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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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

Excepted Schedules

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is amending its regulations to eliminate the requirement for agreements between agencies and OPM in employing persons with mental retardation. The change is intended to improve the use of this appointing authority by eliminating a requirement not specifically required in law.

EFFECTIVE DATE: February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Patricia Paige, (202) 632-0601.

SUPPLEMENTARY INFORMATION: On August 17, 1988, OPM published (at 53 CFR 31012) proposed regulations to amend 5 CFR Part 213 to eliminate the requirement that agencies execute a written agreement with OPM before making appointments under § 213.3102 (t). We received comments from one Federal agency and one Federal employees' union. Key aspects of the proposal are summarized below along with a discussion of the recommendations and OPM's decision.

Key Provision

—Amends 5 CFR 213.3102(t) to delete the requirement for a written agreement between the Office of Personnel Management and a Federal agency prior to using this authority.

Comments Received

—One Federal agency approved the proposed amendment as published.

—A Federal employees' union recommended that the words "may qualify" be changed to read "shall qualify" in the sentence "Upon completion of 2 years of satisfactory service under this authority, the employee may qualify for conversion to competitive status under the provisions of Executive Order 12125 and implementing regulations issued by the Office." The union feels that, without this change, otherwise qualified employees who have served satisfactorily for two years and deserve to be converted by the agency may not be. OPM does not concur with this recommendation for the following reasons: (1) This would not be in accordance with its policy of providing agencies with maximum flexibility in using this appointing authority, (2) Executive Order 12125 specifically states "may be converted" instead of "shall be converted," and (3) FPM guidance provides protection for the employee by specifying that there should be substantial justification for not recommending conversion of an employee who meets the minimum service requirement and who has demonstrated successful job performance.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined by section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant impact on a substantial number of small entities because they affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 213

Government agencies, Employees.

U.S. Office of Personnel Management,

Constance Horner,

Director.

Accordingly, OPM amends Part 213 of Title 5, Code of Federal Regulations, as follows:

PART 213—EXCEPTED SERVICE

1. The authority citation for Part 213 continues to read as follows:

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; Section 213.101 also issued under 5 U.S.C. 2103; Section 213.102 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec 3(5); Section 213.3102 also issued under 5 U.S.C. 3301, 3302 (E.O. 12364, 47 FR 22931), 3307, 8377(h) and 8457.

2. In § 213.3102, paragraph (t) is revised to read as follows:

§ 213.3102 Entire executive civil service.

* * * * *

(t) Positions when filled by mentally retarded persons in accordance with the guidance in Federal Personnel Manual Chapter 306. Upon completion of 2 years of satisfactory service under this authority, the employee may qualify for conversion to competitive status under the provisions of Executive Order 12125 and implementing instructions issued by the Office.

* * * * *

[FR Doc. 89-1361 Filed 1-19-89; 8:45 am]

BILLING CODE 6325-01-M

5 CFR Parts 430 and 534

Pay and Performance Under the Senior Executive Service

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations on Senior Executive Service (SES) pay and performance. The regulations establish requirements necessary to apply consistently and equitably the SES pay provisions of the Civil Service Reform Act of 1978, as amended. In particular, the regulations focus on setting individual basic pay under the SES and implementing the statutory provisions on aggregate compensation. They attempt to provide as much flexibility to agencies as possible under the statutory provisions while providing adequate protections for career appointees. The regulations also permit more flexibility on the part of agencies in operating their SES performance appraisal systems by revising the requirements on the number of SES summary rating levels and the ending date of the SES performance appraisal period.

EFFECTIVE DATE: February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Neal Harwood, (202) 632-4486.

SUPPLEMENTARY INFORMATION: On August 8, 1988, OPM published proposed regulations (53 FR 29684) on pay and performance under the SES. The comment period, which was 60 days

from the date of publication, ended on October 7, 1988. Comments were received from 10 agencies. Comments are summarized below, along with any changes in, or clarifications of, the proposed regulations.

Performance Appraisal for the Senior Executive Service (Part 430, Subpart C)

Two changes to current regulations were included in the proposed regulations. There was no opposition expressed in the comments to either change, and they have both been incorporated in the final regulations.

The first change amends § 430.304(g) to allow agencies to have a three, four, or five summary rating-level system, rather than requiring five levels. (The first three levels under any system must be those established by 5 U.S.C. 4314(a), i.e., unsatisfactory, minimally satisfactory, and fully successful.) As with all significant changes in performance plans, and in accordance with 5 U.S.C. 4312(c)(1) and Subpart A of Part 430, an agency must submit any revision in the number of rating levels in its performance appraisal plan to OPM for review and determination on compliance with law and applicable regulation. Submissions should be sent to the Assistant Director for Pay and Performance Management, Room 7H30.

The second change amends § 430.305(a) to allow agencies to end their SES performance appraisal period at any time, rather than requiring it to end between June 30 and September 30. If an agency changes the end date of its appraisal period, it is not necessary to obtain the prior approval of OPM, but the agency should notify OPM of the change when it is made. The notification should explain how the agency will handle the transition from the old to the new period. For example, if the end date is changed from September 30 to December 31, the agency should state whether the time from October through December will be added to the old period or the new period during the transition, or will be rated separately.

Pay Under the Senior Executive Service (Part 534, Subpart D)

(a) Setting individual basic pay.

The proposed regulations at § 534.401 provided procedures for implementing 5 U.S.C. 5383(c), under which pay for SES members may be adjusted only once in a 12-month period by an appointing authority.

One agency asked whether the 12-month waiting period for a pay adjustment applies when an executive is reassigned between organizations which are in the same agency, but under different appointing authorities. § 534.401(c)(1) has been revised to clarify that the waiting period applies to any pay adjustment in the same agency, so that pay may not be adjusted upon the reassignment unless 12 months have elapsed since the last adjustment.

Under proposed § 534.401(d), pay could be set at any rate upon transfer between agencies, since a new appointing authority is involved. One agency commented that it was not clear whether the 12-month waiting period for a pay adjustment is continuous or starts over if the gaining agency sets an individual's pay at the same level as the losing agency. A new 12-month waiting period begins only if there is a change in the ES rate upon the transfer (e.g., from ES–3 to ES–4). Otherwise, the 12-month waiting period is considered to begin at the time of the last adjustment in the losing agency. The regulations have been clarified on this point.

Under proposed § 534.401(e)(1), if there was a break in SES service of more than 30 days, pay could be set at any rate upon reappointment to the SES; and under proposed § 534.401(c)(1)(iii), a new 12-month waiting period for a pay adjustment was required following the reappointment action, no matter at which rate the pay was set.

One agency suggested requiring a 12-month break in service before allowing pay to be set at any rate upon reappointment, on the basis that an executive might be willing to take even a 30-day break just to be able to get a higher pay rate. We believe 30 days is a sufficient break. It is each agency's responsibility to assure that the break, whatever the length, is not solely for the purpose of avoiding the 12-month waiting period between pay rate changes.

Two agencies argued that if the reappointment was at the same rate the executive previously held, the 12-month waiting period should begin as of the time of the executive's last pay adjustment, not the date of the reappointment action. The agencies said that this would increase flexibility by allowing an agency to reappoint the executive at a higher pay level immediately (starting a new 12-month waiting period) or to reappoint the executive at the same pay level and wait to see how the executive performs before deciding whether to increase the pay level (without having to wait a full 12 months).

We agree that some additional flexibility is appropriate.

Section 534.401(c)(1)(iii) has been revised to provide that a new 12-month waiting period for a pay change starts upon reappointment only if the executive's new ES rate is different from the former rate or if the break in SES service exceeds 12 months. Otherwise, the waiting period begins on the date of the last previous adjustment preceding the reappointment. For example, if an executive received an ES–3 rate on March 1, 1988, left the SES on July 1, 1988, and was reappointed to the SES as an ES–3 on October 1, 1988, the executive would be eligible for a change in pay on March 1, 1989. If the executive was reappointed to the SES as an ES–4, however, on October 1, 1988, the executive would not be eligible for a change in pay until October 1, 1989.

Proposed § 534.401(e)(1) did not specifically state how pay would be set upon reappointment if there had been a break in service of 30 days or less. It has been clarified to state that in this situation, pay may be set at any ES rate if the individual's last ES pay adjustment was more than 12 months earlier. If the last ES pay adjustment was less than 12 months earlier, pay must be set at the former rate. It may then be changed after 12 months have elapsed from the last adjustment.

Section 534.401(f) continued the restriction currently in § 534.402 that the ES rate of an executive who converted to the SES under Subpart C of Part 317 may not be reduced below "the basic payable salary" for the executive immediately before the conversion. One agency asked whether "basic payable salary" means the actual dollar amount received immediately before conversion, or the current salary level of the grade and step occupied immediately before conversion. The term means the former, i.e., the actual dollar amount received immediately before conversion. (b) Aggregate compensation.

Proposed § 534.402 defined an individual's aggregate compensation (basic pay, performance awards, Presidential rank awards, and physicians comparability allowances) and provided, in accordance with 5 U.S.C. 5383(b), that such compensation for a fiscal year may not exceed the pay rate in effect at the end of the fiscal year for level I of the Executive Schedule. The proposed regulations also explained how any amount exceeding the level I ceiling was to be paid later, including situations where an individual transferred to another agency, separated from the Federal service, or died. No comments were received on these provisions, and they have been incorporated in the final regulations as proposed.

E.O. 12291. Federal Regulation

I have determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it deals with the SES employees of the Federal Government.

List of Subjects

5 CFR Part 430

Administrative practice and procedure, Government employees.

5 CFR Part 534

Government employees, Wages.

U.S. Office of Personnel Management,

Constance Horner,

Director.

Accordingly, OPM is amending 5 CFR Part 430 and 5 CFR Part 534 as follows:

PART 430—PERFORMANCE MANAGEMENT

1. The authority citation for Part 430 continues to read as follows:

Authority: 5 U.S.C. chapters 43, 45, 53, and 54.

2. Section 430.304(g) is revised to read as follows:

§ 430.304 SES performance appraisal systems.

* * * * *

(g) Each SES appraisal system shall provide for at least three and not more than five summary rating levels. The rating levels must include an "Unsatisfactory" level, a "Minimally Satisfactory" level, and a "Fully Successful" level. Agencies may also establish up to two levels which are above "Fully Successful." For purposes of this subpart, "Unsatisfactory" is referred to as level 1, "Minimally Satisfactory" is level 2, and "Fully Sucessful" is level 3. A level one level above "Fully Successful" is level 4, and a level two levels above "Fully Successful" is level 5.

* * * * *

3. Section 430.305(a)(1) is revised to read as follows:

§ 430.305 Appraisal of performance.

(a) *Appraisal period.* (1) Each agency appraisal system shall establish an official appraisal period for which a rating of record shall be prepared. Employees shall be given a rating of record at least annually. Systems shall provide for preparing a summary rating when an executive changes positions during the appraisal period, if the executive has served for the minimum appraisal period in the position from which he/she has changed; agency SES Performance Management Plan(s) must describe how these ratings will be taken into consideration in deriving the next rating of record. A summary rating prepared when an executive changes positions during the appraisal period shall not be considered an initial rating.

* * * * *

PART 534—PAY UNDER OTHER SYSTEMS

1. The authority citation for Part 534 is revised as set forth below:

Authority: 5 U.S.C. 1104, 5351, 5352, 5353, 5361, 5383, 5384, 5385, and 5541.

2. Sections 534.401 and 534.402 of Subpart D are revised to read as follows:

Subpart D—Pay Under the Senior Executive Service

§ 534.401 Definitions and setting individual basic pay.

(a) *Definitions.* In this subpart—

"Agency" means an executive agency or military department, as defined by 5 U.S.C. 105 and 102.

"ES rate" means one of the five or more rates of basic pay established by the President under 5 U.S.C. 5382 for the Senior Executive Service.

"Senior executive" means a member of the Senior Executive Service (SES).

(b) *Setting pay upon initial appointment.* An appointing authority may set the pay of a new appointee into the SES at any ES rate.

(c) *Adjusting pay while in the SES.* (1) The pay of a senior executive may not be adjusted by an agency more than once in any 12-month period. A pay adjustment includes:

(i) The assignment of an ES rate upon initial appointment to the SES;

(ii) The change from one ES rate to another while employed in the SES; or

(iii) The assignment of an ES rate upon reappointment to the SES following a break in SES service if the new ES rate is different from the executive's former rate or if the break in service exceeds 12 months.

(2) An appointing authority may raise the pay for a senior executive any number of ES rates at the time of an adjustment.

(3) An appointing authority may lower the pay for a senior executive only one rate at the time of an adjustment. A career senior executive must be provided a 15-day written notice before a pay reduction.

(d) *Setting pay upon transfer.* An appointing authority may set the pay of a senior executive transferring from another agency at any ES rate. If the pay is set at the same rate the executive had in his or her former agency, the action is not considered a pay adjustment for purposes of paragraph (c) of this section.

(e) *Setting pay following a break in SES service.* (1) General.

(i) An appointing authority may set the pay of a former senior executive at any ES rate upon reappointment to the SES if:

(A) There has been a break in SES service of more than 30 days;

(B) There has been a break in SES service of 30 days or less, but the executive's last ES pay adjustment was more than 12 months earlier; or

(C) The reappointment is in a different agency.

(ii) Otherwise, pay must be set at the executive's former ES rate and may not be adjusted until 12 months from the last SES pay adjustment, in accordance with paragraph (c) of this section.

(2) Reinstatement from a Presidential appointment requiring Senate confirmation. If a former career senior executive elected, under 5 CFR 317.801(b), to remain subject to SES pay provisions while serving under a Presidential appointment, pay may be adjusted upon reinstatement to the SES only if 12 months have elapsed since the last SES pay adjustment, in accordance with paragraph (c) of this section. If the former senior executive did not elect to remain subject to the SES pay provisions while serving under the Presidential appointment, pay may be set at any ES rate upon reinstatement.

(f) *Restrictions on reducing the pay of senior executives who converted under Subpart C of Part 317 of this chapter.* The ES rate of a senior executive who entered the SES under the conversion provisions of Subpart C of Part 317 of this chapter cannot be reduced, during such executive's appointment in the SES, below the basic payable salary for that individual immediately before converting to the SES.

§ 534.402 Aggregate compensation.

(a) *Definition.* "Aggregate compensation" consists of basic pay, performance awards, Presidential rank awards, and physicians comparability allowances.

(b) *Limitation on aggregate compensation.* No senior executive may receive in any fiscal year aggregate compensation that will exceed the payable rate in effect for Level I of the Executive Schedule as of the end of the fiscal year.

(c) *Payment of amount exceeding limitation on aggregate compensation.*

(1) Any excess amount that cannot be paid to a senior executive during a fiscal year because of the limitation under paragraph (b) of this section will be paid to that individual in a lump sum at the beginning of the following fiscal year, even if the individual is no longer in the SES. The amount so paid will then be considered part of the aggregate compensation for the new fiscal year.

(2) If a senior executive transfers to a different Federal agency or leaves the Federal service, the agency responsible for making the payment is the agency that employed the executive at the time the excess amount was created.

