection is $689 which is approximately one-half the cost ($1,403) in Federal enforcement States.

Kentucky provides its safety and health personnel with formal training based on the needs of the staff and availability of funds. The average time spent, per person, in formal training was as follows: Safety Inspectors, 28.6 hours; Industrial Hygienists, 41.9 hours; Safety Consultants, 19.3 and Health Consultants, 25 hours. The amount of hours spent in formal training is appropriate considering the experience and previous training of each safety and health inspector and consultant.

(d) *Other Requirements.* States which have approved plans must maintain a safety and health program for State and local government employees which must be as effective as the State's plan for the private sector. See § 1902.3(j). The Kentucky plan provides a program in the public sector which is identical to that in the private sector. Injury rates are lower in the public than in the private sector (all case rate—6.3, lost work day case rate—3.0).

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics annual occupational safety and health survey and other available Federal and State measurements of program impact on worker safety and health indicate a favorable comparison of worker safety and health injury and illness rates between the State and Federal program. See § 1902.37(b)(15). The 1982 BLS rates (8.1—all case rate and 4.1—lost workday case rate) for Kentucky were only slightly higher than rates in States where Federal OSHA provides enforcement coverage and are within the prescribed acceptable levels. The 1982 lost work day case rate in the private sector of 4.1 declined from the 1981 rate of 4.3 cases per 100 full time workers. It should be noted that overall the Kentucky rates have shown a significant decline since the inception of the State plan and compare favorably in that respect with the Federal program.

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.4(1). Kentucky employer recordkeeping requirements are identical to those of Federal OSHA, and the State participates in the BLS Annual Survey of Occupational Illness and Injuries. As noted above, the State participates and has assured its continuing participation with OSHA in the unified management information system as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. Training programs for both the State's staff and the public sector have been established and are ongoing. In the public sector, 490 employers and supervisors and 1642 employees participated in training programs totalling 101 training sessions. One thousand nine hundred private sector employers and supervisors and 4893 employees participated in training programs totalling 287 training sessions (Evaluation Report, Appendix A, p. 12). Kentucky also provides on-site consultation services to employers in both the public and private sectors.

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatoray criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Kentucky plan, as provided by section 18(e) of the Act and 29 CFR 1902.42(c). In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43; the notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart Q of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Kentucky plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Kentucky 18(e) proceeding and the proposed revised compliance staffing benchmarks for Kentucky have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S-6212, Docket No. T-009, Occupational Safety and Health Administration, U.S. Department of Labaor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator, Region IV, U.S. Department of Labor, OSHA, 1375 Peachtree Street, NE. Suite 587, Atlanta, Georgia 30367

Kentucky Labor Cabinet, U.S. Highway 127 South, Frankfort, Kentucky 40601

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps, codification of the State's operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing; the State's FY 1984 Federal grant; and the FY 1983 18(e) Evaluation Report and all previous, post-certification reports. The record on Kentucky's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate

docket (No. T-018) containing background information relevant to the benchmark issue in general and the current benchmark revision process. The content of this record is available for inspection and copying at the following location: Docket Office, Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983-1984 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity To Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Kentucky of the requirements of section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b)(1-15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the acutal operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Kentucky and the public in relation to the proposed revised benchmarks for Kentucky also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Kentucky, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Kentucky State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received on or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T-009, Rm S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Kentucky will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985, and should be submitted in quadruplicate to the Docket Officer, Docket T-009, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Kentucky as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1984, and submitted in quadruplicate to the Docket Officer, Docket No. T-009, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Kentucky and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register**. All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et. seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Kentucky under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and Health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1100 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-010]

Maryland State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity to Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Maryland State occupational safety and health plan, as administered by the Maryland Division of Labor and Industry for a determination under section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Maryland plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall*, 570 F. 2d 1030 (D.C. Cir., 1978). If an affirmative determination under section 18(e) is made, Federal standards and enforcement authority will not longer apply to issues covered by the Maryland plan. This notice also announces that OSHA is soliciting written public

comment to afford interested persons an opportunity to present their views regarding whether or not the revised compliance staffing benchmarks for Maryland should be approved and final State plan approval granted; and that interested persons may request an informal public hearing on the question of final State plan approval.

DATE: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-010, Room S6212, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (hereinafter referred to as the Act), provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary), applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4, if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied. An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for the State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406), pursuant to a U.S. Court of Appeals decision, that directed the Assistant Secretary to calculate for each State plan the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* contained the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval a State must demonstrate that it has allocated sufficient enforcement staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Maryland Plan and of Its Proposed Revised Benchmarks

Maryland Plan

On November 30, 1972, Maryland submitted an occupational safety and health plan in accordance with section 18(b) of the Act and 29 CFR Part 1902, Subpart C, and on January 22, 1973, a notice was published in the **Federal Register** (38 FR 2188) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments in writing and to request an informal hearing concerning the plan. Comments were received from the AFL-CIO and the Construction Industry Safety Advisory Committee. In response to these comments as well as to OSHA's review of the plan submission, the State made changes in its plan, which were discussed in the notice of initial approval (38 FR 17834). Because the comments did not indicate that the plan failed in any material way to meet the criteria for acceptability as set forth in section 18(c) of the Act and 29 CFR Part 1902, no hearing was held.

On July 5, 1973, the Assistant Secretary published a notice granting initial approval of the Maryland plan as a development plan under section 18(b) of the Act (38 FR 17834). The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration.

The Maryland Division of Labor and Industry is designated as having responsibility for administering the plan throughout the State. The plan provides for the adoption by Maryland of standards which are at least as effective

as Federal occupational safety and health standards. The plan requires employers to furnish employment and places of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the agency. Employees are required to comply with all standards and regulations applicable to their conduct. The plan contains provisions similar to Federal procedures governing emergency temporary standards; imminent danger proceedings; variances; safeguards to protect trade secrets; protection of employees against discrimination for exercising their rights under the plan; and employer and employee rights to participate in inspection and review proceedings. Appeals of citations and penalties are heard by a hearing examiner, whose decision may be reviewed by the Commissioner of Labor and Industry. The Commissioner's decision may be appealed to the appropriate circuit court.

The notice of initial approval noted a few distinctions between the Federal and Maryland programs. The State does not cover safety and health in private sector maritime employment. Unlike the Federal Act, citations and penalties under the Maryland plan are reviewed by the agency with overall responsibility for administering the plan rather than an independent agency. However, these agency decisions are subject to review by the appropriate circuit courts. The Assistant Secretary's initial approval of Maryland's developmental plan, a general description of the plan, a schedule of required development steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart O; 38 FR 17834, July 5, 1973).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and submitted for OSHA approval during the period ending June 28, 1976. These "developmental steps" included promulgation of State occupational safety and health standards and program regulations, development and implementation of a compliance manual, implementation of an inspection and enforcement program, development and implementation of an occupational health program, and development of a management information system. In completing these developmental steps, the State developed and submitted for Federal approval all components of its program including, among other things, legislative amendments, management information system, a merit staffing system, a safety and health poster for private and public employees. These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Maryland subpart of 29 CFR Part 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.214).

On August 16, 1976, an operational status agreement was entered into between Federal OSHA and Maryland. Under the terms of that agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement authority with regard to Federal occupational safety and health standards in all issues covered by the Maryland plan.

On February 15, 1980, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Maryland had satisfactorily completed all developmental steps (45 FR 10635). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Maryland plan—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Maryland Benchmarks

In 1976, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) pursuant to a U.S. Court of Appeals decision to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Maryland to allocate 30 safety and 43 health compliance personnel to conduct inspections under the plan.

In September 1984 the Maryland State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Maryland. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Maryland reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents of a revised compliance staffing benchmark of 36 safety and 18 health compliance officers. The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 10 hours on such inspection, and each State safety inspector is able to devote 1,299 hours annully to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedules universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites; response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Maryland.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the 1972-1974 National Occupational Hazards Survey (NOHS) which assesses the potency and toxicity of substances in use in the State. The State has historically spent an average of 40 hours on such

inspections, and each health compliance officer is able to devote 1355 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) work-sites; response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Maryland.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the compliance staffing levels proposed appear to meet the requirements of the Court in *AFL-CIO v. Marshall* and provide staff sufficient to insure a "fully effective" enforcement program.

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Maryland plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's findings that:

(1) The Maryland plan has been monitored in actual operation for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report of the Maryland Plan,* which together with all other post-certification reports have been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall,* C.A. No. 74-406), pursuant to a U.S. Court of Appeals decision, to calculate for each State plan state the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980 OSHA submitted a *Report to the Court* containing the benchmarks and requiring Maryland to allocate 30 safety compliance officers and 43 industrial hygienists to conduct inspections under the plan.

In September 1984, pursuant to the Court Order and the *1980 Report to the Court,* Maryland proposed to revise its fully effective benchmarks to 36 safety and 18 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the court order in *AFL-CIO* v. *Marshall* and appear to provide for a "fully effective" enforcement program.

Maryland has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* in which the State has committed itself to funding the State share of salaries for 42 safety inspectors and 19 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Maryland participates and has assured its continued participation in the unified management information system developed by OSHA.

Issues for Determination in the 18(e) Proceeding

Approval of Proposed Revised Benchmarks

As discussed in the History of the Maryland Plan and of Its Proposed Revised Benchmarks section of this notice, Maryland has proposed revised compliance staffing benchmarks of 36 saftety and 18 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to insure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the *1980 Report to the Court.* As part of the present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Maryland, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Maryland submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health plan.

Final State Plan Approval Determination

The Maryland plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary as part of the final approval process to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.2 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Maryland plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in section 18(c) of the Act, indicate that the regulatory indices and criteria are being met and the Assistant Secretary accordingly has made an initial detemination that the Maryland plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Maryland. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to the criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4 (a) and (b). The Maryland plan provides for adoption of standards that are at least as effective as Federal standards. The State has generally adopted standards which are identical to Federal standards and additionally has adopted several independent State standards for issues such as confirmed spaces, Kepone, and lead in construction. For OSHA standards requiring State action during the 18(e) evaluation period, Maryland's adoption process met the six-month timeframe for all standards [Evaluation Report, p. 4].

Where a State adopts Federal standards, the State's interpretation and application of such standards must

ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1903.4(a), and 1902.4(b)(2). As already noted, the Maryland plan provides for adoption of standards at least as effective as Federal standards. Maryland likewise adopts standards interpretations which are equivalent to Federal interpretations.

The State is required to take the necessary administrative judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from the Federal standards or developed by the State. See § 1902.37(b)(5). No such challenge to State standards has ever occurred in Maryland.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the standard were in effect. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). The one variance granted under the Maryland plan during the 18(e) evaluation period was deemed to provide equivalent protection [Evaluation Report, p.5].

Where a temporary variance is granted, the State must ensure that the employer complies with the standard as soon as possible and provides appropriate interim employee protection. See §§ 1902.37(b)(7) and 1902.4(b)(2)(iv). The Maryland Occupational Safety and Health Act requires that any employer granted a temporary variance must have an effective program for coming into compliance with the standard as soon as possible. During the 18(e) evaluation period no temporary variances were requested [Evaluation Report, p. 5].

Past years' experience indicates that the State's adherence to procedures has been proper when granting permanent and temporary variances.

(b) *Enforcement.* Section 18)c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all work places at least as effective as that in section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to designated target industries while providing adequate protection to all other work places covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Data contained in the 18(e) evaluation indicates that 90.9% of State programmed safety inspections and 97.2% of programmed health inspections are conducted in high hazard industries [Evaluation Report, p. 12].

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3 (e) and (f), and 1902.4(c)(2) (i) and (ix). The Maryland Occupational Safety and Health Act authorizes the Commissioner to petition the Maryland district courts for an order to permit entry into such establishment that has refused entry for the purposes of inspection or investigation. Maryland had 24 denials of entry during the evaluation period and obtained warrants for 12 of these [Evaluation Report, p. 17]. Entry was gained in the other cases after negotiation with the employer.

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2). Maryland has adopted an Operations Manual, and thus follows inspection procedures, including documentation procedures, which are similar to Federal. The Evaluation Report notes adherence by Maryland to these procedures.

Comparison of Federal and State data showed a somewhat lower percentage of State serious safety violations (19.1%). This deviation is attributed to the fact that the State has a high safety inspection penetration rate [Evaluation Report, p. 19]. Establishments on the State's safety High Hazard List are inspected on an average of once every three years. Comparison of Federal and State data showed a higher percentage of State serious health violations (25.2%) [Evaluation Report, p. 19].

State plans must include a prohibition on advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Maryland adopted approved procedures for advance notice. There was one instance of advance notice. No problem with its use was noted during the evaluation period.

State plans must provide for inspection in response to employee complaints and must provide opportunity for employee participation. See §§ 1902.4(c)(2) (i) through (iii). Maryland follows a complaint policy similar to the Federal. The report concluded that the State was providing employees with adequate representation in all inspections [Evaluation Report, p. 14].

State plans must also provide protection for employees against discrimination similar to that found on section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). The Maryland Occupational Safety and Health Law, approved as part of the initial approval and certification process, contains such protection. Ten complaints of discrimination were investigated during this evaluation period and all were satisfactorily addressed [Evaluation Report, p. 25].

The State is required to issue in a timely manner citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.4(c)(2) (x) and (xi). The State's lapse time from inspection to issuance of citation has averaged 23 days for safety and 59 days for health [Evaluation Report, p. 26].

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4 (x) and (xi). Although Maryland's penalty calculation procedures are somewhat different than those of OSHA, the State utilizes the same adjustment factors. The 18(e) evaluation indicates that Maryland proposes appropriate penalties. The average penalty for serious safety violation was $357; the average serious health penalty was $389 [Evaluation Report, p. 22].

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). Maryland's policy regarding follow-up inspections and abatement periods differs from the Federal program. In Maryland, all serious, willful or repeat violations result in follow-up inspections. The 18(e) evaluation report indicates that follow-up inspections accounted for 14.4% of Maryland's total not-in-compliance inspections [Evaluation Report, p. 20]. The results of these follow-ups indicate that abatement is being achieved.

Abatement periods are generally shorter than those set Federally (3.0 days average for safety; 9.3 days average for health). Maryland attempts to document abatement within 30 days for all serious, willful and repeat violations, and the evaluation report indicates effective performance [Evaluation Report, p. 21].

Whenever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g). The Evaluation Report for Maryland noted no adverse adjudications.

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). The Maryland plan provides for 42 safety compliance officers and 19 health compliance offices as set forth in the Maryland FY 1984 grant. This staffing level meets the "fully effective" proposed revised benchmarks established for Maryland for health and safety staffing. The proportion of resources for enforcement is 66% and the average cost per inspection is $833 [Evaluation Report, p. 27].

Maryland provides its safety and health personnel with formal training based on the needs of the staff and availability of funds. The average time spent, per person, in formal training was as follows: Safety Inspectors, 67.4 hours; Industrial Hygienists, 85.3 hours; Safety Consultants, 14.2 hours; and Health Consultants, 42.9 hours. The amount of hours spent in formal training is appropriate considering the experience and previous training of each safety and health inspector and consultant [Evaluation Report, p. 8].

(d) *Other Requirements.* States which have approved plans must maintain a safety and health program for State and local employees which must be as effective as the State's plan for the private sector. See § 1902.3(j). The Maryland plan provides a program in the public sector which is comparable to that in the private sector. Injury rates are higher in the public than in the private (all case rate—8.8; lost work day case rate—5.7) [Evaluation Report, p. 9]. The report attributes the higher public sector rates to shorter workweeks in the public sector, and the fact that three SICs (92—Justice, Public Order and Safety, 16—Construction Other Than Building Construction, and 49—Electrical, Gas and Sanitary Services) account for 48.8% of the cases while only representing 17.4% of public sector employment. The Maryland public sector program also includes a Public Sector Self-Inspection program (PSSI) whereby 24 State agencies and political subdivisions conduct safety self-inspections.

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics annual occupational safety and health survey and other available Federal and State measurements of program of impact on worker safety and health indicate a favorable comparison of worker safety and health injury and illness rates between the State and Federal program. See § 1902.37(b)(15). The 1982 BLS rates (all case rates and lost workday case rates) for Maryand varied only slightly from the rates in States where Federal OSHA provides enforcement coverage and are within the prescribed acceptable levels. The 1982 lost work day case rate in the private sector of 3.7 declined from the 1981 rate of 3.9 cases per 100 full time workers [Evaluation Report, p. 28]. It should also be noted that overall Maryland rates have shown a significant decline since the inception of the State plan, and compare favorably in that respect with the Federal program.

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. See section 18(c)(8) of the Act; 29 CFR 1902.4(1). Maryland employer recordkeeping requirements are identical to those of Federal OSHA, and the State participates in the BLS Annual Survey of Occupational Illness and Injuries. As noted above the State participates and has assured its continuing participation with OSHA in the unified management information system as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. Training programs for both the State's staff and the public sector have been established and are ongoing. In the public sector, 842 employers and supervisors and 4465 employees participated in training programs totalling 196 training sessions. One thousand five hundred seventy-eight (1578) private sector employers and supervisors and 5035 employees participated in training programs totalling 243 training sessions [Evaluation Report, p. 8]. In addition, on-site consultation service are provided in the public sector. (The State's on-site consultation program for the private sector is conducted apart from the State plan under an agreement with OSHA under section 7(c)(1) of the OSH Act.)

Effect of 18(e) Determination

If the Assistant Secretry, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Maryland plan, as provided by Section 18(e) of the Act and 29 CFR 1902.42(c). Maryland has excluded safety and health in private sector maritime activities (enforcement of occupational safety and health standards compared to 29 CFR 1915, shipyard employment; 1917, marine terminals; 1918, longshoring; and 1919, gear certification as well as provisions of general industry standards (29 CFR Part 1910) applicable to hazards found in these employments) from coverage under its plan. Thus, Federal coverage of these issues would be unaffected by an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43; the notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal

enforcement authority or, if the circumstances warrant, initiate action to withdraw approval for the State plan. At the same time, Subpart O of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Maryland plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Maryland 18(e) processing and the proposed revised compliance staffing benchmarks for Maryland have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S-6212, Docket No. T-010, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator, Region III, U.S. Department of Labor, OSHA, Gateway Building—Suite 2100, 3535 Market Street, Philadelphia, Pennsylvania 19104

Maryland Division of Labor and Industry Department of Licensing and Regulation 501 St. Paul Place Baltimore, Maryland 21202

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps, and approval of various standards, developmental steps and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing, the State's FY 1984 Federal grant, and the FY 1983 Evaluation Report and all previous post-certification reports. The record on Maryland's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T-018) containing background information relevant to the benchmark issue in general and the current benchmark revision process. The contents of this record are available for inspection and copying at the following location: Docket Office, Room S-6112, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor 200 Constitution Avenue, NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983-1984 benchmark revision provisions.

Public Participation

Request for Public Comment and Opportunity To Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Maryland of the requirements of Section 18(c) of the Act and all specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b) (1) through (15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Maryland and the public in relation to the proposed revised benchmarks for Maryland also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Maryland, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Maryland State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received or or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T-010, Rm S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Maryland will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985 and should be submitted in quadruplicate to the Docket Officer, Docket T-010, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Maryland as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T-010, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Maryland and must clearly identify the issues which are raised and the position taken respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register**. All written and oral submissions, as well as other information gathered by OSHA, will be considered in any action. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Maryland under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the

approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1105 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-011]

Minnesota State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity to Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Minnesota State occupational safety and health plan, as administered by the Minnesota Department of Labor and Industry, for a determination under section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Minnesota plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall* 570 F.2d 1030 (D.C. Cir., 1978). If an affirmative determination under Section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Minnesota plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised compliance staffing benchmarks for Minnesota should be approved and final State plan approval granted, and that interested persons may request an informal public hearing on the question of final State plan approval.

DATE: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-011, Room S6212, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et. seq.* (the "Act"), provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial-approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3. and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental step" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adquate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a development plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied. An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406), pursuant to a U.S. Court of Appeals decision, that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement

staff to meet the 1980 benchmark or any approved revision thereto.

A final requirement for final approval consideration it that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Minnesota Plan and Its Proposed Revised Benchmarks

Minnesota Plan

On August 22, 1972, Minnesota submitted an occupational safety and health plan in accordance with section 18(b) of the Act and 29 CFR Part 1902, Subpart C, and on November 25, 1972, a notice was published in the **Federal Register** (37 FR 25083) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments in writing and to request an informal hearing concerning the plan.

Comments were received from: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); United States Steel Corporation; Porter Inc.; Honeywell, Inc.; Abrams and Spector, P.A.; Northwestern Bell Co.; Naegele Outdoor Advertising Co., Inc.; International Brotherhood of Electrical Workers; United Auto Workers; Minnesota Association of Commerce and Industry; Winona Area Chamber of Commerce; and Patrick Lee Reagan. The Winona Area Chamber of Commerce; and Patrick Lee Reagan requested a hearing. In response to these comments as well as to OSHA's review of the plan submission, the State made changes in its plan, which were discussed in the notce of initial approval (38 FR 15076). Because the comments did not indicate that the plan failed in any material way to meet the criteria for acceptability as set forth in section 18(c) of the Act and 29 CFR Part 1902, no hearing was held.

On June 8, 1973, the Assistant Secretary published a notice granting initial approval of the Minnesota plan as a developmental plan under section 18(b) of the Act (38 FR 15076). The State's progam became effective on August 1, 1973. The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration.

The plan covers all issues except off-shore private sector maritime employment. The Minnesota Department of Labor and Industry is designated as having responsibility for administering the plan throughout the State. The day-to-day administration of the plan is directed by Assistant Commissioner of Labor and Industry and the Minnesota Occupational Safety and Health Division. Health inspections are conducted by the Minnesota Department of Health, Division of Environmental Health. Health inspection findings are forwarded to the Department of Labor and Industry for action. The Department of Health also provides laboratory services in support of the plan. The plan provides for the adoption by Minnesota of standards which are at least as effective as Federal occupational safety and health standards. The plan requires employers to furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the agency. Employees are required to comply with all standards and regulations applicable to their conduct. The plan contains provisions similar to Federal procedures governing emergency temporary standards; imminent danger proceedings; variances; safeguards to protect trade secrets; protection of employees against discrimination for exercising their rights under the plan; and employer and employee rights to participate in inspection and review proceedings. Appeals of citations and penalties are heard by the Minnesota Occupational Safety and Health Review Board. Decisions of the Occupational Safety and Health Review Board may be appealed to the appropriate State District Court.

The notice of initial approval noted a few distinctions between the Federal and Minnesota program. In addition to adopting all Federal occupational safety and health standards, the State promulgates standards for which there are no corresponding Federal standards. The plan includes prohibition of denial of pay to an employee for participating in an inspection as part of its provision prohibiting discrimination against employees for exercising their rights under the law. State law also provides that standards requiring personal protective equipment mandate that such equipment be made available by or at the cost of the employer. In addition, in 1983 Minnesota enacted its Employee Right-to-Know Law which requires employers to provide information and training to employees concerning hazardous substances in their workplaces.

The Assistant Secretary's initial approval of Minnesota's developmental plan, a general description of the plan, a schedule of required developmental steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart N; 38 FR 15076 (June 8, 1973)).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and submitted for OSHA approval during the developmental period ending June 30, 1976. These "developmental steps" included amendments to the Minnesota Occupational Safety and Health Act, promulgation of State occupational safety and health standards and program regulations, and revision to the State's *Compliance Operations Manual.*

These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Minnesota subpart of 29 CFR Part 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.204).

On September 28, 1976, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Minnesota has satisfactorily completed all developmental steps (41 FR 42659). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Minnesota plan—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Although Minnesota had not sought previously to enter into an operational status agreement, in 1981 OSHA determined that such agreements should be concluded with all qualified States. Thus, a **Federal Register** notice was published on June 11, 1982 (47 FR 25325), announcing that an operational status

agreement had been signed on October 9, 1981 for Minnesota. Under the terms of that agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement authority with regard to Federal occupational safety and health standards in all issues covered by the Minnesota plan.

Minnesota Benchmarks

In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406), pursuant to a U.S. Court of Appeals decision, to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Minnesota to allocate 56 safety compliance officers and 74 industrial hygienists to conduct inspections under the plan.

In September 1984 the Minnesota State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Minnesota. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Minnesota reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents, of a revised compliance staffing benchmark of 31 safety and 12 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule safety inspections of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classification categories whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 8.9 hours on each such inspection, and each State safety inspector is able to devote 1612 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to: Coverage of mobile and public employee (State and local government) worksites; response to complaints and accidents; and follow-up inspections to ascertain compliance based on historical experience and an assessment of proper safety coverage in the State of Minnesota.

The proposed revised health benchmark contemplates general schedule health inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classification categories in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assesses the potency and toxicity of substances in use in the State. The State has historically spent an average of 23.0 hours on each such inspection, and each health compliance officer is able to devote 1628 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or group of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to: Coverage of mobile and public employee (State and local government) worksites; response to compliants and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Minnesota.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and has determined that the compliance staffing levels proposed appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Minnesota plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's findings that:

(1) The Minnesota plan has been monitored in actual operation for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report* of the Minnesota Plan, which together with all other post-certification reports has been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the 1980 *Report to the Court* in *AFL-CIO* v. *Marshall*, Minnesota proposed to revise its fully effective benchmarks to 31 safety and 12 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the Court Order in *AFL-CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Minnesota has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* in which the State has committed itself to funding the State share of salaries for 31 safety inspectors and 12 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Minnesota participates and has assured its continued participation in the Unified Management Information System developed by OSHA.

Issues for Determination in the 18(e) Proceedings

Approval of Proposed Revised Benchmarks

As discussed in the "History of the Minnesota Plan and of its Proposed Revised Benchmarks" section of this notice, Minnesota has proposed revised compliance staffing benchmarks of 31 safety and 12 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to ensure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the

1980 *Report to the Court.* As part of the present 18(e) proceedings, OSHA invites public comment regarding the proposed revised benchmarks for Minnesota, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Minnesota submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.

Final State Plan Approval Determination

The Minnesota plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Minnesota plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in Section 18(c) of the Act, indicate that the regulatory indices and criteria are being met, and the Assistant Secretary accordingly has made an initial determination that the Minnesota plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Minnesota. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments which are at least as effective as the Federal standards. See §§ 1902.37(b)(3); 1902.3(c); 1902.4 (a) and (b). The Minnesota plan provides for adoption of standards that are at least as effective as Federal standards. The State has generally adopted standards which are identical to Federal standards and additionally has adopted State standards for conditions not covered by Federal standards, such as climatic conditions specific to the State.

During the evaluation period, the State experienced some difficulty in complying with the six-month time frame for adopting Federal standards changes. The average lapse time for adoption of standards was 6.9 months. This appears to be due to the State's past practice of publishing notices of adoption of standards semi-annually. A recent change in State procedures now provides for quarterly adoption of standards (18(e) *Evaluation Report,* p. 14).

Where a State adopts Federal standards, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1902.4(a), and 1902.4(b)(2). As already noted, the Minnesota plan provides for adoption of standards which are at least as effective as the Federal standards. Minnesota likewise adopts standards interpretations which are as effective as the Federal.

The State is required to take the necessary administrative, judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from Federal standards or developed by the State. See § 1902.37(b)(5). No such challenges to State standards have occurred in Minnesota.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if a permanent variance had not been granted. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). Minnesota's regulations and procedures governing actions on permanent variances are equivalent to the Federal. The twelve permanent variances granted during the evaluation period were granted in a timely manner in accordance with approved State procedures and were deemed to provide equivalent protection (18(e) *Evaluation Report,* p. 17).

Where a temporary variance is granted, the State must ensure, among other things, that the employer complies with the standard as soon as possible. See §§ 1902.37(b)(7) and 1902.4(b)(2)(iv). The State's temporary variance procedures are comparable to the Federal. The three temporary variances granted by Minnesota during the period met these criteria (18(e) *Evaluation Report,* p. 18).

(b) *Enforcement.* Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA; Section 18(c)(3) requires the State plan to provide for right of entry and inspection of all workplaces at least as effective as that in Section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to designated target industries while providing adequate protection to all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Minnesota's safety targeting plan is based upon the Federal system, supplemented by a special emphasis program which targets inspections in individual facilities in relation to their safety performance and history. The State's health inspection targeting system is comparable to the Federal system. Data contained in the 18(e) evaluation indicate that 95.4% of State programmed safety inspections and 91.0% of State programmed health inspections were conducted in high hazard industries (18(e) *Evaluation Report,* p. 37).

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3(e), and 1902.4(c)(2)(i) and (ix). Minnesota law allows the Attorney General to apply for a warrant from the State District Court to permit entry into an establishment that has refused entry for the purpose of inspection or investigation. Of the 42 denials of entry during the evaluation period, the State was enable to gain warrantless entry, or otherwise resolve the issue, in 19 cases and successfully obtained warrants in 15 cases (18(e) *Evaluation Report,* p. 48).

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2).

The Minnesota *Compliance Operations Manual* has been updated through the issuance of the Division Policies (internal memoranda to State staff), and thus the State follows inspection procedures, including documentation procedures, which are similar to the Federal. The Evaluation Report notes adherence to these procedures. Minnesota's provisions governing classification of violations differ in some respects from the Federal. However, both the number of violations cited per initial inspection (2.2) and the percentage of violations which are considered serious (21.5%) are comparable to Federal statistics.

State plans must included a prohibition on advance notice, and exceptions to this prohibition must be no broader than those allowed by Federal OSHA procedure. See §§ 1902.3(f). Minnesota has adopted procedures governing advance notice which are comparable to OSHA's. The report did not note any improper use of advance notice.

State plans must provide for inspections in response to employee complaints, and must provide an opportunity for employee participation in State inspections. See §§ 1902.4(c)(2)(i) through (iii). Minnesota attempts to formalize all complaints submitted and responds to all written employee complaints by inspection. The State has a procedure similar to OSHA's for handling non-formal complaints by a letter to the employer. During the evaluation period, however, this procedure was not in effect, and 81.4% of complaints received by the State were responded to by inspection. Complaint response was timely (18(e) *Evaluation Report*, pp. 40–42).

In addition, Minnesota's law and procedures provide for employee participation in inspections. Employees exercised their right to accompany the inspection or the walkaround in 13.3% of initial inspections. The report concludes that Minnesota's efforts in apprising employees of their rights, and providing them with the means to exercise their rights, have been successful (18(e) *Evaluation Report*, p. 50).

State plans must also provide protection for employees against discrimination similar to that found in Section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). The Minnesota Act and regulations provide for discrimination protection which is at least as effective as the Federal and in some respects more protective. During the evaluation period, the State investigated fifteen discrimination complaints in a timely manner. The three complaints found meritorious were settled administratively (18(e) *Evaluation Report*, pp. 66–68).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1002.3(d), and 1902.4(c)(2)(x) and (xi). Minnesota's lapse time from inspection to issuance of citation has averaged 10 days for safety and 30 days for health. A recently instituted State policy of issuing citations for which laboratory analysis is not needed without awaiting sampling results for other potential violations, as well as decreased clerical time since implementation of the new Integrated Management Information System, should reduce the health citation lapse time (18(e) Evaluation Report, pp. 72–73).

The State must propose penalties in a manner that is at least as affective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(d)(12), 1902(d), and 1902.4(c)(2) (x) and (xi). In general, Minnesota's procedures for calculation of penalties include consideration of those factors considered Federally (i.e., severity and probability.) Additionally, Minnesota's penalty adjustment factors and the prescribed penalty levels for serious and other than serious violations are comparable to those under the Federal penalty calculation procedures. Within the general framework of this system, however, there are some differences between the Minnesota and Federal penalty systems. The State's system determines severity using six categories, based on worker's compensation disability classifications, while the Federal system uses a ten-point severity scale. The 18(e) evaluation indicates that average proposed penalties for serious violations were $150 for safety and $198 for health (18(e) *Evaluation Report*, p. 58).

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). Minnesota conducts follow-up inspections on all serious, willful and repeat violations, and therefore the State conducts a proportionately greater number of follow-up inspections (16.4% of not-in-compliance inspections) that does Federal OSHA. Because the State conducts more follow-up inspections, case files are not closed as quickly as they are under the Federal program (25.5% of safety cases and 60% of health cases with serious, willful and repeat violations remained open more than 30 days after the abatement date). State abatement periods average 12.6 days for safety and 37 days for health. Abatement dates were extended following petitions by employers for 1.5% of violations; a downward trend in these extensions during the period was apparently the result of a change in the State's procedures (18(e) *Evaluation Report*, pp. 55–57).

Wherever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g). The 18(e) *Evaluation Report* for Minnesota found no adverse adjudications which could result in program deficiencies.

(c) *Staffing and Resources.* A State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). As discussed above, the Minnesota plan provides for 31 safety compliance officers and 12 industrial hygienists as set forth in the Minnesota FY 1984 grant. This staffing level meets the proposed revised fully effective benchmarks for Minnesota for health and safety staffing, as discussed elsewhere in this notice. The State provides a six-month training program for new compliance personnel, which includes attendance at the OSHA Training Institute and in-house and field training exercises. During the evaluation period, State safety and health inspectors received, on the average, over 80 hours of formal training. The proportion of time spent on enforcement by State personnel (72.8%) as opposed to administrative and other duties is similar to that for Federal compliance officers (18(e) *Evaluation Report*, p. 78).