(3) The only exceptions to waiting until the following fiscal year to make the payment of the excess amount are as follows:

(i) If a senior executive dies, payment of the entire excess amount will be made immediately as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(ii) If a senior executive separates from the Federal service, payment will be made following a 30-day break in service. The executive shall be paid any excess amount that would not bring aggregate compensation for the fiscal year above the Level I salary rate anticipated to be in effect on the last day of the fiscal year. Any additional excess amount shall be paid at the beginning of the next fiscal year. If the executive is reemployed in the Federal service during the same fiscal year as separation, any previous payment of an excess amount shall be considered part of that year's aggregate compensation for applying the Level I limitation for the remainder of the fiscal year.

[FR Doc. 89-1362 Filed 1-19-89; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 215, 220, and 235

[Amdt. Nos. 36, 56, and 16]

Minor Amendments; Child Nutrition Programs

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule makes several technical amendments to the regulations governing the operation of the Special Milk Program, 7 CFR Part 215; the School Breakfast Program, 7 CFR Part 220; and State Administrative Expense Funds, 7 CFR Part 235. This rule (1) revises the definitions of "child" and "school" to make them consistent with the definitions in the National School Lunch Program regulations; (2) adds an additional reference to the Uniform Federal Assistance regulations (7 CFR Part 3015) into the Special Milk and School Breakfast Program regulations and adds the definition of "7 CFR Part 3015" to those regulations; (3) revises the provision regarding food substitutions in the School Breakfast Program to make it consistent with the National School Lunch Program; (4) consolidates the Office of Management and Budget control numbers for reporting and recordkeeping requirements for the School Breakfast Program regulations; (5) corrects the addresses for two Food and Nutrition Service Regional Offices; and (6) removes the reference to a tuition limitation for private schools from the regulations pertaining to State administrative expense funds. These revisions are intended to establish consistency throughout the school nutrition programs and remove obsolete provisions.

EFFECTIVE DATE: January 23, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, FNS, USDA, Alexandria, Virginia 22302, (703) 756-3620.

SUPPLEMENTARY INFORMATION:

Classification

This document makes technical changes and corrections, and imposes no new requirements. Further, the definitions of "child" and "school" have already been submitted for public comment. Therefore, the Department has determined, in accordance with 5 U.S.C. 553(b) and 553(d) that prior notice and comment are unnecessary, and that good cause exists for making the rule effective upon publication.

This final rule has been reviewed under Executive Order 12291 and has been classified as not major because it does not meet any of the three criteria identified under the Executive Order. This action will not have an annual effect on the economy of $100 million or more, nor will it result in major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions. Furthermore, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule has also been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). The Administrator of the Food and Nutrition Service has certified that this rule will not have a significant adverse economic impact on a substantial number of small entities.

The Special Milk Program, School Breakfast Program, and State Administrative Expense Funds are listed in the Catalog of Federal Domestic Assistance under 10.556, 10.553, and 10.560, respectively. The programs are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015, Subpart V, 48 FR 29112, June 24, 1983.)

No new collection or recordkeeping requirements are included which require Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). The programs being amended are approved by OMB under the following control numbers: Special Milk Program, 0584-0005; School Breakfast Program, 0584-0012; and State Administrative Expense Funds, 0584-0319.

Background

On August 2, 1988, the Department published a complete rewrite of the National School Lunch Program regulations, 7 CFR Part 210, at 53 FR 29144. To ensure consistency among school nutrition program regulations, the definitions of "child" and "school" stated in the rewrite of the National School Lunch Program regulations are being adopted in this rule for all the school nutrition programs. These revisions are intended to provide consistent definitions for identical terms in all the school nutrition programs. No changes are intended in the practical application of these terms. The Department also is removing the definition "Long-term care facility" from § 220.2 since that term is defined in the definition of "school." Several paragraphs containing regulatory citations which reference the definition of "school" are also being amended to coincide with the revised definition.

In § 220.8(f), a technical amendment is being made to conform with § 210.10(i)(1) in the rewrite of the National School Lunch Program regulations, 7 CFR Part 210. This revision pertains to food substitutions for handicapped and nonhandicapped students, and implements the requirements of the Department's nondiscrimination regulations (7 CFR Part 15b) published in the Federal

Register on June 11, 1982 (47 FR 25470). This revision is intended to provide uniformity between the school meal programs. Under this provision, schools must make substitutions in foods for students who are considered handicapped under 7 CFR Part 15b and whose handicap restricts their diet. Substitutions are to be made on a case-by-case basis only when supported by a statement of the need for substitutions that includes recommended alternate foods. In the case of a handicapped student, the statement must be signed by a physician, and in the case of a nonhandicapped student, by a recognized medical authority. For a further discussion of this provision, the reader may refer to the rewrite of the National School Lunch Program regulations referred to above.

The Department is also revising § § 215.13, 220.15 and 235.8 of the regulations for the Special Milk Program, School Breakfast Program and State Administrative Expense Funds, respectively, to add references to the Department's Uniform Federal Assistance regulations (7 CFR Part 3015) and is adding a definition for "7 CFR Part 3015" to those regulations. Part 3015 implements: (1) OMB Circulars A-102 and A-110, which standardize the administration of grants and cooperative agreements; (2) OMB Circulars A-87, A-21 and A-122, which specify the principles for determining allowable costs; (3) OMB Guidance on Implementation of the Federal Grant and Cooperative Agreement Act of 1977; and (4) OMB Circular A-128, which establishes audit requirements pursuant to the Single Audit Act of 1984. A definition of 7 CFR Part 3015 and references to Part 3015 were also included in the rewrite of the National School Lunch Program regulations, Part 210. This revision is technical in nature and imposes no new requirements because 7 CFR Part 3015 is currently binding on recipients and subrecipients.

Sections 215.16 and 220.20, *Program information,* which provides the addresses of the Regional Offices for the Food And Nutrition Service, are being updated. In addition, a new § 220.21 is being added to Part 220 to display OMB control numbers. The Paperwork Reduction Act of 1980 and OMB regulations to control paperwork burdens on the public require OMB approval of any regulations that impose a collection/recordkeeping burden on the public. This rule amends the regulations to display in chart form all OMB control numbers. A similar amendment for other Child Nutrition Program was published on December 31, 1985 (50 FR 53258).

On August 13, 1987, at 52 FR 30127, the Department amended the regulations for the school meal and milk programs to eliminate the tuition limitation that previously prohibited some private schools from participating in the Child Nutrition Program. The elimination of the tuition limitation was required by Pub. L. 100-71. At that time, however, the Department inadvertently neglected to amend 7 CFR Part 235, State Administrative Expense Funds, to make a corresponding change in that part. Therefore this rule amends § 235.2 *Definitions* to: (1) Remove the reference to a tuition limitation from the definition of "School" and revise the definition to make it consistent with Part 210; and (2) delete the definitions "Tuition" and "Special needs children", since they are no longer needed. The term "special needs children" was used only within the definition of "tuition."

List of Subjects

7 CFR Part 215

Food assistance programs, Special Milk Program, Grant programs—social programs, Nutrition, Children, Milk, Reporting and recordkeeping requirements.

7 CFR Part 220

Food assistance programs, School Breakfast Program, Grant programs—social programs, Nutrition, Children, Reporting and recordkeeping requirements.

7 CFR Part 235

Food assistance programs, National School Lunch Program, School Breakfast Program, Special Milk Program, Grants administration, Intergovernmental relations, Reporting and recordkeeping requirements, Administrative practice and procedure.

Accordingly, Parts 215, 220, and 235 are amended as follows:

PART 215—SPECIAL MILK PROGRAM

1. The authority citation for Part 215 continues to read as follows:

Authority: Secs. 3, 10; 80 Stat. 885, 889, as amended (42 U.S.C. 1772, 1779).

2. In § 215.2:

a. Paragraph (e-1) is amended by removing the regulatory citation "§ 215.2(v) (2) and (3)" and adding in its place the regulatory citation "§ 215.2(v) (3) and (4)" and by adding "and (2)" after the regulatory citation "§ 215.2(v)(1)";

b. Paragraph (v) is revised in its entirety; and

c. Paragraph (x-1) is redesignated (x-2) and a new paragraph (x-1) is added.

The revision and addition read as follows:

§ 215.2 Definitions.

* * * * *

(v) "School" means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child care institutions" includes, but is not limited to: Homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more; or (4) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

* * * * *

(x-1) "7 CFR Part 3015" means the Uniform Federal Assistance Regulations published by the Department to implement Office of Management and Budget Circulars A-21, A-87, A-102, A-110, A-122, and A-128; the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*); and Executive Order 12372.

Note.—OMB Circulars, referred to in this definition, are available from the EOP Publications, New Executive Office Building, 726 Jackson Place NW., Room 2200, Washington, DC 20503.

* * * * *

3. In § 215.3:

a. Paragraph (b) is amended by removing the regulatory citation "§ 215.2(v)(2) or § 215.2(v)(3)" and

adding in its place the regulating citation "§ 215.2(v)(3) or § 215.2(v)(4)"; and

b. Paragraph (c) is amended by removing "or § 215.2(v)(2)" and adding ", § 215.2(v)(2) or § 215.2(v)(3)" in its place.

4. In § 215.13, paragraph (a)(1) is amended by revising the first sentence to read as follows:

§ 215.13 Management evaluations and audits.

(a)(1) The State agency shall ensure that all organizations within the State that administer or participate in the Program covered by this part comply with the audit requirements of 7 CFR Part 3015. * * *

* * * * *

5. In § 215.16, paragraphs (a) and (g) are amended by revising the addresses to read as follows:

§ 215.16 Program information.

(a) * * * Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

* * * * *

(g) * * * Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

PART 220—SCHOOL BREAKFAST PROGRAM

1. The authority citation for Part 220 continues to read as follows:

Authority: Secs. 4 and 10, 80 Stat. 886, 889 (42 U.S.C. 1773, 1779).

2. In § 220.2:

a. Paragraphs (c) and (u) are revised;

b. Paragraph (m) is removed and reserved;

c. A new paragraph (x–1) is added; and

d. Paragraph (z) is amended by removing the regulatory citation "§ 220.2(u)(2)" and adding in its place the regulatory citation "§220.2(u)(3)."

The revisions read as follows:

§ 220.2 Definitions.

* * * * *

(c) "Child" means: (1) A student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (1) and (2) of the definition of "School", including students who are mentally or physically handicapped as defined by the State and who are participating in a school program established for the mentally or physically handicapped; or (2) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraphs (3) and (4) of the definition of "School".

* * * * *

(u) "School" means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child care institutions" includes, but is not limited to: Homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is entended for the care of children confined for 30 days or more; or (4) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

* * * * *

(x–1) "7 CFR Part 3015" means the Uniform Federal Assistance Regulations published by the Department to implement Office of Management and Budget Circulars A–21, A–87, A–102, A–110, A–122, and A–128; the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*); and Executive Order 12372.

Note.—OMB Circulars, referred to in this definition, are available from the EOP Publications, New Executive Office Building, 726 Jackson Place NW., Room 2200, Washington, DC 20503.

* * * * *

3. In § 220.3:

a. Paragraph (b) is amended by removing the regulatory citation "§ 220.2 (u)(1) and (u)(3)" and adding in its place "§ 220.2 (u)(1), (u)(2) and (u)(4)"; and

b. Paragraph (c) is amended by removing the regulatory citation "§ 220.2(u)(2)" and adding in its place "§ 220.2(u)(3)."

4. In § 220.8, paragraph (f) is revised to read as follows:

§ 220.8 Requirements for breakfast.

* * * * *

(f) Schools shall make substitutions in foods listed in this section for students who are considered handicapped under 7 CFR Part 15b and whose handicap restricts their diet. Schools may also make substitutions for nonhandicapped students who are unable to consume the regular breakfast because of medical or other special dietary needs. Substitutions shall be made on a case-by-case basis only when supported by a statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement shall, in the case of a handicapped student, be signed by a physician or, in the case of a nonhandicapped student, by a recognized medical authority.

* * * * *

5. In § 220.15, paragraph (a)(1) is amended by revising the first sentence to read as follows:

§ 220.15 Management evaluations and audits.

(a)(1) The State agency shall ensure that all organizations within the State that administer or participate in the program covered by this part comply with the audit requirements of 7 CFR Part 3015. * * *

* * * * *

6. In § 220.20, paragraphs (f) and (g) are amended by revising the addresses to read as follows:

§ 220.20 Program information.

(f) * * * Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(g) * * * Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

7. In Part 220, add a new § 220.21 to read as follows:

§ 220.21 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control number
220.3(e)	0584–0327
220.5	0584–0012
220.7(a)–(e)	0584–0329
	0584–0012
	0584–0026
220.8(f)	0584–0012
220.9(a)	0584–0012

7 CFR section where requirements are described	Current OMB control number
220.11 (a), (b), (e)	0584-0012
	0584-0002
	0584-0341
220.12(b)	0584-0012
220.13 (a-1)-(c), (f)	0584-0026
	0584-0002
	0584-0341
	0584-0012
220.14(d)	0584-0012
220.15	0584-0012

PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

1. The authority citation for Part 235 continues to read as follows:

Authority: Secs. 7 and 10, Pub. L. 89-642, 80 Stat. 888, 889 (42 U.S.C. 1776, 1779).

2. In § 235.2,

a. Paragraph (o) is revised in its entirety;

b. A new paragraph (q-1) is added; and

c. Paragraph (u), including subparagraphs (1) and (2), and paragraph (v) are removed.

The revision and addition read as follows:

§ 235.2 Definitions.

* * * * *

(o) "School" means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child care institutions" includes, but is not limited to: homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and junvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more; or (4) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

* * * * *

(q-1) "7 CFR Part 3015" means the Uniform Federal Assistance Regulations published by the Department to implement Office of Management and Budget Circulars A-21, A-87, A-102, A-110, A-122, and A-128; the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*); and Executive Order 12372.

Note.—OMB Circulars, referred to in this definition, are available from the EOP Publications, New Executive Office Building, 726 Jackson Place NW., Room 2200, Washington, DC 20503.

* * * * *

3. In § 235.4, paragraph (b)(2) is amended by adding "and (o)(2)" after the regulatory citation "§ 235.2(o)(1)" and by removing the regulatory citation "§ 235.2(o)(2)" and adding in its place "§ 235.2(o)(3)."

4. In § 235.8, the second sentence in paragraph (a) is amended by removing "OMB Circular A-102" and adding in its place "7 CFR Part 3015."

Anna Kondratas,

Administrator.

Date: January 13, 1989.

[FR Doc. 89-1293 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-30-M

Federal Crop Insurance Corporation

7 CFR Part 411

[Docket No. 6555S]

Grape Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Notice of extension of sales closing date.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) herewith gives notice of the extension of the sales closing date for accepting applications for grape crop insurance in California, effective for the 1989 crop year only. This action is necessary because of alteration of unit determinations not contemplated earlier. This action will allow insureds and applicants for insurance an opportunity to review these determinations with regard to their insurance plans. The intended effect of this notice is to advise all interested parties of the extension of the sales closing date and to comply with the provisions of the grape crop insurance regulations with respect to the Manager's authority to extend sales closing dates.

EFFECTIVE DATE: January 23, 1989.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: The closing date for accepting applications for crop insurance on grapes in California is January 31. Because of certain alterations made in unit guidelines resulting in the need for insureds and applicants for insurance to understand these guidelines thoroughly, FCIC is extending the sales closing date in all California counties where grape crop insurance is offered

Under the provisions of 7 CFR 411.7(b), the sales closing date for accepting applications may be extended by placing the extended date on file in the service office and by publishing a notice in the **Federal Register** upon determination that no adverse selectivity will result from such an extension. If adverse conditions develop during such period FCIC will immediately discontinue acceptance of applications.

Accordingly, pursuant to the authority contained in 7 CFR 411.7(b), the Federal Crop Insurance Corporation herewith gives notice that the sales closing date for accepting applications for grape crop insurance in all counties in California where such insurance is otherwise authorized to be offered, is hereby extended through the close of business on February 28, 1989, effective for the 1989 crop year only.

Authority: 7 U.S.C. 1506, 1516.

Done in Washington, DC, on January 13, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1316 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

Agricultural Stabilization and Conservation Service

Commodity Credit Corporation

7 CFR Part 1413

Farm Marketing Quotas, Acreage Allotments, and Production Adjustment; Feed Grain, Rice, Upland and Extra Long Staple Cotton, Wheat, and Related Programs

AGENCY: Commodity Credit Corporation ("CCC"), and Agricultural Stabilization

and Conservation Service ("ASCS"), USDA.

ACTION: Interim rule and request for comments.

SUMMARY: Section 103(h) of the Agricultural Act of 1949, as amended (the 1949 Act), sets forth the criteria to be used to determine whether a type of cotton is extra long staple (ELS) cotton. For purposes of administering Commodity Credit Corporation (CCC) price support and production adjustment programs, all types of cotton which do not meet the definition of ELS cotton have historically been considered to be upland cotton. Due to changing market demands, changes in cotton varieties and due to changing ginning practices, it has been determined that the regulations set forth at 7 CFR Part 1413 which define the terms "ELS" "cotton" and "upland cotton" should be redefined to more accurately reflect current cotton planting and marketing conditions.

EFFECTIVE DATE: January 23, 1989. Comments must be received on or before February 22, 1989 in order to be assured of consideration.

ADDRESSES: Submit Comments to: Director, Cotton, Grain, and Rice Price Support Division, Agricultural Stabilization and Conservation Service, USDA, P.O. Box 2415, Washington, DC 20013.

FOR FURTHER INFORMATION CONTACT: Raymond K. Aldrich, Program Specialist, Cotton, Grain, and Rice Price Support Division, ASCS, P.O. Box 2415, Washington, DC 20013, (202) 447-6688.

SUPPLEMENTARY INFORMATION: This interim rule has been reviewed under USDA procedures implementing Executive Order 12291 and Departmental Regulation 1512-1 and has been classified "not major". It has been determined that this rule will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local governments, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

It has been determined that Regulatory Impact Analyses are not required for the changes being made by this interim rule.

The titles and numbers of the Federal assistance programs to which this interim rule applies are: Cotton Production Stabilization—10.052; as found in the Catalog of Federal Domestic Assistance.

It has been determined that the Regulatory Flexibility Act is not applicable to this interim rule since neither the Agricultural Stabilization and Conservation Service ("ASCS") nor the Commodity Credit Corporation ("CCC") is required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Based on an environmental impact analysis, it has been determined that the changes made herein to the regulations found at 7 CFR Part 1413 will not have a significant impact on the environment and that an environmental impact statement is not required.

A draft environment impact statement pertaining to agricultural acreage adjustment programs has been prepared. Further information is available from Phillip Yasnowsky, Program Analysis Division, ASCS, USDA, P.O. Box 2415, Washington, DC 20013; (202) 447-7887.

This program/activity is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

The Office of Management and Budget has approved the information collection requirements contained in these regulations under the provisions of 44 U.S.C. Chapter 35 and OMB Numbers 0560-0030, 0560-0071, 0560-0091, and 0560-0650 have been assigned.

Producers are in the process of planning for the 1989 crop year and, in some cases, applying fertilizer, herbicides, and undertaking other planting activities. Therefore, in order to assure that producers are provided timely notice of the changes made by this interim rule, this interim rule will become effective upon the date of publication in the **Federal Register**.

Discussion of Changes

The Extra Long Staple Cotton Act of 1983 amended the 1949 Act to provide, effective with the 1984 crop of ELS cotton, that for purposes of the ELS cotton price support and production adjustment program, ELS cotton is "cotton which is produced from pure strain varieties of the Barbadense species or any hybrid thereof, or other similar types of extra long staple cotton, designated by the Secretary, having characteristics needed for various end uses for which American upland cotton is not suitable and grown in irrigated cotton-growing regions of the United States designated by the Secretary or other areas designated by the Secretary as suitable for the production of such varieties or types and which is ginned on a roller type gin or, if authorized by the Secretary, ginned on another type gin for experimental purposes." For purposes of such programs, cotton not meeting this definition of ELS cotton has historically been considered to be upland cotton.

Due to lower foreign production of ELS cotton and an increase in demand for finer and stronger count yarns which utilize ELS cotton, ELS cotton production in the United States has increased from 80,000 bales in 1981 to 367,000 bales in 1988. During this same time, there has not been an increase upward demand trend for U.S. produced upland cotton. As a result of this increased ELS cotton demand, market prices for certain varieties which are generally considered to be ELS cotton have increased from an average of 89.9 cents per pound during the 1986 marketing year to 1.04 cents per pound during the 1987 marketing year. Upland cotton prices, however, have not increased at such a rate. Accordingly, the payment rate used in making ELS cotton deficiency payments has decreased while upland cotton deficiency payment rates have generally remained at or near the maximum level. Some producers have been planting varieties of cotton in nondesignated ELS cotton counties and ginning the production on either a roller-type or a saw-type gin. Since this cotton, by definition, has been considered upland cotton, if such producers of these varieties are participating in the upland cotton acreage reduction program, they must keep within the permitted acreage established for the farm for upland cotton the total planted acreage of traditional upland cotton varieties and varieties of cotton which could be considered as ELS cotton but for the fact that the county had not been designated as an ELS production county. Therefore, these producers are eligible for upland cotton deficiency payments and at the same time they may receive the higher market price for the ELS-type cotton. Further, since ELS cotton varieties tend to have lower yields, these producers have continued to receive deficiency payments which are calculated based upon traditional upland cotton variety

yields although the yield for the farm does not accurately reflect the true productivity of the farm when ELS cotton varieties are actually planted.

In order to provide for the administration of CCC price support and production adjustment programs which more accurately reflect existing production and marketing practices, for purposes of such program administration upland cotton is being redefined to mean planted cotton or stub cotton which is produced from other than pure strain varieties of the Barbadense species, any hybrid thereof, or any other variety of cotton in which one or more of these varieties predominate.

ELS cotton will continue to be defined as any of the following varieties of cotton which is ginned on a roller gin and is grown in counties specified by CCC: American-Pima; Sea Island; Sealand; all other varieties of the Barbadense species of cotton and any hybrid thereof; and any other variety of cotton in which one or more of these varieties predominate.

Accordingly, effective for 1989 and subsequent years, for CCC price support and production adjustment program purposes, 7 CFR 1413.3(g) provides that "cotton" means "ELS cotton" and "upland cotton" meeting the definitions as specified in 7 CFR 1413.3 (n) and (y), respectively, and excludes cotton not meeting such definitions.

An annual review of counties designated or suitable for the production of ELS cotton will be conducted. Counties in which ELS cotton is currently being grown and for which a roller-type gin is available will be designated or redesignated, as appropriate, and a listing of such counties will be published annually in the **Federal Register**. Additional counties may be designated by CCC during the year as deemed appropriate.

List of Subjects 7 CFR Part 1413

Feed grain, Rice, Upland and extra long staple cotton, Wheat, and Related programs.

Interim Rule

Accordingly, the regulations found at Part 1413 of Chapter XIV of Title 7 of the Code of Federal Regulations are amended as follows:

PART 1413—[AMENDED]

1. The authority citation for 7 CFR Part 1413 continues to read as follows:

Authority: Secs. 101A, 103A, 105C, 107C, 107D, 107E, 109, 113, 401, 403, 503, 504, 505, 506, 507, 508, and 509 of the Agricultural Act of 1949, as amended; 99 Stat. 1419, as amended 1407, as amended, 1395, as amended, 1444, 1383, as amended, 1448; 91 Stat. 950, as amended, 63 Stat. 1054, as amended, 99 Stat. 1461, 1461, as amended, 1462, 1463, 1463, 1464, 1464 (7 U.S.C. 1441-1, 1444-1, 1444b, 1445b-2, 1445b-3, 1445b-4, 1445d, 1445h, 1421, 1423, and 1461 through 1469); sec. 1001 of the Food Security Act of 1985, as amended, 99 Stat. 1444 (7 U.S.C. 1308); Sec. 1001 of the Food and Agriculture Act of 1977, as amended, 91 Stat. 950, as amended (7 U.S.C. 1309); Sec. 1009 of the Food Security Act of 1985, 99 Stat. 1453 (7 U.S.C. 1308a).

2. Section 1413.3 is amended by using paragraphs (g), (n), and (y) to read as follows:

§ 1413.3 Definitions.

* * * * *

(g) *"Cotton"* means upland cotton and ELS cotton meeting the definitions set forth in paragraphs (n) and (y) of this section, respectively, and excludes cotton not meeting such definitions.

* * * * *

(n) *"Extra Long Staple (ELS) cotton"*

(1) Extra long staple cotton means any of the following varieties of cotton which is ginned on a roller gin and is grown in counties specified by CCC: American-Pima; Sea Island; Sealand; all other varieties of the Barbadense species of cotton and any hybrid thereof; and any other variety of cotton in which one or more of these varieties predominate.

(2) An annual review of counties designated as suitable for the production of ELS cotton will be conducted. Counties in which ELS cotton is currently being grown and for which a roller-type gin is available will be designated or redesignated, as appropriate, and a listing of such counties will be published annually in the Federal Register. Additional counties may be designated by CCC during the year as deemed appropriate.

* * * * *

(y) *"Upland cotton"* means planted and stub cotton which is produced from other than pure strain varieties of the Barbadense species, any hybrid thereof, or any other variety of cotton in which one or more of these varieties predominate.

Signed at Washington, DC on January 13, 1989.

Milt Hertz,

Administrator, Agricultural Stabilization and Conservation Service, and Executive Vice President, Commodity Credit Corporation.

[FR Doc. 89-1324 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-05-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 100

[INS Number: 1137-89]

Statement of Organization; Ports of Entry for Aliens Arriving by Vessel or by Land Transportation

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule designates Dover, Delaware and Red Hook, St. Thomas, Virgin Islands as "Class A" ports of entry, and further identifies both facilities as ports of entry for all aliens. In addition, Coral Bay, St. John, Virgin Islands is designated as a "Class B" port of entry for aliens who at the time of applying for admission are lawfully in possession of valid alien registration receipt cards, or valid nonresident alien border-crossing identification cards, or are admissible without documents under the documentation waivers contained in 8 CFR Part 212. With the increasing number of vessels arriving at these three locations, it is necessary that each be designated a port of entry, to be regularly staffed by inspectors of the United States Immigration and Naturalization Service.

EFFECTIVE DATE: January 23, 1989.

FOR FURTHER INFORMATION CONTACT: Dwight S. Faulkner, Assistant Chief Inspector, Immigration and Naturalization Service, 425 I Street, NW., Room 7123, Washington, DC 20536, Telephone: (202) 633-3995.

SUPPLEMENTARY INFORMATION: Under the present Service organization Philadelphia, Pennsylvania is one port of entry which includes, among others, the port facilities at Delaware City, Lewes, New Castle, and Wilmington, Del. and at Chester, Essington, Fort Mifflin, Marcus Hook, and Morrisville, Pa. During FY 88, 1,351 passengers and 11,749 crewmen were inspected at Dover, Del. by officers of the Immigration and Naturalization Service. Currently, these inspections are conducted by officers whose duty post is Philadelphia which is located 100 miles away. The port of Dover will be open daily from 8:00 a.m. to 12 midnight, thus providing a more efficient management of personnel and resources.

The designation of ports of entry at Red Hook and Coral Bay will facilitate the inspection of private sailing vessels entering from the British Virgin Islands and will allow for the inspection of

cruise ships at the Red Hook Dock. At the present time, it takes a vessel intending to stop at Coral Bay an extra day of sailing to comply with the Immigration and Nationality Act, as they must proceed to the port of entry at Charlotte Amalie for inspection. With the increase in cruise ship traffic, an inspection port at Red Hook will increase the island's desirability as a cruise ship port.

Compliance with 5 U.S.C. 553 as to notice of proposed rulemaking and delayed effective date is unnecessary because this rule relates to agency management.

In accordance with 5 U.S.C. 605(b) the Commissioner of Immigration and Naturalization certifies that this final rule will not have significant economic impact on a substantial number of small entities. This is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

List of Subjects in 8 CFR Part 100

Administrative Practice and Procedure, Organization and functions (Government agencies).

Accordingly, Chapter I, Part 100 of Title 8 of the Code of Federal Regulations is amended as follows:

PART 100—STATEMENT OF ORGANIZATION

1. The authority citation for Part 100 continues to read as follows:

Authority: Sec. 103 of the Immigration and Nationality Act: 8 U.S.C. 1103.

2. In § 100.4(c)(2) districts No. 4 and 27 are revised as follows:

§ 100.4 Field Service.

* * * * *

(c) * * *

(2) * * *

District No. 4—Philadelphia, PA.

Class A

Dover, Del.
Erie, Pa.
Philadelphia, Pa. (the port of Philadelphia includes, among others, the port facilities at Delaware City, Lewes, New Castle, and Wilmington, Del.; and at Chester, Essington, Fort Mifflin, Marcus Hook, and Morrisville, Pa.)

* * * * *

District No. 27—San Juan, P.R.

Class A

Aguadilla, P.R.
Ensenada, P.R.
*Christiansted, St. Croix, V.I.
Federiksted, St. Croix, V.I.
Fajardo, P.R.
Humacao, P.R.
Jobos, P.R.
Mayaguez, P.R.
*Ponce, P.R.
San Juan, P.R.
*Cruz Bay, St. John, V.I.
*Charlotte Amalie, St. Thomas, V.I.
Red Hook, St. Thomas, V.I.

Class B

Coral Bay, St. John, V.I.

* * * * *

Dated: January 10, 1989.

Richard E. Norton,

Associate Commissioner Examinations, Immigration and Naturalization Service.

[FR Doc. 89-1345 Filed 1-19-89; 8:45 am]

BILLING CODE 4410-10-M

FARM CREDIT ADMINISTRATION

12 CFR Parts 611, 612, 618 and 620

Organization; Personnel Administration; General Provisions; Disclosure to Shareholders

AGENCY: Farm Credit Administration.

ACTION: Final rule; correction.

SUMMARY: The Farm Credit Administration (FCA) is correcting errors that appeared in the final rule which amended the regulation relating to mergers and reorganizations. The final rule appeared in the **Federal Register** on December 15, 1988 (53 FR 50381).

EFFECTIVE DATE: These regulations shall become effective after the expiration of 30 days from publication during which either or both Houses of Congress are in session. Notice of effective date will be published.

FOR FURTHER INFORMATION CONTACT:

James F. Thies, Assistant Chief, Financial Analysis and Standards Division, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090, (703) 883-4475.

or

Gary L. Norton, Senior Attorney, Office of General Counsel, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090, (703) 883-4020, TDD (703) 883-4444.