(d) *Other requirements.* States which have approved plans must maintain a safety and health program for State and local government employees which must be as effective as the State's plan for the private sector. See section 18(c)(6) of the Act and § 1902.3(j). Minnesota's plan provides a program in the public sector which is identical to that in the private sector. Injury and illness rates for State and local government employment (all case rate 7.0; lost workday case rate 2.9) are somewhat lower than those for the

private sector. However, the State government lost workday case rate rose slightly (from 2.3 to 2.4) in 1982, while the private sector rate declined (18(e) *Evaluation Report*, pp. 28–29).

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics' annual occupational safety and health survey and other available Federal and State measurements of program impact on worker safety and health indicate that trends in worker safety and health injury and illness rates under the State program compare favorably with those under the Federal program. See § 1902.37(b)(15). The 1981 and 1982 Bureau of Labor Statistics injury and illness rates for Minnesota (private sector all case rate for 1981, 8.2; 1982, 7.7; lost workday case rate for 1981, 3.7; 1982, 3.4) were similar to rates in States where Federal OSHA provides enforcement coverage. In 1982, the lost workday case rates for the private sector, manufacturing and construction experienced and greater decline in Minnesota than in States with Federal enforcement jurisdiction.

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.3(1). Minnesota employer recordkeeping requirements are substantially equivalent to those of Federal OSHA, and the State participates in the BLS Annual Survey of Occupational Illnesses and Injuries. As noted above, the State participates and has assured its continuing participation with OSHA in the Unified Management Information System as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. The evaluation report notes that the State conducts a training and education program covering the private and public sectors. Although on-site consultation is not a requirement for a State plan, Minnesota is planning to conduct an on-site consultation program covering the public sector (18(e) *Evaluation Report*, pp. 21–23). (The State's on-site consultation program for the private sector is conducted apart from the State plan under an agreement with OSHA under Section 7(c)(1) of the Act.)

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Minnesota plan, as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Minnesota provides coverage for on-shore maritime activities in both the private and public sectors but does not cover safety and health in off-shore private sector maritime activities (enforcement of occupational safety and health standards comparable to 29 CFR Parts 1915, 1917, 1918 and 1919, as well as provisions of general industry standards (29 CFR 1910) appropriate to hazards found in those employments). Thus, Federal coverage of off-shore private sector maritime employment would be unaffected by an affirmative 18(e) determination. In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43; the notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under Section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that if the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart N of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Minnesota plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Minnesota 18(e) proceeding and the proposed revised compliance staffing benchmarks for Minnesota have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S–6212, Docket No. T–011, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator U.S. Department of Labor, OSHA 32nd Floor, Room 3244, 230 South Dearborn Street, Chicago, Illinois 60604

Minnesota Department of Labor and Industry 444 Lafayette Road, St. Paul, Minnesota 55101

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps, codification of the States operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the States plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing; State's FY 1984 Federal grant; and the October 1982 through March 1984 18(e) *Evaluation Report* and all previous, post-certification reports. The record on Minnesota's proposed revised benchmarks includes that State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T–018) containing background information relevant to the benchmark issue in general and the current benchmark revision process. The contents of this record are available for inspection and copying at the following location: Docket Office Room S–6212, Docket No. T–018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL–CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983–1984 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity to Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Minnesota of the requirements of Section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b)(1–15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Minnesota and the public in relation to the proposed revised benchmarks for Minnesota also will be reviewed, and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Minnesota, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Minnesota State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T–011, Room S–6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Minnesota will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985 and should be submitted in quadruplicate to the Docket Officer, Docket T–011, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Minnesota as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T–011, at the address noted above. Written submissions must be directed to the specific banchmarks proposed for Minnesota and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register**. All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S–6212, at the previously mentioned address, between the hours of 8:15 A.M. and 4:45 P.M.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et. seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Minnesota under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9–83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85–1109 Filed 1–15–85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-015]

North Carolina State Plan; Proposed Revision to State Staffing Benchmarks; Comment Period

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed revision to State compliance staffing benchmarks; request for written comments.

SUMMARY: This document gives notice of the proposed revision of the compliance staffing benchmarks applicable to the North Carolina State plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL–CIO* v. *Marshall*, 570 F. 2d 1030 (D.C. Cir., 1978). OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised benchmarks for North Carolina should be approved.

DATE: Written comments must be received by February 20, 1985.

ADDRESS: Written comments should be submitted, in quadruplicate, to the Docket Officer, Docket No. T–015, Room S6212, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523–7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW, Washington, D.C. 20210, (202) 523–8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970 (the "Act", 29 U.S.C. 651 et seq.) provides that States which desire to assume responsibility for developing and enforcing occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Section 18(c) of the Act sets forth the statutory criteria for plan approval, and among these criteria is the requirement that the State's plan provide satisfactory assurances that the State agency or agencies responsible for implementing the plan have "* * * the

qualified personnel necessary for the enforcement of * * * standards," 29 U.S.C. 667(c)(4).

A 1978 decision of the U.S. Court of Appeals and the resultant implementing order issued by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) interpreted this provision of the Act to require States operating approved State plans to have sufficient compliance personnel necessary to assure a "fully effective" enforcement effort. The Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) was directed to establish "fully effective" compliance staffing levels, or benchmarks, for each State plan.

In 1980, OSHA submitted A *Report to the Court* containing these benchmarks and requiring North Carolina to allocate 83 safety and 119 health compliance personnel to conduct inspections under the plan. Attainment of the 1980 benchmark levels or subsequent revision thereto is a prerequisite for State plan final approval consideration under section 18(e) of the Act.

Both the 1978 Court Order and the 1980 *Report to the Court* explicitly contemplate subsequent revision to the benchmarks in light of more current data, including State-specific information, and other relevant considerations. In August 1983 OSHA together with State plan representatives initiated a comprehensive review and revision of the 1980 benchmarks. The State of North Carolina participated in this benchmark revision process and has proposed to the Assistant Secretary revised compliance staffing levels for a "fully effective" program responsive to the occupational safety and health needs and circumstances in the State. (A complete discussion of both the 1980 benchmarks and the present revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.)

The North Carolina plan which was granted initial State plan approval on February 1, 1973 (38 FR 3041) is administered by the North Carolina Department of Labor. The plan was certified as having satisfactorily completed all its developmental commitments on October 5, 1976 (41 FR 43901). Concurrent Federal enforcement jurisdiction was suspended on February 20, 1975 with the signing of an Operational Status Agreement (April 15, 1975, 40 FR 16843).

Proposed Revision of Benchmarks

In September 1984 the North Carolina Department of Labor (the designated agency or "designee" in the State) in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for North Carolina. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for revision to individual State benchmarks, North Carolina reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal, contained in comprehensive documents, of revised compliance staffing benchmarks of 50 safety and 27 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLM) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 9.4 hours on such inspections, and each State safety inspector is able to devote 1368 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspection to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of North Carolina.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 22.6 hours on such inspections, and each health compliance officer is able to devote 1296 hours annually to actual inspection activity, based on State personnel practices. Eastablishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to assertain compliance, based on historical experience and an assessment of proper health coverage in the State of North Carolina.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Effect of Benchmark Revision

Consistent with the 1979 Court Order in *AFL-CIO* v. *Marshall* and the procedures for implementation of benchmarks described by OSHA in the 1980 *Report to the Court*, if the revised benchmarks are approved by OSHA, the State must allocate a sufficient number of safety and health enforcement staff to meet the revised benchmarks in order to be eligible for final approval under section 18(e) of the Act. Approval of the revised benchmarks would be accompanied by an amendment to 29 CFR Part 1952, Subpart I, which generally describes the North Carolina plan, setting forth the State's revised safety and health benchmark levels.

Documents of Record

A comprehensive document containing the proposed revision to North Carolina's benchmarks, including the State's narrative submission and supporting statistical data, has been made part of the record in this proceeding and is available for public inspection and copying at the following locations:

Docket Office Rm S-6212, Docket No. T-015, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator—Region IV, U.S. Department of Labor—OSHA, 1375 Peachtree Street, NE, Atlanta, Georgia 30367

North Carolina Department of Labor, 4 West Edenton Street, Raleigh, North Carolina 27601.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket, Docket T-018, containing background information relevant to the benchmark issue in general and the current benchmark revision process. This informational docket includes, among other material, the 1978 Court of Appeals decision in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 *Report to the Court*, and a report describing the 1983-84 benchmark revision process. It is also available for public inspection and copying at the following location: Docket Office Rm. S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 201 Constitution Ave. NW, Washington, D.C. 20210.

Public Participation

OSHA is soliciting public participation in its consideration of the approval of the revised North Carolina benchmarks to assure that all relevant information, views, data and arguments are available to the Assistant Secretary during this proceeding. Members of the public are invited to submit written comments in relation to whether the proposed revised benchmarks will provide for a fully effective enforcement program for North Carolina in accordance with the Court Order in *AFL-CIO* v. *Marshall*. Comments must be received on or before February 20, 1985, and be submitted in quadruplicate to the Docket Office, Docket No. T-015, Rm. S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210. Written submissions must be directed to the specific benchmarks proposed for North Carolina and must clearly identify the issues which are addressed and the positions taken with respect to each issue.

All written submissions as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and all material submitted in response to this notice, will be made part of the record and will be available for public inspection and copying in the Docket Office, Rm. S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C. this 10th day of January, 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1102 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-016]

South Carolina State Plan; Proposed Revision to State Staffing Benchmarks; Comment Period

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed revision to State compliance staffing benchmarks; request for written comments.

SUMMARY: This document gives notice of the proposed revision of the compliance staffing benchmarks applicable to the South Carolina State plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir., 1978). OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised benchmarks for South Carolina should be approved.

DATE: Written comments must be received by February 20, 1985.

ADDRESS: Written comments should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-016, Room S6212, 200 Constitution Avenue, NW., Washington, D.C. 20210 (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210 (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970 (the "Act", 29 U.S.C. 651 et seq.) provides that States which desire to assume responsibility for developing and enforcing occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Section 18(c) of the Act sets forth the statutory criteria for plan approval, and among these criteria is the requirement that the State's plan provide satisfactory assurances that the State agency or agencies responsible for implementing the plan have "* * * the qualified personnel necessary for the enforcement of * * * standards," 29 U.S.C. 667(c)(4).

A 1979 decision of the U.S. Court of Appeals and the resultant implementing order issued by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) interpreted this provision of the Act to require States operating approved State plans to have sufficient compliance personnel necessary to assure a "fully effective" enforcement effort. The Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) was directed to establish "fully effective" compliance staffing levels, or benchmarks, for each State plan.

In 1980, OSHA submitted a *Report to the Court* containing these benchmarks and requiring South Carolina to allocate 39 safety and 60 health compliance personnel to conduct inspections under the plan. Attainment of the 1980 benchmark levels or subsequent revision thereto is a prerequisite for State plan final approval consideration under section 18(e) of the Act.

Both the 1978 Court Order and the 1980 *Report to the Court* explicitly contemplate subsequent revision to the benchmarks in light of more current data, including State-specific information, and other relevant considerations. In August 1983 OSHA together with State plan representatives initiated a comprehensive review and revision of the 1980 benchmarks. The State of South Carolina participated in this benchmark revision process and has proposed to the Assistant Secretary revised compliance staffing levels for a "fully effective" program responsive to the occupational safety and health needs and circumstances in the State. (A complete discussion of both the 1980 benchmarks and the present revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.)

The South Carolina plan which was granted initial State plan approval on December 6, 1972 (37 FR 25932) is administered by the South Carolina Department of Labor. The plan was certified as having satisfactorily completed all its developmental commitments on August 3, 1976, (41 FR 32425). Concurrent Federal enforcement

jurisdiction was suspended on May 9, 1975 with the signing of an Operational Status Agreement (June 26, 1975, 40 FR 27024).

Proposed Revision of Benchmarks

In September 1984 the South Carolina Department of Labor (the designated agency or "designee" in the State) in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for South Carolina. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for revision to individual State benchmarks, South Carolina reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal, contained in comprehensive documents, of revised compliance staffing benchmarks of 17 safety and 12 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 11.7 hours on such inspections, and each State safety inspector is able to devote 1327 hours annually to actual inspector activity, based on State personnel practices. Establishments have been added to an subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of South Carolina.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 33.7 hours on such inspections, and each health compliance officer is able to devote 1364 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to an use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of South Carolina.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Effect on Benchmark Revision

Consistent with the 1978 Court of Order in *AFL-CIO* v. *Marshall* and the procedures for implementation of benchmarks described by OSHA in the 1980 *Report to the Court*, if the proposed revised benchmarks are approved by OSHA, the State must allocate a sufficient number of safety and health enforcement staff to meet the revised benchmarks in order to be eligible for final approval under section 18(e) of the Act. Approval of the revised benchmarks would be accompanied by an amendment of 29 CFR Part 1952, Subpart C, which generally describes the South Carolina plan, setting forth the State's revised safety and health benchmark levels.

Documents of Record

A comprehensive document containing the proposed revision to South Carolina's benchmarks, including the State's narrative submission and supporting statistical data has been made part of the record in this proceeding and is available for public inspection and copying at the following locations:

Docket Office, Rm S-6212, Docket No. T-016, Occupational Safety and, Health Administration, U.S. Department of Labor, 200 Consitution Avenue, NW., Washington, D.C. 20210

Regional Administrator—Region IV, U.S. Department of Labor—OSHA, 1375 Peachtree Street, NE., Suite 587, Atlanta, Georgia 30367

South Carolina Department of Labor, 3600 Forest Drive, P.O. Box 11329, Columbia, South Carolina 29211.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket, Docket T-018, containing background information relevant to the benchmark issue in general and the current benchmark revision process. This information docket includes, among other material, the 1978 Court of Appeals decision in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 *Report to the Court*, and a report describing the 1983-84 benchmark revision process. It is also available for public inspection and copying at the following location: Docket Office Rm S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 201 Constitution Ave NW., Washington, D.C. 20210.

Public Participation

OSHA is soliciting public participation in its consideration of the approval of the revised South Carolina benchmarks to assure that all relevant information, views, data and arguments are available to the Assistant Secretary during this proceeding. Members of the public are invited to submit written comments in relation to whether the proposed revised benchmarks will provide for a fully effective enforcement program for South Carolina in accordance with the Court Order in *AFL-CIO* v. *Marhsall*. Comments must be received on or before February 20, 1985, and be submitted in quadruplicate to the Docket Office, Docket No. T-016, Rm. S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must be directed to the specific benchmarks proposed for South Carolina and must clearly identify the issues which are addressed and the positions taken with respect to each issue.

All written submissions as well as other information gathered by OSHA will be considered in any action taken.

The record of this proceeding, including written comments and all material submitted in response to this r.ot ce, will be made part of the record and will be available for public inspection and copying in the Docket Office, Rm. S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C. this 10th day of January, 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1101 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-012]

Tennessee State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity To Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request an informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Tennessee State occupational safety and health plan, as administered by the Tennessee Department of Labor, for a determination under section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Tennessee plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall,* 570 F.2d 1030 (D.C. Cir., 1978). If an affirmative determination under section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Tennessee plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not revised compliance staffing benchmarks for Tennessee should be approved and final State plan approval granted; and, that interested persons may request an informal public hearing on the question of final State plan approval.

DATE: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-012, Room S6212, 200 Constitution Avenue, NW, Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et. seq.*, (the "Act") provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied.

An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall,* C.A. No. 74-406), pursuant to a U.S. Court of Appeals Decision, that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or

submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Tennessee Plan and of Its Proposed Revised Benchmarks

Tennessee Plan

On January 31, 1973, Tennessee submitted an occupational safety and health plan in accordance with section 18(b) of the Act and 29 CFR Part 1902, Subpart C, and on March 2, 1973, a notice was published in the **Federal Register** (38 FR 5702) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments in writing and to request an informal hearing concerning the plan. Comments were received from the American Federation of Labor-Congress Industrial Organization (AFL-CIO). In response to these comments as well as to OSHA's review of the plan submission, the State made changes in its plan, which were discussed in the notice of initial approval (38 FR 17838). Because the comments did not indicate that the plan failed in any material way to meet the criteria for acceptability as set forth in section 18(c) of the Act and 29 CFR, Part 1902, no hearing was held.

On July 5, 1973, the Assistant Secretary published a notice granting initial approval of the Tennessee plan as a developmental plan under section 18(b) of the Act (38 FR 17838). The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration.

The Tennessee State plan does not cover safety and health issues with regard to private sector maritime employment, employment on military bases or railroad employers. (As a result of a State Supreme Court decision, the State cannot cover those operations of railroad employers which are subject to Federal OSHA jurisdiction.) The Tennessee Department of Labor is now designated as having responsibility for administering the plan throughout the State. Until 1977, this responsibility was shared with the Tennessee Department of Health. The day-to-day administration of the plan is directed by the Tennessee Division of Occupational Safety and Health. The plan provides for the adoption by Tennessee of standards which are at least as effective as Federal occupational safety and health standards. The plan requires employers to furnish employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with all occupational safety and health standards promulgated by the agency. Employees are required to comply with all standards and regulations applicable to their conduct. The plan contains provisions similar to Federal procedures governing emergency temporary standards; imminent danger proceedings; variances; safeguards to protect trade secrets; protection of employees against discrimination for exercising their rights under the plan; and employer and employee rights to participate in inspection and review proceedings. Appeal of citations and penalties are heard by the Tennessee Occupational Safety and Health Review Commission, whose decisions may be appealed to the Court of Appeals of Tennessee.

The notice of initial approval noted a few distinctions between the Federal and Tennessee program. The State plan does not cover safety and health in private sector maritime employment. Under Tennessee law employees have the right to contest the terms and conditions of citations as well as abatement dates whereas Federally, employees may only object to the established abatement periods. The law also provides for stop orders for cases of imminent danger situations. The Assistant Secretary's initial approval of Tennessee's developmental plan, a general description of the plan, a schedule of required developmental steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart P; 38 FR 17838, July 5, 1973).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and submitted for OSHA approval during the period ending July 5, 1976. These "developmental steps" included amendments to the Tennessee Occupational Safety and Health Act, promulgation of State occupational safety and health standards and program regulations, and development of a public employee program. In completing these developmental steps, the State developed and submitted for Federal approval all components of its program including, among other things, legislative amendments, management information system, a merit staffing system, regulations for inspections, citations and proposed penalties, recordkeeping and reporting regulations, and a safety and health poster for private employers and local government employers choosing to be treated as private employers and a poster for State government employers and all other local government employers.

These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Tennessee subpart of 29 CFR Part 1952 was amended to reflect each of these approval determination (see 29 CFR 1952.244).

On November 11, 1974, an operational status agreement was entered into between Federal OSHA and Tennessee. A **Federal Register** notice announcing the operational status agreement was published on December 23, 1974 (39 FR 44200) and amended April 14, 1976 (41 FR 34252, August 13, 1976). Under the terms of that agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement authority with regard to Federal occupational safety and health standards in all issues covered by the Tennessee plan.

On May 3, 1978, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Tennessee had satisfactorily completed all developmental steps (43 FR 20980). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Tennessee plan—to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Tennessee Benchmarks

In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) pursuant to a U.S. Court of Appeals decision to calculate for each State plan the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Tennessee to allocate 52 safety and 79 health compliance personnel to conduct inspections under the plan.

In September 1984 the Tennessee State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Tennessee. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Tennessee reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents, of a revised compliance staffing benchmark of 22 safety and 14 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 9 hours on such inspections, and each State safety inspector is able to devote 1200 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Tennessee.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS) as published in 1977 which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 29.6 hours on such inspections, and each health compliance officer is able to devote 1420 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites; response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Tennessee.

OSHA has reviewed the State's proposed benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to insure a "fully effective" enforcement program.

Determination Of Eligibility

This **Federal Register** notice announces the eligibility of the Tennessee plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibiity is based upon OSHA's findings that:

(1) The Tennessee plan has been monitored in actual operations for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report of the Tennessee Plan*, which has been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the *1980 Report to the Court*, Tennessee proposed to revised its fully effective benchmarks to 22 safety and 14 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the Court Order in *AFL-CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Tennessee has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* as amended in which the State has committed itself to funding the State share of salaries for 23 safety and 14 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Tennessee participates and has assured its continued participation in the unified management information system developed by OSHA.

Issues for Determination in the 18(e) Proceeding

Approval of Proposed Revised Benchmarks

As discussed in the History of the Tennessee Plan and of Its Proposed Revised Benchmarks section of this notice, Tennessee has proposed revised compliance staffing benchmarks of 22 safety and 14 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to insure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the *1980 Report to the Court*.

As part of the present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Tennessee, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Tennessee

submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.

Final State Plan Approval Determination

The Tennessee plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Tennessee plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in section 18(c) of the Act, indicate that the regulatory indices and criteria are being met, and the Assistant Secretary accordingly has made an initial determination that the Tennessee plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Tennessee. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4 (a) and (b). The Tennessee plan provides for adoption of standards which are identical to Federal standards. For OSHA standards requiring State action during the 18(e) evaluation period, Tennessee's adoption process met with the six month time frame for all standards. (Evaluation Report, pp. 6 and 7).

Where a State adopts Federal standards, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1092.3(d)(1), 1903.4(a), 1902.4(b)(2). As already noted, the Tennessee plan provides for adoption of standards identical to Federal standards. Tennessee likewise adopts standards interpretations, which are identical to the Federal.

The State is required to take the necessary adminstrative judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from the Federal standards or developed by the State. See § 1902.37(b)(5). No such challenge to State standards has ever occurred in Tennessee.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the standard were in effect. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). Tennessee had one request for a permanent variance during the 18(e) evaluation period which was deemed to provide equivalent protection (Evaluation Report, p. 7).

Where a temporary variance is granted, the State must ensure that the employer complies with the standard as soon as possible and provides appropriate interim employee protection. See §§ 1902.37(b)(7) and 1902.4(b)(2)(iv). The Tennessee Occupational Safety and Health Act requires that any employer granted a temporary variance must have an effective program for coming into compliance with the standard as soon as possible. During the 18(e) evaluation period, no temporary variance requests were received (Evaluation Report, p. 7).

Past years' experience indicates that the State's adherence to procedures has been proper when granting permanent and temporary variances.

(b) *Enforcement.* Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all work places at least as effective as that in section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to designated target industries while providing adequate protection of all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). Data contained in the 18(e) evaluation report indicates that 94.2% of State programmed safety inspections and 74.6% of programmed health inspections are conducted in high hazard industries. (Evaluation Report pp. 3, 12 and 13).

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3 (e) and (f), and 1902.4(c)(2) (i) and (ix). The Tennessee Administrative Warrant Act authorizes the Tennessee Department of Labor to petition for an order to permit entry into such establishment that has refused entry for the purpose of inspection or investigation. Tennessee had 12 denials of entry during this evaluation period and was successful in obtaining warrants for all. (Evaluation Report, pp. 3 and 16).

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2).

Tennessee has adopted an Operations Manual, and thus follows inspection procedures, including documentation procedures, which are similar to Federal. The Evaluation Report notes adherence by Tennessee to these procedures. (Evaluation Report, p. 3)

Comparison of Federal and State data showed a somewhat lower percentage of State serious safety violations (12.5%) and serious health violations (8.3%). These deviations can be attributed to the fact that Tennessee formerly allowed a lower classification rating to be assigned to some violations than the Federal (Evaluation Report, p. 18); the average employer has received multiple inspections, resulting in fewer violations being present in the workplace (Evaluation Report, p. 18); and the State's method of grouping other-than-serious violations to constitute serious violations is different than the Federal (Evaluation Report, p. 18).

State plans must include a prohibition on advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Tennessee adopted approved procedures for advance notice similar to

the Federal procedures. There were 30 instances of advance notice. In all 30 instances, advance notice was properly given in accord with procedures as required for the effective conduct of inspections (Evaluation Report, Appendix A, p. 12).

State plans must provide for inspections in response to employee complaints, and must provide opportunity for employee participation in State inspections. See § 1902.4(c)(2) (i) through (iii). Tennessee follows a policy of responding to most complaints with an inspection (94.2%) rather than a letter. During the current evaluation period, 97.7% of all State inspections included either an employee representative on the walkaround or interviews with employees.

State plans must also provide protection for employees against discrimination similar to that found in Section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). The Tennessee Act, approved as part of the initial approval and certification process, contains such protection. Twelve complaints of discrimination were investigated during this evaluation period. None were found meritorious. However, Tennessee had two discrimination cases found meritorious several years ago that had not been litigated as a result of delays in the State Attorney General's office. The Attorney General's office is presently taking action to resolve these two cases. As noted in the evaluation report, the State has obtained assurance from the Attorney General that timely litigation of discrimination complaints will continue. (Evaluation Report, pp. 3 and 25).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.4(c)(2) (x) and (xi). The State's lapse time from inspection to issuance of citation averaged 5.6 days for safety and 15.5 days for health (Evaluation Report, Appendix A, p. 31).

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c) (x) and (xi).

Although Tennessee's procedures for penalty calculation and adjustment are identical to the Federal, the application of those procedures differs somewhat from Federal OSHA. The average penalty for serious safety violation is $145; the average serious health penalty is $221 (Evaluation Report, pp. 4, 22 and 23).

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). Tennessee's policy is to conduct follow-up inspections for all serious, willful, and repeat violations. In addition, the State performs monitoring visits relative to Petitions for Modification of Abatement which the State classified as follow-up inspections thus increasing the percentage of such inspections (21.7% of not-in-compliance inspections). (Evaluation Report, pp. 20–21). Tennessee is observing and citing Failure to Abate violations in 5.0% of follow-up inspections.

The abatement period set for safety violations is comparable to that set Federally (12.0 days average for safety). However, the abatement period set for health is generally longer (41.2 days average for health). Tennessee's percent of violations with abatement periods over 30 days is higher than the Federal (13.1% of safety violations and 26.4% of health violations). The longer abatement periods result from the State's acceptance of the employer's indication of time needed to accomplish abatement. However, Tennessee is obtaining evidence of abatement in 99.5% of its inspections. (Evaluation Report, pp. 20–21).

Whenever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g). The Evaluation Report for Tennessee noted no adverse adjudications during the evaluation period. In February 1976, the State Supreme Court precluded Tennessee from providing coverage in those portions of railroad operations that are traditionally covered by Federal OSHA. Although corrective legislative action was considered, Federal OSHA has agreed to assume responsibility for this limited area and finds that its exclusion from the State plan has no negative impact on its overall authority. In 1979 the State sought and obtained corrective legislative action to remedy a deficiency in its authority to obtain administrative inspection warrants.

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). The Tennessee plan provides for 23 safety compliance officers and 14 industrial hygienists as set forth in the Tennessee FY 1984 grant, as amended. This staffing level meets the "fully effective" revised benchmarks proposed for Tennessee for health and safety staffing. The proportion of resources devoted to enforcement is 65.5%, and the average cost per inspection is $419. (Evaluation Report, Appendix A pp. 33–34).

Tennessee provides its safety and health personnel with formal training based on the needs of the staff and availability of funds. The average time spent, per person, in formal training was as follows: Safety Inspectors, 48.9 hours; Industrial Hygienists, 174.8 hours. OSHA considers the amount of time spent in formal training in be appropriate.

(d) *Other Requirements.* States which have approved plans must maintain a safety and health program for State and local employees which must be as effective as the State's plan for the private sector. See § 1902.3(j). The Tennessee plan provides a program in the public sector which is different from that in the private sector. The three significant differences are: (1) There are no penalties imposed against employers when violations are found and cited; (2) public sector compliance officers make compliance assistance and courtesy visits, as well as conduct inspections, and (3) 98% of the employers are covered by a self-inspection program. Injury rates are somewhat lower in the public sector than in the private (all case rate—5.1, lost work day case rate—2.9) (Evaluation Report Appendix A, p. 4)

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics annual occupational safety and health survey and other available Federal and State measurements of program impact on worker safety and health indicate a favorable comparison of worker safety and health injury and illness rates between the State and Federal program. See § 1902.37(b)(15). The 1982 BLS rates (all case rate and lost workday case rate) for Tennessee were comparable to rates in States where Federal OSHA provides enforcement coverage and are within the prescribed acceptable levels. The 1982 lost workday case rate in the private sector of 3.2 declined from the 1981 rate of 3.3 cases per 100 full time workers. In addition, the decline in rates since 1973 is similar to the decline in States with Federal enforcement.

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.4(l). Tennessee employer recordkeeping requirements are identical to those of Federal OSHA, and the State participates in the BLS Annual Survey of Occupational Illness and Injuries. As noted above, the State participates and has assured its continuing participation with OSHA in the unified management information system as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. Training programs for both the State's staff and the public sector have been established and are ongoing. In the public sector, 2418 public sector employers and supervisors, combined with public employees participated in training programs totalling 63 training sessions. Two thousand and sixty-eight private sector employees and 1675 private sector supervisors and employers participated in combined training programs totalling 167 training sessions (Evaluation Report, pp. 9 and 10).

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Tennessee plan, as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Tennessee has excluded from its plan: Safety and health coverage in private sector maritime activities (enforcement of occupational safety and health standards comparable to 29 CFR Parts 1915, shipyard employment; 1917, marine terminals; 1918, longshoring; and 1919, gear certification as well as provisions of general industry standards (29 CFR Part 1910) appropriate to hazards found in these employments). Coverage of railroad employees is also excluded from the plan pursuant to a Tennessee Supreme Court ruling that the Tennessee Safety and Health Act does not extend to this group of workers. In addition, Tennessee does not covered employment on military bases. Thus, Federal coverage of these issues would be unaffected by an affirmative 18(e) determination.

In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43; the notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart P of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Tennessee plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Tennessee 18(e) proceeding and the proposed revised compliance staffing benchmarks for Tennessee have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The Contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S-6212, Docket No. T-012, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator—Region IV, U.S. Department of Labor, OSHA, 1375 Peachtree Street, NE Suite 587, Atlanta, Georgia 30367

Tennessee Department of Labor, 501 Union Building, Suite "A"—2nd Floor, Nashville, Tennessee 37219.

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps codification of the State's operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulationsand procedures, an organizational chart for State staffing; the State's FY 1984 Federal grant; and the FY 1983 18(e) Evaluation Report and all previous, post-certification reports. The record on Tennessee's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T-018) containing background information relevant to the benchmark issue in general and the current benchmark revision process. The content of this record is available for inspection and copying at the following location: Docket Office, Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983-1984 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity To Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Tennessee of the requirements of section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 CFR 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b)(1-15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and

analyzed. Data and views submitted by Tennessee and the public in relation to the proposed revised benchmarks for Tennessee also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Tennessee, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Tennessee State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received on or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T-012, Rm S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Tennessee will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985, and should be submitted in quadruplicate to the Docket Officer, Docket T-012, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Tennessee as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T-102, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Tennessee and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register.** All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Tennessee under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects In CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1984.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1110 Filed 1-15-85; 8:45 am]

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29 CFR Part 1952

[Docket No. T-013]

Utah State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity to Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request an informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Utah State occupational safety and health plan, as administered by the Industrial Commission of Utah, for a determination under Section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Utah plan, which were originally established in April 1980 in response to the U.S. Court of Appeals in *AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir., 1978). If an affirmative determination under Section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Utah plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not revised compliance staffing benchmarks for Utah should be approved and final State plan approval granted; and, that interested persons may request an informal public hearing on the question of final State plan approval.

DATES: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-013, Room S6212, 200 Constitutional Avenue, NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the "Act"), provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds

that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied.

An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL–CIO* v. *Marshall*, C.A. No. 74–406), pursuant to a U.S. Court of Appeals Decision, that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Utah Plan and of its Proposed Revised Benchmarks

Utah Plan

Utah submitted an occupational safety and health plan on September 20, 1972, in accordance with section 18(b) of the Act and 29 CFR Part 1902; and on October 21, 1972, a notice was published in the **Federal Register** (37 FR 22781) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments in writing and to request an informal hearing concerning the plan. Comments were received from the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), Utah Manufacturers Association, United States Steel Corporation, Associated General Contractors of America, and the Horne Construction Corporation. No requests for a hearing were received. In response to these comments as well as to OSHA's review of the plan submission, the State made changes in its plan, which were discussed in the notice of initial approval (38 FR 1178).

On January 10, 1973, the Assistant Secretary published a notice granting initial approval of the Utah plan as a developmental plan under section 18(b) of the Act (38 FR 1178). The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Administration.

The plan covers all issues except maritime employment and the State does not enforce its standards on the Hill Air Force Base. The Utah Industrial Commission is designated as having responsibility for administering the plan throughout the State. The day-to-day administration of the plan is directed by the Utah Division of Occupational Safety and Health within the Industrial Commission. The plan provides for the adoption by Utah of occupational safety and health standards which are generally identical to the Federal standards. Utah has also promulgated under its plan independent State standards for oil, gas, geothermal and related services, lock-out and tag-out procedures, industrial railroads and explosive materials.

The plan requires that each employer shall furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or physical harm to his employees and comply with the standards promulgated under the Utah Act. Each employee shall comply with the Occupational Safety and Health standards, orders, rules, and regulations promulgated under the Utah Act.

The plan contains provisions for emergency temporary standards; imminent danger proceedings; discrimination protection; variances; safeguards to protect trade secrets; and employer and employee rights to participate in inspection and review proceedings. Appeals of citations and penalties are heard by the Occupational Safety and Health Review Commission. Decisions of the Review Commission may be appealed to the State District Court.

The notice of initial approval noted a few distinctions between the Federal and Utah programs. The State plan does not cover safety and health in maritime employment. Utah's contest period is 30 days compared to 15 days under the Federal law. Unlike the Federal

program, the Utah Industrial Commission rather than the courts may initially restrain employee discrimination and afford the employee any appropriate relief through the issuance of an order.