SUPPLEMENTARY INFORMATION: In publishing the final rule in the **Federal Register**, three errors were inadvertently made.

PART 611—ORGANIZATION

1. On page 50392, third column, the word "director" was omitted and the word "or" was misspelled in § 611.310(c). Paragraph (c) is corrected to read as follows:

Subpart C—Election of Directors

§ 611.310 Eligibility for membership on bank and association boards and subsequent employment.

* * * * *

(c) No bank director shall, within 1 year after the date when he or she ceases to be a member of the board, serve as a salaried director, officer or employee of such bank, or any association with which the bank has a discount or agency relationship.

* * * * *

2. On page 50397, third column, a grammatical error was made in first sentence of § 611.1195(b). Paragraph (b) is corrected to read as follows:

Subpart O—Special Reconsideration of Mergers

§ 611.1195 Stockholder vote.

* * * * *

(b) In the case of a petition to withdraw from the existing association, ballots shall be sent to each stockholder of the existing association who would be a stockholder of one of a separate association. The petition, as it applies to each such separate association, shall be approved, by stockholders who vote in person or by proxy, if agreed to by a majority of the stockholders who would be served by the separate association.

* * * * *

PART 612—PERSONNEL ADMINISTRATION

2. On page 50399, second column, a typographical error was made in the authority citation. The authority citation for Part 618 is corrected to read as follows:

Authority: Secs. 1.5, 1.11, 1.12, 2.2, 2.4, 2.5, 2.12, 3.1, 3.7, 4.12, 4.13A, 4.25, 4.29, 5.9, 5.10, 5.17; 12 U.S.C. 2013, 2019, 2020, 2073, 2075, 2076, 2093, 2122, 2128, 2183, 2200, 2211, 2218, 2243, 2244, 2252.

Date: January 13, 1989.

David A. Hill,

Secretary, Farm Credit Administration Board.

[FR Doc. 89-1380 Filed 1-19-89; 8:45 am]

BILLING CODE 6705-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21 and 25

[Docket No. NM-32; Special Conditions No. 25-ANM-25]

Special Conditions: Boeing 747-400, Lightning and Radio Frequency (RF) Energy Protection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 747-400 airplane. This airplane will have novel or unusual design features associated with a number of high technology avionic systems including cathode ray tube engine and flight information displays, full authority digital engine controls, and electrical flap actuator systems. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection from the effects of lightning and the susceptibility to external radio frequency (RF) energy sources. This notice contains safety standards which the Administrator finds necessary to ensure that critical and essential functions of systems in the 747-400 are maintained.

EFFECTIVE DATE: December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Gene Vandermolen, Flight Test and Systems Branch, ANM-111, Transport Airplane Directorate, Aircraft Certification Service, FAA, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168, telephone (206) 431-2157.

SUPPLEMENTARY INFORMATION:

Background

On May 17, 1985, the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124-2207, submitted an application to amend Type Certificate A20WE to include the Boeing Model 747-400 series airplane. This airplane is a derivative version of the existing Model 747-300 series airplane. The 747-400 will be delivered with PW4000, CF6-80C2, or RB211-524G engines with full authority digital engine controls. Maximum takeoff gross weight will be increased to 870,000 lbs. Cockpit controls will be simplified and automated for operation by a crew of two. Appropriate hydraulics, avionics, pneumatic, and environment control system changes will be made. An optional fuel tank is being offered in the horizontal tail section. Scheduled completion date for certification is December 1988.

Lightning Protection

The Boeing Model 747-400 airplane will be certificated with a number of high technology avionic systems including cathode ray displays of engine and flight instruments, full authority digital engine controls, and electrical flap actuator systems. These electronic systems may be vulnerable to lightning induced transients (indirect effects) that could be generated by a lightning strike to, or in the vicinity of, the airplane.

These systems, which may be designed to perform critical as well as essential functions, may be susceptible to disruption to both command/response signals and the operational mode logic as a result of electrical and magnetic interference. To ensure that a level of safety is achieved equivalent to that of existing aircraft, a special condition is being proposed which requires that the critical and essential system functions be designed and installed to preclude component damage and interruption of function due to the indirect effects of lightning. To provide a means of compliance with this special condition, a clarification of the threat for lightning is needed.

Discussion

The following "threat definition" is adopted to be used in demonstrating compliance with the lightning protection special condition. It is based on SAE Report AE4L-87-3.

The lightning current waveforms (Components A, D, and H) defined below, along with the voltage waveforms in Advisory Circular (AC) 20-53A, will provide a consistent and reasonable standard which is acceptable for use in evaluating the effects of lightning on the airplane. These waveforms depict threats that are external to the airplane. How these threats affect the airplane and its systems depend upon the systems' installation configuration, materials, shielding, airplane geometry, etc. Therefore, tests (including tests on the completed airplane or an adequate simulation) and/or verified analysis need to be conducted in order to obtain the resultant internal threat to the installed systems. These systems may then be evaluated with this internal threat in order to determine their susceptability to upset and malfunction.

To evaluate the induced effects to these systems, three considerations are required:

1. *First Return Stroke:* (Severe Strike—Component A, or Restrike—Component D). This external threat needs to be evaluated to obtain the resultant internal threat and to verify that the level of the induced currents and voltages is sufficiently below the equipment "hardness" level;

2. *Multiple Stroke Flash:* (½ Component D). A lightning strike is often composed of a number of successive strokes, referred to as a multiple-stroke. Although multiple strokes are not necessarily a salient factor in a damage assessment, they can be the primary factor in a system upset analysis. Multiple strokes can induce a sequence of transients over an extended period of time. While a single event upset of input/output signals may not affect system performance, multiple signal upsets over an extended period of time (2 seconds) may affect the systems under consideration. Repetitive pulse testing and/or analysis needs to be carried out in response to the multiple stroke environment to demonstrate that the system response meets the safety objective. This external multiple stroke environment consists of 24 pulses and is described as a single Component A followed by 23 randomly spaced restrikes of ½ magnitude of Component D (peak amplitude of 50,000 amps), all within 2 seconds. An analysis or test needs to be accomplished in order to obtain the resultant internal threat environment for the system under evaluation; and

3. *Multiple Burst:* (Component H). In-flight data-gathering projects have shown bursts of multiple, low amplitude, fast rates of rise, short duration pulses accompanying the airplane lightning strike process. While insufficient energy exists in these pulses to cause direct (physical damage) effects, it is possible that indirect effects resulting from this environment may cause upset to some digital processing systems.

The representation of this interference environment is a repetition of low amplitude, high peak rate of rise, double exponential pulses which represent the multiple bursts of current pulses observed in these flight data gathering projects. This component is intended for an analytical (or test) assessment of functional upset of the system. Again, it is required that this component be translated into an internal environmental threat in order to be used. This "Multiple Burst" consists of 24 random sets of 20 strokes within a period of 2 seconds. Each set of 20 strokes is made up of 20 "Multiple Burst" waveforms randomly distributed within a period of one millisecond. The individual "Multiple Burst" waveform is defined below.

The following current waveforms constitute the "Severe Strike" (Component A), "Restrike" (Component D), "Multiple Stroke" (½ Component D), and the "Multiple Burst" (Component H). These components are defined by the following double exponential equation:

$$i(t)=I_o(e^{-at}-e^{-bt})$$

where:

t = time in seconds,

i = current in amperes, and

		Severe strike (component A)	Restrike (component D)	Multiple stroke (½ component D)	MultipleBurst (component H)
I_o, amp	=	218,810	109,405	54,703	10,572
a, sec^{-1}	=	11,354	22,708	22,708	187,191
b, sec^{-1}	=	647,265	1,294,530	1,294,530	19,105,100
This equation produces the following characteristics:					
i_{peak}	=	200 KA	100 KA	50 KA	10 KA
and					
$(di/dt)_{max}$(amp/sec)	=	1.4×10^{11} @t=0+sec	1.4×10^{11} @t=0+sec	0.7×10^{11} @t=0+sec	2.0×10^{11} @t=0+sec
di/dt (amp/sec)	=	1.0×10^{11} @t=.5 us	1.0×10^{11} @t=.25 us	0.5×10^{11} @t=.25 us	
Action Integral (amp ^{2} sec)	=	2.0×10^{6}	0.25×10^{6}	$.0625\times10^{6}$	

Protection From Unwanted Effects of Radio Frequency (RF) Energy

Airplane designs which utilize metal skins and mechanical command and control means have traditionally been shown to be immune from the effects of RF energy from ground-based transmitters. With the trend toward increased power levels from these sources, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of the airplane to RF energy must be established. No universally accepted guidance to define the maximum energy level in which civilian airplane system installations must be capable of operating safely has been established.

It is not possible to precisely define the RF energy to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for RF energy, and coupling to cockpit installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing RF emitters, an adequate level of protection exists when compliance with the RF special condition is shown with paragraph 1 or 2 below:

1. A minimum RF threat of 100 volts per meter average electric field strength from 10 KHz to 20 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. An RF threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Average (V/m)	Peak (V/m)
10 KHz-3 MHz	100	100
3 MHz-30 Mhz	1,000	1,000
30 MHz-100 MHz	100	100
100 MHz-200 MHz	200	3,000
200 MHz-1 GHz	2,000	6,000
1 GHz-2 GHz	2,000	14,000
2 GHz-8 GHz	600	14,000
8 GHz-10 GHz	2,000	14,000
10 GHz-40 GHz	1,000	8,000

To establish the values in paragraph 2 above, an analysis was performed using a model of U.S. airspace and the Electromagnetic Compatibility Analysis Center (ECAC) data base, which contains the characteristics of all U.S. emitters. This analysis assumed a minimum separation distance between the airplane and emitters as follows: in the airport environment, 250 ft. for fixed emitters and 50 ft. for mobile emitters; for the air-to-air environment, 50 ft. from interceptor aircraft and 500 ft. from non-interceptor aircraft; for the ground-to-air environment, 500 ft.; and for the ship-to-air environment, 1,000 ft. The results of this analysis were then combined with the results of a study of emitters in European countries. The above values are therefore believed to represent the worst case external threat levels to which an airplane would be exposed in the operating environment.

Discussion of Comments

Notice of Proposed Special Conditions No. SC-88-6-NM for the Boeing Model 747-400 was published in the **Federal Register** on September 23, 1988 (53 FR 36990). Comments were received from five commenters. Two of the commenters have no objection to the proposed special conditions as written.

Lightning Protection

One commenter disagrees that the 747-400 has novel or unusual design features associated with the displays, engine controls, and flap actuation systems.

The FAA disagrees with this comment and has determined that there are novel or unusual design features associated with the systems mentioned. In addition, the existing lightning protection rules are not considered adequate for advanced technology systems that perform essential and critical functions. Under the provisions of §§ 21.16 and 21.101(b)(2), special conditions are used to establish a level of safety equal to that established by reference in the original type certificate.

One commenter objects to the sentence on carbon brakes in the background section, and suggests that this system falls into the context of the fourth sentence of the notice.

The FAA has deleted that sentence from the paragraph in the background section of these final special conditions.

One commenter suggests that the lightning threat, as defined in the notice, applies to all new aircraft.

The FAA agrees with this comment and is applying similar special conditions to all new transport category airplanes in a uniform manner.

Two commenters object to the reference to the direct effects of lightning in the notice, and think that § 25.581 adequately covers the direct effects.

The FAA concurs and has removed reference to direct effects from these final special conditions.

Two commenters do not think that existing FAA rules or current practice suggests that recovery of function after a

lightning encounter is a necessary condition.

The reason that the FAA has determined that essential functions must be recoverable after the lightning encounter is to minimize the possibility of total loss of function in the event of multiple strikes. Rulemaking is underway to add these requirements to the regulations.

One commenter proposes that the lightning protection special condition for critical functions be rewritten to replace the words "are not affected" with "shall not prevent the continued safe flight and landing of the airplane."

The FAA disagrees with this comment. The proposed revision would allow degradation of systems performing critical functions as long as the airplane could continue flying and land safely. A second lightning strike could cause the function to be completely lost. The FAA considers this unacceptable.

One commenter does not consider the multiple stroke and multiple burst test waveforms to be realistic.

The FAA has depended on the SAE AE-4L Committee to define reasonable test waveforms and test techniques. The multiple stroke and multiple burst waveforms are examples that came from that committee and the FAA concurs with the committee's conclusion that these waveforms are realistic. Regardless of the precise definition of the waveforms, what is important is that each system must be demonstrated to be free of upset or failure due to multiple stroke and multiple burst for the entire spectrum of frequencies and voltages associated with lightning.

Protection from Unwanted Effects of RF Energy

Two commenters do not consider that a special condition for RF protection is necessary or reasonable at this time because the threat has not been precisely defined, and one commenter proposed that the lightning protection special condition for essential functions be cancelled to be consistent with the requirements for RF protection.

The FAA considers RF protection requirements are necessary at the present time because of aircraft accidents in the military attributed to interference from RF sources, and because airplanes are using more electronic systems to perform critical functions. Lightning is a well defined threat and has been studied for years. Therefore, it must be considered for both critical and essential systems. Since a clear definition of the RF threat does not exist, the FAA has made the decision that essential systems need not be addressed. However, because of the nature of critical failures, RF must be addressed for critical functions. Thus an interim threat has been defined for critical systems. The economic impact caused by applying RF protection requirements to essential systems is not justified at this time.

One commenter proposes a rewrite of the RF protection special condition to replace the words "are not adversely affected" with "shall not prevent the continued safe flight and landing of the airplane."

The FAA disagrees with this comment. The wording proposed by the commenter for the special condition would allow performance degradation of systems performing critical functions, or loss of an engine, due to RF exposure as long as the airplane could continue to fly and land safely. The FAA does not agree that this is a satisfactory level of safety for airplanes operating in an environment where they may be exposed to high energy RF emissions. The intent of the special condition is to ensure that systems performing critical functions are not adversely affected by RF energy. Because the word "adversely" is difficult to define quantitatively, it is removed from the final special condition. The determination of whether a critical system is adversely affected must be made on a case-by-case basis. An example of an acceptable condition would be a case where a computer input is perturbed by RF spurious signals, but the output signal remains within the design tolerances with the result that the system affected is able to continue in its selected mode of operation unaffected by the perturbation. It is not permissible that exposure to electromagnetic radiation could result in a large system upset. Pilot intervention to restore the system following an upset is not an acceptable means to restore that system to its normal state of operation.

One commenter does not consider the proposed methods of compliance with the RF protection requirements to be practical. Alternate methods of testing are suggested.

The FAA will consider the alternate methods of testing that are suggested by the commenter, in addition to the work that the SAE AE-4R committee is doing in this area.

Type Certification Basis

The type certification (TC) basis for the Boeing Model 747-400 series airplane is proposed to be Part 36 of the Federal Aviation Regulations (FAR); Special Federal Aviation Regulation (SFAR) No. 27-6; and Part 25 of the FAR, amended by Amendments 25-1 through 25-59, except that the applicable amendment numbers for the following section are those indicated as follows: Section 25.571 through Amendment 25-9; §§ 25.251; 25.305, 25.607, 25.657, and 25.683 through Amendment 25-22; § 25.1401 through Amendment 25-26; §§ 25.787 and 25.812 through Amendment 25-31; § 25.675 through Amendment 25-37; § 25.1438 through Amendment 25-40; §§ 25.107, 25.109, and 25.149 through Amendment 25-41; §§ 25.331, 25.351, 25.789, and 25.809 through Amendment 25-45; § 25.772 through Amendment 25-46; and § 25.785 through Amendment 25-50 and §§ 25.365 and 25.783 through Amendment 25-53. As proposed, the requirements of the following sections do not apply to this type design because the original certification basis, which did not include these sections, has been determined to be adequate: Sections 25.631, 25.832, 25.858, and 25.1529. The TC basis includes special conditions, exemptions, and equivalent safety findings which are part of the model 747-300 series certification basis. These exceptions, existing exemptions and the noise and environmental requirements are not pertinent to these special conditions. Special conditions concerning flight deck electronic displays, overhead crew rest accommodations, and the reliability of electronic engine controls and thrust management systems are also being considered.