The Assistant Secretary's initial approval of the developmental plan for Utah, a general description of the plan, schedule of required developmental steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart E; 38 FR 1178 (January 10, 1973)).

In accordance with the State's developmental schedule all major structural components of the plan were put in place and submitted for OSHA approval during the period ending January 3, 1976. These "developmental step" included enactment of enabling legislation; promulgation of State occupational safety and health standards; adoption of Federal standards and revocation of existing State standards; adoption of program regulations equivalent to 29 CFR Parts 1903, 1904, 1905; and the development of a management information system.

These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of Section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Utah subpart of 29 CFR Part 1952 was amended to reflect each of these approval determinations (see 29 CFR 1952.114).

During 1974, the Utah plan had met the OSHA requirements for an operational status agreement. A **Federal Register** notice was published on October 10, 1974 (39 FR 36479), announcing that the operational status agreement had been signed on October 4, 1974. Under the terms of the agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement authority with regard to Federal occupational safety and health standards in all issues covered by the Utah plan.

On November 19, 1976, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Utah had satisfactorily completed all developmental steps (41 FR 51014). In certifying the plan, the Assistant Secretary found the structural features of program—the statute, standards, regulations, and written procedures for administering the Utah plan—to be at least as effective as corresponding Federal provisions. Certification does not however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accordance with section 18(e) of the Act whether the Statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Utah Benchmarks

In 1978, the Assistant Secretary was directed by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) pursuant to a U.S. Court of Appeals decision, to calculate for each State Plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks and requiring Utah to allocate 15 safety and 23 health compliance personnel to conduct inspections under the plan.

In September 1984 the Utah State designee in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Utah. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Utah reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal to OSHA, contained in comprehensive documents, of a revised compliance staffing benchmark of 10 safety and 9 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications Whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 9.8 hours on such inspections, and each State safety inspector is able to devote 1440 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury, and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Utah.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Health Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 25.8 hours on such inspections, and each health compliance officer is able to devote 1384 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents; and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Utah.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the compliance staffing levels proposed appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program".

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Utah plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made

before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's findings that:

(1) The Utah plan has been monitored in actual operation for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report* of the Utah Plan, which together with all other post-certification reports, has been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the *1980 Report to the Court* in *AFL-CIO* v. *Marshall* Utah proposed to revise its fully effective benchmarks to 10 safety and 9 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the court order in *AFL-CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Utah has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* (as amended) in which the State has committed itself to funding the State share of salaries for 10 safety and 9 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Utah participates and has assured its continued participation in the unified management information system developed by OSHA.

Issues for Determination in the 18(e) Proceedings

Approval for Proposed Revised Benchmarks

As discussed in the "History of the Utah Plan and of its Proposed Revised Benchmarks" section of this notice, Utah has proposed revised compliance staffing benchmarks of 10 safety and 9 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to ensure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL-CIO* v. *Marshall* and the *1980 Report to the Court.*

As part of the present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Utah, including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Utah submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.

Final State Plan Approval Determination

The Utah plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1092.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.37(b). OSHA believes that the results of its evaluation of the Utah plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in Section 18(c) of the Act, indicate that the regulatory indices and criteria are being met, and the Assistant Secretary accordingly has made an initial determination that the Utah plan is eligible for an affirmative 18(c) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination of Utah. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4(a) and (b). The Utah plan provides for adoption of standards which are generally identical to the Federal standards. Utah's response to adoption of Federal standards is prompt and timely. During the period covered by the 18(e) Evaluation Report, Utah adopted all applicable standards within the six-month time frame (Evaluation Report, p. 3).

Where a State adopts Federal standards, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1902.4(a), and 1902.4(b)(2). As noted above, the Utah plan provides for the adoption of standards which are generally identical to the Federal standards. The State likewise adopts standards interpretations which are also identical to the Federal.

The State is required to take the necessary administrative, judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from Federal standards or developed by the State. See § 1902.37(b)(5). There has not been a challenge to any of the State standards.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the variance had not been granted. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). During this evaluation period, Utah granted two permanent variances. The report notes that equivalent protection for affected employees is assured in both cases (Evaluation Report, p. 4).

Where a temporary variance from a standard is granted, the State has ensured that the employer has come into compliance with the standard as early as possible. See § 192.37(b)(7). Under the Utah plan, no temporary variances were granted (Evaluation Report, p. 4).

(b) *Enforcement.* Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is at least as effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all workplaces at least as effective as that in Section 8 of the Act. The State inspection program must provide that sufficient resources be

directed to designated target industries while providing adequate protection to all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c).

Utah's scheduling system for safety and health inspections is generally the same as OSMA's except that it uses workers' compensation data to supplement the safety scheduling. Ninety-eight percent (98.0%) of Utah's programmed safety inspections and 98.9% of programmed health inspections are conducted in high hazard industries. The report indicates that the percent of total inspections that were general schedule for safety and health is 76.7% and 57.1%. The percent is slightly lower than the Federal and is due to Utah's practice of conducting more follow-ups (15.6% safety and 10.8% health) (Evaluation Report, p. 9).

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.37(b)(9), 1902.3(e) and (f), and 1902.4(c)(2) (i) and (ix). Under the Utah plan, the Commission is authorized to petition for an order to permit entry into places of employment that have refused entry for the purpose of inspection or investigation. Utah's average time from date of denial to date of warrant application is 7.1 days versus the 3.7 Federal average. During this evaluation period, Utah had 10 denials of entry and obtained warrants for six (Evaluation Report, p. 14).

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.(d)(1), and 1902.4(c)(2). Utah has adopted a Compliance Operation Manual and also follows established inspection procedures, including documentation procedures, which are generally identical to Federal procedures. The Evaluation Report indicates that the State adheres to these approved procedures. The State percent of serious violations for safety and health is 5.1 and 12.7 (Evaluation Report, pp. 15 and 16).

State plans must include a prohibition on advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Utah's procedures for advance notice generally parallel OSHA's. During the evaluation period, Utah issued no advance notice of inspection.

State plans must provide for inspection in response to employee complaints, and must provide opportunity for employee participation in State inspections. See §§ 19002.4(c)(2) (i) through (iii). Utah follows a complaint policy similar to the Federal, except that the State responds by letter instead of inspection only for alleged de minimis type violations. The State responded to 21% pf safety complaints by letter and 10% for health. Employee representatives either accompanied inspectors or employees were interviewed on 100% of inspections during the evaluation period (Evaluation Report, p. 15).

State plans must also provide protection for employees against discrimination similar to that found in Section 11(c) of the Federal Act. See § 1902.4(c)(2)(v). The Utah State plan provides authority to protect employees from being discriminated against for exercising their rights thereunder in terms similar to Section 11(c) of the Federal Act. However, during this evaluation period Utah did not receive or investigate any discrimination complaints. Since completion of the Federal training of State staff has been completed, one discrimination complaint has been received and is under investigation by Utah. Past monitoring of Utah's plan has disclosed effective application of the State's approved discrimination protection provisions (Evaluation Report, p. 24).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.4(c)(2) (x) and (xi). Utah's lapse time from inspection to issuance of citation has averaged 9 days for safety and 7 for health.

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c) (x) and (xi). Utah's procedures for penalty calculation and adjustment are generally identical to the Federal. The average proposed penalty for serious safety ($320.00) and serious health ($346.00) is somewhat higher than OSHA's (Evaluation Report, pp. 20–21).

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d), and 1902.4(c)(2) (vii) and (xi). Utah conducted more follow-up inspections (15.6% safety and 10.8% health) than the Federal, because the State has a follow-up policy which generally provides for reinspection on all citations for serious, willful or repeated violations. Utah's percent of open inspections (Safety) 30 days after the last abatement is 22.5%. Since Utah has corrected an error in the coding of case closing data, a later review indicates that virtually no safety cases are opened 30 days after the last abatement date (Evaluation Report, p. 18).

Whenever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiencies in its program which may be caused by an adverse administrative or judicial determination. See §§ 1902.37(b)(14) and 1902.3 (d) and (g). There were no such adverse adjudications in Utah during the evaluation period.

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the Act; 29 CFR §§ 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). The Utah plan provides for 10 safety and 9 health compliance officers as set forth for the amended Fiscal Year 1984 grant. This staffing level meets the "fully effective" proposed revised benchmarks of 10 safety and 9 health compliance officers established for Utah safety and health staffing. The State's cost per covered worker is $3.77. Staff training continues to be an important activity in Utah's program. Utah recognizes the importance of training its staff, thus during the evaluation period the average number of hours staff members spent in formal training was: Safety Compliance Officer, 108 hours; Industrial Hygienist, 133 hours; Training and Education Staff, 93 hours; and Other Staff, 27 hours (Evaluation Report, p. 7).

(d) *Other Requirements.* States which have approved plans must maintain a safety and health program for State and local government employees which must be as effective as the State's plan for the private sector. See section 18(c)(6) of the Act and 1902.3(j). The Utah plan provides a program for the public sector which is identical to the private sector, except the State does not assess monetary penalties. There has been an increase in lost work day case rates from 1981–1982 in the public sector, however, the public sector rates in Utah are still well below the private sector rates. Injury rates are generally lower in the public sector than in the private

sector (all case rate 8.1; lost workday case rate 2.2). UOSH conducted 5.5% of its total inspections in the public sector during the evaluation period (Evaluation Report, p. 8).

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics annual occupational safety and health survey and other available Federal and State measurements of program impact on worker safety and health, indicate the trends in worker safety and health injury and illness incidence rates under the State program compare favorably with those under the Federal program. See § 1902.37(b)(15). In 1982 the all industry all case rate for Utah (8.9) was higher than in Federal States and the all industry lost workday case rate for the year was the same (3.4) as the Federal. However, from 1981 to 1982, the percent of reduction in all industry lost workday case rates in Utah was greater than the reduction for that rate in Federal States, and the Utah's all industry all case rate decreased by 8.2%.

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.3(l). Utah employer recordkeeping requirements are generally identical to the Federal and the State participates in the BLS Annual Survey of Occupational Illnessess and Injuries. Further, the State participates and has assured its continuing participation with OSHA in the unified management information system as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conductinig training and consultation with employers and employees. The evaluation report indicates that effective training and a consultation program have been implemented. The State's on-site consultation program for the private sector is conducted apart from the State plan under an agreement with OSHA under section 7(c)(1) of the OSHA Act. Utah's Act does not provide authority for the State to conduct on-site consultation for the public sector. Comprehensive and extensive training was provided during the evaluation period. During the evaluation period, 2,824 employers and supervisors and 18,156 employees were trained in the private sector, plus one employer and 31 employees in the public sector; 972 out of 2,824 (34.4%) of employers trained and 4,624 out of 18,156 (25.5%) of employees trained were from high hazard industries. Utah continues to operate a satisfactory outreach program in both the private and public sectors, providing about 18% of its resources on training employers and employees (Evaluation Report, p. 6).

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operations, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Utah plan, as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Utah has excluded from its plan safety and health coverage in maritime activities (enforcement of occupational safety and health standards comparable to 29 CFR Parts 1915, shipyard employment; 1917, maritime terminals; 1918, longshoring; and, 1919, gear certification; as well as provisions of general industry standards (29 CFR Part 1910) appropriate to hazards found in these employments) and does not enforce its standards on Hill Air Force Base. Thus, Federal coverage of these issues would be unaffected by an affirmative 18(e) determination. In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43. The notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which is at least as effective as the Federal, or that if the State has failed to submit program change supplements as required by 29 CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart E of 29 CFR Part 1952, which codifies OSHA decisions regarding approval of the Utah plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Utah 18(e) proceeding and the proposed revised compliance staffing benchmarks for Utah have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S-6212, Docket No. T-013, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator—Region VIII, U.S. Department of Labor, OSHA, Room 1554, Federal Building, 1961 Stout Street, Denver, Colorado 80294

Utah Industrial Commission, Utah Occupational Safety and Health, 160 East Third South, Salt Lake City, Utah 84110-5800.

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps, codification of the State's operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing; the State's FY 1984 Federal grant; and the October 1982 through March 1984 Evaluation Report and all previous post-certification reports. The record on Utah's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T-018) containing background information relevant to the benchmark issue in general and the current benchmark revision process. The contents of this record are available for inspection and copying at the following location: Docket Office, Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983–84 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity to Request Hearing

The Assistant Secretary is directed under § 1902.41 to make a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Utah of the requirements of section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b)(1–15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Utah and the public in relation to the proposed revised benchmarks for Utah also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Utah, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Utah State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) determination. These comments must be received on or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T–013, Rm S–6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Utah will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985 and should be submitted in quadruplicate to the Docket Officer, Docket T–013, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Utah as a prerequisite for the proposed 18(e) detemination. These comments also must be received on or before February 20, 1985, and submitted in quadruplicate to the Docket Officer, Docket No. T–013, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Utah and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register.** All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S–6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval would not place small employers in Utah under any new or different requirements, nor would any additional burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9–83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85–1108 Filed 1–15–85; 8:45 am]

BILLING CODE 4510–26–M

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29 CFR Part 1952

[Docket No. T–017]

Virginia State Plan; Proposed Revision to State Staffing Benchmarks; Comment Period

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed revision to State compliance staffing benchmarks; request for written comments.

SUMMARY: This document given notice of the proposed revision of the compliance staffing benchmarks applicable to the Virginia State plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir. 1978). OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not the revised benchmarks for Virginia should be approved.

DATES: Written comments must be received by February 20, 1985.

ADDRESS: Written comments should be submitted, in quadruplicate, to the Docket Officer, Docket No. T–017, Room S6212, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523–7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523–8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970 (the "Act", 29 U.S.C. 651 et seq.) provides that States which desire to assume responsiblity for developing and enforcing occupational safety and health standards may do so

by submitting, and obtaining Federal approval of, a State plan. Section 18(c) of the Act sets forth the statutory criteria for plan approval, and among these criteria is the requirement that the State's plan provide satisfactory assurances that the State agency or agencies responsible for implementing the plan have "* * * the qualified personnel necessary for the enforcement of * * * standards," 29 U.S.C. 667(c)(4).

A 1978 decision of the U.S. Court of Appeals and the resultant implementing order issued by the U.S. District Court for the District of Columbia (*AFL-CIO* v. *Marshall*, C.A. No. 74-406) interpreted this provision of the Act to require States operating approved State plans to have sufficient compliance personnel necessary to assure a "fully effective " enforcement effort. The Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) was directed to establish "fully effective" compliance staffing levels, or benchmarks, for each State plan.

In 1980, OSHA submitted a *Report to the Court* containing these benchmarks and requiring Virginia to allocate 51 safety and 74 health compliance personnel to conduct inspections under the plan. Attainment of the 1980 benchmark levels or subsequent revision thereto is a prerequisite for State plan final approval consideration under section 18(e) of the Act.

Both the 1978 Court Order and the 1980 *Report to the Court* explicitly contemplate subsequent revision to the benchmarks in light of more current data, including State-specific information, and other relevant considerations. In August 1983 OSHA together with State plan representatives initiated a comprehensive review and revision of the 1980 benchmarks. The Commonwealth of Virginia participated in this benchmark revision process and has proposed to the Assistant Secretary revised compliance staffing levels for a "fully effective" program responsive to the occupational safety and health needs and circumstances in the State. (A complete discussion of both the 1980 benchmarks and the present revision process is set forth in today's **Federal Register** in the notice proposing revised benchmarks and final approval for the Wyoming State Occupational Safety and Health Plan.)

The Virginia plan which was granted initial State plan approval on September 28, 1976 (41 FR 42655) is administered by the Virginia Department of Labor and Industry. The plan was certified as having satisfactorily completed all its developmental commitments on August 21, 1984 (49 FR 33123). Concurrent Federal enforcement jurisdiction was suspended on October 11, 1981 with the signing of an Operational Status Agreement (June 11, 1982, 47 FR 25324).

Proposed Revision of Benchmarks

In September 1984 the Virginia Department of Labor and Industry (the designated agency or "designee" in the State) in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Virginia. Pursuant to an initiative begun in August 1983 by the State plan designees as a group with OSHA, and in accord with the formula and general principles established by that group for revision to individual State benchmarks, Virginia reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. This reassessment resulted in a proposal, contained in comprehensive documents, of revised compliance staffing benchmarks of 38 safety and 21 health compliance officers.

The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employees in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate (as determined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey). The State has historically spent an average of 21.4 hours on such inspections, and each State safety inspector is able to devote 1,167 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers of groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the Commonwealth of Virginia.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS), as published in 1977, which assess the potency and toxicity of substances in use in the State. The State has historically spent an average of 40 hours on such inspections, and each health compliance officer is able to devote 1,233 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the Commonwealth of Virginia.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the proposed compliance staffing levels appear to meet the requirements of the Court in *AFL-CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Effect of Benchmark Revision

Consistent with the 1978 Court Order in *AFL-CIO* v. *Marshall* and the procedures for implementation of benchmarks described by OSHA in the 1980 *Report to the Court*, if the proposed revised benchmarks are approved by OSHA, the State must allocate a sufficient number of safety and health enforcement staff to meet the revised benchmarks in order to be eligible for final approval under section 18(e) of the Act. Approval of the revised benchmarks would be accompanied by an amendment to 29 CFR Part 1952, Subpart EE, which generally describes the Virginia plan, setting forth the State's revised safety and health benchmark levels.

Documents of Record

A comprehensive document containing the proposed revision to Virginia's benchmarks, including the State's narrative submission and supporting statistical data has been made part of the record in this

proceeding and is available for public inspection and copying at the following locations:

Docket Office Rm S-6212, Docket No. T-017, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator—Region III, U.S. Department of Labor—OSHA, Gateway Building, Suite 2100, 3535 Market Street, Philadelphia, Pennsylvania 19104

Virginia Department of Labor and Industry, 205 North Fourth Street, Richmond, Virginia 23241

In addition, to facilitate informed public comment, an informational record has been established in a separate docket, Docket T-018, containing background information relevant to the benchmark issue in general and the current benchmark revision process. This informational docket includes, among other material, the 1978 Court of Appeals decision in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Report to the Court, and a report describing the 1983-84 benchmark revision process. It is also available for public inspection and copying at the following location: Docket Office Rm S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 201 Constitution Ave. NW., Washington, D.C. 20210.

Public Participation

OSHA is soliciting public participation in its consideration of the approval of the revised Virginia benchmarks to assure that all relevant information, views, data and arguments are available to the Assistant Secretary during this proceeding. Members of the public are invited to submit written comments in relation to whether the proposed revised benchmarks will provide for a fully effective enforcement program for Virginia in accordance with the Court Order in *AFL-CIO* v. *Marshall*. Comments must be received on or before February 20, 1985, and be submitted in quadruplicate to the Docket Office, Docket No. T-017, Rm. S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must be directed to the specific benchmarks proposed for Virginia and must clearly identify the issues which are addressed and the positions taken with respect to each issue.

All written submissions as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and all material submitted in response to this notice, will be made part of the record and will be available for public inspection and copying in the Docket Office, Rm. S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational Safety and Health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C. this 10th day of January, 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

[FR Doc. 85-1107 Filed 1-15-85; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

[Docket No. T-006]

Wyoming State Plan; Eligibility for Final Approval Determination; Proposed Revision to State Staffing Benchmarks; Comment Period and Opportunity to Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed final State plan approval; proposed revision to State compliance staffing benchmarks; request for written comments; notice of opportunity to request an informal public hearing.

SUMMARY: This document gives notice of: (1) The eligibility of the Wyoming State occupational safety and health plan, as administered by the Wyoming Occupational Health and Safety Commission, for a determination under section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted; and, (2) the proposed revision of the compliance staffing benchmarks applicable to the Wyoming plan, which were originally established in April 1980 in response to the U.S. Court of Appeals decision in *AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir., 1978). If an affirmative determination under Section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the Wyoming plan. This notice also announces that OSHA is soliciting written public comment to afford interested persons an opportunity to present their views regarding whether or not revised compliance staffing benchmarks for Wyoming should be approved and final State plan approval granted; and, that interested persons may request an informal public hearing on the question of final State plan approval.

DATES: Written comments and requests for a hearing must be received by February 20, 1985.

ADDRESS: Written comments and requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T-006, Room S-6212, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: James Foster, Director, Office of information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue, NW., Washington, D.C. 20210, (202) 523-8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et. seq.* (the "Act") provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of, a State plan. Procedures for State plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and 1902.4, finds that the plan provides or will provide for State standards and enforcement which are "at least as effective" as Federal standards and enforcement, "initial approval" is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary "developmental steps" to meet the criteria within a 3-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a "certification of completion of developmental steps" when all of a State's developmental commitments have been met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of

concurrent Federal enforcement activity, it becomes eligible to enter into an "operational status agreement" with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied.

An affirmative determination under section 18(e) of the Act (usually referred to as "final approval" of the State plan) results in the withdrawal of Federal standards authority and enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be "at least as effective" overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL–CIO* v. *Marshall*, C.A. No. 74–406), pursuant to a U.S. Court of Appeals Decision, that directed the Assistant Secretary to calculate for each State plan State the number of enforcement personnel needed to assure a "fully effective" enforcement program. In 1980, OSHA submitted a *Report to the Court* containing the benchmarks for each State plan State. The 1978 Court Order specifically provided for periodic revision to the benchmarks in light of current data and other relevant considerations, and the 1980 *Report to the Court* explicitly contemplates subsequent revision to the benchmarks based on OSHA reassessment and/or submission of individual State-specific information. In order to be granted final approval, a State must demonstrate that it has allocated sufficient enforcement staff to meet the 1980 benchmarks or any approved revision thereto.

A final requirement for final approval consideration is that a State must participate in OSHA's Unified Management Information System (Uni-MIS). This is required so that OSHA can obtain the detailed program performance data on a State necessary to make an objective evaluation of whether the State performance meets the statutory and regulatory criteria for final approval.

History of the Wyoming Plan

Wyoming submitted an occupational safety and health plan on January 30, 1973, in accordance with section 18(b) of the Act and 29 CFR Part 1902; on February 23, 1973, a notice was published in the **Federal Register** (38 FR 5018) concerning the submission of the plan, announcing that initial Federal approval of the plan was at issue and offering interested persons an opportunity to submit data, views and arguments in writing and to request an informal hearing concerning the plan. Written comments concerning the plan were submitted on behalf of the United States Steel Corporation. In response to these comments as well as OSHA's review of the plan submission, revisions to the plan were made as reflected in the **Federal Register** notice of initial approval (39 FR 15394). No requests for a hearing were recieved.

On May 3, 1974, the Assistant Secretary published a notice granting initial approval of the Wyoming plan as a developmental plan under section 18(b) of the Act (39 FR 15394). The plan provides for a program patterned in most respects after that of the Federal Occupational Safety and Health Adminstration.

The plan covers all issues except maritime employment and the State does not enforce its standards on Warren Air Force Base. The Wyoming Occupational Health and Safety Commission is designated as having responsibility for administratering the plan throughout the State. The day-to-day administration of the plan is directed by the Wyoming Health and Safety Department which is headed by an Administrator appointed by the Commission. The plan provides for the adoption by Wyoming of occupational safety and health standards which are at least as effective as Federal standards. In addition, Wyoming has promulgated under its plan independent State standards for oil and gas well drilling and servicing.

The plan provides that each employer shall furnish to each of his employees, employment and place of employment which are free from recognized hazards that are causing or are likely to cause death or serious harm to his employees. Employees are required to comply with all standards and regulations applicable to their conduct.

The plan contains provisions for emergency temporary standards; imminent danger proceedings; variances; discrimination protection; safeguards to protect trade secrets and employer and employee rights to participate in inspection and review proceedings. Appeals of citations and penalties are heard by an independent hearing officer of the Occupational Health and Safety Commission. Decisions of the Commission may be appealed to the State District Court.

The notice of initial approval noted a few distinctions between the Federal and Wyoming programs. The State plan does not cover safety and health in maritime employment and on Warren Air Force Base. Unlike OSHA's six month time period for the issuance of notices of violation, Wyoming's notices of violation may not be issued after the expiration of ninety (90) days following the occurrence of any alleged violation. Wyoming's discrimination provision differs from the Federal in that a case does not go into court unless it is on an appeal from an administrative decision following a contested case hearing. The State's emergency temporary standards are in effect for a period of one hundred twenty (120) days compared to the Federal 6 month period.

The Assistant Secretary's approval of the developmental plan for Wyoming, a general description of the plan, a schedule of required developmental steps, and a provision for discretionary concurrent Federal enforcement during the period of initial approval, were codified in the Code of Federal Regulations (29 CFR Part 1952, Subpart BB, 39 FR 15394 (May 3, 1974)).

In accordance with the State's developmental schedule, all major structural components of the plan were put in place and submitted for OSHA approval during the period ending May 3, 1977. These "developmental steps" included adoption of Federal standards as State occupational safety and health standards, legislative amendment to the Administrative Procedure Act and the Fair Employment Practice Act, program regulations, completion of a compliance manual, merit staffing system, and the

development of a management information system.

These submissions were carefully reviewed by OSHA; after opportunity for public comment and modification of State submissions, where appropriate, the major plan elements were approved by the Assistant Secretary as meeting the criteria of section 18 of the Act and 29 CFR 1902.3 and 1902.4. The Wyoming subpart of 29 CFR was amended to reflect each of these approval determinations (see 29 CFR 1952.344).

The Wyoming plan was approved with language in its Occupational Health and Safety Act which could be interpreted to require criminal prosecution for the assessment and collection of all penalties. (OSHA's penalties are civil and assessed through an administrative process.) The State, however, considered its penalties to be civil and operated as such through a State administrative review board. In July, 1978, the State Attorney General rendered an opinion that all penalties under the State Act were criminal. An effort to revise the enabling legislation failed in the Wyoming General Assembly. As a result of Wyoming's failure to revise its law to change the method for collection of penalties from criminal to civil, OSHA notified the State that it was being given the opportunity to show cause why a proceeding should not be initiated for withdrawal of approval of the plan. Before this proceeding was begun, the U.S. District Court for the District of Wyoming enjoined OSHA from proceeding further with plan withdrawal action. Before the Federal Court adjudicated the case, the Wyoming General Assembly passed amendments to the Wyoming Occupational Health and Safety Act to replace the criminal penalties with appropriate civil penalties (Enrolled Act No. 13, Senate, 1980). The amendments were reviewed and approved by OSHA on December 11, 1980 (45 FR 83484).

On December 30, 1980, in accordance with procedures at 29 CFR 1902.34 and 1902.35, the Assistant Secretary certified that Wyoming had satisfactorily completed all developmental steps (45 FR 85739). In certifying the plan, the Assistant Secretary found the structural features of the program—the statute, standards, regulations, and written procedures for administering the Wyoming plan to be at least as effective as corresponding Federal provisions. Certification does not, however, entail findings or conclusions by OSHA concerning adequacy of actual plan performance. As has already been noted, OSHA regulations provide that certification initiates a period of evaluation and monitoring of State activity to determine in accorance with section 18(e) of the Act whether the statutory and regulatory criteria for State plans are being applied in actual operations under the plan and whether final approval should be granted.

Although Wyoming had not sought previously to enter into an operational status agreement, in 1981 OSHA determined that such agreement should be concluded with all qualified States. Thus, a **Federal Register** notice was published on October 10, 1982 (47 FR 25323), announcing that an operational status agreement had been signed on December 10, 1981 for Wyoming. Under the terms of that agreement, OSHA voluntarily suspended the application of concurrent Federal enforcement with regard to Federal occupational safety and health standards in the issues covered by the Wyoming plan.

History of the Benchmarks Issue and Proposed Revised Benchmarks for Wyoming

The 1980 Benchmarks

Section 18(c)(4) of the Act and 29 CFR 1902.3(h) require State plans to provide a sufficient number of adequately trained enforcement personnel necessary for the enforcement of standards. OSHA implements this requirement by calculating for each State plan State a required staffing level or "benchmark." A 1978 court of appeals decision and resulting district court order place special requirements upon OSHA in determining what staffing levels are appropriate in a particular plan State. Prior to 1978, OSHA's criterion for staffing required that States maintain a level of enforcement staffing "at least as effective as" that which OSHA could provide in the State if no plan were in effect. In 1974, the AFL-CIO challenged this criterion in the U.S. District Court for the District Court for the District of Columbia. The District Court initially held that OSHA's "at least as effective as" test for State staffing was appropriate under the Act (*AFL-CIO* v. *Brennan*, 390 F. Supp. 972 (D.D.C., 1975)). However, in 1978 the U.S. Court of Appeals for the District of Columbia Circuit reversed this ruling (*AFL-CIO* v. *Marshall*, 570 F.2d 1030 (D.C. Cir., 1978)). The Court of Appeals, noting the absence from sections 18(c)(4) and (5) of the Act of the "at least as effective as" language found elsewhere in section 18(c), and calling attention to legislative history anticipating that States would provide the staffing and funding "necessary to do the job," found that the direct State-to-Federal numerical comparisons previously used to calculate benchmarks were inappropriate. Instead, the Court held, the Secretary must establish "criteria that are part of an articulated plan to achieve a fully effective enforcement effort at some point in the forseeable future." 570 F.2d 1042. The case was remanded to the District Court for entry of an order directing the development of benchmarks consistent with the Court of Appeals decision, attainment of which would be required for final approval of State plans under section 18(e). The District Court order, issued December 5, 1978, directed the Secretary *inter alia* to develop benchmarks for "fully effective" staffing taking into account certain factors set forth in the order; to develop for each State a timetable for reaching these benchmarks within five years; and to develop procedures and criteria for future revision of benchmarks in light of new data, information, or other considerations. The Court retained jurisdiction for a period of five years to review action taken by the Secretary in implementing the Order. The case was dismissed in 1984 but the substantive provisions of the Order pertaining to benchmarks remain in effect.

The first benchmarks produced by OSHA under the Court Order were the result of a two-year project culminating in the filing of a Report to the Court on April 25, 1980. The AFL-CIO stipulated at that time that OSHA's Report, including the basic formula for deriving the benchmarks, was a "satisfactory response" to the Court's Order. (The complete 1980 Report is available in an informational docket, Docket T-018).

The 1980 Report set forth a detailed description of the methods and data sources used in calculating the benchmarks. An important feature of the Report is the basic benchmark formula, under which estimates of the number of each type of inspection (general schedule, mobile, complaint, accident, follow-up, public sector) required annually are added together; the sum of these inspections is then divided by a "utilization factor" (the number of hours an inspector has available to devote to enforcement activities) to produce the required number of inspectors. Supplying the data necessary for each of the "building blocks" in this formula is a complex process. Some of the required information is essentially objective and performance-related. In 1980, some of this data was derived from State-specific sources but in many instances data reflecting Federal historical experience rather than State experience was used. Other inputs to the formula, however, required OSHA to make

judgments based on experience. In rendering these judgments in 1980 OSHA relied on panels of State and Federal safety and health experts, using a modified "Delphi process" means of developing consensus judgments among experts by "averaging" the experts' responses during the course of several questioning periods. Since 1980, the methods and assumptions on which the data for calculating these initial benchmarks were based have been the subject of intense examination by OSHA, the National Advisory Committee on Occupational Safety and Health (NACOSH), the U.S. Congress and individual State plan States.

A widely criticized shortcoming of the 1980 procedure was its reliance, for many critical data elements, upon Federal experience rather than State-specific data, which fails to reflect the enormous diversity which exists among individual State plan States in such areas as industrial mix, geography, hazardousness of establishments and program history, thus producing an inaccurate assessment of actual workload in most States. The criticism was also made that the "Delphi process," in the modified form used in 1980 to determine general schedule inspection times and frequencies for States, resulted in estimates that were largely artificial and based on impressions rather than verifiable data. The methodology used in 1980 assumed a need for universal coverage, i.e. general schedule inspections in every single worksite in every industry within a State regardless of hazardousness or past inspection history; such coverage is not required by the 1978 Court Order, is not consistent with the intent of the Occupational Safety and Health Act of 1970, and is not justified in light of the actual experience of OSHA and the States in designing effective enforcement programs. (The majority of serious injuries and illnesses occur within a relatively small subset of the nation's workplaces.) Moreover, in many States the resulting benchmarks were so high that sufficient numbers of qualified personnel were not likely available nationwide to meet the combined States increased staffing requirements. Finally, important components of a fully effective enforcement program, such as special emphasis programs for high-hazard local industries, or exemption programs for participation in consultation or voluntary compliance programs, were not factored into the 1980 benchmark formula. (Transcripts of NACOSH hearings on benchmarks, and a copy of the resulting NACOSH resolution recommending comprehensive revision of the 1980 staffing levels have been included in the informational docket, T-018. The similar views of experts from several plan States are reflected in testimony before NACOSH as well as in the reports of Congressional hearings held by the Subcommittee on Health and Safety of the House Committee on Education and Labor in 1980 and 1983, transcripts of which are also available in the information docket, T-018.

The 1984 Benchmark Revision Process

Based on its own analysis and the concerns raised by NACOSH and the individual States, OSHA determined in 1983 that a comprehensive review and revision of the 1980 benchmarks was warranted. The District Court's December 5, 1978 order in *AFL-CIO* v. *Marshall* directed OSHA, in developing a comprehensive plan for calculating benchmarks, to provide a "procedure for revision of these benchmarks and funding criteria to reflect new data, information or other relevant considerations, including Congressional action in response to benchmarks previously established, which indicates that different levels should be set in a State, several States or all States." In compliance with the Court Order, the 1980 *Report to the Court* described in some detail several possible means of revising benchmarks. These include unilateral revision by the Department of Labor (and indeed the Department started its intent to initiate such a revision in light of whatever new data or experiences might become available during the first two years of implementation of the new benchmarks (p. 34-5)); and revision in response to petitions by individual States for change in their benchmarks and State requests for revision based upon State-specific information (p. 22). The revision presently being undertaken by OSHA involves a joint effort by OSHA and the State plan States, and is in effect a hybrid of the two types of revisions just discussed.