After careful review of the comments noted above, the FAA has determined that air safety and the public interest require adoption of the special conditions as proposed. Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29(b), effective October 14, 1980, and become part of the type certification basis in accordance with § 21.101.

Under standard practice, the effective date of these final special conditions would be 30 days after publication in the **Federal Register**. As the intended type certification date for the Boeing Model 747-400 is December 1988, the FAA finds that good cause exists to make these special conditions effective upon issuance.

Conclusion

This action affects only certain design novel or unusual features on one model series of airplanes. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Boeing Model 747–400 series airplane.

1. The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f–10, 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

2. *Lightning Protection.* Each electronic system which performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these critical functions are not affected when the airplane is exposed to lightning.

Each essential function of new or modified electronic systems or installations must be protected to ensure that the essential function can be recovered after the airplane has been exposed to lightning.

For the purpose of these special conditions, the following definitions apply:

Critical Functions. Functions whose failure would contribute to or cause a failure condition which would prevent the continued safe flight and landing of the airplane.

Essential Functions. Functions whose failure would contribute to or cause a failure condition which would significantly impact the safety of the airplane or the ability of the flightcrew to cope with adverse operating conditions.

3. *Protection from Unwanted Effects of Radio Frequency (RF) Energy.* The airplane attitude information displayed by the Integrated Display System, the Electrical Flap Actuator System, and the Full Authority Digital Engine Control System must be designed and installed to ensure that the operation and operational capabilities of these critical functions are not affected when the airplane is exposed to high energy RF fields.

Issued in Seattle, Washington, on December 21, 1988.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–1300 Filed 1–19–89; 8:45 am]

BILLING CODE 4910–13–M

Federal Highway Administration

23 CFR Part 655

[FHWA Docket Nos. 87–21 and 88–16]

RIN 2125–AA37

National Standards for Traffic Control Devices; Manual on Uniform Traffic Control Devices

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final amendments to the Manual on Uniform Traffic Control Devices (MUTCD); comments requested on editorial amendments.

SUMMARY: This document contains notice of amendments to the MUTCD which are being adopted by the FHWA for inclusion therein. The MUTCD is incorporated by reference in 23 CFR Part 655, Subpart F and recognized as the national standard for traffic control devices on all public roads. The amendments affect various parts of the MUTCD and are intended to expedite traffic, improve safety and provide a more uniform application of highway signs, signals, and markings.

DATES: Effective January 23, 1989. Comments on the editorial amendment must be received on or before February 22, 1989.

ADDRESS: Submit signed, written comments on the editorial change to Docket No. 88–16, to the Federal Highway Administration, Room 4232, HCC–10, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m. ET, Monday through Friday. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Philip O. Russell, Office of Traffic Operations, (202) 366–2184, or Mr. Michael J. Laska, Office of Chief Counsel, (202) 366–1383, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday, except legal holidays. For 30 days following the publication of this rule, the referenced materials will be available for inspection and copying at the above address.

SUPPLEMENTARY INFORMATION: The MUTCD is available for inspection and copying as prescribed in 49 CFR Part 7, Appendix D. It may be purchased for $44.00 from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 950–036–00000–1. The purchase of a MUTCD includes a subscription service for adopted revisions.

This document contains the dispositions of proposals for changes in the MUTCD which were received or originated by the FHWA. Previous **Federal Register** actions regarding requests are listed in the following table:

BILLING CODE 4910–22–M

Item	Request No.	Title	Published in Federal Register FHWA Docket No.
		Final Rulings.	
1	I-8 (Chng.)	Responsibility for Maintaining Traffic Control Devices	Docket No. 87-21 (53 FR 2233, January 27, 1988).
2	II-119 (Chng.)	Standard Sign to Implement Manditory Seat Belt Laws	Docket No. 87-21 (53 FR 2233, January 27, 1988).
3	II-161 (Chng.)	LOGO Signing - Number of LOGO's on Sign Panels	Docket No. 87-21 (53 FR 2233, January 27, 1988).
4	III-35 (Chng.)	Warrants for Centerline Pavement Markings	Docket No. 87-21 (53 FR 2233, January 27, 1988).
5	III-48 (Chng.)	Lane Lines in Cloverleaf Interchanges	Docket No. 87-21 (53 FR 2233, January 27, 1988).
6	IV- 85 (Chng.)	Revision of Warrant 7, System Warrant	Docket No. 87-21 (53 FR 2233, January 27, 1988).
7	VI- 56 (Chng.)	Work Zone Lane Shift Tapers	Docket No. 87-21 (53 FR 2233, January 27, 1988).
8	VI- 57 (Chng.)	Temporary Pavement Markings in Construction and Maintenance Areas	Docket No. 87-21 (53 FR 2233, January 27, 1988).
9	VI- 59 (Chng.)	Section 6G-6, Control of Traffic	Docket No. 87-21 (53 FR 2233, January 27, 1988).
10	VI- 60 (Chng.)	Color and Design of Work Zone Vests	Docket No. 87-21 (53 FR 2233, January 27, 1988).
		Editorial Change.	
11	IV-92 (Chng.)	Provisions for Pedestrians	Not Previously Published in Federal Register.

BILLING CODE 4910-22-C

Advance copies of the text changes to the MUTCD for all of the adopted requests will be distributed to everyone currently appearing on the FHWA **Federal Register** mailing list for MUTCD matters. Those wishing to receive an advance copy of the text changes or to be added to this mailing list should write to the Federal Highway Administration, Office of Traffic Operations, HTO-21, 400 Seventh Street, SW., Washington, DC 20590.

Discussion of Requests

These amendments are being processed in accordance with the rulemaking procedure of the Administrative Procedure Act (5 U.S.C. 553) and the Department of Transportation's regulatory policies and procedures.

Each request is assigned an identification number which indicates, by Roman numeral, the primary organizational part of the MUTCD affected and, by Arabic numeral, the order in which the request was received.

The FHWA has reviewed the comments received in response to the notices and the other information relating to the MUTCD and these proposals. The FHWA is acting on the following requests for change to the MUTCD. Each action and its basis is summarized below:

(1) Request I-8(C)—Responsibility for Maintaining Traffic Control Devices

The National Transportation Safety Board (NTSB) investigated an accident where traffic control devices had been removed by an agent of a highway agency. The missing traffic control devices may have had a direct bearing on the cause of the accident and on the severity of the accident. The NTSB has requested that responsibility for maintaining traffic control devices be clarified in the MUTCD.

The FHWA proposed to amend the first sentence of Section 1A-3 to read. "The responsibility for the installation, operation and effective maintenance of traffic control devices rests with the governmental body or official having jurisdiction."

There were 28 commenters that had reviewed the FHWA's proposal. Fifteen State DOT's, one county, one city, and 5 others favored some improvement of the wording in Section 1A-3. Several of the commenters felt that it was not necessary to insert the words "installation, operation and effective maintenance", as this is repetitive of requirements found in Section 1A-2.

The FHWA has determined that the final text will read: "The responsibility for the design, placement, operation and maintenance of traffic control devices rests with the governmental body or official having jurisdiction."

The amendment imposes no additional costs on highway agencies; therefore, no implementation period is proposed.

(2) Request II-119(C)—Standard Sign to Implement Mandatory Seat Belt Laws

The National Association of Governor's Highway Safety Representatives has requested that a standard sign be developed and adopted for use by States having mandatory safety seat belt laws. Because of the variations that exist among the seat belt laws of the several States, it is not possible to adopt a standard sign. However, it does appear to be practical to develop and adopt a standard symbol that can be used on regulatory signs that notify vehicle occupants of mandatory seat belt laws.

The FHWA has reviewed and evaluated many existing and proposed symbol designs. The FHWA proposed to amend the MUTCD to require that the standard symbol be used, if a State determines that a seat belt symbol is to be shown on the regulatory signs that implement its safety seat belt laws. The FHWA also solicited comments on both the concept of using a standard symbol for this purpose and on the details of the proposed symbol. The FHWA used the comments received regarding the details of the proposed symbol to guide its final design.

Thirty-three commenters addressed the docket, including the National Highway Traffic Safety Administration (NHTSA). Thirty of the commenters favored adoption of a standard symbol, however four of these did not feel that the symbol should be mandatory.

The NHTSA submitted three shoulder/lap combination symbols and requested that they be tested, along with other designs. The symbol preferred by NHTSA is the seat belt warning symbol required by NHTSA Federal Motor Vehicle Safety Standard No. 101 (49 CFR 571.101). Manufacturers are required to use this symbol; consequently, it appears on motor vehicle instrument panels every time the ignition is switched on and should already be familiar to many motorists.

The symbol shown below was tested with three others for driver's reaction time to the symbols, meaning and action responses to the signs, and preference among the signs. Data were collected in Alabama and Washington, DC. The symbol was found to perform satisfactorily. The FHWA has selected this symbol. The symbol must be used, if a State determines that a seat belt symbol is to be shown on the regulatory signs used to implement its mandatory safety seat belt laws.

Seat Belt Symbol R16-1

This amendment may have some financial impact in those States that have already installed signs for mandatory safety seat belt laws. To offset these costs, a compliance date of December 31, 1995 is established.

(3) Request II-161(C)—LOGO Signing—Number of LOGO's on Sign Panels

The rules and regulations for Specific Service (LOGO) Signing were transferred from 23 CFR Part 655, Subpart C and incorporated into the MUTCD by Final Rule, FHWA Docket No. 83-26 (50 FR 10001, March 13, 1985). There are now over 30 States using LOGO signs on some or all of their rural freeway systems. Since the initial installations of LOGO signs in 1968, the number of LOGOs on a sign panel has been limited to six for GAS and four each for FOOD, LODGING, and CAMPING. More than 30 States now have experience with LOGOs and LOGO programs. With regard to the number of logos allowed per panel, the FHWA proposed to change the "shall" conditions to "should" conditions. In addition, this amendment would allow the background of the LOGO to be other than blue, at each State's discretion; the paragraph discussing LOGO signing on ramps would be clarified; and several minor editorial changes would be made.

Of the 33 commenters that reviewed this amendment, 18 States, the National Committee on Uniform Traffic Control Devices (NCUTCD), and 6 others opposed its adoption. Of the 18 States who opposed: 8 indicated that they prefer or would support a mandatory limit of six LOGO's for all services, and 10 States indicated that they want to keep the current mandatory limit of six LOGOs for GAS and four LOGOs each for FOOD, LODGING, AND CAMPING. The NCUTCD also supports the latter position.

Those commenters that opposed the amendment had specific, well founded reasons for not changing the standard.

The FHWA strongly believes that the number of LOGOs should be limited to six LOGOs for GAS and four LOGOs each for FOOD, LODGING, AND CAMPING. The FHWA also recognizes that the individual States are directly responsible for the operation and safety of their transportation facilities, and for the control of outdoor advertising. Each State is also responsible for its own economic development. The flexibility afforded by the revised standard will allow the individual States to manage the implementation of these diverse programs.

Because changes to existing or future LOGO signing with regard to the number of LOGOs that will be used on each panel will be at each State's discretion, no implementation period is necessary.

(4) Request III-35(C)—Warrants for Center Line Pavement Markings

The FHWA had been petitioned to initiate rulemaking to establish warrants for center line pavement markings.

The FHWA proposed to amend the fifth paragraph of Section 3B-1 to read as follows:

"Center lines shall be placed on all paved roadway surface that will retain pavement markings under the following conditions:

1. In rural districts on all two-way roadways 18 feet or more in width when the prevailing off-peak 85 percentile speed or posted speed limit, whichever, is higher, is 35 MPH or greater.

2. In residence or business districts on all through highways with an ADT of 50 or greater, and on other streets where the ADT is 500 or greater"

The FHWA received about 200 comments concerning this proposal. The majority of the comments were from cities and counties. The commenters expressed concern about one or more of the following:

a. Markings would be required on many, if not all, highways and streets;

b. Pavement edge damage would increase significantly on narrow pavements because drivers of heavy vehicles would drive closer to the edge of pavements to avoid straddling or driving on the center line;

c. The incidence of sideswipe accidents and other accidents with parked vehicles would increase because the drivers of the moving vehicles would drive closer to the parked vehicles to keep to the right of the center line;

d. For the most part, the Pavement Marking Demonstration program involved rural highway projects; therefore, the results and conclusions reached from the analysis of the program may not be transferable to urban streets and highways;

e. The installation and maintenance of center line pavement markings would be a major expense;

f. National criteria and engineering judgment, as currently provided for in the MUTCD, are the best standards to assure that markings are installed and maintained in a cost-effective manner.

Because of the legitimate concerns raised by a multitude of commenters, the FHWA finds that it is not appropriate to set national standards for center line markings at this time. In denying this request it must be understood that the FHWA firmly believes that some minimum standards for center lines should be established. Therefore, the FHWA will consider alternative actions which may be necessary to better determine standards that are responsive to the motorists' needs and to the concerns expressed in the docket comments.

(5) Request III-48(C)—Lane Lines in Cloverleaf Interchanges

A private citizen has pointed out a need to illustrate the desirable pavement marking pattern to be used to separate the mainline from a cloverleaf's combined acceleration/deceleration lane. The FHWA proposed the addition of a figure to Section 3B-11 that will show the typical installation of these pavement markings.

There are many tasks to be accomplished by the drivers in the weaving section between cloverleaf ramps. Defining the lane line throughout the entire length of the combined acceleration/deceleration lane, with standard skip stripe markings, is desirable so that drivers can better determine their lateral position.

It is possible to design a more complex set of coded pavement markings to inform the drivers of their longitudinal position within the weaving area. Because of the high degree of pavement marking wear that occurs in weaving areas, the FHWA finds that it is not practical to attempt to maintain such a system in the field.

Of the 28 commenters who reviewed this amendment, all but 4 concurred with the FHWA. Those opposed and several who concurred felt that there will be cases, unusually long combination lanes, when the marked line should be terminated with a dotted line. The FHWA acknowledges that these special situations will occur. The addition of a figure showing the typical pavement marking treatment will not preclude the use of other pavement markings for special situations.

This amendment adds a figure that clarifies an existing provision of the MUTCD. No implementation period is needed.

(6) Request IV-85(C)—Revision to Warrant 7, Systems Warrant

The Systems Warrant (existing Warrant 7) is intended to provide for signalization along collector and arterial routes in order to establish traffic platoons and to encourage the traffic platoons to flow in progression. Typically, the warrant is applicable in outlying, developing areas of nonuniform density; where the distance between major signalized intersections is so great that the platoons break up into low-density streams. Through the application of this warrant, the total number of signals can sometimes be reduced and the traffic progression significantly improved within the highway (street) system.

The NCUTCD reviewed the warrant and recommended the following revisions to remedy minor deficiencies and to make the warrant more representative of current traffic characteristics:

1. Increase the required volume of existing or immediately projected traffic entering the intersection to 1,000 vehicles (now 800) during the peak hour of a typical weekday or for each of any 5 hours of a Saturday and/or Sunday.

2. For the peak hour criteria (5 year projected traffic volumes based on an engineering study) one or more of the volume based warrants would be met.

3. The existing version of the warrant lists five characteristics of a major route and stipulates that a route, to be considered major in applying the warrant, must have one or more of these characteristics. It was recommended that characteristic (2) (Connects areas of principal traffic generation) be deleted as it is subject to varying definitions and it is already covered in the other characteristics. It was also recommended that characteristic (4) (Surface street freeway or expressway ramp terminals) be deleted as it is covered in the other characteristics.

Of the 32 responses that were received, 18 concurred with comments, 12 concurred with no comment, and 2 did not concur.

The State of Florida stated that a traffic signal installation should not be warranted on future (projected) traffic volumes and that traffic signals should not be installed until they can be justified on the basis of the existing conditions. The State of Oregon

disagreed with the proposed 1,000 vehicles during the peak hour on a typical day as the proper threshold. They believe that 800 vehicles per hour is the proper volume to warrant a traffic signal.

The FHWA finds that because the System Warrant primarily addresses developing areas, and traffic volumes typically take some time to develop after the completion of a project, basing the need on a 5-year projection is appropriate. Further, the intent of the MUTCD is clear throughout, that finding a signal that is "warranted" is not in itself justification for a signal, see IV-66(C). Funding and other priority considerations would also impact when a signal is to be installed.

The FHWA amends Section 4C-9 (Warrant 7, Systems Warrant) to provide for these changes. The amendment provides a more realistic warrant and does not impose additional costs on State and local highway agencies. No compliance date is needed to implement this change.

(7) Request VI-56(C)—Work Zone Land Shift Tapers

The NCUTCD requested that Part VI of the MUTCD be amended by adding length standards for work zone lane shift tapers. Most manuals and other publications do not differentiate between the length of taper required for different taper applications. Often the same taper length is recommended for a merge application and for a lane shift application. The NCUTCD also found that there is no standard use of terms for describing the various taper applications.

The FHWA proposed to adopt the recommendations of the NCUTCD. Section 6C-2 would be separated into two separate sections. The first would address the length of tapers and would include the following table. The second section would include the channelization issues that are currently presented in Section 6C-2.

TABLE VI-2.—TAPER LENGTH CRITERIA FOR WORK ZONES

Type of taper	Taper length
Upstream tapers:	
Merging taper	L minimum
Shifting taper	½ L minimum
Shoulder taper	⅓ L minimum
Two-way traffic taper	100 feet maximum
Downstream tapers (use is optional).	100 feet/lane

Formulas for L

Speed Limit	Formula
40 MPH or less	$L = WxS^2 \div 60$
45 MPH or greater	$L = WxS$

L=Taper length in feet.
W=Width of offset in feet.
S=Posted speed or off-peak 85 percentile speed in MPH.

In addition, Figures 6-5, 6-6, and 6-7 would be revised to reflect the above changes.

All but two of the 27 commenters agreed with the proposal. Several suggestions were received for improving or clarifying some provisions of the proposal. These suggestions will be accommodated in the final text to the extent possible.

This amendment will impose some additional costs on State and local highway agencies; therefore, a compliance date of January 23, 1989 is established for this amendment.

(8) Request VI-57(C)—Temporary Pavement Markings in Construction and Maintenance Areas

Request VI-3 as published in the MUTCD implemented requirements for minimum pavement marking treatments for traffic control in work zones. That revision provided for minimum stripe-to-gap ratios, allowed raised pavement markers, and other changes.

Change VI-57 would further amend Section 6D to clarify and provide further guidance. Section 6D-1 would be revised to provide further guidance for the use of permanent pavement markings in accordance with Sections 3B, 7C, 8B-4, and 9C on any permanent pavement surfaces and final lifts as well as on temporary pavements, detours, runarounds, or interim lifts open to traffic and when the project work is suspended for the winter of other extended periods of time.

Section 6D-3, Exception Number 1 would be revised to further describe temporary lanes and center lines. Also, the provisions for the use of signs rather than pavement markings in short-term operations would be extended to apply to low-volume roadways.

Section 6D-3 would be further revised to include a recommendation that each highway agency should have a policy that will, within the scope of this section, provide more detailed criteria and describe the conditions where temporary pavement markings will be used. This policy would include, but not be limited to, criteria, definitions of extended periods of time and a traffic volume threshold for low-volume roads.

The changes were proposed to clarify the amendments made by the final rule on March 9, 1987, at 52 FR 7126, provide more guidance for pavement markings on permanent pavement surfaces and interim or temporary pavements open to traffic for extended periods of time, and allow flexibility for the use of signs rather than pavement markings for low-volume roads.

The proposal also stated that it is the policy of the FHWA that full standards for pavement markings are desirable for all pavements and the minimums should be used only when full standards are not practical or possible.

The FHWA received 29 comments concerning this proposal. Twelve States, the NCUTCD, and six other concurred that improvements were desirable. The most prominent suggestion was to replace the term "temporary pavement markings" with "short-term pavement marking" and to define "short-term" as a time period not to exceed two weeks.

Most of the commenters who opposed the proposal and several of those who concurred that improvements were desirable objected to the pavement marking stripe and gap length standards that were adopted in the final rule on March 9, 1987. These commenters requested that research be conducted to determine the standards for pavement marking stripe and gap lengths.

Most of the concerns expressed by the NCUTCD have been accommodated in the amendment or will be considered for further research; however, at this time the FHWA does not agree that the detail of requested research is desirable and feasible.

The final rule of March 9, 1987, at 52 FR 7126, has a compliance date of December 31, 1988. This amendment adds some flexibility to the provisions adopted in that final rule. Therefore, the same compliance date of December 31, 1988 is established for this amendment.

(9) Request VI-59(C)—Section 6G-6, Control of Traffic

The NCUTCD requested that the sentence, "The use of traffic control signs should be discouraged." be deleted from the first paragraph of MUTCD Section 6G-6. The NCUTCD requested this change because the sentence is potentially misleading. While the objective on freeways is to keep traffic in a free-flowing condition as much as possible, this sentence, taken out of context, could be easily misinterpreted and is misleading to those responsible for traffic control on freeways. The statement has little value in this section.

All of the 24 commenters indicated that Section 6G-6 needed clarification.

Two commenters offered suggestions for additional text. The other commenters agreed that the deletion was sufficient.

This amendment, to delete the sentence, will impose no additional costs on highway agencies; therefore, it is proposed that the change would become effective upon the issuance of a final rule. No implementation period is required.

(10) Request VI-60(C)—Color and Design of Work Zone Vests

Section 6F-3 of MUTCD includes the following provision: "The use of orange clothing such as a vest, shirt, or jacket shall be required for flaggers. For nighttime conditions, similar outside garments shall be reflectorized." The MUTCD does not include provisions that would describe or provide details on the color, design, or extent of the retroreflection. The FHWA has interpreted Section 6F-3 to mean that only orange colored retroreflective material will satisfy the standard. In practice, vests have had a variety of designs, patterns, and colors for the retroreflective portion of the vests. Accordingly, it was proposed to amend Section 6F-3 by adding two sentences to the end of the second paragraph to read as follows: "The retroreflective material shall be either orange, white, or yellow. The design of the retroreflective portions including stripe width, extent, design and type of material shall be determined by the contracting agency, or purchaser of the vest."

The term "reflection" as used throughout Section 6F-3 would be changed to "retroreflection."

Of the 26 who commented on this proposal, only four opposed adding standards for the color of vest retroreflective materials to the MUTCD at this time. Many commenters suggested that silver be included. Several others requested that lime-yellow, bright yellow green, and fluorescent colors be allowed.

The MUTCD recognizes silver as a white material, and recognizes fluorescent red-orange and yellow-orange as acceptable substitutes for orange. The final text will include silver and the two fluorescent oranges. As proposed, the design of the retroreflective portions of the flagger vest will be determined by the contracting agency or purchaser of the vest.

This amendment will have little or no financial impact on State and local agencies. No implementation period is needed.

Discussion of Editorial Changes

In accordance with the procedures published in FHWA Docket 83-18 (48 FR 30145, June 30, 1983), the FHWA invites comments to FHWA Docket 88-16 on the following editorial change (Request IV-92(C)—Provisions for Pedestrians):

The FHWA is making the following editorial change to the MUTCD. The change and its basis are summarized below.

This editorial revision to the MUTCD imposes no additional costs on State and local highway agencies; therefore, no compliance dates are needed for its implementation.

(11) Request IV-92(C)—Provisions for Pedestrians

Minimum traffic signal requirements for pedestrians are presently included in provisions found in Section 4C-12, 4D-6, and 4D-7 of the MUTCD. Minimum traffic signal requirements for pedestrians are also discussed in IV-69(Intr.)—Traffic Signals at T-Intersections. These various requirements are applicable to all traffic signals, not just pedestrian signals. These minimum traffic signal requirements for pedestrians do not always receive proper attention by practitioners because of the fragmented manner in which the provisions are provided.

This revision provides coverage of the provisions in two sections (4B-28 and 4B-29) and eliminates certain redundancies. This change will facilitate the understanding of, and attention to, provisions for pedestrians at traffic signals.

A new Section 4B—28, Provisions for Pedestrians is added that reflects IV-69(Intr.)—Traffic Signals at T-Intersections; Section 4C-12 and the first paragraph of Section 4D-7 (as revised by IV-59). The new Section 4B-28 reads:

4B-28 Provisions for Pedestrians

The design and operation of traffic control signals must take into consideration the needs of pedestrians as well as vehicular traffic. Where minimum numbers of pedestrian movements regularly occur:

1. Signal indications must be visible to pedestrians.

This can be accomplished for a given pedestrian movement by:

a. Provision of pedestrian signal indications, or

b. A R.Y.G. signal face for an adjacent vehicular movement visible to pedestrians, or

c. Vehicular indications for conflicting movements that can be conveniently viewed by pedestrians, and from which pedestrians can readily and accurately deduce when they have the right-of-way.

2. There must be an opportunity to cross without excessive delay. Pedestrian actuation shall be installed at traffic control signals where the signal operation does not otherwise provide this opportunity.

3. Pedestrians should be provided with sufficient time to cross the roadway. This may be accomplished by adjusting the signal operation and timing to automatically provide this assurance or via pedestrian actuation.

Where it is desired to prohibit certain pedestrian movements at a traffic control signal, a sign NO PEDESTRIAN CROSSING (2B-36) may be used.

Other changes are:

1. Delete Section 4C-12.

2. Add a new Section 4B-29, Pedestrian Detectors, and move the text of present Section 4D-6 to the new Section 4B-29.

3. Replace the present text of 4D-6, Detectors with "See Section 4B-29, Pedestrian Detectors".

4. Add to Item 3 of the "SHALL" warrants for pedestrian signals in Section 4D-3 "(See Section 4B-28)".

5. Delete the first paragraph of Section 4D-7 (as revised by IV-59).

Appropriate changes will be made to Part VII of the MUTCD to reflect these revisions.

In consideration of the foregoing and under the authority of 23 U.S.C. 109(d), 315, and 402(a), and the delegation of authority in 49 CFR 1.48(b), the Federal Highway Administration hereby adopts the Manual on Uniform Traffic Control Devices as amended herein.

Regulatory Impact

The Federal Highway Administration (FHWA) 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. As stated herein, the economic impact of these amendments is so minimal as not to require preparation of a full regulatory evaluation. For the same reasons and under the criteria of the Regulatory Flexibility Act, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Since the editorial amendment contained in this document is technical in nature, the FHWA finds good cause to make the editorial amendment final without the opportunity for comment under the Administrative Procedure Act. However, interested parties may comment on the editorial amendment by

December 19, 1988, and such comments will be placed in FHWA Docket 88-16 and considered. For the same reasons, opportunity for prior comment is not required under the regulatory policies and procedures of the Department of Transportation.

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Incorporation by Reference

The MUTCD has been incorporated by reference in 23 CFR Part 655 under the provisions of 5 U.S.C. 552(a) and 1 CFR Part 51 and approved by the Director of the Federal Register as of April 1, 1988. The MUTCD was last revised on March 16, 1988 (53 FR 8620). The MUTCD citation included in 23 CFR 655.601(a) is amended to reflect the amendments contained in this document.

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 655

Design standards, Grant programs—transportation, Highways and roads, Signs, Traffic regulations, Incorporation by reference.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: January 10, 1989.

Robert E. Farris,

Federal Highway Administrator, Federal Highway Administration.

The FHWA hereby amends Chapter I of Title 23, Part 655, Code of Federal Regulations, as set forth below.

PART 655—TRAFFIC OPERATIONS

1. The authority citation for 23 CFR Part 655, Subpart F continues to read as follows:

Authority: 23 U.S.C. Sections 109 (d), 114(a), 217, 315, 402(a), 23 CFR 1204.4; and 49 CFR 1.48(b).

2. In § 655.601, the first sentence of paragraph (a) is revised to read as follows:

§ 655.601 Purpose.

* * * * *

(a) Manual on Uniform Traffic Control Devices for Streets and Highways, FHWA, 1978, as of January 1989. * * *

* * * * *

[FR Doc. 89-1056 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8240]

Limitation of Foreign Tax Credit for Foreign Oil and Gas Taxes

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary Income Tax Regulations relating to the amendments made to the Internal Revenue Code by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). The amendments require that foreign oil and gas extraction income and losses from all foreign countries be aggregated before computing the limit on creditability of foreign taxes. The amendments also repeal the separate application of the foreign tax credit limitation to taxes on foreign oil related income. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register.**

DATES: The amendments are effective for taxable years beginning after December 31, 1982, except as follows. The special rule provided at § 1.907(c)-2T(d)(7) with respect to allocation of earnings and profits or deficits that arise in taxable years beginning after December 31, 1986, is effective after that date. The special rules provided for determination of FORI and FOGEI tax with respect to dividends received and amounts includible in gross income under section 951(a) in taxable years beginning after December 31, 1986, at § 1.907(c)-3(T) (b)(1) and (c), respectively, are effective after December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Richard L. Chewning of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:CORP:T:R (INTL-152-86)) (202-566-6384, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary Income Tax Regulations (26 CFR Part 1) under section 907 of the Internal Revenue Code. These amendments conform the regulations to changes made to section 907 by section 211 (96 Stat. 448) of TEFRA.

Need for Temporary Regulations

The proper application of changes made to section 907 by TEFRA is dependent upon the Internal Revenue Service's detailed specifications of the manner in which those changes will be administered. These regulations are necessary to provide taxpayers with immediate guidance with regard to their taxable years that remain open under the statute of limitations. Therefore, good cause is found to dispense with the notice and public procedure requirements of 5 U.S.C. 553(b) and the delayed effective date requirement of 5 U.S.C. 553(d).

Explanation of Provisions

The amount allowed as a foreign tax credit under section 901 for foreign taxes paid with respect to foreign oil and gas extraction income (FOGEI) is limited by section 907(a). The amount of the foreign tax credit cannot exceed the amount of FOGEI multiplied by, in the case of a corporation, the highest corporate tax rate or, in the case of an individual, the individual's average tax rate.