Legal authority for the present revision project is derived from the District Court's 1978 order, and therefore the criteria applicable to the revisions are the same as those applicable to the 1980 benchmarks. In particular, the revision process in consistent with the "fully effective" concept announced by the Court of Appeals in *AFL-CIO* v. *Marshall* and incorporated in the 1978 District Court order. Comparison of Federal and State staffing patterns—the "at least as effective as" methodology rejected by the Court of Appeals—has been carefully avoided at all steps of the process. Instead, the focus of the revision process has been to design and conduct a realistic and reliable measure of the enforcement needs of each State.

The 1978 Court Order requires that benchmarks be determined on the basis of the "best information and techniques currently available", and that OSHA provide an explanation of the assumptions, techniques and sources used in calculating them. Factors set forth in the order as required to be considered include the number of employers and employees in the State; the anticipated number of accident, complaint, and follow-up inspections required, and the number of inspections an inspector can reasonably be required to perform. The Court Order provides relatively broad discretion and requires extensive application of professional judgement by OSHA in evaluating the need for general schedule inspections within a State, requiring OSHA to determine the number of general inspections that should be conducted anually "to provide proper coverage" both in safety and health. In determining an appropriate annual number of general schedule safety inspections, the Court order specifies that consideration is required of the State's ability to allocate inspectors efficiently according to a scheduling system which analyzes past injury experience to ascertain those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In health similar consideration must be given to the State's ability to allocate inspectors based on the potency and toxicity of substances in use in the State, the extent of employee exposure to and use of toxic substances by individual employers or groups of employers, and the extent to which hazardous exposures can be eliminated by inspection.

The Benchmark Formula

In order to effect a comprehensive review and revision of the benchmarks, in August, 1983, the State plan designees formed a Benchmark Taskgroup to work with OSHA. The Taskgroup consisted on the members of the Board of Directors of the Occupational Safety and Health State Plans Association (OSHSPA) or their representatives from five States: Hawaii, Wyoming, Michigan, Washington and South Carolina. These States reflected the broad spectrum of variation in State industrial makeup, geography, and nature of enforcement programs.

Over the course of a year, the Taskgroup held six meetings and had indepth discussions on every aspect of the benchmark formula. There were

periodic consultations with the membership of OSHSPA to obtain input from the entire group of State plan States. From its inception, the Taskgroup in accord with the terms of the 1980 Report agreed that the basic benchmark formula used in 1980 was conceptually sound. However, certain modifications to the data inputs used in 1980 were necessary to incorporate, wherever available, State-specific data and to build flexibility into the formula to accommodate differences among States. The Taskgroup decided on an approach that established initial general schedule fixed site safety and health inspection universes for each State that would provide proper program coverage for high hazard establishments within a State. These universes would be calculated in the same manner for all States but would be based on State-specific data. For safety, the Taskgroup chose an initial general schedule inspection universe of large establishments (greater than ten employees) in private sector manufacturing Standard Industrial Classifications (SICs) whose State-specific Lost Workday Case Injury Rate (LWCIR) as determined by the Bureau of Labor Statistics Annual Survey of Occupational Injuries and Illnesses was higher than the overall State LWCIR. For health, the Taskgroup chose an initial general schedule inspection universe of large establishments (greater than ten employees) with potential for exposure to health hazards based on a ranking system incorporating the most current available data on industrial exposures to regulated substances (the National Occupational Hazards Survey (NOHS) published in 1977), and number of workers exposed to such health hazards in each State's industries. After the establishment of these initial fixed site inspection universes, the universes could be adjusted by each State in accordance with a number of different adjustment factors (additions and subtractions), the burden being on each State to justify the adjustments it chose to make using State-specific data and rationales.

OSHA believes this approach is appropriate because it is based on uniform methodology yet incorporates State-specific data and policies to reflect differences among the States. Because of the wide variety among States in program experience, policies, and data used to identify hazardous establishments, the adjustment factors are defined in a manner sufficiently flexible to accommodate this diversity and ensure that the benchmarks accurately reflect the best available information from each State. This approach also allows States to allocate sufficient staff for additional special program emphasis beyond those required for proper program coverage, that are responsive to local needs and philosophies.

All other components of the proposed benchmark formula are as they were in 1980 except that accident inspections are added as a separately calculated component rather that being subsumed within general schedule inspections. The major difference is that the computation of each component is based on State-specific data rather than Federal averages. The benchmarks are developed in terms of full-time equivalent Safety and Health Compliance Personnel, as the Taskgroup recognized that many inspection functions could be performed by qualified technicians and cross-trained personnel. (Supervisory personnel, except to the extent that they spend time doing actual field inspections, cannot be used to fulfill the benchmark requirements.)

Using the benchmark revision methodology developed by the Taskgroup, individual States may submit to Federal OSHA proposed revisions to their 1980 benchmarks based upon State specific data and policies, as mandated by the 1978 Court Order and using the procedure discussed in the 1980 *Report to the Court.* OSHA, in accord with a settlement agreement in a related case, *McGowan* v. *Marshall* (No. 80–2234, D.D.C. 1981), will seek public comment on each proposed revision before approving it.

The Benchmark Timetable

As provided by the 1978 Court Order, OSHA included in the 1980 *Report to the Court,* a schedule which required States, not yet meeting the benchmarks, to allocate additional staff each year equivalent to 20% of the difference between existing staff levels and benchmark levels (in effect, a mandatory five-year timetable for reaching the "fully effective" staffing levels (pp. 30–32)). However, as a matter of practical necessity, the 1980 Report also provided that States were required to complete an annual "benchmark step" only when additional funds were made available by Congress to fund the Federal share of such staffing increase. Absent such additional funding, the timetable would in effect be recalculated and the time for full implementation of the benchmarks proportionately delayed. Since 1980, there has been no increase in the amount of funding made available by Congress for State staff, and thus the five-year timetable projected in 1980 never began to run. The present proposed revision does not affect the above described provisions of the 1980 Report in any way. If revisions are aproved, States which do not meet the revised benchmarks, will still be required to move toward benchmark levels in annual increments amounting to 20% of the difference between existing staff and the revised benchmarks, subject to the availability of matching Federal funds.

Proposed Revised Benchmarks for Wyoming

Pursuant to the initiative begun in August 1983 by the State plan designees as a group with OSHA and in accord with the formula and general principles established by that group for individual State revision of the benchmarks, Wyoming reassessed the staffing necessary for a "fully effective" occupational safety and health program in the State. In September 1984 the Wyoming Health and Safety Department in conjunction with OSHA completed a review of the components and requirements of the 1980 compliance staffing benchmarks established for Wyoming (staff of 5 safety and 10 health compliance officers). This reassessment resulted in a proposal to OSHA, of a revised compliance staffing benchmark of 6 safety and 2 health compliance officers.

The State-submitted data and documentation in support of the revision have been made part of the record of the present final approval proceeding. The proposed revised safety benchmark contemplates biennial general schedule inspection of all private sector manufacturing establishments with greater than 10 employee in Standard Industrial Classifications whose State-specific Lost Workday Case Injury Rate is higher than the overall State private sector rate as detemined by the Bureau of Labor Statistics' (BLS) Annual Occupational Injury and Illness Survey. The State has historically spent an aveage of 9.3 hours on such inspections, and each State safety inspector is able to devote 1800 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial, general schedule universe based on the State's analysis of past injury and inspection experience to identify those employers or groups of employers most likely to have hazards which could be eliminated by inspection. In addition, inspection resources are allocated to coverage of

mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper safety coverage in the State of Wyoming.

The proposed revised health benchmark contemplates general schedule inspection coverage once every three years of all private sector manufacturing establishments with greater than 10 employees in the 150 Standard Industrial Classifications in the State having the highest likelihood of exposure to health hazards. These are determined by a health ranking system utilizing data from the National Occupational Hazards Survey (NOHS) as published in 1977, the health effects of substances for which there are OSHA standards, and the average number of workers per establishment in the industry within the State. The State has historically spent an average of 14 hours on such inspections, and each health compliance officer is able to devote 1800 hours annually to actual inspection activity, based on State personnel practices. Establishments have been added to and subtracted from this initial general schedule universe based on the State's knowledge gained from inspection experience and other data on the extent of employee exposure to and use of toxic substances and harmful physical agents by individual employers or groups of employers, and the extent to which such hazardous exposures can be eliminated by inspection. In addition, inspection resources are allocated to coverage of mobile and public employee (State and local government) worksites, response to complaints and accidents, and follow-up inspections to ascertain compliance, based on historical experience and an assessment of proper health coverage in the State of Wyoming.

OSHA has reviewed the State's proposed revised benchmarks and supporting documentation and determined that the compliance staffing levels proposed appear to meet the requirements of the Court in *AFL–CIO* v. *Marshall* and provide staff sufficient to ensure a "fully effective enforcement program."

Determination of Eligibility

This **Federal Register** notice announces the eligibility of the Wyoming plan for an 18(e) determination. (29 CFR 1902.39(c) requires that this preliminary determination of eligibility be made before 18(e) procedures begin.) The determination of eligibility is based upon OSHA's finding that:

(1) The Wyoming plan has been monitored in actual operation for at least one year following certification. The results of OSHA monitoring of the plan since the commencement of plan operations are contained in written evaluation reports which are prepared annually and made available to the State and to the public. The results of OSHA's most recent post-certification monitoring during the period from October 1982 through March 1984 are set forth in an 18(e) *Evaluation Report of the Wyoming Plan,* which together with all other post-certification reports, have been made part of the record of the present proceedings.

(2) The plan meets the State's proposed revised benchmarks for enforcement staffing. In September 1984, pursuant to the terms of the Court Order and the *1980 Report to the Court* in *AFL–CIO* v. *Marshall,* Wyoming proposed to revise its fully effective benchmarks to 6 safety and 2 health compliance officers based on an assessment of State-specific characteristics and historical experience. As is discussed elsewhere in this **Federal Register** document, the Assistant Secretary has determined that these proposed staffing levels appear to be in accordance with the court order in *AFL–CIO* v. *Marshall* and appear to provide for a fully effective enforcement program.

Wyoming has allocated these positions, as evidenced by the FY 1984 *Application for Federal Assistance* (as amended) in which the State has committed itself to funding the State share of salaries for 6 safety inspectors and 2 health compliance officers. The FY 1984 application has been made part of the record in the present proceeding.

(3) Wyoming participates and has assured its continued participation in OSHA's unified management information system.

Issues for Determination in the 18(e) Proceedings

Approval of Proposed Revised Benchmarks

As discussed in the "History of the Benchmark Issue and Proposed Revised Benchmarks for Wyoming" section of this notice, Wyoming has proposed revised compliance staffing benchmarks of 6 safety and 2 health compliance officers. OSHA believes, based on the State's submission, that this is sufficient compliance staff to ensure a fully effective enforcement program and is in accord with the terms of the 1978 Court Order in *AFL–CIO* v. *Marshall* and the 1980 *Report to the Court.* As part of the present 18(e) proceeding, OSHA invites public comment regarding the proposed revised benchmarks for Wyoming including any specific data, information, experience or views on whether the proposed level of staffing is sufficient to provide fully effective safety and health enforcement coverage of workplaces under the State plan. The Wyoming submission and supporting data have been made part of the record in this proceeding. A detailed summary of the benchmark revision process is set forth above.

Final State Plan Approval Determination

The Wyoming plan is now at issue before the Assistant Secretary for determination as to whether the criteria of section 18(c) of the Act are being applied in actual operation. 29 CFR 1902.37(a) requires the Assistant Secretary, as part of the final approval process, to determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4. The Assistant Secretary must make this determination by considering the factors set forth in § 1902.3(b). OSHA believes that the results of its evaluation of the Wyoming plan, contained in the 18(e) Evaluation Report, considered in light of these regulatory criteria and the criteria in Section 18(c) of the Act, indicate that the regulatory indices and criteria are being met, and the Assistant Secretary accordingly has made an initial determination that the Wyoming plan is eligible for an affirmative 18(e) determination. This notice initiates proceedings by which OSHA expects to elicit public comment on the issue of granting an affirmative 18(e) determination to Wyoming. In order to encourage the submission of informed and specific public comment, a summary of current evaluation findings with respect to these criteria is set forth below.

(a) *Standards and Variances.* Section 18(c)(2) of the Act requires State plans to provide for occupational safety and health standards which are at least as effective as Federal standards. A State is required to adopt, in a timely manner, all Federal standards and amendments or to develop and promulgate standards and amendments at least as effective as the Federal standards. See §§ 1902.37(b)(3), 1902.3(c), 1902.4(a) and (b). The Wyoming plan provides for adoption of standards which are at least as effective as the Federal standards. However, a large number of standards which are adopted by the State are identical to the Federal standards. Wyoming is generally prompt in the adoption of Federal standards. During

the evaluation period, the State adopted all 4 applicable permanent Federal standards within the 6 months time frames for response to Federal actions. Wyoming adopted the new Federal Hazard Communication Standard in August 1984 as an interim standard pending legislative consideration of a different State standard. In addition Wyoming repromulgated its Access to Employee Medical and Exposure Records Standard in November 1984 to incorporate OSHA comments and recommendations regarding its earlier adopted access standard. Wyoming is current in its response to Federal standards. Any prior delays were minimal and have had no adverse impact in maintaining Wyoming's performance at a level at least as effective as the Federal program (Evaluation Report, p. 3).

Where a State adopts Federal standards, the State's interpretation and application of such standards must ensure consistency with Federal interpretation and application. Where a State develops and promulgates its own standards, interpretation and application must ensure coverage at least as effective as comparable Federal standards. While acknowledging prior approval of individual standards by the Assistant Secretary, this requirement stresses that State standards, in actual operation, must be at least as effective as the Federal standards. See §§ 1902.37(b)(4), 1902.3(c)(1), 1902.3(d)(1), 1902.4(a), and 1902.4(b)(2). As previously noted, the Wyoming plan provides for the adoption of standards which are at least as effective as the Federal standards. In most cases, the State adopts identical Federal standards. The State likewise either adopts standards interpretations which are at least as effective as the Federal or identical interpretations.

The State is required to take the necessary administrative, judicial or legislative action to correct any deficiency in its program caused by an administrative or judicial challenge to any State standard, whether the standard is adopted from Federal standards or developed by the State. See §1902.37(b)(5). There has not been a challenge to any of the State standards.

When granting permanent variances from standards, the State is required to ensure that the employer provides as safe and healthful working conditions as would have been provided if the standard were in effect. See §§ 1902.37(b)(6) and 1902.4(b)(2)(iv). The one variance granted under the Wyoming plan during the 18(e) evaluation period was deemed to be handled in an appropriate manner (Evaluation Report, p. 4).

Where a temporary variance is granted, the State must ensure that the employer complies with the standard as soon as possible and provides appropriate interim employee protection. See §§ 1902.37(b)(7) and 1902.4(b)(2)(iv). Under the Wyoming plan, a temporary variance shall not exceed one year nor be renewed more than two times. During this 18(e) evaluation period, no temporary variance requests were received.

(b) *Enforcement.* Section 18(c)(2) of the Act requires State plans to maintain an enforcement program which is at least effective as that conducted by Federal OSHA; section 18(c)(3) requires the State plan to provide for right of entry and inspection of all workplaces at least as effective as that in section 8 of the Act.

The State inspection program must provide that sufficient resources be directed to designated target industries while providing adequate protection to all other workplaces covered under the plan. See §§ 1902.37(b)(8), 1902.3(d)(1), and 1902.4(c). The evaluation report indicates that 91% of programmed safety inspections and 61.5% of programmed health inspections are conducted in high hazard industries. The percentage of programmed safety inspections is below the comparable Federal level during the evaluation period due only to economic conditions. Wyoming's high hazard industries of oil and gas well drilling, extraction, and servicing; manufacturing; and construction have collectively experienced a 34% to 54% reduction in employment. Programmed health inspections are low because there was a State-wide 16% decline in employment in the State's chemical and allied products industry (Evaluation Report, p. 9).

In cases of refusal of entry, the State must exercise its authority, through appropriate means, to enforce the right of entry and inspection. See §§ 1902.3(b)(9), 1902.3(e) and (f), and 1902.4(c)(2)(i) and (ix). Under the Wyoming plan, the Commission is authorized to petition for an order to permit entry into places of employment that have refused entry for the purpose of inspection or investigation. Wyoming had nine denials of entry during this evaluation period and received warrants for all nine cases. (Evaluation Report, p. 13).

Inspections must be conducted in a competent manner following approved enforcement procedures which include the requirement that inspectors acquire information adequate to support any citation issued. See §§ 1902.37(b)(10), 1902.3(d)(1), and 1902.4(c)(2). Wyoming has adopted an Operations Manual, and follows established inspection procedures, including documentation procedures, which are generally identical to Federal procedures. The Evaluation Report indicates the State's adherence to inspection procedures. Wyoming's percent of serious violations for safety and health is 6.3% and 4%, respectively. The State finds fewer serious violations that the Federal because there is little heavy industry in the State, and most of the establishments that were inspected during this evaluation period had already been inspected previously (Evaluation Report, p. 14).

State plans must include a prohibition on advance notice, and exceptions must be no broader than those allowed by Federal OSHA procedure. See § 1902.3(f). Wyoming adopted established procedures for advance notice. There were six instances of advance notice. No problem with its use was indicated during the evaluation period (Evaluation Report, p. 14).

State plans must provide for inspections in response to employee complaints, and must provide opportunity for employee participation in State inspections. See §§ 1902.4(c)(2)(i) through (iii). Wyoming follows a complaint policy similar to the Federal. The report indicates that Wyoming provided proper employee representation in all inspection cases. Employee representatives accompanied inspectors or employees were interviewed on 100% of initial inspections.

State plans must also provide protection for employees against discrimination similar to that found in Section 11(c) of the Federal Act. See §§ 1902.4(c)(2)(v). The Wyoming Act, approved as part of the initial approval and certification process, contains such protection. The State investigated six discrimination compliants during the evaluation period. The investigations were complete, thorough and handled in a satisfactory manner. (Evaluation Report, p. 20).

The State is required to issue, in a timely manner, citations, proposed penalties, and notices of failure to abate. See §§ 1902.37(b)(11), 1902.3(d), and 1902.4(c)(2)(x) and (xi). Wyoming's lapse time from inspection to issuance of citation has averaged 5.6 days for safety and 3.1 days for health.

The State must propose penalties in a manner that is at least as effective as the penalties under the Federal program, which includes first instance violation

penalties and consideration of comparable factors required in the Federal program. See §§ 1902.37(b)(12), 1902.3(d), and 1902.4(c)(x) and (xi). Wyoming's procedures for penalty calculation and adjustment are generally identical to the Federal. However, the 18(e) evaluation report indicates that Wyoming's proposed penalties are lower than OSHA's. The average penalty for serious safety violations is $208; the average penalty for serious health violations is $230. The lower State penalties are due to the fact that the average establishment size in Wyoming is small, resulting in greater penalty reductions for size (Evaluation Report, p. 17).

The State must ensure abatement of hazards cited including issuance of notices of failure to abate and appropriate penalties. See §§ 1902.37(b)(13), 1902.3(d) and 1902.4(c)(2) (vii) and (xi). Wyoming conducted slightly more follow-up inspections (5.3%) than the Federal and found failure-to-abate situtations in 10% of the follow-up inspections conducted. Wyoming rarely sets abatement dates in excess of 30 days (12% for safety; 0% for health) (Evaluation Report, p. 16).

Wherever appropriate, the State must seek administrative and judicial review of adverse adjudications. Additionally, the State must take necessary and appropriate action to correct any deficiences in its program which may be caused by an adverse administrative or judical determination. See §§ 1902.37(b)(14) and 1902.3(d) and (g). As discussed in the History of the Wyoming Plan above, Wyoming obtained legislative correction of a deficiency identified in its system for collecting penalties.

(c) *Staffing and Resources.* The State is required to have a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan. See section 18(c)(4) of the the Act; 29 CFR 1902.37(b)(1); 1902.3(d) and 1902.3(h). A State must also direct adequate resources to administration and enforcement of the plan. See section 18(c)(5) of the Act and § 1902.3(i). As discussed above, the Wyoming plan provides for 6 safety and 2 health compliance officers as set forth in the amended Fiscal Year 1984 grant. This staffing level meets the proposed revised "fully effective" benchmarks for Wyoming safety and health staffing as discussed elsewhere in this notice. The proportion of resources devoted to enforcement is 31.8% and the average cost per inspection is $381.00. Wyoming provides adequate formal classroom training and field training for its staff (Evaluation Report, p. 23).

(d) *Other Requirements.* States which have approved plans must maintain a safety and health program for State and local employees which must be as effective as the State's plan for the private sector. See section 18(c) of the Act and 1902.3(j). The Wyoming plan provides a program for the public sector which is identical to the private sector, except that public sector employers are not assessed any penalties. Injury rates are significantly lower in the public sector than in the private (all case rate—4.3; lost workday case rate—1.8) (Evaluation Report, p. 8).

As a factor in its 18(e) determination, OSHA must consider whether the Bureau of Labor Statistics Annual Occupational Safety and Health Survey and other available Federal and State measurements of program impact on worker safety and health indicate a favorable comparison of worker safety and health injury and illness rates between the State and Federal program. See § 1902.37(b)(15). Both the BLS all case rate for Wyoming (7.6) and lost workday case rate (3.6) were slightly higher than rates in States where Federal OSHA provided enforcement coverage in 1982. However, both the all case and lost workday case rates have experienced continuing decline in Wyoming comparable to that in the Federal program since inception of the State program (Evaluation Report, p. 23).

State plans must assure that employers in the State submit reports to the Secretary in the same manner as if the plan were not in effect. See section 18(c)(7) of the Act; 29 CFR 1902.3(k). The plan must also provide assurances that the designated agency will make such reports to the Secretary in such form and containing such information as he may from time to time require. Section 18(c)(8) of the Act; 29 CFR 1902.3(1). Wyoming employer recordkeeping requirements are generally identical to the Federal (except that Wyoming does not exempt employers with 10 or fewer employees) and the State participates in the BLS Annual Survey of Occupational Illness and Injuries. In addition, the State participates and has assured its continuing participation with OSHA in the unified management information system as a means of providing reports on its activities to OSHA.

Section 1902.4(c)(2)(xiii) requires States to undertake programs to encourage voluntary compliance by employers by such means as conducting training and consultation with employers and employees. The evaluation report indicates that a training program and a public sector consultation program have been implemented. (The State's on-site consultation program for the private sector is conducted apart from the State plan under an agreement with OSHA under section 7(c)(1) of the OSH Act.) Broad and extensive training was provided during the current evaluation period. Wyoming continues to operate a satisfactory outreach program in both the private and public sectors (Evaluation Report, p. 7).

Effect of 18(e) Determination

If the Assistant Secretary, after completion of the proceedings described in this notice, determines that the proposed revised benchmarks provide sufficient compliance staffing necessary for a "fully effective" occupational safety and health program and that the statutory and regulatory criteria for State plans are being applied in actual operation, final approval will be granted and Federal standards and enforcement authority will cease to be in effect with respect to issues covered by the Wyoming plan, as provided by section 18(e) of the Act and 29 CFR 1902.42(c). Wyoming has excluded from its plan: safety and health coverage in private sector maritime activities (enforcement of occupational safety and health standards comparable to 29 CFR Parts 1915, shipyard employment; 1917, marine terminals; 1918, longshoring; and 1919, gear certifications; as well as provisions of general industry standards (29 CFR Part 1910) appropriate to hazards found in these employments) and does not enforce its standards on Warren Air Force Base. (OSHA, Wyoming and the U.S. Air Force have entered into a formal agreement that Wyoming will inspect private contractors working on MX missile sites throughout the State, but not those located on Warren Air Force Base.) Thus, Federal coverage of these issues would be unaffected by an affirmative 18(e) determination. In the event an affirmative 18(e) determination is made by the Assistant Secretary following the proceedings described in the present notice, a notice will be published in the **Federal Register** in accordance with 29 CFR 1902.43. The notice will specify the issues as to which Federal authority is withdrawn, will state that Federal authority with respect to discrimination complaints under section 11(c) of the Act remains in effect, and will state that if continuing evaluations show that the State has failed to maintain a compliance staff which meets the revised fully effective benchmarks, or has failed to maintain a program which

is at least as effective as the Federal, or that the State has failed to submit program change supplements as required by CFR Part 1953, the Assistant Secretary may revoke final approval and reinstate Federal enforcement authority or, if the circumstances warrant, initiate action to withdraw approval of the State plan. At the same time, Subpart BB of 29 CFR Part 1952, which codified OSHA decisions regarding approval of the Wyoming plan, would be amended to reflect the 18(e) determination if an affirmative determination is made.

Documents of Record

All information and data presently available to OSHA relating to the Wyoming 18(e) proceeding and the proposed revised compliance staffing benchmarks for Wyoming have been made a part of the record in this proceeding and placed in the OSHA Docket Office. The contents of the record are available for inspection and copying at the following locations:

Docket Office, Room S-6212, Docket No. T-006, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210

Regional Administrator, U.S. Department of Labor, OSHA, Room 1554, Federal Building, 1961 Stout Street, Denver, Colorado 80294

Wyoming Department of Occupational Health and Safety, 604 East 25th Street, Cheyenne, Wyoming 82002

To date, the record on final approval determination includes copies of all **Federal Register** documents regarding the plan including notices of plan submission, initial Federal approval, certification of completion of developmental steps, codification of the State's operational status agreement, and approval of various standards, developmental steps, and other plan supplements. The record also includes the State plan document, which includes a plan narrative, the State legislation, regulations and procedures, an organizational chart for State staffing; the State's FY 1984 Federal grant; and the October 1982 through March 1984 Evaluation Report and all previous, post-certification reports. The record on Wyoming's proposed revised benchmarks includes the State's narrative submission and supporting statistical data.

In addition, to facilitate informed public comment, an informational record has been established in a separate docket (No. T-018) containing background information relevant to the banchmark issue in general and the current benchmark revision process. The content of this record is available for inspection and copying at the following location: Docket Office, Room S-6212, Docket No. T-018, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

The informational record on benchmarks includes the 1978 decision of the U.S. Court of Appeals for the District of Columbia in *AFL-CIO* v. *Marshall*, the 1978 implementing Court Order, the 1980 Department of Labor *Report to the Court*, and a description of the 1983-1984 benchmark revision process.

Public Participation

Request for Public Comment and Opportunity to Request Hearing

The Assistant Secretary is directed under § 1902.41 to making a decision whether an affirmative 18(e) determination is warranted or not. As part of the Assistant Secretary's decision-making process, consideration must be given to the application and implementation by Wyoming of the requirements of section 18(c) of the Act and all the specified criteria and indices of effectiveness as presented in 29 CFR 1902.3 and 1902.4. These criteria and indices must be considered in light of the 15 factors in 29 CFR 1902.37(b)(1-15). However, this action will be taken only after all the information contained in the record, including OSHA's evaluation of the actual operations of the State plan, and information presented in written submissions and during an informal public hearing, if held, is reviewed and analyzed. Data and views submitted by Wyoming and the public in relation to the proposed revised benchmarks for Wyoming also will be reviewed and consideration will be given to whether these proposed revised staffing levels will provide for a fully effective enforcement program for Wyoming, in accordance with the Court Order in *AFL-CIO* v. *Marshall*. OSHA is soliciting public participation in this process so as to assure that all relevant information, views, data and arguments related to the indices, criteria and factors presented in 29 CFR Part 1902, and proposed revised benchmarks, as they apply to the Wyoming State plan, are available to the Assistant Secretary during this administrative proceeding.

Interested persons are invited to submit written data, views, and arguments with respect to this proposed 18(e) detrmination. These comments must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T-006, Rm S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Written submissions must clearly identify the issues which are addressed and the positions taken with respect to each issue. The State of Wyoming will be afforded the opportunity to respond to each submission.

Pursuant to 29 CFR 1902.39(f), interested persons may request an informal hearing concerning the proposed 18(e) determination. Such requests also must be received on or before February 20, 1985 and should be submitted in quadruplicate to the Docket Officer, Docket T-006, at the address noted above. Such requests must present particularized written objections to the proposed 18(e) determination. The Assistant Secretary will decide within 30 days of the last day for filing written views or comments and requests for a hearing whether the objections raised are substantial and, if so, will publish notice of the time and place of the scheduled hearing.

Interested persons are also invited to submit written data, views and comments with respect to the proposed revised compliance staffing benchmarks for Wyoming as a prerequisite for the proposed 18(e) determination. These comments also must be received on or before February 20, 1985 and submitted in quadruplicate to the Docket Officer, Docket No. T-006, at the address noted above. Written submissions must be directed to the specific benchmarks proposed for Wyoming and must clearly identify the issues which are raised and the position taken with respect to each issue.

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish his decisions in the **Federal Register**. All written and oral submissions, as well as other information gathered by OSHA will be considered in any action taken. The record of this proceeding, including written comments and requests for hearing and all materials submitted in response to this notice and at any subsequent hearing, will be available for inspection and copying in the Docket Office, Room S-6212, at the previously mentioned address, between the hours of 8:15 a.m. and 4:45 p.m.

Regulatory Flexibility At

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) that this determination will not have a significant economic impact on a substantial number of small entities. Final approval

would not place small employers in Wyoming under any new or different requirements, nor would any additonal burden be placed upon the State government beyond the responsibilities already assumed as part of the approved plan. A copy of this certification has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational Safety and Health.

(Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (43 FR 35736))

Signed at Washington, D.C., this 10th day of January 1985.

Robert A. Rowland,

Assistant Secretary of Labor.

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Part IV

Department of Energy

Western Area Power Administration

Sacramento Area Office, Central Valley Project, Notice

DEPARTMENT OF ENERGY

Western Area Power Administration

Sacramento Area Office—Central Valley Project Withdrawal Procedure

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of withdrawal procedure.

SUMMARY: The Sacramento Area Office of the Western Area Power Administration (Western) is issuing this notice to propose rules for withdrawal of Central Valley Project (CVP) power allocations from its customers under varying circumstances prescribed by law. This notice will also propose rules which will govern allocation and service of power to preference customers in Trinity, Tuolumne, and Calaveras Counties with statutory first preference rights to CVP power.

Explanation of Terms

The following terms will be used throughout this notice and are intended to have the indicated meanings:

1. "Contract 2948A" means Contract No. 14-06-200-2948A, dated July 13, 1967, between Western and Pacific Gas and Electric Company (PGandE) as such contract may hereinafter be amended, supplemented or superseded, providing for, among other things, transmission and firming of CVP resources.

2. "Contract Rate of Delivery" or "CRD" means that amount of CVP capacity allocated to the Contractor to provide firm electric energy from the CVP pursuant to power sales contracts between Western and its customers, and Contract 2948A.

3. "Diversity Contracts" means those contracts with the National Aeronautics and Space Administration (NASA-Ames) and the Department of Energy (DOE) Laboratories providing for additional CVP allocations to such customers in exchange for their participation in Western's load control program.

4. "First Preference Customers" means those CVP customers in Trinity, Tuolumne, and Calaveras Counties which have satisfied the statutory requirements according to Reclamation Law for a right to service of up to 25 percent of the additional power made available from the CVP power system as a result of the construction of the Trinity River powerplants and the New Melones powerplant and their integration with the CVP.

5. "Load Growth Customer" means those CVP customers entitled to service of CVP power to meet load growth up to levels specified in the Santa Clara Settlement.

6. "Load Level" means the maximum allowable simultaneous demand for power during any month of all of those CVP customers whose CRDs are designated as contributing to the particular load level.

7. "Maximum Entitlements of First Preference Customers" means the maximum amount of CRD which is available to satisfy the rights of First Preference Customers; such amounts will be calculated separately for preference customers located in Trinity County and for preference customers located in Tuolumne and and Calaveras Counties and will include the amounts of energy or CRD already being used by customers in those counties; the Maximum Entitlements may be reduced pursuant to these rules.

8. "Maximum Entitlement of Westlands" means the maximum amount of CRD which is available to satisfy Westlands' contract rights; such amount will include the amount of energy or CRD already being used by Westlands; Westlands' Maximum Entitlement may be reduced pursuant to these rules.

9. "Maximum Simultaneous Demand" or "MSD" means the maximum level of simultaneous customer demand for power of preference customers of the CVP measured each thirty-minute demand interval and adjusted to the Tracy load center which Western is able to meet at any one point in time, as such ability is constrained by the availability of power from the CVP, the provisions of the PGandE Contract and the terms of the Santa Clara Settlement.

10. "Project Use" means the power determined by the Bureau of Reclamation (Bureau), to be necessary to operate CVP pumping facilities, to operate powerplants and offices, and for any other purposes determined in accordance with Reclamation Law to be necessary for operation of the CVP.

11. "Santa Clara Settlement" means the Memorandum of Understanding among Western, PGandE, the City of Santa Clara, and other CVP customers, dated February 8, 1980, providing for settlement of issues raised in the case of City of Santa Clara v. Andrus, 572 F. 2d 660 (9th Cir. 1978), cert. den., 439 U.S. 859 (1978), and for PGandE's agreement to raise the CVP customer Load Level to 1,152 MW.

12. "Type I Withdrawable Power" means that portion of a customer's CRD which may be reduced to meet the 925-MW Load Level limitations.

13. "Type II Withdrawable Power" means the 60-MW portion of the City of Santa Clara's CRD which may be reduced to meet the 1,050-MW Load Level limitations pursuant to the Santa Clara Settlement.

14. "Westlands Withdrawable Power" means that portion of the CRD of CVP customers which is subject to withdrawals to serve the load of Westlands Water District, as described in the power sales contracts of such customers and these rulemaking proceedings.

1. Purpose of Rules

This rulemaking proceeding is being conducted by Western for the purpose of developing and clarifying methods of withdrawal of CVP power from customers under circumstances prescribed by law or by contract.

Although First Preference Customers have been served CVP power for 2 years, their power needs have been served from diversity within Western's customer load and have not required withdrawals of power from other customers. Such diversity was available due in part to allocations which were made under Western's 1981 Power Marketing Plan, but which were unused until recently. The diversity also resulted from Western's load control program which was commenced under the 1981 Power Marketing Plan. The load control program is being expanded in order to add to the diversity in Western's system and reduce the risk of withdrawals. However, Western does not believe the load control program provides enough assurance against the need for withdrawals to satisfy the rights of First Preference Customers to avoid developing procedures for such withdrawals. Rules for service to First Preference Customers are necessary in order to facilitate resource planning by both First Preference Customers and by those CVP customers which are subject to withdrawals to serve First Preference Customers. Such rules will include a method for determination of the Maximum Entitlements of First Preference Customers.

Withdrawals to meet Load Level limitations have been made in the past according to procedures for withdrawals at the 925-MW Load Level. Those procedures will not be changed under these rulemaking proceedings. This rulemaking proceeding will address procedures for withdrawal at the 1,152-MW Load Level, which will become more likely as service of new allocations begins. Expansion of the load control program will help avoid the risk of such withdrawals.

Most of the rules will clarify provisions which are already in Western's power sales contracts with its

customers. Many of such contracts refer specifically to the rules for the procedures for withdrawals. To the extent any of the rules contained herein become incorporated in customer contracts pursuant to those contracts, they will be binding upon Western for the duration of the contract term, subject to conditions in such contracts. To the extent any of the rules are not incorporated into contracts, they will be subject to modification in the future as required, subject to publication and public comment.

2. Withdrawals to Serve Project Use

Since the time the CVP became operational in the early 1950's, the Bureau has followed a policy of utilizing CVP power first to meet Project Use. Such policy is consistent with Federal Reclamation laws which provide that a contract for the sale of power from Reclamation Projects is not to be made "unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes," 43 U.S.C. 485h(c). By reserving the right to withdraw CVP power to serve Project Use, Western has assured the Bureau of the availability of power for irrigation and other CVP purposes.

All of Western's existing contracts provide for the right to withdraw power from CVP customers to serve Projects Use. The risk of such withdrawals is slight due to support which PG and E is obligated to provide for CVP operations under Contract 2948A. Commitments already made by Western for protection from any potential withdrawals will be described and confirmed in this rulemaking proceeding. Development of rules for apportionment of such withdrawals among the customers will be delayed until there is more risk of the need for withdrawal to serve Project Use.

3. Sales to First Preference Customers

Qualified preference customers in Trinity, Tuolumne and Calaveras Counties, California (defined as First Preference Customers), are entitled to up to 25 percent of the additional electric energy made available to and integrated with the CVP power system as a result of the construction of the Trinity River powerplants and the New Melones Powerplant. Such entitlements are described under the Trinity River Division Act of August 12, 1955 (69 Stat. 719) and the Flood Control Act of 1962 of October 23 (76 Stat. 1173, 1191).

Current First Preference Customers and their effective CRDs are Trinity County Public Utilities District (TCPUD) (6.0 MW), Tuolumne County Public Power Agency (TCPPA) (4.0 MW), Calaveras Public Power Agency (CPPA) (4.0 MW) and Sierra Conservation Center (SCC) (1.5. MW). The present total CRDs of such entities are 15.5 MW. The TCPUD recently requested that its CFR be increased from 6 MW to 8n MW, to be effective January 1, 1985.

Although Western currently has power sales contracts in place with these entities, Western has not previously issued rules for sales and service of CVP power and energy to First Preference Customers. Such rules are described in these rulemaking proceedings.

4. Withdrawals to Satisfy the Rights of First Preference Customers

Power not yet under contract to First Preference Customers has been allocated to other preference customers subject to withdrawal to satisfy the rights of First Preference Customers. Such withdrawals will be made in accordance with the rules created during this rulemaking proceeding and provisions in the power sales contracts of customers with CRDs which are subject to such withdrawals.

5. Withdrawals to Serve Westlands Water District

After construction of the Trinity River powerplants in 1963, the Bureau allocated 50 MW of power to the Westlands Water District (Westlands) as a preference customer. Westlands was then anticipating construction of additional water distribution facilities which would have increased its pumping load and, consequently, its power requirements. Delays in funding resulted in a contract between the Bureau and Westlands providing for a guarantee of service of the 50-MW power allocation at future times when increases in Westlands' requirements occurred. The agreement provided for a reservation of the 50-MW allocation to meet increases in Westlands' requirements only until the date of an announcement by the United States. " * * * that the total firm load of all preference customers has reached a simultaneous demand of 1,050 megawatts which is expected to occur about the year 1980." [1] In 1980, Western and Westlands again amended the contract in accordance with the Santa Clara Settlement which made increases in the Westlands CRD up to 50 MW a part of the 102-MW increase in the maximum Load Level of the CVP.

Westlands' present CRD for CVP power is 8.85 MW. Since Westlands' requirements are not expected to increase substantially within the near future, 41.15 MW of the 50-MW maximum CRD were allocated to other preference customers in Western's 1981 Power Marketing Plan (46 FR 51224, October 16, 1981). Such power is subject to withdrawal from such customers at times when Westlands requests additional power pursuant to its power sales contract with Western. It is also subject to withdrawals to serve Project Use, to satisfy the rights of First Preference Customers, and to meet Load Level limitations, as it would be if it were being used by Westlands.

Contracts with recipients of the allocations of Westlands Withdrawal Power provide that such withdrawals of Westlands Withdrawal Power will be made in accordance with these rulemaking proceedings.

6. Load Level Withdrawals

Under Contract 2948A with PGandE, Western has agreed that the Maximum Simultaneous Demand of all loads served by the CVP, other than Project Use, cannot exceed 1,152 MW.

Since the total of the customer CRDs which Western has contracted to serve is in excess of 1,152 MW, the Maximum Simultaneous Demand of the total load may exceed 1,152 MW. These rulemaking proceedings will describe the way in which withdrawals will be made if the 1,152-MW Load Level is exceeded.

In addition to the 1,152-MW Load Level, there are two previously established Load Levels. These Load Levels, the 925-MW and 1,050-MW Load Levels, and withdrawals to meet them are described in the Santa Clara Settlement. To the extent rules for such withdrawals are not described in the Santa Clara Settlement, such rules will be promulgated in this proceeding.

Authority: Act of Congress (The Reclamation Act) approved June 17, 1902 (32 Stat. 388), Act of Congress, the River and Harbors Act (the Central Valley Project, California), approved August 26, 1937 (50 Stat. 844, 850), Act of Congress (The Reclamation Project Act of 1939) approved August 4, 1939 (53 Stat. 1187), Act of Congress (Trinity River Division) approved August 12, 1955 (69 Stat. 719), Act of Congress (Flood Control Act—New Melones Project) approved October 23, 1962 (76 Stat. 1173, 1191), Act of Congress (DOE Organization Act) approved August 4, 1977 (91 Stat. 565).

DATES: The tentative schedule for this rulemaking proceeding is given below. Persons planning to speak at the Information/Comment Forum should send their names and affiliation to the address noted below at least 3 days

[1] Amendment No. 1, Contract No. 14-06-200-3131A, dated September 11, 1972.

prior to the date of the Forum so that a speakers list may be developed.

Information/Comment Forum—February 6, 1985
Comments on Proposed Rules—February 22, 1985
Publication of Proposed Final Rules—March 22, 1985
Information/Comment Forum on Proposed Final Rules—April 5, 1985
Comments on Proposed Final Rules—April 19, 1985
Publication of Final Rules—May 17, 1985

Written comments are to be submitted to the address below by the deadlines in order that adequate consideration can be given. Mr. David G. Coleman, Area Manager, Sacramento Area Office, Western Area Power Administration, 2800 Cottage Way, Sacramento, CA 95825 (916) 484-4251, FTS 468-4251.

Attachments

Western has provided attachments which contain additional information explaining how the rules developed through this proceeding will affect the customers.

Attachment A-1 indicates the approximate amount of the Maximum Entitlements of the First Preference Customers under each of the alternatives described in these rules.

Attachment B-1 contains formulas describing the apportionment of withdrawals to satisfy the rights of First Preference Customers. Attachment B-2 indicates the approximate amount which could be withdrawn from each customer to satisy the rights of First Preference Customers under two of the alternatives for calculation of the Maximum Entitlements of First Preference Customers. Such amounts are determined using the formula described in Attachment B-1 and the amounts of Maximum Entitlement of First Preference Customers described in Attachment A-1 under Alternatives 1 and 3.

Attachment C-1 contains preliminary formulas for both of the alternatives under rule 5.9.5 which apportions withdrawals among the customers to meet the 1,152-MW Load Level. Such formulas will also be used to calculate withdrawals at the 102-MW Load Level.

Attachment D-1 describes the effect of Load Level withdrawals on the Maximum Entitlements of the First Preference Customers and Westlands. Attachment D-1 contains several formulas, because there are two alternatives which adjust withdrawals to meet Load Level due to the effect on the Maximum Entitlements. The procedures for calculation of the amount to be withdrawn under each alternative are complicated by the overlap of these alternatives with other rules.

For further information concerning the proposed rules or the Comment Forum, please contact the Sacramento Area Manager.

Summary of Comments

Prior to publication of these proposed rules in the **Federal Register**, Western submitted a draft of the rules to customers and interested parties for informal review and comment. Some of the comments have been incorporated in the revised rules. Others will be considered for inclusion in the final rules. A summary of some of the issues raised in the comments is as follows:

1. Western should delay the rulemaking proceeding or the publication of final rules until resolution of litigation (Arvin-Edison Water Storage District v. Hodel) between Western and irrigation district preference customers. (Glenn-Colusa Irrigation District, April 17, 1984)

2. The proposed rules for withdrawals to satisfy the rights of First Preference Customers conflict with the Sacramento Municipal Utility District (SMUD) Settlement Agreement. (SMUD, April 5, 1984)

3. The rulemaking proceedings are not necessary due to Western's load control program and other methods of addressing the issues. (Redding, April 5, 1984)

4. Western should not serve capacity to First Preference Customers. (Redding, April 5, 1984; Santa Clara, April 5, 1984; Palo Alto, April 5, 1984)

5. Certain First Preference Customers do not have utility responsibility and therefore should not be entitled to receive allocations of CVP power. (Redding, April 5, 1984)

6. Load Growth Customers are not subject to withdrawals to meet the entitlements of First Preference Customers. (Palo Alto, April 5, 1984)

7. Irrigation and water districts are inherently inflexible with regard to time of use of power and should not be penalized for their inability to participate in Western's load control program. (Irrigation and water districts, April 27, 1984)

8. Withdrawals to meet Load Level according to the customers' contributions to the Maximum Simultaneous Demand would be in violation of the SMUD Settlement Agreement. (SMUD, April 5, 1984)

9. Withdrawals from NASA-Ames should be made only from the portion of NASA's CRD which is not subject to reduction pursuant to NASA's Diversity Contract. (NASA-Ames, April 27, 1984)

These issues, as well as other issues raised during the public comment period, will be considered and addressed prior to publication of the Final Rules.

Proposed Rules

1. Withdrawals to Serve Project Use

1.1 Withdrawals to serve Project Use will not be made from the first 290 MW of SMUD's CRD prior to January 1, 2005.

1.2 The 30 MW of CVP allocated to NASA-Ames and the DOE laboratories for participation in Western's load control program will be withdrawn pro rata among such participants to serve Project Use after all other withdrawals for Project Use.

1.3 Western will not reduce any customer's CRD below 0.5 MW to serve Project Use unless such reduction is necessary to meet the requirements of Reclamation Law.

1.4 The 30 MW of CVP power allocated to praticipants in the cogeneration and renewable resource program described in Western's 1981 Power Marketing Plan will be withdrawn pro rata among such participants to meet Project Use prior to withdrawals described in Rules 1.2 and 1.3 above, but after all other withdrawals for Project Use.

1.5 The extent to which the Maximum Entitlements of the First Preference Customers will be subject to reductions to serve Project use is determined under Rules 2.3 and 2.4.

1.6 CVP power allocated to Westlands will be subject to withdrawals for Projects Use as provided in Rule 1.7 below, but the withdrawals will be made from Westlands Withdrawable Power as described in section 4, until there is no such power remaining Such withdrawals will reduce Westland's Maximum Entitlement. At such time as there is no more Westlands Withdrawable Power, Westland's CRD will be reduced for Project Use with the CRDs of CVP customers as described in Rule 1.7 below.

1.7 Should withdrawals to serve Project Use ever become necessary, Western will promulgate additional rules at that time to apportion such withdrawals among the CVP customers, subject to the exceptions described above.

1.8 Western will give written notice to all customers of its intent to withdraw to serve Project Use 17 months prior to the effective date of such withdrawal.

2. Allocations to First Preference Customers

2.1 Western will serve to the First Preference Customers, from resources available to and integrated with the CVP, energy at each First Preference Customer's CRD and will treat First Preference Customers in the same manner as other CVP customers unless otherwise provided under these rules or by law. The method for calculating the Maximum Entitlements of the First Preference Customers will be determined pursuant to these rules.

2.2 Increases in the CRDs of existing First Preference Customers will be effected by revising the exhibits which designate the CRDs of such customers and which are attached to such customer's sales contracts.

Such exhibit revisions will be conditional upon execution by the parties of an amendment to the contract which stipulates that increases in CRD will be made in accordance with these rules.

The amendments will also provide that the First Preference Customers agrees to pay for its demand in an amount determined to be the effective capacity rate multiplied by the effective CRD. The effective CRD will be the amount of power requested by the customer and approved by Western. The effective capacity rate is the rate approved on an interim or final basis under Department of Energy Delegation Order 0204–108 (48 FR 55664, December 14, 1983), or as such order may be modified or replaced.

2.3 The Maximum Entitlements will be determined using one of the following methods:

$$\text{Alternative 1: } X = \frac{A}{4} - (L + P)$$

$$\text{Alternative 2: } X = \frac{A}{4}$$

$$\text{Alternative 3: } X = \frac{A}{C} \times B \times .25 \times H$$

Where:

A= The average annual amount of generation available from the Trinity River powerplants (1,654,000,000 kWh's) or the New Melones powerplants (492,000,000 kWh's);

B= Allocations of CVP power which Western is presently obligated to serve (1,417,759 kW) + losses associated with such allocations (70,888 kW);

C=The amount of energy required to serve Western's customer loads (6,893,482,000 kWh's) + losses associated with such energy (634,372 kWh's);

H=Load factor hours in the year (5,256 for Trinity at an assumed 60 percent load factor and 4,380 for New Melones at a 50 percent load factor);

L=25 percent of the average annual adjustments for losses for transmission of such energy to the Tracy substation and back to customer loads as provided under Contract 2948A;

P=25 percent of the Project Use apportioned to the Trinity River powerplants or New Melones powerplants; and

X=The amount of energy from the Trinity River Division or New Melones Project powerplants which is available to satisfy the rights of First Preference Customers.

2.4 The Maximum Entitlements will be reevaluated and adjusted, if necessary, by Western each year to reflect changes in energy availability (caused, for example, by unit changes), water release policies, Project Use, or losses. Western will not adjust Maximum Entitlements without providing customers notice and opportunity to comment on the proposed adjustments.

2.5 The Maximum Entitlements to energy described under Rule 2.3 will be served at CRDs as described in Western's power sales contracts and Contract 2948A. The amount of energy associated with such CRDs will not exceed the Maximum Entitlements to energy.

A First Preference Customer's CRD may be adjusted by Western each year to reflect changes in a First Preference Customer's load factor and for changes in the Maximum Entitlements under Rule 2.4. If increases in a First Preference Customer's load factor during the year have caused the Maximum Entitlement to be exceeded or if the Maximum Entitlement has been reduced pursuant to Rule 2.4, Western will withdraw an amount of the customer's CRD which is proportionate to such excess. If the load factor is subsequently reduced or the Maximum Entitlement is increased, Western will reinstate a proportionate amount of CRD previously withdrawn, subject to any agreements determined by Western to be necessary between Western and PG and E.

2.6 If the requests of First Preference Customers for power become greater than the Maximum Entitlements, allocations of any unallocated first preference power will be marketed among the qualifying entities according to rulemaking proceedings promulgated at such time.

2.7 After an entity becomes a First Preference Customer, Western will increase such customer's CRD by up to 1 MW one time in each year to meet such customer's load growth. For increases in excess of 1 MW, the First Preference Customer must notify Western in writing 4 months in advance. Such increases will be subject to other rules described in these proceedings.

2.8 The First Preference Customers will be responsible for forecasting their load requirements as accurately as practicable and will cooperate with Western in developing load forecasting procedures to assure Western that such load projections are being reasonably determined. The amount of CVP power requested but not used by a First Preference Customer will be paid for by such customer pursuant to Rule 2.2. If a First Preference Customer underestimates its demand, it will be responsible for paying a supplemental supplier for supplemental service until it has satisfied the notice requirements necessary to obtain additional CVP power.

2.9 First Preference Customers may reduce their CRDs upon 4 months written notice to Western. If any portion of the CRD which the First Preference Customer is relinquishing is reallocated to another Western customer prior to the end of the 4-month period, the reduction will be effective upon the date of the transfer.

2.10 To qualify for an initial allocation of power, a potential First Preference Customer must comply with the notice provisions of the Trinity River Division Act of 1955 or the Flood Control Act of 1962, as appropriate. Any notice should contain the following applicant profile data:

2.10.1 A statement of eligibility as a preference customer of first preference rights under Reclamation Law and either of the two Acts of Congress, Trinity River Division (69 Stat. 719) or the 1962 Flood Control Act (New Melones) (76 Stat. 1173, 1191);

2.10.2 A brief description of the organization that will interact with Western on contract and billing matters;

2.10.3 Description of: (1) Number and types of power customers served; Governmental, Residential, Commercial, Industrial, Military, Agricultural, or other; (2) 24-hour load profile data, if available, for seasonal peak days in the past 3 years; and (3) projected monthly capacity and energy demand for the next 5 years, indicating the forecasting method and assumptions used; and

2.10.4 A brief description of the transmission service being requested of Western (direct or wheeled), and the transmission voltage and location of delivery points.

3. Withdrawals to Satisfy the Rights of First Preference Customers

3.1 The amount of power and energy withdrawable from CVP customers to satisfy the rights of First Preference Customers will be the amounts determined pursuant to Rules 2.3, 2.4, and 2.5 less the amounts already being used by First Preference Customers.

3.2 Withdrawals to satisfy the rights of First Preference Customers will not be made from the first 290 MW of SMUD's CRD prior to January 1, 2005.

3.3 The 30 MW of CVP power allocated to NASA-Ames and the DOE laboratories for participation in Western's load control program will be withdrawn to satisfy First Preference Customers pro rata among such participants after all other withdrawals to satisfy the rights of First Preference Customers.

3.4 Western will not reduce any customer's CRD below 0.5 MW to satisfy the rights of First Preference Customers, unless such reduction is necessary to meet the requirements of Reclamation Law.

3.5 The 30 MW of CVP power allocated to participants in the cogeneration and renewable resource program will be withdrawn to satisfy the rights of First Preference Customers pro rata among such participants prior to withdrawals described in Rules 3.3 and 3.4 above, but after all other withdrawals to satisfy the rights of First Preference Customers.

3.6 CVP power allocated to Westlands will be subject to withdrawals to satisfy the rights of First Preference Customers according to the formula described in Amendment No. 2 to Westlands' Power Sales Contract No. 14-06-200-3131A, but the withdrawals will be made from Westlands Withdrawable Power as described in section 4 until there is no such power remaining. Such withdrawals will reduce Westlands' Maximum Entitlement. At such time as there is no more Westlands Withdrawable Power, Westlands' CRD will be reduced to satisfy the rights of First Preference Customers pro rata with the CRDs of CVP customers as described in Rule 3.7 below.

3.7 Appointment of withdrawals to satisfy the rights of First Preference Customers will be determined by apportioning the amount to be withdrawn pro rata among the customers except First Preference Customers, using 20 percent of each customer's CRD as the initial basis for apportionment. A preliminary formula describing such apportionment is included in Attachment B-1.

3.8 Amounts withdrawn to satisfy the rights of First Preference Customers may be reinstated by Western in the reverse order and proportion in which such amounts were withdrawn if a First Preference Customer reduces its CRD or if additional power becomes available from improvements or additions to the powerplants. Such reinstatement will be made subject to any agreements determined by Western to be necessary between Western and PGandE.

3.9 Western will notify affected CVP customers of its intent to reduce CRDs to satisfy the rights of First Preference Customers 90 days in advance of the date on which such reduction is to be effective. Such notice will be in writing and will indicate an estimate of the amount of reduction.

3.10 As an alternative to the procedures described in Rules 3.1–3.9 above, Western is proposing that increases in the CRDs of First Preference Customers be served from diversity within the CVP system.

4. Withdrawals to Serve Westlands Water District

4.1 For the term of its agreement and for purposes specified in such agreement, Westlands is entitled to increase its CRD up to a total CRD of 50 MW, except as reduced by withdrawals described in these rules.

4.2 Amounts of Westlands Withdrawable Power are specified in Western's power sales contracts with customers which were allocated such power.

Such amounts are allocated according to the following formula:

$$WW = 41.15\ mW \times \frac{P}{SP}$$

Where:

WW = The portion of a customer's CRD which is subject to withdrawal to serve Westlands;

P = The amount of CRD allocated to the customer from the 102 MW reduced by any portion of such CRD allocated in support of cogeneration and renewable resource projects and by 0.5 MW; and

SP = The sum of the customers' P's.

4.3 The Westlands Withdrawable Power of each customer will be reduced at the time of withdrawals to satisfy the rights of First Preference Customers, to serve Project Use, and to meet Load Level limitations, by the amounts necessary to reflect withdrawals which would otherwise have been made at such times from Westlands. Westlands' Maximum Entitlement will be reduced to reflect such withdrawals.

4.4 The Westlands Withdrawable Power of each customer will be reduced as necessary to meet Westlands' load growth and to meet Westlands' contributions to withdrawals for other purposes under Rule 4.3 above according to the following formula:

$$X = \frac{WW}{WWS} \times WD$$

Where:

WW = The Westlands Withdrawable Power of such customer remaining after any previous reductions in such power;

WWS = The sum of all of the Customers' Westlands Withdrawable Power remaining after any previous reductions in such power;

WD = The total amount of power to be withdrawn for service to Westlands or to meet Westlands' contribution to other withdrawals under Rule 4.3 above; and

X = The amount of the reduction in Westlands Withdrawable Power of such customer.

4.5 Westlands Withdrawable Power will be reinstated in the reverse order and the proportion in which it was withdrawn if Westlands' requirements for power are reduced or if power would otherwise have been reinstated to Westlands and Westlands' demands have already been met. Such reinstatement will be subject to any agreements determined by Western to be necessary between Western and PGandE.

4.6 Western will give at least 15 days written notice of intent to withdraw Westlands Withdrawable Power when increased service to Westlands does not require installation of distribution facilities and at least 90 days written notice when increased service to Westlands requires installation of distribution facilities.

5. Load Level Withdrawals

5.1 In any month in which a Load Level is exceeded, Western will withdraw power according to the rules described below.

5.2 Prior to January 1, 2005, the first 290 MW of SMUD's CRD will not be reduced for Load Level limitations.

5.3 Western will use its best efforts to exercise its rights to control load under its contracts with NASA-Ames and Stanford Linear Accelerator Center (SLAC) to prevent the maximum simultaneous demand from exceeding the 925-MW, 1,050-MW, and 1,152-MW Load Levels to the extent practicable. Such efforts will not create any rights in any customer or interested party to render the United States liable for any

claims, damages, costs, losses, causes of action, or liability of whatsoever kind or nature in the event such parties lose some or all of their CRDs.

5.4 Western will institute an extended load control program to protect the 925-MW, 1,050-NW, 102-NW, and 1,152-MW Load Levels by offering incentives to customers which agree to reduce load at the time of the Maximum Simultaneous Demand.

Such incentive may include billing such customers for CVP capacity based on their contribution to the Maximum Simultaneous Demand at times when Western requests them to reduce load.

Another incentive could be that the portion of the CRD of any participant in Western's load control program which is equivalent to the amount by which such participant reduces its demand at Western's request at the time of Maximum Simultaneous Demand would not be included in the initial apportionment of withdrawals to meet Load Level limitations.

5.5 Western reserves the right to assign the contributions of the First Preference Customers to the Maximum Simultaneous Demand to whichever Load Level Western believes is most appropriate. The contributions of NASA-Ames and the DOE laboratories to the Maximum Simultaneous Demands of the Various Load Levels will be apportioned among such Load Levels according to the amount of CRD attributable to such Load Level.

5.6 Western will be unable to notify CVP customers in advance of a withdrawal to meet Load Level limitations. Western will notify CVP customers as soon as practicable of a withdrawal after the month in which such withdrawal occurred.

5.7 Withdrawals at the 925-MW Load Level.

5.7.1 Those customers which had CRDs which were effective prior to the Santa Clara Settlement all contribute to the 925-MW Load Level. Load Growth Customers can contribute up to the amount of demand associated with the maximum amounts of CRD designated under the Santa Clara Settlement. The contributions of those customers which were not designated as Load Growth Customers can be only up to that amount associated with those portions of their CRDs which were effective prior to the Santa Clara Settlement. The 925-MW Load Level has been exceeded when the described contributions of both Load Growth Customers and non-Load Growth Customers to the 925-MW Load Level exceed 925 MW at the time of the Maximum Simultaneous Demand.

5.7.2 Non-Load Growth Customers which had contracts for service of CVP power prior to the Santa Clara Settlement will have a portion of their CRDs reduced when the Maximum Simultaneous Demand of customers contributing to the 925-MW Load Level exceeds 925 MW. The portions of such customers' CRDs which are subject to withdrawals to meet the 925-MW Load Level will hereinafter be called Type I Withdrawable Power.

5.7.3 The amount of Type I Withdrawable Power of each customer with such power is the amount described as being withdrawable to meet the 925-MW Load Level in the power sales contracts of such customers. If such contracts are replaced, the provisions specifiying the amount subject to withdrawal will be preserved.

5.7.4 The Type I Withdrawable Power of each customer will be reduced by Western in any amount necessary to meet the 925-MW Load Level.

5.7.5 Western may reinstate Type I Withdrawable Power at any time unless the total amount of such power is, at any time, reduced to zero. The amounts of power to be reinstated will be determined by Western.

5.7.6 There will be no withdrawals of power, other than Type I Withdrawable Power, to meet the 925-MW Load Level. If the 925-MW Load Level has been met by withdrawals to Type I Withdrawals Power or if there is no more Type I Withdrawable Power outstanding, withdrawals will then be made according to Rules 5.8 and 5.9 below.

5.8 Withdrawals at the 1,500-MW Load Level.

5.8.1 After the Type I Withdrawable Power among all of the CVP customers with such power has been reduced to zero, the City of Santa Clara's 60 MW of CRD which was awarded to it under the Santa Clara Settlement (hereinafter called Type II Withdrawable Power) will be withdrawn to the extent necessary to meet the 1,050-MW Load Level.

5.8.2 The 1,050 MW-Load Level has been exceeded when the Maximum Simultaneous Demand attributable to all 925 MW CRDs of those customers described in Rule 5.7.1 above and the City of Santa Clara's 65-MW CRD of long-term power and Type II Withdrawable Power pursuant to the Santa Clara Settlement, exceed 1,050 MW.

5.8.3 Type II Withdrawable Power will be reinstated to Santa Clara if, during the year following a withdrawal, the combined annual maximum simultaneous demand attributable to the CRDs included in the 1,050-MW Load Level is less than 1,050-MW plus losses to Tracy Substation. The amount of Type II Withdrawable Power to be reinstated will be the difference between the maximum simultaneous demand at 1,050 MW, adjusted for losses, up to 60 MW. Reinstatement of such power will be effective on the first day of the 13th month following the month in which a withdrawal occurs.

5.9 Withdrawals to Meet the 102-MW and 1,152-MW Load Level Limitations.

5.9.1 Withdrawals will be made pursuant to this section only when the 1,152-MW Load Level has been exceeded. The 1,152-MW Load Level has been exceeded when the Maximum Simultaneous Demand of all CVP customers during any month exceeds 1,152 MW.

5.9.2 If the 1,152-MW Load Level and either or both of the 1,050-MW Load Level and 925-MW Load Level have been exceeded, withdrawals will be made first to meet the 925-MW and 1,050-MW Load Levels as described in Rules 5.7 and 5.8 above. The amount remaining which is then in excess of the 1,152-MW Load Level will be withdrawn pursuant to this section.

5.9.3 Exceptions from Initial Withdrawals.

5.9.3.1 The 30 MW of CVP power allocated to NASA-Ames and the DOE laboratories for participation in Western's load control program will be reduced to meet Load Level limitations only after withdrawals from all other CVP customers to meet Load Level limitations. Demand, however, will be reduced temporarily by NASA-Ames and the DOE laboratories to meet Load Level limitations in accordance with provisions described in the Diversity Contracts between Western and such entities. The reduction in the diversity allocation which goes into effect as a penalty at times when a participant in the load control program fails to reduce its demand will be effective ahead of all other withdrawals to meet Load Level limitations.

5.9.3.2 No customer's CRD will be reduced below 0.5 MW to meet 1,152-MW Load Level limitations unless necessary, as determined by Western, to comply with Reclamation Law or the PGandE Contract.

5.9.3.3 The 30 MW of CVP power allocated to CVP customers participating in Western's cogeneration and renewable resource program will be reduced to meet Load Level limitations before withdrawals from customers described in Rules 5.9.3.1 and 5.9.3.2 above, but after withdrawals from all other CVP customers to meet Load Level limitations.

5.9.3.4 CVP power allocated to Westlands and being used by Westlands will be subject to withdrawal to meet Load Level limitations as provided in Rules 5.9.4 and 5.9.5 below, but the withdrawals will be made from Westlands Withdrawable Power until there is no such power remaining. Westlands' Maximum Entitlement will be reduced by such withdrawals.

5.9.3.5 First Preference Customers will not be subject to withdrawals to meet Load Level (unless provided or required by law).

5.9.4 Withdrawals To Meet The 102 MW Load Level.

Alternative 1: If the Maximum Simultaneous Demand of customers with CRDs allocated from the 102 MW made available under the Santa Clara Settlement exceeds 102 MW, withdrawals will be made among all such CRDs according to procedures similar to those described in Rule 5.9.5 for withdrawals at the 1,152-MW Load Level. Such withdrawals will occur only if the 1,152-MW Load Level has also been exceeded.

Alternative 2: There will be no withdrawals to meet the 102-MW Load Level. Instead, withdrawals from CRDs allocated from the 102 MW made available under the Santa Clara Settlement will be made according to the formula for withdrawals from all customers contributing to the 1,152-MW Load Level as described in Rule 5.9.5 below.

5.9.5 Apportionment Of Withdrawals To Meet The 1,152-MW Load Level.

After withdrawals pursuant to Rules 5.7, 5.8 and 5.9.4 above, Western will withdraw any additional amounts of CRD which may be necessary to meet the 1,152-MW Load Level.

Each affected customer's contribution to the Maximum Simultaneous Demand must be reduced by an amount which added to similar reductions in the demands of other customers, will bring the Maximum Simultaneous Demand down to 1,152 MW. The amount of such reductions could be determined under either of the following methods:

Alternative 1: Apportion the necessary amount of reduction in demand among the customers according to the customers' contributions to the Maximum Simultaneous Demand.

Alternative 2: Apportion the necessary amount of reduction in demand among the customers according to each customer's CRD.

The method of apportionment under either alternative is described in greater detail in Attachment C-1.

5.9.6 Effect Of Load Level Withdrawals On Maximum Entitlements of First Preference Customers And Westlands.

The method of apportionment under either alternative is described in greater detail in Attachment C-1. Withdrawals to meet the 1,152-MW Load Level correspond to the customers' use of their CRDs. Such use may include use of CRDs which may have been withdrawable to satisfy the rights of First Preference Customers or to serve Westlands. As a result, the withdrawals have the effect of reducing the Maximum Entitlements of the First Preference Customers or Westlands. The procedures described under Alternative 1 below illustrate the effect of such withdrawals upon the Maximum Entitlements of First Preference Customers and Westlands. The procedures described under Alternative 2 adjust the withdrawals to preserve the Maximum Entitlements of First Preference Customers and Westlands.

Alternative 1: The Maximum Entitlements of Westlands and First Preference Customers will be reduce to reflect withdrawals to meet Load Level limitations caused by the use of such entitlements by other CVP customers. The apportionment of withdrawals under Rule 5.9.5 above will not be adjusted.

Explanation: Under Alternative 1, withdrawals would be made from all CVP customers pursuant to Rule 5.9.5 above. Such withdrawals would reduce the Maximum Entitlements of Westlands and the First Preference Customers to the extent such entitlements are being used by other customers.

Alternative 2: Those customers which have CRDs which are subject to withdrawals to serve either First Preference Customers or Westlands will have the amount of reduction in CRD needed to meet the 1,152-MW Load Level, as determined under Rule 5.9.5 above, taken from that portion of their CRDs which is not subject to withdrawals to serve First Preference Customers or Westlands.