Changes Made by TEFRA

Since enactment of section 907 by the Tax Reduction Act of 1975, in computing the FOGEI limitation of section 907(a), pre-TEFRA section 907(c)(4) provided that net operating losses relating to extraction of minerals from oil or gas wells arising in one foreign country did not offset FOGEI arising in other foreign countries. This per-country loss rule was repealed by TEFRA; thus, for taxable years beginning after December 31, 1982, FOGEI and foreign oil extraction losses from all foreign countries are aggregated before computing the limitation of section 907(a). Section 907(c)(4), amended by TEFRA, provides for the recapture of overall foreign oil extraction losses for years preceding the limitation year, but beginning after December 31, 1982, against limitation year FOGEI before application of

section 907(a). Foreign taxes in excess of the section 907(a) limitation, under section 907(f), as amended by TEFRA, may be carried back for two years and forward for five years. Under old section 907(f), the carryback-carryover tax amount could not exceed 2% of FOGEI for the limitation year. This 2% limitation was eliminated by TEFRA.

Prior to TEFRA, after section 907(a) limited creditable FOGEI taxes to a certain percentage of FOGEI, the creditability of those taxes, together with taxes on foreign oil related income (FORI), were subject to the further limitation of pre-TEFRA section 907(b). That section provided that the section 904 limitation on foreign tax credits would be applied separately with respect to FORI, which prior to TEFRA included FOGEI. This separate application of the section 904 limitation for FORI was repealed by section 211 of TEFRA for taxable years beginning after December 31, 1982.

New section 907(b) was added by TEFRA in order to neutralize the consequence of the shifting by some foreign countries of the tax burden from taxes on FOGEI, creditability of which would be limited by section 907(a), to taxes on FORI. New section 907(b) limits creditable FORI taxes, which do not include FOGEI taxes, to the amount that would have been imposed by the foreign country on income that is neither FORI nor FOGEI if, under foreign law, FORI taxes in excess of this limitation were treated as a deductible expense. For United States tax purposes, FORI taxes in excess of the section 907(b) limitation are deductible as business expenses.

New section 907(e), as added by TEFRA, provides transitional rules applicable to unused taxes carried from a year beginning before January 1, 1983, to a year beginning after December 31, 1982 (the effective date of the TEFRA changes), and to unused taxes carried back from a year beginning after December 31, 1982, to a year beginning before January 1, 1983.

Section 212 of TEFRA added certain foreign base company oil related income as an additional item to the category of foreign base company income under the subpart F provisions of sections 951 through 964. See section 954 (a)(5) and (g)(1). These regulations define this FORI for purposes of section 954 (a)(5) and (g)(1).

Section 907 Regulations

The regulations under section 907 consist of two sets: the set of regulations proposed by this notice dealing with taxable years beginning after December 31, 1982, and the set published as T.D. 7961 (49 FR 26208) dealing with taxable years beginning before January 1, 1983 (1984 Treasury Decision). This latter set of regulations was supplemented by T.D. 8160 (52 FR 33930) published in the **Federal Register** on September 9, 1987 (1987 Treasury Decision) which contained definitions of interest on working capital, exchange gain or loss, directly related services and lease or license of related property. Many of the provisions of the regulations contained in these temporary regulations are substantially similar to provisions of the regulations contained in the 1984 and 1987 Treasury Decisions because they deal with provisions in section 907 that were not affected by TEFRA. Thus, §§ 1.907(c)-1T, 1.907(c)-2T, and 1.907(c)-3T are very similar to §§ 1.907(c)-1A, 1.907(c)-2A and 1.907(c)-3A, respectively, and § 1.907(d)-1T is virtually identical to § 1.907(d)-1A. The treatment by the temporary regulations of two matters, the carryover of foreign oil extraction losses and the new limitation on FORI taxes in section 907(b), are explained below in more detail.

Carryover of Foreign Oil Extraction Losses

New section 907(c)(4) requires that a foreign oil extraction loss incurred in one year be carried over and offset against FOGEI of a later year. This rule operates only for purposes of determining FOGEI under section 907(a) and thus operates independently of the rule of section 904(f) dealing with overall foreign losses. Taxes imposed on FOGEI retain their character as FOGEI taxes even though FOGEI is reduced by a loss carryover. Therefore, they may be carried back and forward to other taxable years under section 907(f).

Limitation on FORI Taxes

Section 907(b), as amended, places a limitation on the amount of creditable FORI tax if the FORI tax is excessive. In § 1.907(b)-1T(a), the temporary regulations provide that non-dual capacity taxpayers and dual capacity taxpayers that use the facts and circumstances method of § 1.901-2A(c)(2) to determine their creditable taxes and specific economic benefits must apply the safe harbor formula of § 1.901-2A(e)(1) to the FORI tax payments made to the foreign country to determine the amount of FORI tax that is creditable under section 907(b). Section 907(b) does not apply, however, if the safe harbor formula has already been applied to the tax paid by a dual capacity taxpayer under section 901. These temporary regulations provide examples showing the interaction of sections 901 and 907(b).

Treatment of Income from Sale of Stock

In light of the Supreme Court decision in *Arkansas Best* v. *Commissioner*, 108 S. Ct. 971 (1988), the temporary regulations provide that for both pre-TEFRA and post-TEFRA years, stock of any corporation will not be treated as an asset used by a person in section 907(c) activities. Therefore, income (or loss) from the sale of stock will never be FOGEI or FORI.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Therefore, these rules do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6) and a Regulatory Flexibility Analysis is not required.

Drafting Information

The principal author of these regulations is Richard L. Chewning of the Office of Associated Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service. Other personnel from offices of the Internal Revenue Service and Treasury Department participated in developing these regulations.

List of Subjects in 26 CFR 1.861 through 1.997-1

Income taxes, Corporate deductions, Aliens, Exports, DISC, Foreign investment in U.S., Foreign tax credit, FSC, Sources of income, United States investments abroad.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

PART 1—[AMENDED]

Paragraph 1. The authority for Part 1 is amended by adding a new citation to read as follows:

Authority: 26 U.S.C. 7805. * * * Section 1.907(b)-1T is also issued under 26 U.S.C. 907 (b). * * *

§ 1.907-0 [Redesignated as § 1.907(a)-0A]

Par. 2. Section 1.907-0 is redesignated as § 1.907(a)-0A and the heading is revised to read "§ 1.907(a)-0A Introduction (for taxable years beginning before January 1, 1983).".

Par. 3. Sections 1.907(a)-1, 1.907(b)-1, 1.907(b)-2, 1.907(c)-1, 1.907(c)-2, 1.907(c)-3, 1.907(d)-1, 1.907(e)-1 and

1.907(f)–1 are redesignated by adding an "A" at the end of each regulation section number and by deleting the period at the end of each section heading and adding "(for taxable years beginning before January 1, 1983).".

Par. 4. The following center heading is inserted immediately preceding the caption to § 1.907(a)–0A:

Regulations Applicable to Taxable Years Beginning Before January 1, 1983

Par. 5. Paragraphs (a) through (j) of § 1.907(a)–0A are redesignated as paragraphs (b) through (k), respectively, and a new paragraph (a) is added.

§ 1.907(a)–0A Introduction (for taxable years beginning before January 1, 1983).

(a) *Effective dates.* [Reserved] For guidance, see § 1.907(a)–0AT.

* * * * *

Par. 6. A new § 1.907(a)–0AT is added immediately after § 1.907(a)–0A to read as follows:

§ 1.907(a)–0AT Introduction (for taxable years beginning before January 1, 1983) (Temporary regulations).

(a) *Effective dates.* The provisions of §§ 1.907(a)–0A through 1.907(f)–1A apply to taxable years beginning before January 1, 1983, and all references in these regulations to section 907 are to section 907 as it existed prior to the amendments made by section 211 of the Tax Equity and Fiscal Responsibility Act of 1982 (96 Stat. 448). For provisions that apply to taxable years beginning after December 31, 1982, see §§ 1.907(a)–0T through 1.907(f)–1T.

(b) through (k) [Reserved]

Par. 7. Section 1.907(c)–1A is amended as follows:

1. By removing the last sentence of paragraph (d)(1), and
2. By revising paragraph (d)(3).

§ 1.907(c)–1A Definitions relating to FORI and FOGEI (for taxable years beginning before January 1, 1983).

* * * * *

(d) *Assets used in a trade or business.*

* * * * *

(3) *Stock.* [Reserved] For guidance, see § 1.907(c)–1AT (d)(3).

* * * * *

Par. 8. A new § 1907(c)–1AT is added immediately after § 1.907(c)–1A to read as follows:

§ 1.907(c)–1AT Definitions relating to FORI and FOGEI (for taxable years beginning before January 1, 1983) (Temporary regulations).

(a) through (c) [Reserved]

(d) *Assets used in a trade or business.*

(1) and (2) [Reserved]

(3) *Stock.* Stock of any corporation (whether foreign or domestic) will not be treated as an asset used by a person in section 907(c) activities. This provision applies to taxable years beginning after December 31, 1974, and beginning before January 1, 1983.

(d)(4) through (h) [Reserved]

Par. 9. There is added immediately preceding the new center heading above § 1.907(a)–0A the following new § 1.907–0, a new center heading and new §§ 1.907 (a)–0T through 1.907(f)–1T:

§ 1.907–0 Outline of regulation provisions for section 907.

This section lists the paragraphs contained in §§ 1.907(a)–OT through 1.907(f)–1A.

Regulations Applicable to Taxable Years Beginning After December 31, 1982

§ 1.907(a)–0T Introduction (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) Effective dates.
(b) Key terms.
(c) FOGEI tax limitation.
(d) Reduction of creditable FORI taxes.
(e) FOGEI and FORI.
(f) Posted prices.
(g) Transitional rules.
(h) Section 907(f) carrybacks and carryovers.
(i) Statutes covered.

§ 1.907(a)–1T Reduction in taxes paid on FOGEI (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) Amount of reduction.
(b) Foreign taxes paid or accrued.
(1) Foreign taxes.
(2) Foreign taxes paid or accrued.
(c) Limitation level.
(1) In general.
(2) Limitation percentage for corporations.
(3) Limitation percentage for individuals.
(4) Losses.
(5) Priority.
(d) Illustrations.
(e) Effect on other provisions.
(1) Deduction denied.
(2) Reduction inapplicable.
(3) Section 78 dividend.
(f) Section 904 limitation.

§ 1.907(b)–1T Reduction of creditable FORI taxes (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) In general.
(b) Amount of income, war profits, or excess profits tax.
(1) Dual capacity taxpayer.
(2) Non-dual capacity taxpayer.
(c) Amount that is not income, war profits, or excess profits tax.
(d) Examples.

§ 1.907(c)–1T Definitions relating to FOGEI and FORI (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) Scope.
(b) FOGEI.
(1) General rule.
(2) Amount.
(3) Other circumstances.
(4) Income directly related to extraction.
(5) Income not included.
(6) Fair market value.
(7) Economic interest.
(c) Carryover of foreign oil extraction losses.
(1) In general.
(2) Reduction.
(3) Foreign oil extraction loss defined.
(4) Affiliated groups.
(5) FOGEI taxes.
(6) Examples.
(d) FORI.
(1) In general.
(2) Transportation.
(3) Distribution or sale.
(4) Processing.
(5) Primary product from oil.
(6) Primary product from gas.
(7) Directly related income.
(e) Assets used in a trade or business.
(1) In general.
(2) Section 907(c) activities.
(3) Stock.
(4) Losses on sale of stock.
(5) Character of gain or loss.
(6) Allocation of amount realized.
(7) Interest.
(f) Terms and items common to FORI and FOGEI.
(1) Minerals.
(2) Taxable income.
(3) Interest on working capital.
(4) Exchange gain or loss.
(5) Allocation.
(6) Facts and circumstances.
(g) Directly related income.
(1) In general.
(2) Directly related services.
(3) Leases and licenses.
(4) Related person.
(5) Gross income.
(h) Coordination with other provisions.
(1) Certain adjustments.
(2) Section 901(f).

§ 1.907(c)–2T Section 907(c)(3) items (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) Scope.
(b) Dividend.
(1) Section 1248.
(2) Section 78 dividend.
(c) Taxes deemed paid.
(1) Voting stock test.
(2) Dividends and interest.
(3) Amounts included under section 951(a).
(d) Amount attributable to certain items.
(1) Certain dividends.
(2) Interest received from certain foreign corporations.
(3) Dividends from domestic corporation.
(4) Amounts with respect to which taxes are deemed paid under section 960(a).
(5) Section 78 dividend.
(6) Special rule.
(7) Deficits.
(8) Illustrations.
(e) Dividends, interest, and other amounts from sources within a possession.
(f) Income from partnerships, trusts, etc.

§ 1.907(c)–3T FOGEI and FORI taxes (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) Tax characterization, allocation and apportionment.
(1) Scope.

(2) Three classes of income.
(3) More than one class in a foreign tax base.
(4) Allocation of tax within a base.
(5) Modified gross income.
(6) Allocation of tax credits.
(7) Withholding taxes.
(b) Dividends.
(1) In general.
(2) Section 78 dividend.
(c) Includible amounts under section 951(a).
(d) Partnerships.
(e) Illustrations.

§ 1.907(d)–1T Disregard of posted prices for purposes of chapter 1 of the Code (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) In general.
(1) Scope.
(2) Initial computation requirement.
(3) Burden of proof.
(4) Related parties.
(b) Adjustments.
(c) Definitions.
(1) Foreign government.
(2) Minerals.
(3) Posted price.
(4) Other pricing arrangement.
(5) Fair market value.

§ 1.907(e)–1T Transitional rules (for amounts carried between a taxable year beginning before January 1, 1983, and a taxable year beginning after December 31, 1982) (Temporary regulations).

(a) General rule.
(b) Rules for carryover of FORI and pre-TEFRA non-FORI taxes.
(c) Examples.

§ 1.907(f)–1T Carryback and carryover of credits disallowed by section 907(a) (for amounts carried between taxable years that each begin after December 31, 1982) (Temporary regulations).

(a) In general.
(b) Unused FOGEI.
(1) In general.
(2) Year of origin.
(c) Tax deemed paid or accrued.
(d) Excess extraction limitation.
(e) Excess general section 904 limitation.
(f) Section 907(f) priority.
(g) Cross-reference.
(h) Example.

Regulations Applicable to Taxable Years Beginning Before January 1, 1983

§ 1.907(a)–0A Introduction (for taxable years beginning before January 1, 1983).

(a) Key terms.
(b) FOGEI tax limitation.
(c) Section 904 limitation.
(d) FOGEI and FORI.
(e) Posted prices.
(f) Transitional rules.
(g) Section 907(f) carrybacks and carryovers.
(h) Cross-references.
(i) Statutes covered.
(j) Pre-TEFRA Code references.

§ 1.907(a)–0AT Introduction (for taxable years beginning before January 1, 1983) (Temporary regulations).

(a) Effective dates.

§ 1.907(a)–1A Reduction in taxes paid on FOGEI (for taxable years beginning before January 1, 1983).

(a) Amount of reduction.
(b) Foreign taxes paid or accrued.
(1) Foreign taxes.
(2) Foreign taxes paid or accrued.
(c) Limitation level.
(1) In general.
(2) Limitation percentage for corporations.
(4) Losses.
(5) Priority.
(d) Illustrations.
(e) Effect on other provisions.
(1) Deduction denied.
(2) Reduction inapplicable.
(3) Section 78 dividend.