Explanation: Alternative 2 adjusts the apportionment of withdrawals under Rule 5.9.5 above in order to preserve the Maximum Entitlements of First Preference Customers and Westlands. The amount of reduction in that portion of the CRDs of the borrowing customers which is not initially subject to withdrawals to serve First Preference Customers or Westlands would be substantially increased.

5.9.7 If, during the 12 months following a withdrawal to meet the 1.152-MW Load Level, there have been no such additional withdrawals, CRDs, which have been reduced to meet the 1,152-MW Load Level will be reinstated effective on the first day of the 13th month following the month of withdrawal, subject to any agreement determined by Western to be necessary with PGandE prior to such reinstatement.

The amount of power to be reinstated will be the difference between the highest Maximum Simultaneous Demand during the 12-month period following the month of withdrawal and 1,152 MW or the total amount withdrawn, whichever is less. Such amount will be apportioned among the customers based on the amount withdrawn from such customers during the withdrawal. If the Maximum Entitlements of the First Preference Customers or Westlands are reduced to reflect withdrawals to meet Load Level, the Maximum Entitlements will be increased to reflect reinstatement under this rule.

SUPPLEMENTARY INFORMATION:

1. *Withdrawals to Serve CVP Project Use*

(a) Background

The initial amounts of generation from new Federal projectss needed to serve Project Use are usually indicated in feasibility reports submitted to Congress by the Bureau prior to authorization of construction of a project. Such amounts will fluctuate with additions to pumping load, climatic changes, and technical changes in operation or structure of a project.

During fiscal year 1983, Project Use requirements amounted to 1.458 billion kWh's. Western expects the amount of energy required to serve Project Use to have increased to 1.673 billion kWh's by the year 2000.

Western will not have to withdraw power from CVP customers to serve Project Use so long as it has surplus capacity and energy in its accounts with PGandE under Contract 2948A or is able to buy capacity and energy to meet deficits in CVP generation. Since there is no near-term risk of such withdrawals, Western has not calulated a methodology for apportionment of such withdrawals. However, existing commitments made with respect to withdrawals to serve Project Use are described herein.

(b) Exceptions to Initial Reduction, Explained by Rule (Rules 1.1-1.4)

Approximately 377.5 MW of customer CRD will not be included in the initial apportionment of reductions to serve Project Use; 290 MW of SMUD's CRD, 0.5 MW of each customer's CRD (27.5

MW total), 30 MW of congeneration and renewable resource allocations, and 30 MW of allocations to participantss in the load control program. These exceptions are explained, by rule, as follows:

Rule 1.1 Under SMUD's orignial power sale contract with Western, the first 290 MW of SMUD's CRD were exempt from withdrawals for any purpose, including withdrawals to serve Project Use. The 70 MW allocated to SMUD under the 1966 amendment to the SMUD power sale contract were subject to withdrawals to serve Project Use, to satisfy the rights of First Preference Customers in Trinity County, and to meet Load Level limitations under Contract 2948A or its predecessor. The 70 MW allocation was not withdrawable to satisfy the rights of First Preference Customers in Tuolumne or Calaveras Counties. The power sales contract was entered into by SMUD and the United States in December 1952.

In April 1983, SMUD and Western entered into the SMUD Settlement Agreement which provided for settlement of a lawsuit between SMUD and Western over interpretation of the SMUD power sales agreement. The SMUD Settlement Agreement extends SMUD's power sales contract from 1994 to 2004. The provisions for withdrawal were left essentially as they were in the original contract. The SMUD Settlement Agreement provides as follows:

> 12. No withdrawal of power for Project pumping or for public agencies in counties in which Project plants are located shall be made from the 290 megawatts sold to Contractor under the original Contract. Any withdrawals of power from the additional 70 megawatts sold to Contractor under the March 22, 1966, letter amendment to the Contract shall be for the purposes set forth in Article 2 of that letter agreement and shall be based upon policies that are adopted after rulemaking procedures and that are not less favorable to Contractor than to any other resale customer.

The SMUD power sales contract provides that if the United States is unable to supply the amount of power which the United States agreed to supply under such contract, that

> * * * The United States shall be obligated to supply such deficiencies by interchange, or by purchase or by other means if such purchases or other means are authorized and appropriated therefor by the Congress.

The exemption of SMUD's CRD from withdrawals is distinguished from exemptions of the CRDs of other CVP customers because delivery of power is guaranteed to SMUD. The exemption of other CRDs is from the initial apportionment of withdrawals only. Such power could be withdrawn, if necessary.

The exemptions in the original SMUD power sales contract arose from circumstances which were unique at the time the SMUD contract was executed. The SMUD Settlement Agreement was executed in settlement of a lawsuit. Western does not intend to extend similar exemptions to any other customer.

Rule 1.2 In Western's 1981 Power Marketing Plan, Western proposed to allocate 30 MW of power to customers participating in Western's load control program. At times when the Maximum Simultaneous Demand might otherwise exceed the 925-MW, 1,050-MW or 1,152-MW Load Levels, participants in the program are requested to reduce load which would otherwise be met by CVP power allocated under both their original power sales contracts with Western and their Diversity Contracts. Since such temporary reductions protect the CVP customers which would otherwise suffer long-term reductions in CRDs to meet Load Level limitations and since the requested reduction in CRD is equivalent to a first withdrawal to meet Load Level limitations, Western has agreed, as a matter of administrative discretion, that the 30 MW allocated as part of the load control program should be protected from withdrawals as provided in these rules, to the extent allowable under Reclamation Law.

Rule 1.3 Western has decided that no customer's CRD should be reduced below 0.5 MW to the extent possible. Withdrawals from small CRDs are an administrative burden which is not justified by the amount of power made available as a result of such withdrawals. Also, the economic impact of withdrawals on a customer with a less than 0.5-MW CRD is greater relative to that suffered by customers with larger CRDs.

Rule 1.4 This rule also reflects a commitment made in Western's 1981 Power Marketing Plan. Some of the participants in Western's cogeneration and renewable resource program are relying on the value of the CVP allocation associated with the development of the cogeneration or renewable resource project in order to obtain financing for such projects. Western has agreed, as a matter of administrative discretion, to protect such allocations from withdrawals in accordance with these rules and to the extent allowable under Reclamation Law.

(c) Withdrawals From First Preference Customers and Westlands (Rules 1.5 and 1.6)

Rule 1.5 See discussion relating to Project Use under Rules 2.3 and 2.4.

Rule 1.6 Since Westlands can always request additional CVP power from Western to serve its loads until its entitlement is reached, it would be a futile exercise for Western to withdraw power from Westlands to serve Project Use and then have to withdraw from other customers to meet Westlands' requests. As a result, withdrawals to meet Project Use from those customers with Westlands Withdrawable Power will include both a portion of Westlands Withdrawable Power to reflect the amount which would otherwise have been withdrawn from Westlands and a portion of the balance of the customer's CRD.

(d) Apportionment of Withdrawals to Serve Project Use (Rule 1.7)

This rule reserves Western's right to apportion withdrawals to serve Project Use according to a methodology devised at the time such withdrawals become necessary. Apportionment of such withdrawals will be accomplished through a rulemaking proceeding and will be subject to the exceptions described above.

(e) Notice (Rule 1.8)

Rule 1.8 describes the notice procedure which Western will use for withdrawals to serve Project Use.

So long as Western has capacity and energy in its accounts with PGandE or is able to purchase capacity and energy to meet deficits, PGandE is obligated under article 21 of Contract 2948A to support Western's firm load. Western would know at least 17 months in advance whether there would be enough capacity in it bank accounts with PGandE to make up for deficits in CVP generation.

Notice provisions in Western's power sales contracts for withdrawals to serve Project Use vary from 90 days to 17 months and are unspecified in some cases. To establish consistent treatment among the affected CVP customers, 17 months will be the notice period which will be applicable to all customers, including those with contracts providing for less notice.

2. Allocations to First Preference Customers

(a) Background (Rule 2.1)

There are two Federal laws granting "first preference rights" to CVP customers. The first, the Act of August 12, 1955, authorized the construction of

the Trinity River Division and provided that:

Section 4. Contracts for the sale and delivery of the additional electric energy available from the Central Valley Project Power System as a result of the construction of the plants herein authorized and their integration with that system shall be made in acordance with preferences expressed in the Federal Reclamation Laws: *Provided* that a first preference, to the extent of 25 per centum of such additional energy shall be given, under Reclamation Law, to Preference Customers in Trinity County, California, for use in that county, who are ready, able and willing, within twelve months after notice of availability by the secretary, to enter into contracts for the energy.

The second law, the Act of October 23, 1962, reauthorized the New Melones Project and gave Tuolumne and Calaveras Counties a "First Preference" similar to that given Trinity County in the 1955 Trinity River Act:

Provided further, that contracts for the sale and delivery of the additional electric energy available from the Central Valley Project Power System as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal Reclamation Laws except that a first preference, to the extent as needed and as fixed by the Secretary of the Interior, but not to exceed 25 per centum of such additional energy, shall be given, under Reclamation Law, to preference customers in Tuolumne and Calaveras Counties, California for use in that county * * *

One of the Congressional reports prepared during the 1950's when the Trinity River Division Act was passed stated:

Congress intends definitely, firmly and beyond doubt, that Federally generated power shall be sold to public bodies and cooperatives where reasonably possible and that the executive departments shall act affirmatively to achieve that end. This principal (sic) * * * is a Keystone of Federal power policy.

House Committee on Government Operations, *Certain Activities Regarding Power, Department of the Interior (Change in Power Line Regulations),* H.R. Rep. 1975, 84th Cong., 2d Sess. 7 (1956). It is apparent that preference was a primary concern when the Trinity River Division Act was passed. Congress enacted the Act after it had investigated the sale of public power in the United States over several years and found that many small public utilities were not receiving the benefits of low-cost Federal power. See; e.g., House Committee on Government Operation, *Effect of Department of Interior and REA Policies on Public Power Preference Customers,* H.R. Rep. 2279, 84th Cong., 2d Sess. (1956).

As a result, when Congress authorized the 1955 Trinity River Division as an integral part of the CVP, it included two specific provisions to protect preference customers. First, it provided that contracts for the allocation and delivery of the additional energy made available to and integrated with the CVP from the Trinity River powerplants were to be made in accordance with preferences set forth in the Federal Reclamation Law. Second, Congress gave residents of Trinity County a statutory entitlement to "25 percent of such additional energy" made available. These rules for allocation of power and energy to First Preference Customers are consistent with the authorizing statutes and Congressional intent expressed by the reservation of the first preference rights. To the extent possible, without abrogating first preference rights, service of power and energy to First Preference Customers will be subject to terms and conditions applicable to most other CVP customers.

Such terms and conditions will include service of both capacity and energy to such customers from resources available to and integrated with the CVP at rates established to cover the costs of such resources.

Some customers have argued that the First Preference Customers are entitled only to energy. Service of First Preference Customer energy entitlements at an assured rate of delivery (Contract Rate of Delivery) as Western is proposing results in an allocation of capacity as well as energy. Since first preference clauses in the laws authorizing construction of the Trinity River powerplants and New Melones powerplant provide for a first preference only to extent "of 25 per centum of such additional energy * * *", such customers argue that the specific reference to energy precludes any first preference for capacity.

Western is interpreting the laws providing for the first preference rights to provide for a right to service of energy at an assured rate of delivery. Such an interpretation is consistent with previous interpretations of preference rights, and with the intent of Congress in including the first preference right in the laws authorizing construction of the projects.

At the time construction of the Trinity River Division was being considered, the Mid-Pacific Regional Director of the Bureau outlined a plan of development for the CVP which included a steam electric plant addition for firming the hydro-energy. The plan was further described as follows:

However, this service (firming service) could be provided over the full repayment period through the existing contract with the Pacific Gas & Electric Co., relative to sale and interchange of electric power and energy, and an extension of this contract or a similar contract. This would result in a reduction in the capital cost and in the annual revenues. Integration of the Trinity division with the Central Valley Project under conditions and terms similar to those included in the present power contract, would assure favorable economic and financial conditions for the project. In other words, the Trinity division would likewise have a favorable benefit-cost ratio and repayment under this alternative plan of operation. However, as there is no assurance that this firming service will be continued by contract, the facilities for providing it should be authorized for construction at the same time the storage, conveyance, and hydro-generation facilities are authorized.

Report of Mid-Pacific Regional Director, Bureau of Reclamation, January 31, 1952 (House Committee on Interior and Insular Affairs, Central Valley Project Documents, Part 1, Authorizing Documents, H. Doc. 416, 84th Congress, 2nd Session 862 (1956).

It is apparent that the laws were drafted in the expectation that the Government would have firming services available for the additional energy it would have to market to customers from construction of the projects. Such firming services would be available due to continuation of the PGandE contract or the construction of a thermal plant to firm the CVP. It is consistent with such expectation to construe the first preference right to apply to such firming services.

The laws authorizing construction of the projects require "integration" of the projects with "other features" of the CVP, * * * as presently authorized and as may in the future be authorized by Act of Congress as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available * * * (69 Stat. 719). The contracts to be made with preference entities, including the First Preference Customers, were, according to the laws, to be for energy made available from the projects and "their integration with that system." Arrangements which Western has with PGandE for firming of the CVP as described under the laws are a "feature" of the CVP and thus "integrated" with the rest of the CVP. Such integration is necessary in order to provide for the most beneficial and most economic utilization of the CVP. Since the first preference right applies to the energy as integrated with other features of the CVP, the first preference right must apply to capacity and firming services made available under those arrangements and integrated into the CVP.

The argument that the first preference right applies only to energy is also inconsistent with law interpreting other preference rights. The laws authorizing the Trinity River powerplants and New Melones powerplant contain clauses establishing general preference rights, which apply to all potential preference customers, including First Preference Customers. Such clauses also refer only to energy. If the first preference right applies only to energy, then the general preference right also must be construed to provide for a preferences only to energy. Such a construction would be contrary to past Western policy and case law related to preference. See, *City of Santa Clara* v. *Andrus*, 572 F.2d 660 (1978), cert. den., 439 U.S. 859 (1978).

Common utility practice also supports an interpretation which would make the preference right to energy encompass firming capacity. The laws provide that the contracts are to be for the sale "and delivery" of the additional energy. It is Western's opinion that "delivery" refers to service of the energy to the customers. Since energy is served to CVP preference customers at a "contract rate of delivery," the laws should be read to assume a preference to the firming services needed for delivery of the energy.

(b) Increases in CRDs (Rule 2.2)

Western's contracts with its existing First Preference Customers do not provide for the following:

(1) Procedures for increasing such customers' CRDs or a contractual right to such increases;

(2) Procedures for allocating the power available to satisfy the rights of First Preference Customers among such customers;

(3) Notice requirements for increases in CRD; or

(4) Conversion of a First Preference Customer's energy entitlement to a CRD, based on Western's interpretation of the Trinity River Act and New Melones authorizing act.

Rules to address the areas described above are set forth in this proceeding because Western has determined that such rules are necessary to an orderly and equitable administration of the First Preference Customer rights and the rights of other CVP customers.

Since the contracts do not provide for increases in the CRDs of First Preference Customers to meet such customers, load growth, exhibit revisions to adjust the CRDs will be required. Rule 2.2 provides for the necessary exhibit revisions upon notice in according with these proceedings.

Such exhibits may be conditional upon execution by the parties of amendment to the contract which stipulates that increases in CRD will be made in accordance with these rules. Such increases would be subject to adjustment to reflect changes in Maximum Entitlements.

The amendment will also require that the First Preference Customers agree to pay a minimum charge based on the amount of CRD requested by them and approved by Western. CVP customers normally are billed based on their peak demand during the month rather than the maximum amount of CRD to which they are entitled. Western is proposing the minimum charge in this instance in order to provide an incentive for accurate load forecasting by the First Preference Customers.

(d) Calculation of Energy Entitlements (Rules 2.3, 2.4)

Rule 2.3 sets forth the methodology which Western will use in calculating the Maximum Entitlements to energy. (See also attachment A-1.)

Rule 2.3 uses an average water year to determine the Maximum Entitlements of First Preference Customers. Some customers have argued that Western should use actual generation figures in calculating the Maximum Entitlements of First Preference Customers. Western prefers to use an average water year for four reasons:

(1) Such an approach is consistent with accepted utility practice; (2) the new CVP energy and capacity rates are based on average annual energy generation figures; (3) administration of withdrawals based on actual generation would be cumbersome due to the fluctuations in such generation; and (4) the swings in generation are great enough that CVP customers affected by the withdrawal would face serious obstacles in forecasting or planning for their power needs, resulting in both planning and budget unreliability.

Under Alternative 1 to Rule 2.3, the Maximum Entitlements of First Preference Customers would be reduced by current Project Use. Reductions for Project Use are made by apportioning the average annual amount of energy needed to serve Project Use pro rata among the CVP powerplants according to the average annual generation of such powerplants. Such apportionment reduces the First Preference Customers Maximum Entitlement from the Trinity River powerplants by 127.25 GWh/yr. and the Maximum Entitlement from New Melones powerplant by 37 GWh/yr.

Since the time the CVP became operational in the early 1950's, the Bureau has followed a policy of utilizing CVP power first to meet Project Use. Such policy is consistent with Federal Reclamation laws which provide that a contract for the sale of power from Reclamation Projects is not to be made "unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes," 43 U.S.C. 485(c). It would be consistent with this policy and the statutes to reduce the Maximum Entitlements of the First Preference Customers to reflect existing Project Use.

The Trinity River Division Act also provides that:

> * * * The operation of the Trinity River division shall be integrated and coordinated, from both a financial and operational standpoint, with the operation of other features of the Central Valley Project, as presently authorized and as may in the future be authorized by Act of Congress, as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available * * *. (69 Stat. 719)

There is a similar provision contained in the statute authorizing the New Melones Project. (76 Stat. 1173, 1191.)

"Integration," as described under these laws would logically require that *all* of the CVP powerplants be available for any Project Use. In keeping with the priority for Project Use, the energy from the Trinity River powerplants or New Melones powerplant would be used to meet Project Use before being used to serve CVP customer load, including the loads of First Preference Customers.

Western would also deduct losses from the First Preference Customer Maximum Entitlement described in Alternative 1 for transmission of the energy from the generating source to the Tracy Substation and then from the Tracy Substation to the customer point of delivery to reflect losses charged by PGandE under Contract 2948A. This would reduce the Maximum Entitlement of each customer by 4½ percent for transmission to the Tracy Substation and by 4½ percent from the Tracy Substation to load. In the case of SCC, which has a delivery voltage of below 44 kV, the reduction for losses from the Tracy Substation to SCC is 8 percent.

The Maximum Entitlements would be reduced for losses under Alternative 1 on the rationale that the losses are directly related to the use of their energy entitlements by the First Preference Customers.

Under Alternative 2 to Rule 2.3, the Maximum Entitlement to energy would not be reduced by Project Use or by transmission losses. The argument advanced by First Preference Customers in support of this alternative is that the

25-percent entitlements under the statutes are integrated into the CVP along with the projects themselves under the integration clauses of the applicable laws.

They argue that reductions in their Maximum Entitlements, if any, should be limited to that required to serve only that portion of the Project Use which is directly related to the Trinity River Division or New Melones Project.

The language establishing the first preference rights provide for 25 percent of the "energy made available" without limitation. The First Preference Customers urge an interpretation of the laws which would satisfy Project Use from the 75 percent of the generation remaining after deducting the 25-percent first preference entitlement from total generation.

The First Preference Customers say that there was never an intent when the first preference right was created that the First Preference Customers would have to use a portion of their entitlement to support nonlocal needs. Rather the intent was that the First Preference Customers receive 25 percent of the power generated from the projects and that they have a priority above uses outside the county.

The First Preference Customers also argue that transmission losses should not be deducted from their Maximum Entitlements, since the CVP automatically supports generation with energy purchases from outside the CVP.

Under Alternative 3, the Maximum Entitlements of the First Preference Customers would be determined according to the ratio of the average annual amount of energy produced by the Trinity River powerplants or New Melones powerplant to the amount of energy allocated to all CVP Preference Customers. As described in Attachment A-1, the Maximum Entitlement to energy under Alternative 3 is greater than that which is used in Alternatives 1 and 2 due to purchases of energy by Western which supplement project generation.

Rule 2.4 describes Western's right to adjust the Maximum Entitlements. Changes in laws, technical additional, or revisions to the projects, the passage of time, and other factors may affect the calculation of the generation from the powerplants. For example, the Department of the Interior has changed the water release policies of the Trinity River Division in the past, particularly those related to fish and wildlife releases, with the effect of reducing the average annual generation. Changes in generation as a result of changes in operating policy should also be taken into account in determining the Maximum Entitlements.

(e) First Preference Customers CRDs (Rule 2.5)

Rule 2.5 ensures that the CRDs will be proportionate to the First Preference Customers' Maximum Entitlements to energy and that such CRDs will be adjusted annually according to the customers' average annual load factors so that the Maximum Entitlements to energy will not be exceeded. An alternative would fix the maximum CRD at a specified load factor. This could either limit or extend a First Preference Customer's Maximum Entitlement to energy, depending on whether the specified load factor was higher or lower than the actual load factor. This alternative is not viewed by Western as a fair treatment of the issue.

(f) Allocation of Power Among First Preference Customers (Rule 2.6)

This rule provides for allocation of energy among competing First Preference Customers.

Under the proposed rule Western will serve power to existing First Preference Customers on a first- come first-serve basis until Western receives simultaneous requests for energy which are in excess of the amount available. At such time, Western will issue a proposed marketing plan for the remaining power, using policies and criteria developed at such time.

Western believes that a delay of the marketing criteria is best, since future First Preference Customers are not in a position to be represented during these proceedings and since the requests for energy are not currently expected to exceed the amount available.

(g) Notice of Increases or Reductions in CRD (Rules 2.7, 2.8.2.9)

Rule 2.7 provides for notice by First Preference Customers for increases in CRD. Western has agreed to allow increases which are less than 1 MW to be served without notice, because such increases can usually be served from diversity and will not require a withdrawal from other CVP customers. Rule 2.8 is designed to place the burden of forecasting power needs on the First Preference Customers. Rule 2.9 allows the First Preference Customers to reduce their CRD in the event an error in forecasting is made. The minimum charge provision described in Rule 2.2 would provide the incentive for doing so.

(h) Initial Qualification for Power (Rule 2.10)

Rule 2.10 describes the way in which a First Preference Customer May qualify for power.

Under either act, the preference customers entitled to a first preference must be ready, able, and willing to enter into contracts for the energy within 12 months after the "notice of availability" (the date the unit or division is declared available for power allocation) or within 12 months after any 5-year anniversary thereof. After the first notice of availability, a notice 18 months in advance of the 5-year anniversary dates must be given in order to exercise the first preference right.

The anniversary date for the Trinity River Division is every 5 years after January 2, 1962, which was the date the then Secretary of the Interior, Stewart L. Udall, approved the marketing of power from the Trinity River Division. The TCPUD gave the appropriate 18 months notice prior to January 2, 1982 (the anniversary date), has contracted with Western, and is now receiving power service.

A conditional notice of power availability from the New Melones Project was issued April 5, 1982. TCPPA, CPPA, and SCC have exercised their First Preference Rights and are receiving a portion of their Maximum Entitlements. The earliest new customers in Tuolumne or Calaveras Counties can apply for a power allocation is 18 months before the next anniversary date of April 5, 1987.

3. Withdrawals to Satisfy the Rights of First Preference Customers

(a) Amount Withdrawable to Satisfy the Rights of First Preference Customers (Rule 3.1)

Rule 3.1 refers to Rules 2.3, 2.4, and 2.5 to determine the maximum amounts of CRD and associated energy which may be withdrawn from CVP customers to satisfy the rights of First Preference Customers. Rule 2.3 describes the calculation of the Maximum Entitlements to energy. The Maximum Entitlement to CRD, as described under Rule 2.5, is determined by converting the Maximum Entitlements to energy to CRDs. Such amounts may be adjusted under Rule 2.4.

(b) Contract Rights

Western's power sales contracts with CVP customers provide for withdrawal to satisy the rights of First Preference Customers in varying ways. A description of the contract provisions is as follows:

(1) For Trinity: Eight contracts, which all expire in 1984 or 1985, allow for a withdrawal of 25 percent or some other portion of the CRDs of the customers with such contracts; 17 of the contracts provide for withdrawals according to these rulemaking proceedings; 5 of the contracts provide for pro rata withdrawal; 15 of the contracts provide for withdrawal in any amount necessary; contracts with First Preference Customers do not provide for withdrawal to satisfy the rights of First Preference Customers; Westlands' contract provides for withdrawal according to a pro rata formula; and SMUD's contract and Settlement Agreement provides for withdrawal of its CRD above 290 MW in accordance with these rulemaking proceedings.

(2) For New Melones: Seventeen of the contracts provide for withdrawal according to these rulemaking proceedings, 5 of the contracts provide for pro rata withdrawal, 23 of the contracts provide for withdrawal in any amount necessary; contracts with First Preference Customers do not provide for withdrawals to satisfy the rights of First Preference Customers; SMUD's contract does not provide for withdrawals to serve First Preference Customers in Tuolomne or Calaveras Counties, and Westlands' contract provides for withdrawal according to a pro rata formula.

Those contracts which provide for withdrawals in any amount necessary and those contracts which provide for withdrawals according to these rulemaking proceedings will incorporate procedures contained in Rules 3.1 through 3.10 by reference. Customers with contracts providing for withdrawals in any amount necessary may request amendments which would specifically provide for incorporation of these rules by reference.

Those customers with contracts which expire in 1984 or 1985 will be offered new contracts which will incorporate procedures contained in these rulemaking proceedings, either specifically or by reference.

(c) Exceptions To Initial Pro Rata Reduction Explained by Rule (3.2–3.6)

Rule 3.2, 3.3, 3.4, 3.5, 3.6. The explanation of these rules is basically the same as that for Rules 1.1, 1.2, 1.3, 1.4, and 1.6 respectively.

(d) Apportionment of Withdrawals to Satisfy the Rights of First Preference Customers (Rule 3.7)

Apportionment of withdrawals to satisfy the rights of First Preference Customers is described in Rule 3.7.

The initial apportionment of such withdrawals is based on 20 percent of each customer's CRD (except SMUD, Westlands, and the Load Growth Customers) because approximately 20 percent of SMUD's CRD is subject to withdrawals to satisfy the rights of First Preference Customers in Trinity County. Using 20 percent of the other customers' CRDs (and 20 percent of both the Westland's Maximum Entitlement and the maximum CRDs of the Load Growth Customers) to apportion the withdrawals will cause an equitable distribution of the necessary reductions in CRDs.

(e) Reinstatement (Rule 3.8)

Rule 3.8 describes possible reinstatement under certain circumstances. It should be noted that such a reinstatement may trigger a withdrawal to meet Load Level limitations, in which case Western would probably forego the reinstatement.

(f) Notice (Rule 3.9)

Rule 3.9 is consistent with the notice provisions for withdrawal to satisfy the rights of First Preference Customers in most of Western's contracts with its customers.

Ten of Western's contracts provide that withdrawals to satisfy the rights of First Preference Customers in Trinity County will only be made upon 17 months' notice. Notice for withdrawal to satisfy the rights of First Preference Customers in Tuolumne and Calaveras Counties is unspecified in such contracts. Eight of these contracts will terminate in 1984 or 1985 and, upon termination, will incorporate the 90-day notice provision described in Rule 3.9.

The other two contracts are with SMUD and Westlands and do not terminate until 2004. Western will attempt to negotiate amendments to these contracts providing for an adjustment to the notice period to the extent necessary.

(g) Alternative: Service of First Preference Customers from System Diversity (Rule 3.10)

Western is proposing an alternative to withdrawals to satisfy the rights of First Preference Customers. Increases in the CRDs of First Preference Customers would instead be served from diversity within the system. As the diversity is reduced to meet the First Preference Customer demand, there could be more frequent withdrawals to meet Load Level limitations as described under Rule 5.9.

There are advantages to accomplishing withdrawals to satisfy the rights of First Preference Customers using this alternative. Some of these are as follows:

(1) For those customers which are subject to such withdrawals, this alternative delays the withdrawals as long as possible. Withdrawals only to serve First Preference Customer load may cause a withdrawal while there is still diversity remaining in the system. Such diversity could be used for these customers which would otherwise face reductions in their CRDs.

(2) Withdrawals of CRD from one customer for use by another customer on a one-to-one basis do not take into consideration the way in which such CRD is used. Service of a winter-peaking First Preference Customer will require that less CRD be withdrawn from a summer-peaking customer. This is because both types of customers are served by a system which is more likely to exceed Load Level limitations during the summer and the winter-peaking customer will contribute less to such likelihood.

(3) The risk of harm created by errors in forecasting by First Preference Customers will be reduced. As presently proposed, withdrawals to satisfy the rights of First Preference Customers will occur despite errors in such projections. The power could be withdrawn and then not used. If withdrawals were made only to meet Load Level limitations, the power would not be withdrawn until it is actually being used.

(4) For Western, the alternative is an advantage, because it means a reduced administrative burden. Withdrawals would only be made from all of the customers as necessary.

(5) Substitution of Load Level withdrawals for withdrawals to satisfy the rights of First Preference Customers can work as an extension of the load control program and the programs being developed for scheduling to load.

4. Withdrawals to Serve Westlands Water District

(a) Background (Rule 4.1)

By contract described in the summary introduction to these proposed rules, and according to the terms of the Santa Clara Settlement, Westlands is entitled to a total CRD of 50 MW. Westlands' CRD at the time of the allocations made from the 102 MW increase in the CVP load level was 8.85 MW. The balance of Westlands' 50-MW Maximum Entitlement was allocated to other CVP customers as Westlands Withdrawable Power.

Westlands' present forecast indicates that it does not expect its demand to exceed 8.85 MW through 1993.

Rule 4.1 describes Westlands' contract rights.

(b) Allocation of Westlands Withdrawable Power (Rule 4.2)

Rule 4.2 describes the methodology for calculation of the amount of Westlands Withdrawable Power allocated to each customer with such power. The methodology was not described at the time of allocation or in the power sales contracts with such customers. Questions arose subsequently as to how the Westlands Withdrawable Power was apportioned. Allocations of CRD made to any customer in support of cogeneration and renewable resource projects and 0.5 MW of CRD were deducted from the total amount of CRD which was allocated to any customer receiving allocations out of the 102-MW increase in load level. The balance of such allocations were divided into Westlands Withdrawable Power and "firm" allocations according to the formula described in Rule 4.2.

An alternative would reduce the CRDs by the cogeneration and renewable resource allocations plus .05 MW in each CRD after apportionment between Westlands Withdrawable Power and firm CRD. This would cause greater amounts of Westlands Withdrawable Power to be allocated to those customers with smaller total CRDs and smaller amounts to be allocated to those customers with greater total CRDs.

(c) Reductions in Westlands' Withdrawable Power for Other Purposes (Rule 4.3)

Westlands' Maximum Entitlement is subject to withdrawal to satisfy the rights of First Preference Customers, to serve Project Use, and to meet Load Level limitations. In order to effect reductions in Westland's Maximum Entitlement as soon as withdrawals become necessary for any reason, the reductions to meet Westlands' contribution must come from Westlands Withdrawable Power. Rule 4.3 describes this process.

An alternative would be to wait to make such withdrawals until after Westlands has used its Maximum Entitlement. Assuming that withdrawals to meet Westlands' lad growth lag behind withdrawals for other purposes, such a method would decrease the amount and frequency of withdrawals from customers with Westlands Withdrawals Power. The amount which would otherwise have been withdrawn from Westlands to meet Westlands' contributions to withdrawals to serve Project Use, to satisfy the rights of First Preference Customers, and to meet Load Level limitations would instead be added to the amount to be withdrawn from all CVP customers. When and if Westlands ever did have enough load to use all of its 50-MW entitlement, it would get the entire 50 MW unimpaired by previous withdrawals.

Western would like to have comments from its customers on the proposed rule and the above described alternative as well as any other alternatives which may be applied to this problem.

(d) Calculation of Reductions in Westlands Withdrawable Power (Rule 4.4)

Rule 4.4 provides the methodology which will be used by Western in determining how much Westlands Withdrawable Power will be withdrawn from each customer at times when such withdrawals become necessary to serve Westlands' request for power and at times when such withdrawals are made for other purposes as described in Rule 4.3. The formula describes a pro rata apportionment of the amount which it is necessary to withdraw, based on the amount of the customer's Westlands Withdrawable Power remaining after prior reductions.

The pro rata formula is consistent with language contained in the power sales contracts of customers with Westlands Withdrawal Power.

(e) Reinstatement (Rule 4.5)

Rule 4.5 provides for reinstatement of Westlands Withdrawable Power if previous reductions in such power are no longer necessary.

The most likely way in which this rule will be used is if withdrawals have been previously made from Westlands Withdrawal Power to meet Westlands' contributions to withdrawals to meet Load Level limitations and there is a reinstatement to all CVP customers under Rule 5.9.7.

(f) Notice (Rule 4.6)

Rule 4.6 is consistent with the requirement in Westlands' contract for notice to Western to serve Westlands' power needs.

5. Load Level Withdrawals

(a) Background (Rule 5.1)

Western is currently serving a total CRD of approximately 1,400 MW. The Maximum Simultaneous Demand of Western's customer load cannot exceed 1,152 MW under the terms of Contract 2948A. Diversity within the CVP customer load was determined to be approximately 153 MW prior to allocation of the CRDs made available after the Load Level was increased by 102 MW. This includes the diversity made available from Western's existing load control program.

Much of the amount which may be required to be withdrawn to meet Load Level limitations will be made up by withdrawals from customers which have Type I Withdrawable Power at the 925-MW Load Level. There currently is 60.2 MW of such withdrawable power outstanding.

After those withdrawals, Western will begin to reduce the City of Santa Clara's 60 MW of withdrawable power allocated to it under the terms of the Santa Clara Settlement.

Western does not expect to have to make withdrawals at the 1,152-MW Load Level in the near future, assuming that existing conditions remain the same, including continued participation by the DOE Laboratories and NASA-Ames in Western's load control program.

(b) Exemption From Withdrawals to Meet Load Level (Rule 5.2)

Rule 5.2 describes Western's contractual commitment to SMUD to exempt 290 MW of SMUD's CRD from withdrawals to meet Load Level. The rationale for this exemption is described in subsection 1(d) of this supplementary information.

(c) Load Control Program (Rule 5.3 and 5.4)

Western has an existing load control program designed to protect the 925-MW, 1,050-MW, and 1,152-MW Load Levels to the extent possible. Contracts are currently in effect with NASA-Ames, the DOE Laboratories, and the City of Santa Clara to assist in this effort. These contracts will not be described extensively in this proceeding, but are available upon request for review.

Rule 5.4 describes Western's intent to extend the load control program. Western would like to have customer comment on how best to accomplish this.

The first incentive described in Rule 5.4—to charge participants in the load control program for demand according to their contribution to the system peak—is similar to that contained in Western's existing load control contracts.

The second incentive—to protect participant in the load control program from load level withdrawals—essentially included in the methodology for withdrawals to meet Load Level described under Rule 5.9.5. Since the

demand reduction required under both alternatives of Rule 5.9.5 is the result of the MSD exceeding the allowable Load Level, the amount of CRD withdrawn from each customer to meet the Load Level must result in the necessary amount of reduction in such customer's demand contribution to the MSD. The customer's CRD in any given month is its own system peak which may or may not be the same as its contribution to the MSD. The total amount of demand reduction is first apporptioned as a reduction in the customer's contribution to the MSD. If the customer peaked at a different time than the MSD, then the initial apporptionment of demand reduction must be converted to a CRD reduction. Under both alternatives, this "conversion" step would be accomplished by deeming, for purpose of withdrawal calculations, that each customer's contribution to the MSD is equal to its monthly peak (or CRD). Otherwise a customer whose contribution to the MSD is much smaller than its system peak would have a relatively large amont of CRD withdrawn from such customer, compared to those customers whose system peaks where at the MSD. Such a result would provide a disincentive to those customers participating in Western's load control program. The withdrawal methodology is described in more detail in attachment C-1.

(d) Assignment of Contributions to Maximum Simultaneous Demand to Load Level (Rule 5.5)

The CRDs of First Preference customers may be assigned to a particular Load Lever or apporptioned among the Load Levels. The CRDs which are reduced to serve First Preference Customer load may come from customers whose CRDs are attributable to any of those Load Levels. The method of apportioning the CRDs among the Load Levels may have an impact on withdrawals to meet Load Level.

The 30 MW of diversity allocation, were made to the DOE Laboratories and NASA-Ames out of the 102 MW made available under the Santa Clara Settlement based on diversity which Western determined was available within the 102 MW. The contributions of the DOE Laboratories, and NASA-Ames to the Maximum Simultaneous Demand, however, do not necessarily always belong to a determination of whether the 102-MW Load Level has been exceeded. This is because a portion of the CRDs of the DOE laboratory, and NASA-Ames is attributable to the 925-MW Load Level. The DOE laboratories and NASA-Ames are required under their diversity contracts to reduce demand by more than the 30-MW diversity allocation. At least a portion of such reduction should be attributed to the 925-MW Load Level.

(e) Notice (Rule 5.6)

Rule 5.6 indicates that Western will be unable to give CVP customers advance notice of a withdrawal. This is because Western cannot know whether the Maximum Simultaneous Demand has exceeded 1,152 MW until at least 3 weeks after the end of the month in which such demand occurred. Western recognizes that there is a provision in about half of its contracts which requires 90 days advance notice. If such provision remains in the contracts, Western will continue to provide notice of an intent to withdraw due to the expectation that the Load Level will be exceeded. However, Western will be unable to indicate in such notice how much will be withdrawn, from which customers, or even whether there will actually be a withdrawal, since that information will not be available until after the withdrawal actually occurs. Western would prefer, with the concurrence of the CVP customers, to amend the contracts to revise the notice requirements.

(f) Withdrawals to Meet the 925 MW Load Level Limitations (Rules 5.7.1–5.57.6)

Rules 5.7.1 through 5.7.3 describe the calculation of the 925-MW Load Level.

Customers which have Type I Withdrawable Power are as follow:

Customer	Type I withdrawable power (MW)
Air Force	4.90
DOE	17.60
U.C. Davis	1.55
Navy	8.30
City of Santa Clara	27.85
Total	60.20

Withdrawals of Type I Withdrawable Power benefit Load Growth Customers which were assured service of power up to levels of CRD specified in the Santa Clara Settlement. Those customers and their maximum CRDs are as follows:

Load growth customer	Maximum CRD (megawatts)	Difference between CRD in use and maximum CRD (megawatts)
Biggs	4.20	1.49
Gridley	9.40	2.42
Palo Alto	175.00	.707
Plumas-Sierra REC	25.00	11.26
Redding	116.00	10.80
Roseville	69.00	10.44
Shasta PUD	11.45	0.00

Type I Withdrawable Power is withdrawn from those customers which have such power according to procedures which have been determined by Western to the most efficient and equitable method of effecting such withdrawals. Procedures for reinstatement of Type I Withdrawable Power have also been developed by Western over several years. Procedures for both withdrawal and reinstatement of Type I Withdrawable Power are set out in Rules 5.7.4 through 5.7.6.

(g) Withdrawals to meet the 1,050-MW Load Level Limitations (Rules 5.8.1–5.8.3)

The rules for withdrawals to meet the 1,500-MW Load Level limitation describe what is required under the Santa Clara Settlement. They are included in the rulemaking proceeding in order to clarify the way in which withdrawals occur and are not intended to add to the requirements of the Santa Clara Settlement.

Under Rule 5.8.3, Type II Withdrawable Power will be reinstated to Santa Clara if the 1,050-MW Load Level has not been exceeded during the 12 months following a withdrawal. This rule clarifies an ambiguity in the Santa Clara Settlement which appears to require withdrawal of the full amount of Type II Withdrawable Power prior to reinstatement.

(h) Withdrawals to Meet the 1,152-NW Load Level Limitation (Rules 5.9.1–5.9.7)

(1) Background (Rules 5.9.1–5.9.2): Rules 5.9.1 and 5.9.2 describe the 1,152-MW Load Level and its relationship to the 1,050-NW and 925-MW Load Levels.

(2) Exceptions From Initial Pro Rata Withdrawal (Rule 5.9.3): Rules 5.9.3.1–5.9.3.4 describe exceptions to the initial pro rata withdrawals to meet the 102-MW and 1,152-MW Load Levels. The rationale for Rules 5.9.3.1, 5.9.3.2, and 5.9.3.3 is similar to the rationale for Rules 1.2, 1.3, and 1.4, respectively. Rule 5.9.3.4 describes withdrawals from Westlands. The rationale for this rule is similar to that for Rule 1.6.

Rule 5.9.3.5 confirms Western's determination that the First Preference Customers will not be subject to withdrawals to meet Load Level.

(3) Withdrawals at the 102-NW Load Level (Rule 5.9.4, Alternatives 1 and 2):

Rule 5.9.4 describes withdrawals among the customers with allocations made out of the 102 MW made available under the Santa Clara Settlement.

Under Alternative 1, withdrawals would be made among such customers pursuant to procedures similar to those described under Rule 5.9.5 for withdrawals at the 1,152-NW Load Level.

Under Alternative 2, withdrawals would not be made at the 102-MW Load Level. Withdrawals which would otherwise occur at the 102-MW Load Level would be included in withdrawals among all customers at the 1,152-MW Load Level.

Alternative 2 is consistent with established Western policy which treats all CVP customers the same, to the extent possible, regardless of the order in which they become entitled to CVP power. Western will consider Alternative 1 if arguments are indicated which support a departure from previous policy.

(4) Apportionment of Withdrawals to Meet the 1,152-MW Load Level (Rule 5.9.5-Alternatives 1 and 2): Two alternatives are proposed for apportioning withdrawals to meet the 102-MW and 1,152-MW Load Levels among CVP customers. Under Alternative 1, the withdrawals would be apportioned pro rata among the customers (except for those specifically excluded) according to such customers' contributions to the Maximum Simultaneous Demand. Alternative 2 would apportion such withdrawals according to the customers' CRDs.

Under Alternative 1, those customers which contribute less to the circumstances causing the need for a withdrawal have less power withdrawn. Thus, customers are encouraged to participate in load control to the benefit of all of Western's customers.

Alternative 1 has the following disadvantages which would be corrected if alternative 2 were used:

(i) Not all customers, even if they have load control programs, are able to reduce load at Western's Maximum Simultaneous Demand.

(ii) The original allocations of power were not made based on the customers' ability to reduce load at the Maximum Simultaneous Demand. To withdrawal power on such basis now would effectively transfer the right to CVP power from certain customers to others based on technical attributes not previously considered.

(iii) The customers likely to have the most power withdrawals are those with the largest residential loads. Such a result may be inconsistent with other priorities established by Western in the past.

An additional alternative (proposed by SMUD) would apportion withdrawals using only that portion of a customer's CRD which is subject to withdrawals in the apportionment formula.

These alternatives are explained in more detail in Attachment C-1.

(5) Reductions in the Maximum Entitlements of Westlands and First Preference Customers to Meet Load Level (Rule 5.9.6): The problem addressed by this rule is one created by use by customers of CRDs which are subject to withdrawals to serve other customers in the future. The temporary use by such customers of the withdrawable CRD may result in a permanent withdrawal of such CRD under Rules 5.9.4 or 5.9.5 to meet Load Level limitations. Such withdrawal would occur due to use of the CRD by the "borrowing" customer rather than by the customer which would otherwise have been entitled to the use of such CRD in the future.

Alternative 1 would reduce the Maximum Entitlements of Westlands and the First Preference Customers by reducing such entitlements as they are being used by other customers.

An argument in support of this option is that if Westlands or the First Preference Customer were using the power (and paying for such use), instead of the borrowing customer, the power would be withdrawn anyway. An argument against such alternative is that since the First Preference Customer and Westlands would not be using the power, they would have no control over or effect on the need for withdrawal of such power to meet Load Level limitations.

Alternative 2 would place the onus of such effect on the "borrowing" customers. In the short term, the amount withdrawn from such customers would be no different from the other alternatives. In the long term, however, as the First Preference Customers or Westlands exercise their rights to increases in CRD, the amount available to be withdrawn from such customers to satisfy such rights would be greater than under the other alternatives. One argument in support of Western's adoption of this alternative is that the "borrowing" customers have a lower quality right to the power in the first place. An argument against the alternative is that increased reductions in the non-withdrawable portion of such customers' CRDs due to their use of the "borrowed" power unjustly penalizes them for using (and paying for) the "borrowed" power.

Western requests comments from customers and interested parties on these alternatives. Western will consider additional proposals or modifications to these alternatives in constructing a final rule.

(6) Reinstatement (Rule 5.9.7): Rule 5.9.7 provides for reinstatement of CRDs previously withdrawn to meet Load Level limitations. Western's contracts with its customers do not presently provide for such reinstatement.

Western will amend its contracts to provide for reinstatement, but reserves the right to refuse to amend the contracts or otherwise agree to reinstatement if necessary to assure equitable treatment of CVP customers under these rulemaking procedures.

Regulatory Requirements

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) each agency, when required by 5 U.S.C. 553 to publish certain proposed rules, is further required to prepare and make available for public comment an initial regulatory flexibility analysis to describe the impact of the proposed rule on small entities. In this instance, these rules implement certain specific statutory requirements relating to services provided by Western.

Under 5 U.S.C. 601(2), rules of particular applicability relating to rates or services are not considered "rules" within the meaning of the Act, Since the rules proposed herein are of limited applicability and are being set in accordance with specific legislation under particular circumstances, Western believes that no flexibility analysis is required.

Executive Order 12291

Western has determined that this is not a major rule because it does not meet the criteria of section 1(b) of Executive Order 12291, 46 FR 13193 (February 19, 1981). Western has an exemption from sections 3, 4, and 7 of Executive Order 12291.

National Environmental Policy Act

In compliance with the National Environmental Policy Act (NEPA) of 1969 and Department of Energy guidelines in the **Federal Register** at 45 FR 20694-20701 (March 28, 1980), Western will evaluate the potential environmental impacts of the proposed action. An Environmental Evaluation (based on NEPA considerations) will be made, and the results of that evaluation will be published with the final rules regarding this action.

Availability of Information

All brochures, studies, comments, letters, memorandums, and other documents made or kept by Western for the development of these rules will be available for inspection and copying at the Sacramento Area Office, Western Area Power Administration, 2800 Cottage Way, Sacramento, California 95825, (916) 484-4251.

Issued at Golden, Colorado, January 8, 1985.

William H. Clagett,

Acting Administrator.

ATTACHMENT A-1.—CAPACITY AND ENERGY ENTITLEMENTS OF FIRST PREFERENCE CUSTOMERS

[Rules 2.3, 2.4, and 2.5]

	Alternative 1	Alternative 2	Alternative 3
Trinity:			
1 (a) Maximum Energy Entitlement.	286,000,000 kWh's	413,250,000 kWh's	429,520,320 kWh's
2 (b) Maximum CRD Entitlement.	54.414 MW	78.624 MW	81.72 MW
3 (c) Energy associated with current CRD.	36,160,005 kWh's	36,160,005 kWh's	36,160,005 kWh's
4 (d) Withdrawable energy.	249,839,995 kWh's	379,924,940 kWh's	397,984,320 kWh's
5 (e) Withdrawable CRD.	47.53 MW	72.284 MW	75.72 MW
New Melones (Tuolumne and Calaveras Counties):			
1 (a) Maximum Energy Entitlement.	86,000,000 kWh's	123,000,000 kWh's	106,534,740 kWh's
2 (b) Maximum CRD Entitlement.	19.634 MW	28.082 MW	24.323 MW
3 (c) Energy associated with current CRD.	43,287,923 kWh's	43,287,923 kWh's	43,287,923 kWh's
4 (d) Withdrawable energy.	42,712,077 kWh's	83,105,860 kWh's	64,924,740 kWh's
5 (e) Withdrawable CRD.	9.75 MW	16.973 MW	14.823 MW

NOTES.—

(1) Maximum Entitlements to energy. The Maximum Entitlements to energy under alternatives 1 and 2 are based on average annual energy generation. Such amounts may fluctuate under Rule 2.4. The Maximum Entitlement under Alternative 3 is based on a ratio apportioning CRD to the First Preference Customers according to a ratio of the average annual amount of energy produced by the Trinity River Division or New Melones Project to the amount of energy allocated to all CVP preference customers, multiplied by the total amount of CRD supported by the CVP. Project Use will reduce the Maximum Entitlement under Alternative 1, but will not reduce the Maximum Entitlements under Alternatives 2 or 3.

(2) Maximum CRD entitlements of First Preference Customers. CRD entitlements are calculated by converting the maximum energy entitlements in item (1) to CRD's based on expected load factors of the First Preference Customer.

(3) Amount of energy which First Preference Customers are presently entitled to use; such amount includes losses under all alternatives; (TCPUD's current load factor is 63 percent. The load factors of other First Preference Customers are 50 percent.)

(4) Amount of energy which can be withdrawn from other CVP customers. This amount is calculated by deducting the amount of energy which the First Preference Customers are presently entitled to use (described in (b)) from the Maximum Entitlement described in (a), except that under alternatives 2 and 3 the losses associated with energy use are not deducted from the Maximum Entitlement.

(5) Amount of CRD which can be withdrawn from other CVP customers, after deducting the amount currently in use. Such amounts, for purposes of this chart, are determined using a 60 percent load factor for TCPUD and a 50 percent load factor for customers in Tuolumne and Calaveras Counties.

Such amounts will fluctuate according to the average load factor of the First Preference Customer.

Attachment B-1: Apportionment of Withdrawals to Satisfy the Rights of First Preference Customers

(Rule 3.7)

Apportionment of withdrawals to satisfy the rights of First Preference Customers will be determined by apportioning the amount to be withdrawn pro rata among the customers, using 20 percent of each customer's CRD as the basis for apportionment.

Withdrawals for First Preference Customers in Tuolumne and Calaveras Counties will be calculated separately from withdrawals for First Preference Customers in Trinity County. SMUD is not subject to withdrawals to serve First Preference customers in Tuolumne or Calaveras Counties.

First Preference Customers will not be subject to such withdrawals.

A preliminary formula to describe the apportionment of such withdrawals is as follows:

1. The amount to be withdrawn from each customer (WD) will be determined as follows:

$$WD = A \times \frac{P}{SP}$$

Where:

WD = The amount to be withdrawn from the customer's CRD;

P = 20 percent of the customer's CRD including Westlands Withdrawable Power; P for Load Growth Customers will be 20 percent of the maximum amount of CRD to which they are entitled; P for SMUD will be 0 for withdrawals for First Preference Customers in Tuolumne and Calaveras Counties and will be 70 MW for withdrawals for First Preference Customers in Trinity County; P will be reduced by amounts previously withdrawn under this rule and under Rule 5.9.5;

A = The total amount of CRD which is required to be withdrawn to serve First Preference Customers determined at the time of the need for such withdrawal; and

SP = The sum of all the customers' P's.

Attachment B-2: Effect of Withdrawals to Satisfy the Rights of First Preference Customers

The following chart lists the maximum amounts of CRD in kW's which could be withdrawn from each customer to satisfy the rights of First Preference Customers under Alternatives 1 and 3 as described in Attachment A-1. The amounts which could be withdrawn under Alternative 2 for Trinity would be about 96 percent of the amount withdrawable under Alternative 3 for Trinity and about 28 percent *less* the amount withdrawable under Alternative 3 for New Melones.

	New Malones		Trinity	
	Alt. 1	Alt. 3	Alt. 1	Alt. 3
Air Force	506	760	1,810	2,866
Alameda	209	319	747	1,183
Ames	848	1,273	3,034	4,806
Army	81	122	289	458
Arvin-Edison	293	439	1,047	1,657
Banta CarBona	36	54	129	204
Biggs	41	61	146	232
Broadview WD	5	7	17	28
Byron Bethany	22	32	77	121
California	216	326	775	1,228
Denalo-Earlimart ID	10	15	34	55
DOE Labs	862	1,294	3,084	4,883
East Bay MUD	19	29	69	110
East Contra Costa	24	37	87	138
Glenn-Colusa	29	44	104	165
Gridley	91	138	328	295
Healdsburg	32	48	114	182
ICA Dixon	5	7	17	28
James	10	15	382	606
Kern Tulare	10	15	34	55
Lindsay-Strathmore	10	15	34	55
Lodi	131	197	469	743
Lompoc	52	77	184	292
Lower Tule River ID	19	29	34	55
Modesto ID	107	160	104	165
Navy	576	863	2,057	3,259
Palo Alto	1,707	2,561	6,105	9,667
Patterson WD	20	29	70	110
Plumas-Sierra	244	365	870	1,380
Provident	7	11	26	41
Rag Gulch WD	5	7	34	55
Rec. Dist. 2035	15	23	56	89
Redding	1,131	1,698	4,047	6,407
Roseville	673	1,009	2,407	3,811
San Luis WD	64	97	231	366
Santa Clara	1,491	2,237	5,332	8,443
Santa Clara Valley WD	10	15	17	28
Shasta Dam PUD	112	168	399	632
SMUD	0	0	12,211	19,333
Terra-Bella ID	10	15	17	28
Turlock ID	107	160	104	165
Ukiah	29	44	69	110
U.S. Fish and Wildlife	5	7	17	28
Westlands	86	130	308	489
West Side ID	20	29	70	110
West Stanis laus ID	51	76	182	288

Attachment C-1: Apportionment of Withdrawals to Meet the 1,152-MW Load Level (Rule 5.9.5)

Withdrawals to meet the 1,152-MW Load Level will be made according to the following procedures:

1. Each affected customer's contribution to the Maximum Simultaneous Demand (D) must be reduced by an amount (R) which, added to all of the "R's" of the affected customers (Total) will bring the Maximum Simultaneous Demand down to 1,152 MW. "R" will be calculated for each affected customer by one of the following methods:

Alternative 1: Apportion the necessary amount of reduction in demand (Total)

among the customers according to each customer's contribution to the Maximum Simultaneous Demand (D). A preliminary formula to describe this is as follows:

$$R = \text{Total} \times \frac{D}{SD}$$

Alternative 2: Apportion the necessary amount of reduction in demand among the customers according to each customer's allocation of CVP power (Allocation). A preliminary formula to describe this is as follows:

$$R_1 = \text{Total} \times \frac{\text{Allocation}}{\text{S Allocation}}$$

2. Since under both alternatives, "R_1" is indicative of contribution to Maximum Simultaneous Demand, it must be converted to "Y_1" which would be the amount of "CRD" (used on the customer's monthly system peak) to be withdrawn from such customer, except for adjustment under step 4 below. Convert "R" to "Y" using the following formula for each customer:

$$Y_1 = R_1 \times \frac{CRD}{D}$$

3. $Z = R1$

"Z" is the initial amount of CRD withdrawn from each customer. This step provides, as a matter of policy, that a customer whose contribution to the MSD is less than its system peak (CRD) for the month will be deemed to have reached its system peak at the MSD for the purpose of allocating withdrawals to meet Load Level. If a customer's contribution to the MSD is less than its system peak for the month, the amount of CRD withdrawn from such customer will be greater proportionately than that of those customers whose contributions to the MSD were equal to their system peaks. If such a result were to be effective only during the month of the withdrawal and the customer could use its entire allocation the next month, there would be no equity problems. But if a customer's contribution to the MSD is very small relative to its system peak, it could have virtually all of its allocation withdrawn. Since Western encourages its customers to reduce demand at the MSD for purposes of load control, such a result would be inconsistent with other Western policies. By deeming the customer's system peak to be equal to contribution to the MSD, the customer whose contribution to the MSD is less than its system peak, will suffer proportionately less withdrawal.

4. $P1 = Y1 - Z$

Since the amount of demand reduction apportioned by Steps 3 and 5 will not be enough due to the "deemer" described in Step 3, the dificit in such reduction must be determined and then itself allocated among the customers. P1, calculated for each customer, is the amount of CRD which was *not* withdrawn from such customer due to the deemer. After conversion back to demand (Step 5 below), it will reflect the amount of demand reduction which is still needed before the Load Level will be met.

5. $$Q = P1 \times \frac{D}{CRD}$$

This step converts the amount of CRD *not* withdrawn from each customer back to demand so that the total amount of reduction in demand still needed (the sum of the "Q's" or "SQ") can be determined.

6. $$R2 = SQ \times \frac{D}{SD}$$

Step 6 provides for allocation of the deficit determined under Steps 4 and 5 (SQ) among the customers according to the ratio of each customer's contribution to the MSD to the sum of all of the customer's contribution to the MSD to the sum of all of the customers' contribution to the MSD.

7. $$Y2 = R2 \times \frac{CRD}{D}$$

Under Step 7, the deficit allocated to each customer is converted to the amount of CRD which would have to be withdrawn from such customer in order to reduce the deman to the allowable Load Level. This is the same process used in Step 2.

8. Step 3 through 6 are repeated until the total amount of required demand reduction has been reached.

9. All of the "Z's", representing the amount of CRD to be withdrawn from each customer after each iteration are added together to determine the total amount of CRD to be withdrawn from each customer.

Total = The amount by which the Maximum Simultaneous Demand of CVP customers exceeds the 1,152-MW Load Level during the month in which a withdrawal is required. 1,152-MW will be used as the applicable Load Level even if all of the allocations of CVP power are not being used in order to make use of diversity in the system;

Allocaton = 20 percent of the affected customer's allocation of CVP power. "Allocation" for SMUD will be 71 MW; "Allocation" for NASA-Ames and the DOE laboratories will be 20 percent of their non-diversity allocations;

S Allocation = The sum of all of the customers' "Allocations", as defined above;

D = 20 percent of the affected customer's CVP demand at the time of the MSD; "D" for NASA-Ames and the DOE laboratories will be reduced by the portion of the CVP demand of such customers which is attributable to diversity allocations; "D" for SMUD will be 20 percent of SMUD's total CVP demand at the time of the MDS;

SD = The sum of all of the customers' "D's" as defined above;

MSD = The Maximum Simultaneous Demand;

CRD = 20 percent of the customer's CRD or peak CVP demand for the month, whichever is less; "CRD" for NASA-Ames and the DOE laboratories will be 20 percent of their nondiversity allocations or 20 percent of the portions of their peak demands for the month attributable to such allocations, whichever is less; "CRD" for SMUD will be 71,000 kW or the portion of SMUD's peak demand attributable to 71,000 kW of SMUD's CVP allocation, whichever is less;

R = The amount of reduction required in a customer's contribution to the MSD; and

Z = The amount of CRD which will be withdrawn from the customer; the amount of CRD to be withdrawn is based on the customer's system CVP peak demand.

Attachment D-1: Effect of Load Level Withdrawals on Maximum Entitlements of First Preference Customers and Westlands (Rule 5.9.6)

1. Under Alternative 1, the apportionment of withdrawals described under Rule 5.9.6 would not be adjusted. This alternative instead would reduce the Maximum Entitlements of the First Preference Customers and Westlands.

(a) The portion of the amount of CRD withdrawn from a customer which will reflect the amount of reduciton in the Maximum Entitlements of First Preference Customers can be described in a preliminary formula as follows:

$$A = Z \times \frac{FP}{CRD}$$

Where:

A = The portion of "Z", defined below, which will reduce the Maximum Entitlements of First Preference Customers;

Z = "Z" as defined in Attachment C-1 for the customer subject to this formula;

FP = The portion of a customer's CRD which is subject to withdrawals to serve First Preference Customers after previous reductions in such portion; such portion will be equal to "P", as defined in Attachment B-1, except for Westland, and will be determined according to the year in which the withdrawal to meet Load Level occurs; "FP" for Westlands will be 20 percent of its highest monthly CRD occurring prior to or during the month of withdrawal;

CRD = The customer's effective CRD, which is the customer's highest monthly CRD prior to or during the month of withdrawal, except that CRD for Load Growth Customer will be maximum CRDs described in the Santa Clara Settlement.

(b) The amount of withdrawal which reflects reductions in the Maximum Entitlements will be added for all of the customers and apportioned between the New Melones Project and Trinity River

Division according to the amount of the Maximum Entitlements to CRD determined to be available for those projects.

(c) The portion of the amount of CRD withdrawn from a customer which will reflect the amount of reduction in Westland's Maximum Entitlement can be described in the following preliminary formula:

$$B = WWY + \left(Z \times \frac{WW}{CRD} \right)$$

Where:

B=The portion of Z, as defined below, which will reduce Westland's Maximum Entitlement;

WWY=The amount withdrawn from Westlands to meet Load Level limitations based on Westland's use of its effective CRD;

Z="Z" as defined in Attachment C-1 for the customer subject to this formula;

WW=the amount of Westlands Withdrawable Power to which such customer is entitled after previous reductions in such entitlement; and

CRD=The customer's effective CRD, which is the customer's highest monthly CRD prior to or during the month of withdrawal, except that CRD for Load Growth Customers will be their maximum CRD's described in the Santa Clara Settlement.

2. Alternative 2 would adjust the apportionment of withdrawals described under Rule 5.9.5. Under this alternative, the portion of the amount withdrawn from customers to meet Load Level limitations which would otherwise have reduced the Maximum Entitlements of the First Preference Customers and Westlands under Alternative 1 above would instead be shifted to the "firm" portion of such customer's CRDs. The Maximum Entitlements of the First Preference Customers and Westlands would remain intact.

The procedures for adjustment in withdrawals under this alternative will not affect the First Preference Customers or SMUD, but will affect Westlands. Such precedures are as follow:

(a) The amount of a customer's CRD which would be subject to withdrawals to meet the 1,152-MW Load Level would be adjusted under Alternative 2 as follows:

$$MAX = CRD - (WW + FP)$$

Where:

WW=The portion of a customer's CRD which is subject to withdrawals to serve Westlands after previous reduction in such portion; such portion is described under Rule 4.2;

FP=The portion of a customer's CRD which is subject to withdrawals to serve First Preference Customers after previous reductions in such portion; such portion will be equal to "P", as defind in Attachment B-1, except for Westlands, and will be determined according to the year in which the withdrawal to meet Load Level occurs; "FP" for Westlands will be 20 percent of its highest monthly CRD occurring prior to or during the month of withdrawal;

CRD=The customer's CRD; CRD for Load Growth Customers will be the maximum amount to which such customers are entitled under the Santa Clara Settlement; and

MAX=The amount of a customer's CRD which would be subject to withdrawals to meet the 1152 MW Load Level, under Alternative 2.

(b) The amount of reduction in "'MAX" to meet Load Level limitations will be determined as follows:

$$Y = Z \times \frac{CRD}{MAX}$$

Where:

Z=The amount of CRD to be withdrawn from each custom under Rule 5.9.5; and

MAX="MAX", as described in step (a) above; after previous reductions in such amount; and

CRD="CRD" as defined in step (a) above; and

Y=The amount of reduction in "MAX" (the portion of a customer's CRD which is subject to withdrawals to meet the 1152 NW Load Level as adjusted under step; (a) above).

[FR Doc. 85-1174 Filed 1-15-85; 8:45 am]

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federal register

Wednesday
January 16, 1985

Part V

Department of Agriculture

Office of the Secretary

Competitive Research Grants Program; Invitation for Application; Notice

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Competitive Research Grants Program; Invitation for Applications

AGENCY: Office of Grants and Program Systems, Office of the Secretary, USDA.

ACTION: Application notice for Competitive Research Grants in New Research Areas for Fiscal Year 1985.

SUMMARY: Applications are invited for additional competitive grant awards under the Competitive Research Grants Program for Fiscal Year 1985. See 49 FR 31652, August 7, 1984, for research areas previously announced.

The authority for this program is contained in Section 2(b) of the Act of August 4, 1965, as amended (7 U.S.C. 450i(b)). Under this program the Secretary may award competitive research grants, for periods not to exceed five years, for the support of research projects to further the programs of the Department of Agriculture. Proposals may be submitted by any State agricultural experiment station, college, university, other research institution or organization, Federal agency, private organization, corporation or individual. Proposals from scientists at non-United States organizations will not be considered for support.

As outlined in OMB Circular No. A-89, the official program number and title for these grants are 10.206, Grants for Agricultural Research, Competitive Research Grants.

Applicable Regulations

Regulations applicable to this program include the following: (a) The regulations governing the Competitive Research Grants Program, 7 CFR Part 3200 (49 FR 5570, February 13, 1984); and (b) the USDA Uniform Federal Assistance Regulations, 7 CFR Part 3015. For reasons set forth in 7 CFR Part 3015, Subpart V, this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Additional Specific Research Areas to be Supported in Fiscal Year 1985

Standard grants and a small number of continuation grants will be awarded to support basic research in the following additional program areas: biotechnology, animal science, insect pest science, acid precipitation, soybean research, and alcohol fuels research. The major initiative in biotechnological research is designed to provide opportunities to address research problems in all areas of agricultural science including plants, animals, forestry, and microorganisms associated with these biota. It is anticipated that this new initiative will advance the Nation's competitive advantages in the food, feed, fiber and natural resource processes broadly. Ultimately, information from this program will be useful for advancing the understanding of key agriculturally important phenomena such as reproduction, vulnerability and resistance to biological, chemical and physical stress, regulation and enhancement of growth and development, and transformation of waste and byproducts of cellular and tissue systems. The new research areas, and those formerly funded under other programs, are being conducted under the Competitive Research Grants Program to allow eligibility for a fuller range of potential scientific capability, including Federal agencies and private organizations. The specific research areas and guidelines are addressed below.

Consideration will be given to research proposals which address fundamental questions in the areas noted below and which are consistent with the long-range agricultural needs of the Nation. While basic guidelines are provided to assist members of the scientific community in assessing their interest in the program areas and to delineate certain important areas where new information is vitally needed, the guidelines are not meant to provide boundaries or to detract from the creativity of potential investigators. Submission is encouraged of innovative projects in the so-called "high-risk" category as well as those which may have a more certain payoff potential.

The following specific research areas (program areas) and guidelines are thus provided as a base from which proposals may be developed.

7.0 *Biotechnology.* Research in molecular genetics has demonstrated the feasibility of introducing and obtaining the expression of foreign genes in microorganisms, animals, and plants, including trees, as well as modifying genes and obtaining different phenotypes. New techniques in biotechnological research allow for both the direct manipulation of the genome of an organism as well as the direct manipulation of cells for the alteration of their genetic information. These techniques include cell and protoplast culture, plant regeneration, somatic hybridization, embryo manipulation and transfer, recombinant DNA techniques and hybridoma technology. These advances offer promise for developing agriculturally important animals, plants and microorganisms with new gene combinations or modifications. Few genes important to agricultural biota have been isolated, neither have they been characterized, nor have their modes of action on gene expression been elucidated. This lack of knowledge impedes the application of the new biotechnological research techniques for the benefit of agriculture. Moreover, the extisting techniques must often be modified, and new methodologies be developed in many cases for the study of agriculturally important organisms or problems.

The Biotechnology program area is being initiated in recognition of the need for more information for the application of biotechnology in agriculture. The impetus for that initiative was on the basis that there are overiding agricultural research needs in three broad areas:

1. Structure, function, and organization of plant, animal, and microbial genomes.
2. Transfer, expression, and regulation of individual genes and gene systems.
3. Genetic and molecular control of growth, development, and resistance to physical and biological stress.

Therefore, priorities will be given to research aimed at the development of fundamental concepts underlying important biological phenomena. The application of cellular and molecular biology techniques to the study of these problems will be emphasized. Other experimental approaches will also be considered, provided that they are clearly the necessary prerequisite for the subsequent molecular analysis of the problem being addressed. Any agriculturally important organism(s) may be used to accomplish the objectives of this program area. However, the use of experimental model systems should be justified relative to the objectives of this research area. In all instances, innovative new research will be given high priority.

Approximately $19,206,000 is available to support this program area. The Biotechnology program area is divided into the following sub-program areas or specific areas of inquiry:

7.1 *Molecular Biology.* One of the major limiting factors for the application of biotechnology to agriculture is the lack of basic information about genes. The primary objective of this category is to increase our understanding of the structure, function, regulation, and expression of genes of plant, animal, and their associated microbial systems.

This sub-program area will emphasize the following categories of research: (1)

Identification, isolation and characterization of genes and gene products, (2) relationships between gene structure and function, (3) regulatory mechanisms of gene expression, (4) interactions between nuclear and organellar genes, and between extrachromosomal and chromosomal genes, (5) mechanisms of gene recombination and transposition, (6) molecular basis of chromosomal replication, and (7) mechanisms of interaction with beneficial or deleterious microorganisms.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475–5022 or 475–5042.

7.2 *Molecular and Cellular Mechanisms of Growth and Development.* Suboptimal growth and development are limiting factors in animal and plant productivity. Yet, a basic understanding of the developmental processes in agriculturally important animals and plants is largely lacking. New experimental approaches are being developed through advances in molecular and cell biology. The goal of this sub-program area is to encourage the use of emerging techniques for the investigation of the developmental processes.

This research area will place emphasis on, but not be limited to, studies of (1) cellular and molecular mechanisms controlling growth and developmental processes, including reproduction, differentiation, and senescence, and (2) metabolic processes related to growth and development. Projects designed to identify molecular, cellular, and organismal targets for genome manipulation are also encouraged.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475–5042.

7.3 *Genetic and Molecular Mechanisms Controlling Responses to Physical and Biological Stress.* Biological and physical stresses prevent the expression of the full genetic potential of an organism's productivity and set limits on where and when it thrives. A major goal of this sub-program area is to understand the molecular basis for the organism's interaction with these stresses and to identify which genetic systems causing these responses can be manipulated by techniques in biotechnology. Research on plants, animals, or their associated microorganisms should emphasize: (1) Identification, isolation, transfer, and expression of genes that are regulated by, or involved in, stresses; (2) physiological-genetic and biochemical-genetic analyses of identified genes or genomic segments that are likely to affect performance under stress; (3) molecular mechanisms underlying coordination of organismal responses to stress; (4) fundamental mechanisms of stress responses, injury, tolerance, and avoidance at the molecular, cellular, and organismal levels; and (5) laboratory and field investigations on the physiology of the organism that contribute to an understanding of the causes, consequences and avoidance of stresses, rather than simply describing the effects of stress.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475–5038.

An original and 14 copies of each proposal submitted under the Biotechnology program area are requested. This number of copies is necessary to permit thorough, objective peer evaluation of all proposals received before funding decisions are made.

8.0 *Animal Science.* Suboptimal reproductive performance in domestic farm animals is the most limiting factor preventing more efficient production of animal food products. This failure to achieve maximal reproductive efficiency is due to problems related to puberty, ovulation, insemination, fertilization, prenatal death and poor survival of offspring.

The economic loss to the producer and increased costs of animal food products to the consumer due to inefficient reproductive performance makes the requirement for new knowledge in these areas high priority. Although the exact needs may vary from species to species and region to region, there are areas where additional fundamental research is critical.

8.1 *Brucellosis.* This sub-program area will support research at the cellular, molecular, and genetic levels that will (a) define the mechanisms by which *Brucella abortus* induces disease in cattle and (b) defines the basis of the bovine interactive response with *B. abortus* that results in protective immunity. Proposals are also encouraged which, through molecular biological analyses, identify and produce (a) antigens to differentiate non-infected, vaccinated, and the *B. abortus*-infected cattle, and (b) immunogens to stimulate long-lived protective immunity in cattle.

8.2 *Reproductive Physiology.* This sub-program area will support innovative research in the following categories: (a) Mechanisms affecting embry survival, endocrinological control of embryo development, mechanisms of embryomaternal interactions, and embryo implantation; (b) gamete physiology, primarily gametogensis including maturation process, ovulation, and superovulation; fundamental processes of fertilization, mechanisms regulating gamete survival *in vivo* and *vitro*, and in basic questions regarding gamete transport; and (c) fundamental questions addressing parturition, postpartum interval to conception, and neonatal survival.

Emphasis will be on innovative approaches which may contribute to a thorough understanding of the reproductive processes in agriculturally important animals. The use of experimental model systems should be justified relative to the objectives of this research.

Proposals on the development of methods for *in vitro* manipulation and preservation of animal gametes and embryos will be considered, but overall objectives of such studies should be related to the development of fundamental knowledge in one or more of the foregoing areas.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475–5034.

Approximately $4,321,350 is available to support the Animal Science program area, of which $2,400,750 is to study reproductive efficiency, and $480,150 is to study brucellosis. $1,440,450 is available for reproductive physiology.

An original and nine copies of each proposal submitted under the Animal Science program area are requested. This number of copies is necessary to permit thorough, objective peer evaluation of all proposals received before funding decisions are made.

9.0 *Insect Pest Science.* Uncontrolled insect pests are a major factor in reducing crop and forest productivity. Before successful strategies for managing insect pests can be developed, a strong basic insect biology research effort is needed. This program area, restricted to the insect pests listed below, will support research on behavioral physiology; chemical ecology; insect-host interaction; endocrinology; population dynamcis; behavioral ecology; insect pathogens, parasites, and predators; and epidemiology of beetle-borne pathogens. Proposals bringing a blend of approaches to a specific problem are encouraged.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475–5046.

Approximately $2,880,900 is available for the Insect Pest Science program area: $960,300 will support studies of the boll weevil/bollworm; 960,300 will support research on the pine bark beetle; and

960,300 will support research on the gypsy moth.

An original and 9 copies of each proposal submitted under the Insect Pest Science program area are requested. This number of copies is necessary to permit thorough, objective peer evaluation of all proposals received before funding decisions are made.

10.0 *Acid Precipitation.* Largely single-factor research on above-ground plant tissues has not provided clear evidence of reductions in plant growth or yield following exposure to acid precipitation. There is a need to take advantage of knowledge gained thus far and recognize that the problem is far more complex than initially projected. New research must reflect that complexity, especially in the area of forest response. More emphasis should be placed on multiple-factor studies that deal with both direct and indirect effects.

Funds in the amount of $667,409 are available to support this program area. Priority will be given to research projects directly addressing the effects of acid precipitation on economically important plants, including trees, and associated microorganisms.

These grant funds will continue to be administered as a contribution of USDA to the National (Federal) Acid Precipitation Assessment Program (NAPAP). In that regard, plans for use of these funds are coordinated with research underway or planned by the U.S. Environmental Protection Agency, the Electric Power Research Institute and other organizations working within or in coordination with the NAPAP. This coordination is mandated by the NAPAP to ensure complimentarity and to avoid unnecessary duplication. Specifically, these funds will be administered with cognizance of the Effects Research Program of Interregional Research Project IR-7, known also as the National Atmospheric Deposition Program (NADP).

The following priority areas of research on acid deposition were developed through guidance of scientists of the Effects Research Program of the IR-7 Project and those of other organizations involved in research on acid deposition. These research areas are not in order of priority for funding consideration. Proposals dealing with agricultural crops and forest will be considered, but emphasis will be in the forestry area.

1. Interactive effects of acidic rain with other atmospheric pollutants on plant productivity and quality.

2. Effects of excess hydrogen, nitrogen and sulfur on heavy metal mobilization and fine root turnover.

3. Predisposition of plants to secondary effects (e.g., pathogens, insects, climatic) as a result of acid deposition.

Further information can be obtained from the program coordinator at (202) 447-5741.

An original and 14 copies of each proposal submitted under the Acid Precipitation program area are requested. This number of copies is necessary to permit thorough, objective peer evaluation of all proposals received before funding decisions are made.

11.0 *Soybean Research.* The overall goal of this program area is to support long-term, basic biological research on soybeans that can generate new ideas, new knowledge, and innovative technologies which ultimately will contribute to increased productivity of the soybean crop. Interdisciplinary approaches are encouraged. This program area emphasizes research projects that are designed to: (1) Enhance the fundamental understanding of physiology and biochemistry of the soybean, and (2) develop innovative genetic and breeding strategies for enhanced soybean germplasm. Priorities will be given to the areas of research that are *not* addressed by the other program areas at the Competitive Research Grants office.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475-5022.

Approximately $497,435 is available to support this program area.

An original and nine copies of each proposal submitted under the Soybean Research program area are requested. This number of copies is necesssary to permit thorough, objective peer evaluation of all proposals received before funding decisions are made.

12.0 *Alcohol Fuels Research.* Proposals will be considered for research relating to the physiological, microbiological, biochemical and genetic processes controlling the biological conversion of agriculturally important biomass material to alcohol fuels and industrial hydrocarbons. Studies on factors which limit efficiency of biological production of alcohol fuels and means of overcoming these limitations will be within the scope of this program area.

If necessary, further information may be obtained from the Associate Program Manager at (202) 475-5022.

The total funds expected to be available for this program area are $518,562.

An original and nine copies of each proposal submitted under the Alcohol Fuels Research program area are requested. This number of copies is necessary to permit thorough, objective peer evaluation of all proposals received before funding decisions are made.

Where and When to Submit Grant Applications

The number of copies to be submitted for each research grant application are indicated in the individual program area descriptions. Each research grant application must be submitted within the time limits listed below to: Grants Administrative Management, ATTENTION: Competitive Research Grants Program, Office of Grants and Program Systems, U.S. Department of Agriculture, Room 010, West Auditor's Building, 15th and Independence Avenue, SW., Washington, D.C. 20251.

To be considered for funding during Fiscal Year 1985, the proposals should be postmarked by the following dates:

March 1, 1985—Biotechnology, Molecular Biology (Gene Structure), Responses to Stress, Developmental Biology (Growth/Development)
March 1, 1985—Animal Science
March 1, 1985—Insect Pest Science
March 22, 1985—Acid Precipitation
March 22, 1985—Soybean Research
March 22, 1985—Alcohol Fuels Research

What to Submit

The number of copies to be submitted with each application is identified in the respective program area described above. Each proposal must include a like number of Form S&E-661, "Grant Application," which is included in the "Research Grant Application Kit." See 7 CFR 3200.4. Proposers should note that one copy of this form must contain pen-and-ink signatures of the principal investigator(s) and the authorized organizational representative.

Please note that potential applicants who were on the Competitive Research Grants mailing list for 1984, or who recently requested placement on the list for 1985, will receive copies automatically. All others will receive copies upon request from: Grants Administrative Management, Attention: Proposal Services Unit, Office of Grants and Program Systems, U.S. Department of Agriculture, Room 010, West Auditor's Building, 15th & Independence Avenue, SW., Washington, D.C. 20251, Telephone: (202) 475-5049.

Information collection requirements contained in this document have been approved in OMB Document No. 0525-0001.

Special Instructions

The Competitive Research Grants Program should be indicated in Block 7 and the applicable program area and

sub-program area (specific area of inquiry) should be indicated in Block 8 of Form S&E–661 provided in the Research Grant Application Kit. Select one program area only. The number assigned to the specific area of inquiry must also be cited (e.g., 7.1, 7.2) in Block 8 of form S&E–661. (Example: Biotechnology-Environmental Stress 7.2). The final determination of the program and sub-program areas will be made by the program staff and/or appropriate peer panel. The code numbers assigned to program areas and sub-program areas are listed below:

7.0 Biotechnology
- 7.1 Molecular Biology (Gene Structure)
- 7.2 Developmental Biology (Growth/Development)
- 7.3 Responses to Stress

8.0 Animal Science
- 8.1 Brucellosis
- 8.2 Reproductive Physiology

9.0 Insect Pest Science
- 9.1 Boll weevil/Bollworm
- 9.2 Pine Bark Beetle
- 9.3 Gypsy Moth

10.0 Acid Precipitation

11.0 Soybean Research

12.0 Alcohol Fuels Research

All copies of a proposal should be mailed in one package, if at all possible. Due to the volume of proposals received, proposals submitted in several packages are very difficult to identify. If copies of the proposal must be mailed in more than one package, the number of packages should be marked on the outside of each. It is important that *all packages be mailed at the same time.* Also, please see that each copy of each proposal is *stapled securely* in the upper left-hand corner. DO NOT BIND. Information should be typed on one side of the page only. Every effort should be made to *ensure* that the *proposal contains all pertinent information when initially submitted.* Prior to mailing, compare your proposal with the Application Requirements checklist contained in the "Research Grant Application Kit" and instructions contained in the regulations governing the Competitive Research Grants Program, 7 CFR Part 3200.

Done at Washington, D.C., this 10th day of January, 1985.

Orville G. Bentley,

Assistant Secretary for Science and Education.

[FR Doc. 85–1224 Filed 1–15–85; 8:45 am]

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federal register

Wednesday
January 16, 1985

Part VI

Department of Transportation

Research and Special Programs Administration

City of New York; Application for Non-Preemption Determination; Public Notice and Invitation To Comment

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. NPDA-2]

City of New York; Application For Non-Preemption Determination; Public Notice and Invitation To Comment

AGENCY: Research and Special Programs Administration, Materials Transportation Bureau (MTB), DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: The City of New York has applied to the Department of Transportation for an administrative determination concerning the City's restriction on the highway transportation of radioactive materials, which is inconsistent with the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. 1801–1812) and the regulations issued thereunder and therefore preempted under section 112(a) of the HMTA. Pursuant to section 112(b) of the HMTA, the City seeks a Departmental determination that its inconsistent transportation requirement is not preempted because it offers a level of safety equivalent to the Federal rule and does not unreasonably burden commerce.

The inconsistent local requirement is set forth at section 175.111(1) of the City Health Code and effectively bans the highway transportation of spent nuclear fuel through the City. The applicable Federal rule is set forth at 49 CFR 177.825 and establishes requirements on the highway routing of spent nuclear fuel and other highway route controlled quantity shipments of radioactive material.

In its application the City presents technical analyses and legal arguments to support its contention that its inconsistent regulation meets the statutory criteria for waiver of preemption under section 112(b) of the HMTA. This notice solicits public comment to assist the Department in making a determination on that issue.

DATES: Comments received on or before March 4, 1985 will be considered before a non-preemption determination is issued.

ADDRESSES: The City's application and any comments received may be reviewed at the following locations and times:

Dockets Branch, Materials Transportation Bureau, Room 8426, 400 Seventh Street, SW., Washington, D.C. 20590, (8:30 a.m. to 5:00 p.m., Monday through Friday excluding holidays)

Office of the Law Department, City of New York, 100 Church Street, 6th Floor, New York, N.Y. 10007, (9:00 a.m. to 3:00 p.m., Monday through Friday excluding holidays)

Written comments may be submitted to the MTB Dockets Branch at the above address. Three copies of each comment are required and must indicate the correct docket number (NPDA-2). Two copies of each comment must also be sent to Mr. Barry L. Schwartz of the New York City Law Department at the above address. The fact of submission of the required copies to Mr. Schwartz is to be certified at the time the comment is submitted to the Dockets Branch. (The following format is suggested: "I hereby certify that two copies of this comment regarding docket no. NPDA-2 have been sent to Mr. Barry L. Schwartz at the address noted in the **Federal Register** publication.")

FOR FURTHER INFORMATION CONTACT: Elaine Economides, Office of Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, SW., Washington, D.C. 20590, (Tel. 202/755-4972).

SUPPLEMENTARY INFORMATION:

1. Preemption Under the HMTA

The HMTA (49 U.S.C. 1801–1812) at section 112(a) (49 U.S.C. 1811(a)) expressly preempts "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in (the HMTA) or in a regulation issued under (the HMTA)." However, section 112(b)(49 U.S.C. 1811(b)) provides that an inconsistent requirement of a state or political subdivision thereof ceases to be preempted if, upon the application of an appropriate state agency, the Secretary of Transportation determines that such requirement satisfies the statutory criteria as to effect on safety and commerce.

Procedural regulations implementing section 112 of the HMTA are codified at 49 CFR 107.201–107.225. These regulations provide for the issuance of inconsistency rulings and non-preemption determinations. Briefly, an inconsistency ruling is an administrative opinion as to the relationship between a requirement of a state or political subdivision thereof and a requirement of the HMTA or regulations issued under the HMTA. The administrative determination of whether a state or political subdivision requirement is inconsistent is based on a consideration of case law criteria which have been incorporated in the procedural regulations at 49 CFR 207.209(c). The inconsistency of a non-Federal requirement can also be established by a court of competent jurisdiction or by the express acknowledgement of the enacting jurisdiction.

If the state or local requirement is found to be inconsistent with a Federal requirement, the state or locality may seek a non-preemption determination, i.e., a determination as to whether preemption should be waived pursuant to section 112(b) of the HMTA (49 U.S.C. 1811(b)). The HMTA places the burden of proof on the applicant to demonstrate that the inconsistent requirement: (1) Affords the public a level of safety at least equal to that afforded by the HMTA and the regulations issued thereunder; and (2) does not unreasonably burden commerce. The procedural regulations adopted to implement section 112(b) set forth the following factors to be considered in determining whether the inconsistent requirement unreasonably burdens commerce:

(1) The extent to which increased costs and impairments of efficiency result from the State or political subdivision requirement.

(2) Whether the State or political subdivision requirement has a rational basis.

(3) Whether the State or political subdivision requirement achieves its stated purpose.

(4) Whether there is need for uniformity with regard to the subject concern and if so, whether the State or political subdivision requirement competes or conflicts with those of other States and political subdivisions. (49 CFR 107.111(b)).

When the Department has received all the substantive information it considers necessary to process an application for a non-preemption determination, it is procedurally required to serve notice of that fact upon the applicant and all other persons identified by the applicant as having received notice of the proceeding as well as those notified by the Department on its own initiative. If, within 90 days of such notice, the Department has not taken action on the application, the applicant may treat the application as having been denied in all respects and may appeal therefrom.

2. Background

By resolution adopted January 15, 1976, the City of New York amended its Health Code to include § 175.111(1). This resolution, which appears in its entirety as Appendix A to this document, established a requirement for a Certificate of Emergency Transport to be

issued by the Commissioner of Health for each shipment of certain specified radioactive materials which is to be transported into or through the City. The practical effect of section 175.111(1) was a ban of most commercial shipments of radioactive materials in or through the City.

Among those parties affected by the City's adoption of section 175.111(1) was Associated Universities, Inc. (AUI) which has operated Brookhaven National Laboratory on Long Island since 1947. The two research reactors in use at Brookhaven consume fuel consisting of enriched uranium. Spent fuel from the reactors is stored at Brookhaven until shipped to a recovery facility for reclamation of valuable materials and eventual disposal of the remaining waste.

Prior to the City' adoption of section 175.111(1), Brookhaven's practice was to ship spent fuel in six shipments over a six-week period each year. After the City's adoption of section 175.111(1) effectively banned the highway transportation of spent nuclear fuel from Long Island, AUI turned to the use of a water crossing from Long Island to Connecticut. Subsequent adoption of local restrictions in Connecticut barred this route and, as a result, spent fuel shipments from Brookhaven have been suspended for several years.

In March of 1977 AUI applied to the Department of Transportation for an administrative determination on the question of whether section 175.111(1) was inconsistent with the HMTA or the regulations issued thereunder and, therefore, preempted under section 112(a) of the HMTA (49 U.S.C. 1811 (a)). After providing public notice and opportunity to comment, the Department issued an inconsistency ruling (IR-1, 43 FR 16954, April 20, 1978) which concluded that there was no identifiable requirement in the text of the HMTA or the regulations issued thereunder that would provide a basis for a finding of inconsistency with section 175.111(1). Nevertheless, the Department pointed out "(t)he legal validity of section 175.111 (was) still subject to serious doubt" (43 FR 16958) in view of the possibility of preemption under the Commerce Clause of the U.S. Constitution or the Atomic Energy Act of 1954. Finally, the Department announced its intent to examine the need for Federal routing regulations for radioactive materials and advised that section 175.111 and similar requirements adopted elsewhere could face a necessary future harmonization with rulemaking resulting from the Department's intended inquiry.

On August 17, 1978, the Department published an advance notice of proposed rulemaking (43 FR 36492) under Docket No. HM-164 concerning the highway routing of radioactive materials. Based on this advance notice and the notice of proposed rulemaking which followed (45 FR 7140, January 31, 1980), the Department issued HM-164 as a Final Rule on January 19, 1981, with an effective date of February 1, 1982 (46 FR 5298). Entitled "Radioactive Materials; Routing and Driver Training Requirements", HM-164 requires vehicles carrying large-quantity shipments of radioactive materials to operate over "preferred routes" selected to reduce time in transit, except that an Interstate System bypass or beltway around a city is to be used when available. The Department designated the entire Interstate Highway System as a "preferred route" because of the System's low accident rate and its capacity to reduce transit time. However, because the Department believed that, in many cases, local roads might provide safer, more direct routes for highway carriers and that state authorities were better situated to determine where alternative routes might be preferable, the Department recognized the validity of alternative "preferred routes" designated by state routing agencies as offering a level of safety equal to or greater than the Interstate System. In order to assist the states in this endeavor, the Department, developed "Guidelines for Selecting Preferred Highway Routes for Shipments of Large Quantity Radioactive Materials." (This publication has since been reissued under the title "Guidelines for Selecting Preferred Highway Routes for Highway Route Controlled Quantity Shipments of Radioactive Materials", DOT/RSPA/MTB-84-22, June 1984.)

Accompanying HM-164 was an appendix expressing the Department's opinion on the types of State and local transportation restrictions that would be considered inconsistent. According to the appendix, HM-164 would preempt local regulations, such as the New York City Health Code, that prohibit the highway transport of large-quantity shipments of radioactive materials between any two points without providing an alternate route for the duration of the prohibition.

Throughout the rulemaking process, the City, expressed its objections to the Department's proposals, repeatedly urging the Department to broaden the scope of its inquiry and to consider barging as an alternative requirement for transporting large-quantity shipments of radioactive materials around urban centers that lack circumferential highways. When the Department failed to incorporate the City's barging suggestion into its Notice of Proposed Rulemaking, the City reiterated its support of barging and requested the Department to accompany the Final Rule with a non-preemption determination) waiving preemption of the City's transportation restriction. Because this would have required the Department to issue a ruling on the basis of a regulation not yet issued, the City's application for a non-preemption determination was denied as premature.

Once HM-164 was issued as a Final Rule, the City renewed its application for a waiver of preemption. Under the governing procedural regulations, the party seeking a waiver of preemption bears the burden of proving that the statutory criteria for a waiver of preemption have been met. The City, however, took the position that the Department was responsible for providing evidence that HM-164 offered greater safety than the status quo. As the parties had reached an impasse, on January 15, 1982, the Department responded to the City's request for an interlocutory ruling and notified the City that the non-preemption application would most likely be disapproved for lack of substantial supporting documentation. Preemption of the City's regulation, however, was prevented by order of the U.S. District Court.

Shortly after publication of HM-164 as a Final Rule, the City filed a complaint in the U.S. District Court for the Southern District of New York seeking to invalidate HM-164 on numerous grounds. On January 29, 1982, the District Court issued an order temporarily restraining the preemptive effect on HM-164 on the City's regulation.

On February 19, 1982, the District Court, in an exhaustive opinion, ruled that HM-164 violated both the HMTA and the National Environmental Policy Act (NEPA) in its preemption of State and local bans on the transportation of large-quantity radioactive materials along highways in densely populated areas. The District Court permanently enjoined the enforcement nationwide of what it concluded to be the invalid effect of HM-164. The Court then offered the parties the opportunity to suggest corrections to the opinion. Based on these suggestions, the District Court filed an amended opinion and judgment on May 6, 1982, which limited its earlier decision to a permanent injunction on the preemptive effect of HM-164 on New York City's Health Code.

The Department appealed and on August 10, 1983, the Second Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with instructions to enter a judgment upholding the validity of HM-164. The Circuit Court upheld the validity of HM-164 in all respects and ruled, *inter alia*, that the Department's refusal to consider the barging alternative in the context of a highway routing rule of national applicability violated neither the HMTA nor NEPA.

The City appealed the Circuit Court decision but on February 27, 1984, the U.S. Supreme Court announced its refusal to review the case, thereby upholding the decision of the Circuit Court and the validity of HM-164.

By specifically upholding the preemptive effect of HM-164 on the City's ordinance, the Court implicitly found the ordinance to be preempted by HM-164. In view of this, the City advised the Department of its intent to apply for a waiver of preemption pursuant to section 112(b) of the HMTA (49 U.S.C. 1811(b)). That application was submitted on December 24, 1984. Pursuant to 49 CFR 107.217, the City mailed a copy of its application and supporting documentation to each of 34 parties who it considered would be affected by the requested waiver.

3. The City's Application for Waiver

Although section 175.111(1) of the City Health Code restricts the transportation of five categories of radioactive materials, the City has limited its request for a waiver of preemption to the restriction on irradiated or spent nuclear fuel. In examining the effects on safety and commerce of the City's restriction as compared to HM-164, the City has limited its analysis to shipments originating at Brookhaven National Laboratory on Long Island and terminating at a reprocessing facility in Idaho. The reasons given for this limited focus are as follows:

The only present source of irradiated fuel on Long Island is from BNL. While at some future time the Shoreham Nuclear Power Station on Long Island, may become operational, the technical factors and costs—both absolute and incremental—are not now ascertainable. Since the passage of § 175.111(1), no other shippers or carriers of irradiated fuel have applied to the City for a Certificate of Emergency Transport. Moreover, it would be unlikely that any shipments of spent fuel originating in New England would pass through the City because: a) These shipments would be subject to 49 CFR 177.825(b) requiring the carrier to use an Interstate system bypass or beltway around the City, i.e.—I-84 to the Newburg-Beacon Bridge or I-287 to the Tappan Zee Bridge and b) the Nuclear Regulatory Commission has not designated any approved routes for the shipment of spent fuel through the City of New York.

Relying on a safety analysis which was submitted with the City's application, the City asserts that there are at least three alternative routes which are superior to the highway route contemplated under HM-164. Each of these involves transporting the shipments by water from Long Island to Connecticut.

4. Public Comment

Comments should be restricted to the following issues:

(a) Whether the City's restriction on the highway transportation of spent nuclear fuel affords the public an equal or greater level of protection than is afforded by HM-164. (N.B. the "public" includes all who are or would be exposed to transportation risk, not just those who are or would be affected in New York City.)

(b) Whether the City's restriction on the highway tranportation of spent nuclear fuel unreasonably burdens commerce.

Persons intending to comment on this docket should examine: the HMTA (49 U.S.C. 1801-1812); the Hazardous Materials Regulations (49 CFR, Parts 171-179), especially the highway routing requirements at section 177.825; the Department's "Guidelines for Selecting Preferred Highway Routes for Highway Route Controlled Quantity Shipments of Radioactive Materials", DOT/RSPA/MTB-84/22 (June 1984); the procedures governing the Department's issuance of non-preemption determinations (49 CFR 107.215-107.225); and § 175.111(1) of the New York City Health Code which is provided as Appendix A to this notice.

Issued in Washington, D.C. on January 11, 1985.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

[FR Doc. 85-1278 Filed 1-15-85; 8:45 am]

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federal register

Wednesday
January 16, 1985

Part VII

Environmental Protection Agency

40 CFR Part 180
Oxamyl; Proposed Tolerance

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP 3E2833/P361; PH-FRL 2758-7]

Oxamyl; Proposed Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the tolerance for residues of the insecticide/nematicide oxamyl in or on the raw agricultural commodity bananas. This proposed regulation to revise the maximum permissible level for residues of oxamyl in or on the commodity was requested, pursuant to a petition, by E.I. du Pont de Nemours and Co.

DATE: Comments, identified by the document control number [PP 3E2833/P361], must be received on or before February 15, 1985.

ADDRESS: Written comments by mail to:

Information Services Section, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

In person, bring comments to: Rm. 236, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 236 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT:

By mail: Jay Ellenberger, Product Manager (PM) 12, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Office location and telephone number: Rm. 202, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-2386).

SUPPLEMENTARY INFORMATION: E.I. du Pont de Nemours and Co., Wilmington, DE 19898, has submitted pesticide petition 3E2833 to the EPA proposing to amend 40 CFR 180.303 by establishing a tolerance for residues of the insecticide/nematicide oxamyl (methyl *N'*, *N'*dimethyl-*N*-[(methylcarbamoyl)oxy]-1-thiooxamimidate] in or on the raw agricultural commodity bananas imported from Costa Rica at 0.3 part per million (pm). Section 180.303 currently specifies a tolerance of 0.1 ppm for bananas.

The data submitted in the petition and other relevant material have been evaluated. The toxicological data considered in support of the tolerance include a 2-year rat feeding/oncogenicity study and a 2-year dog feeding study, both of which were negative under the conditions of the studies, with no-observed-effect levels (NOEL) of 50 ppm and 100 ppm, respectively; a mouse oncogenicity study which was negative under the conditions of the study at dietary levels up to 75 ppm for 2 years; a three-generation rat reproduction study with a NOEL of 50 ppm; a rat teratogenicity study which was negative; and a rabbit teratogenicity study which was negative at up to 4 milligrams 9 mg)/kilogram (kg)/day with a NOEL of 2 mg/kg/day for fetotoxicity. Based on the 2-year chronic rat feeding/oncogenicity study with a NOEL of 50.0 ppm and using a safety factor or 100, the acceptable daily intake (ADI0 for humans is calculated to be 0.025 mg/kg of body weight (bw)/day. The theoretical maximum residue contribution (TMRC) resulting in the human diet from this and previously established tolerances utilizes 42.67 percent of the ADI.

The metabolism of oxamyl is adequately understood, and an adequate analytical method, gas chromatography using a flame photometric detector, is available for enforcement purposes. No regulatory actions are currently pending against continued registration of oxamyl, nor are there any relevant considerations involved in the establishment of this tolerance. Because there are no livestock or poultry feed items involved, there will be no secondary residues in meat, milk, poultry, and eggs as a result of this use.

Based on the above information considered by the Agency, the tolerance established by amending 40 CFR 180.303 would protect the public health. It is proposed, therefore, that the tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the **Federal Register** that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 3E2833/P361]. All written comments filed in response to this petition will be available in the Information Services Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e)))

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: January 11, 1985.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

PART 180—[AMENDED]

Therefore, it is proposed that 40 CFR 180.303 be amended by revising the tolerance for the raw agricultural commodity bananas, to read as follows:

§ 180.303 Oxamyl; tolerances for residues.

* * * * *

Commodities	Parts per million
* * * * *	
Bananas	0.3
* * * * *	

[FR Doc. 85-1438 Filed 1-15-85; 9:12 am]

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federal register

Wednesday
January 16, 1985

Part VIII

The President

Proclamation 5292—National Sanctity of Human Life Day, 1985

Federal Register
Vol. 50, No. 11
Wednesday, January 16, 1985

Presidential Documents

Title 3—

The President

Proclamation 5292 of January 14, 1985

National Sanctity of Human Life Day, 1985

By the President of the United States of America

A Proclamation

America was founded by men and women who shared a vision of the value of each and every individual. Our forebears strove to build a nation in which the dignity of every person was respected and the rights of all were secure. Our laws have sought to foster and protect human life at all its stages.

Legal acceptance of abortion imperils this cherished tradition. By permitting the destruction of unborn children throughout the term of pregnancy, our laws have brought about an inestimable loss of human life and potential. Yet the tragedy of abortion extends beyond the loss of the nearly 17 million children who have been robbed of the gift of life. This tragedy is multifaceted—inflicting emotional harm on women, denying prospective adoptive couples the joy of sharing their loving homes with children, and eroding respect for the most fundamental of rights, the right to life.

No cause is more important than restoring respect for this right because the freedoms we hold so dear cannot endure as long as some lives are regarded as unworthy of protection. Nor can our commitment to defend the dignity of all persons survive if we remain indifferent to the destruction of 1.5 million children each year in the United States.

I do not believe that Americans will continue to tolerate this practice. Respect for the sanctity of human life remains too deeply engrained in the hearts of our people to remain forever suppressed. This respect for life is evident in communities throughout our Nation where people are reaching out, in a spirit of understanding and helping, to women with crisis pregnancies and to those who bear the spiritual and emotional scars of abortion. Such efforts strengthen the bonds of affection and obligation that unite us and assure that the family, the primary guardian of life and human values, will continue to be the foundation of our society.

If America is to remain what God, in His wisdom, intended for it to be—a refuge, a safe haven for those seeking human rights—then we must once again extend the most basic human right to the most vulnerable members of the human family. We must commit ourselves to a future in which the right to life of every human being—no matter how weak, no matter how small, no matter how defenseless—is protected by our laws and public policy.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim Sunday, January 20, 1985, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in homes and places of worship to give thanks for the gift of life, and to reaffirm our commitment to the dignity of every human being and the sanctity of each human life.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteen hundred and eighty-five, and of the Independence of the United States of America the two hundred and ninth.

Ronald Reagan

[FR Doc. 85-1462
Filed 1-15-85; 11:47 am]
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