§ 1.907(b)–1A Application of section 904 limitation with respect to FORI (for taxable years beginning before January 1, 1983).

(a) In general.
(b) Overall limitation.
(c) FORI taxes.

§ 1.907(b)–2A FORI tax carryovers and carrybacks (for taxable years beginning before January 1, 1983).

(a) Modifications in use of § 1.904–2.
(b) Unused foreign tax.
(1) General rule.
(2) Per-country limitation year.
(c) Tax deemed paid or accrued with respect to FORI.
(d) Excess FORI limitation.
(1) When overall limitation applies.
(2) Per-country limitation year.
(e) Cross-reference.
(f) Separation of limitation.
(1) General rule.
(2) Special rules.
(g) Illustrations.

§ 1.907(c)–1A Definitions relating to FORI and FOGEI (for taxable years beginning before January 1, 1983).

(a) Scope.
(b) Extraction income.
(1) General rule.
(2) Amount.
(3) Other circumstances.
(4) Income directly related to extraction.
(5) Income not included.
(6) Fair market value.
(7) Economic interest.
(c) Other FORI.
(1) In general.
(2) Transportation.
(3) Distribution or sale.
(4) Processing.
(5) Primary product from oil.
(6) Primary product from gas.
(7) Directly related income.
(d) Assets used in a trade or business.
(1) In general.
(2) Section 907(c) activities.
(3) Stock.
(4) Losses on sale of stock.
(5) Character of gain or loss.
(6) Allocation of amount realized.
(7) Interest.
(e) Terms and items common to other FORI and FOGEI.
(1) Minerals.
(2) Taxable income.
(3) Interest on working capital.
(4) Exchange gain or loss.
(5) Allocation.
(6) Facts and circumstances.
(f) Directly related income.
(1) In general.
(2) Directly related services.
(3) Leases and licenses.
(4) Related person.
(5) Gross income.
(g) Certain net operating losses.
(1) In general.
(2) Passive income.
(3) Source rule.
(h) Coordination with other provisions.
(1) Certain adjustments.
(2) Section 901(f).

§ 1.907(c)–1AT Definitions relating to FORI and FOGEI (for taxable years beginning before January 1, 1983) (Temporary regulations).

§ 1.907(c)–2A Section 907(c)(3) items (for taxable years beginning before January 1, 1983).

(a) Scope.
(b) Dividend.
(1) Section 1248 dividend.
(2) Section 78 dividend.
(c) Taxes deemed paid.
(1) Voting stock test.
(2) Dividends and interest.
(3) Amounts included under section 951(a).
(d) Amount attributable to certain items.
(1) Certain dividends.
(2) Interest received from certain foreign corporations.
(3) Dividends from domestic corporations.
(4) Amounts with respect to which taxes are deemed paid under section 960(a).
(5) Section 78 dividend.
(6) Special rule.
(7) Deficits.
(8) Illustrations.
(e) Dividends, interest, and other amounts from sources within a possession.
(f) Income from partnerships, trusts, etc.

§ 1.907(c)–3A FOGEI and FORI taxes (for taxable years beginning before January 1, 1983).

(a) Tax allocation.
(1) Scope.
(2) Three classes of income.
(3) More than one class in a foreign tax base.
(4) Allocation of tax within a base.
(5) Modified gross income.
(6) Allocation of tax credits.
(7) Coordination with regulations under section 901.
(8) Withholding taxes.
(b) Dividends.
(1) In general.
(2) Section 78 dividend.
(c) Includible amounts under section 951(a).
(d) Partnerships.
(e) Illustrations.

§ 1.907(d)–1A Disregard of posted prices for purposes of chapter 1 of the Code (for taxable years beginning before January 1, 1983).

(a) In general.
(1) Scope.
(2) Initial computation requirement.
(3) Burden of proof.

(4) Related parties.
(b) Adjustments.
(c) Definitions.
(1) Foreign government.
(2) Minerals.
(3) Posted price.
(4) Other pricing arrangement.
(5) Fair market value.

§ 1.907(e)–1A Transitional rules for section 904 carrybacks and carryovers (for taxable years beginning before January 1, 1983).

(a) Carryovers from taxable years ending before January 1, 1975.
(1) In general.
(2) Sections 901(e) and 907(a).
(3) General rule for division of unused foreign tax.
(4) Computation.
(5) Illustrations.
(b) Transitional rules for carryovers from per-country limitation years ending before January 1, 1976.
(1) In general.
(2) Pro rata reduction of carryovers.
(3) Illustrations.
(c) Transitional rules for carryback from taxable years ending after December 31, 1974.
(1) In general.
(2) Applicable principles.

§ 1.907(f)–1A Carryback and carryover of credits disallowed by section 907(a) (for taxable years beginning before January 1, 1983).

(a) In general.
(b) Unused foreign extraction tax.
(1) In general.
(2) Limit.
(3) Year of origin.
(c) Tax deemed paid or accrued.
(d) Excess extraction limitation.
(e) Excess oil related limitation.
(f) Limitation percentage in certain excess limitation years.
(g) Section 907(f) priority.
(h) Per-country limitation.
(i) Cross-reference.
(j) Illustration.

Regulations Applicable to Taxable Years Beginning After December 31, 1982

§ 1.907(a)–0T Introduction (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) *Effective dates.* The provisions of §§ 1.907(a)–0T through § 1.907(f)–1T apply to taxable years beginning after December 31, 1982. For provisions that apply to taxable years beginning before January 1, 1983, see §§ 1.907(a)–0A through 1.907(f)–1A, 1.907(a)–0AT and 1.907(c)–1AT.

(b) *Key terms.* For purposes of the regulations under section 907—

(1) "FOGEI" means foreign oil and gas extraction income.

(2) "FORI" means foreign oil related income.

(3) "FOGEI taxes" mean foreign oil and gas extraction taxes as defined in section 907(c)(5).

(4) "FORI taxes" mean foreign taxes on foreign oil related income. See § 1.907(c)–3T.

(c) *FOGEI tax limitation.* Section 907(a) limits the foreign tax credit for taxes paid or accrued on FOGEI. See § 1.907(a)–1T.

(d) *Reduction of creditable FORI taxes.* Section 907(b) recharacterizes FORI taxes as non-creditable deductible expenses to the extent that the foreign law imposing the FORI taxes is structured, or in fact operates, so that the amount of tax imposed with respect to FORI will be materially greater, over a reasonable period of time, than the amount generally imposed on income that is neither FOGEI nor FORI. See § 1.907(b)–1T.

(e) *FOGEI and FORI.* FOGEI includes the taxable income from the extraction of minerals from oil or gas wells by a taxpayer (or another person) and from the sale or exchange of assets used in the extraction business. FORI is a broader category of income than FOGEI. FORI includes taxable income from the activities of processing oil and gas into their primary products, transporting or distributing oil and gas and their primary products, and from the disposition of assets used in these activities. For this purpose, a disposition includes only a sale or exchange. FOGEI and FORI may also include taxable income from the performance of related services or from the lease of related property and certain dividends, interest, or amounts described in section 951(a). See §§ 1.907(c)–1T through 1.907(c)–3T.

(f) *Posted prices.* Certain sales prices are disregarded when computing FOGEI for purposes of chapter 1 of the Code. See § 1.907(d)–1T.

(g) *Transitional rules.* Section 907(e) provides rules for the carryover of unused FOGEI taxes from taxable years beginning before January 1, 1983, and carryback of FOGEI taxes arising in taxable years beginning after December 31, 1982. See § 1.907(e)–1T.

(h) *Section 907(f) carrybacks and carryovers.* FOGEI taxes disallowed under section 907(a) may be carried back or forward to other taxable years. These FOGEI taxes may be absorbed in another taxable year to the extent of the lesser of the separate excess extraction limitation or the excess limitation in the general limitation category (section 904(d)(1)(I)) for the carryback or carryover year. See § 1.907(f)–1T.

(i) *Statutes covered.* The regulations under section 907 are issued as a result of the enactment of section 601 by the Tax Reduction Act of 1975, of section 1035 by the Tax Reform Act of 1976, of section 301(b)(14) of the Revenue Act of 1978, and of section 211 of the Tax Equity and Fiscal Responsibility Act of 1982.

§ 1.907(a)–1T Reduction in taxes paid on FOGEI (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) *Amount of reduction.* FOGEI taxes are reduced by the amount by which they exceed a limitation level (as defined in paragraph (c) of this section).

(b) *Foreign taxes paid or accrued.* For purposes of the regulations under section 907—

(1) *Foreign taxes.* The term "foreign taxes" means income, war profits, or excess profits taxes of foreign countries or possessions of the United States otherwise creditable under section 901 (including those creditable by reason of section 903).

(2) *Foreign taxes paid or accrued.* The terms "foreign taxes paid or accrued," "FOGEI taxes paid or accrued," and "FORI taxes paid or accrued" include foreign taxes deemed paid under sections 902 and 960. Unless otherwise expressly provided, these terms do not include foreign taxes deemed paid by reason of sections 904(c) and 907(f).

(c) *Limitation level*—(1) *In general.* The limitation level is FOGEI for the taxable year multiplied by the limitation percentage for that year.

(2) *Limitation percentage for corporations.* A corporation's limitation percentage is the highest rate of tax specified in section 11(b) for the particular year.

(3) *Limitation percentage for individuals.* Section 907(a)(2)(B) provides that the limitation percentage for individual taxpayers is the effective rate of tax for those taxpayers. The effective rate of tax is computed by dividing the entire tax, before the credit under section 901(a) is taken, by the taxpayer's entire taxable income.

(4) *Losses.* (i) For purposes of determining whether income is FOGEI, a taxpayer's FOGEI will be recharacterized as foreign source non-FOGEI to the extent that FOGEI losses for preceding taxable years beginning after December 31, 1982, exceed the amount of FOGEI already recharacterized. See § 1.907(c)-1T(c). However, taxes that were paid or accrued on the recharacterized FOGEI will remain FOGEI taxes.

(ii) Taxes paid or accrued by a person to a foreign country may be FOGEI taxes even though that person has under U.S. law a net operating loss from sources within that country.

(iii) For purposes of determining whether income is FOGEI, a taxpayer's income will be treated as income from

sources outside the United States even though all or a portion of that income may be resourced as income from sources with the United States under section 904(f)(1) and (4).

(5) *Priority.* (i) Section 907(a) applies before section 908, relating to reduction of credit for participation in or cooperation with an international boycott.

(ii) Section 901(f) (relating to certain payments with respect to oil and gas not considered as taxes) applies before section 907.

(d) *Illustrations.* Paragraphs (a) through (c) of this section are illustrated by the following examples.

Example (1). M, a U.S. corporation, uses the accrual method of accounting and the calendar year as its taxable year. For 1984, M has $20,000 of FOGEI, derived from operations in foreign countries X and Y, and has accrued $11,500 of foreign taxes with respect to FOGEI. The highest tax rate specified in section 11(b) for M's 1984 taxable year is 46 percent. Pursuant to section 907(a), M's FOGEI taxes limitation level for 1984 is $9,200 (46% × $20,000). The foreign taxes in excess of this limitation level ($2,300) may be carried back or forward. See section 907(f) and § 1.907(f)-1T and section 907(e) and § 1.907(e)-1T.

Example (2). The facts are the same in *Example* (1) except that M is a partnership owned equally by U.S. citizens A and B who each file as unmarried individuals and do not itemize deductions. Pursuant to section 905 (a), A and B have elected to credit foreign taxes in the year accrued. The total foreign taxes accrued by A and B with respect to their distributive shares of M's FOGEI is $11,500 ($5,750 accrued by A and $5,750 accrued by B). A and B have no other FOGEI. A's only taxable income for 1984 is his 50% distributive share ($10,000) of M's FOGEI and A has a preliminary U.S. tax liability of $1,079. B has $112,130 of taxable income for 1984 (including his 50% distributive share ($10,000) of M's FOGEI) and has a preliminary U.S. tax liability of $44,000. Pursuant to section 907(a), A's FOGEI taxes limitation level for 1984 is $1,079 (($1,079/$10,000) × $10,000)) and B's FOGEI taxes limitation level for 1984 is $3,924 (($44,000/$112,130) × $10,000)).

(e) *Effect on other provisions*—(1) *Deduction denied.* If a credit is claimed under section 901, no deduction under section 164(a)(3) is allowed for the amount of the FOGEI taxes that exceed a taxpayer's limitation level for the taxable year. See section 275(a)(4)(A). Thus, FOGEI taxes disallowed under section 907(a) are not added to the cost or inventory amount of oil or gas.

(2) *Reduction inapplicable.* The reduction under section 907(a) does not apply to a taxpayer that deducts foreign taxes and does not claim the benefits of section 901 for a taxable year.

(3) *Section 78 dividend.* The reduction under section 907(a) has no effect on the amount of foreign taxes that are treated as dividends under section 78.

(f) *Section 904 limitation.* FOGEI taxes as reduced under section 907(a) are creditable only to the extent permitted by the general limitation of section 904(d)(1)(I).

§ 1.907(b)-1T Reduction of creditable FORI taxes (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) *In general.* If the foreign law imposing a FORI tax (as defined in § 1.907(c)-3T) is either structured in a manner, or operates in a manner, so that the amount of tax imposed on FORI is generally materially greater than the tax imposed by the foreign law on income that is neither FORI nor FOGEI ("described manner"), section 907(b) provides a special rule which limits the amount of FORI taxes paid or accrued by a person to a foreign country which will be considered income, war profits, or excess profits taxes. Section 907(b) will apply to a person regardless of whether that person is a dual capacity taxpayer as defined in § 1.901-2(a)(2)(ii)(A). (In general, a dual capacity taxpayer is a person who pays an amount to a foreign country part of which is attributable to an income tax and the remainder of which is a payment for a specific economic benefit derived from that country.) Foreign law imposing a tax on FORI will be considered either to be structured in or to operate in the described manner if any of the tax imposed on FORI is considered not be an income, war profits or excess profits tax under paragraph (b) of this section.

(b) *Amount of income, war profits, or excess profits tax*—(1) *Dual capacity taxpayer.* If for a taxable year a dual capacity taxpayer has applied the safe harbor formula of § 1.901-2A(e) to determine the portion of a FORI tax paid or accrued during the year that is a payment of tax rather than a payment for a specific economic benefit, section 907(b) shall not apply. However, if the dual capacity taxpayer has used the facts and circumstances method of § 1.901-2A(c)(2) to establish the portion of the FORI tax that is a payment of tax rather than a payment for a specific economic benefit, the safe harbor formula of § 1.901-2A(e) will be applied to the portion of the payment determined to be a tax under the facts and circumstances method to determine whether section 907(b) will further reduce that amount.

(2) *Non-dual capacity taxpayer.* With regard to non-dual capacity taxpayers, the portion of the FORI tax that is considered an income, war profits, or excess profits tax is determined by applying the safe harbor formula of § 1.901-2A(e) with respect to the person's foreign oil related income (as determined under foreign law pursuant to the provisions of paragraph (e)(2) of that section).

(c) *Amount that is not income, war profits, or excess profits tax.* The difference between the amount of FORI tax and the amount determined pursuant to paragraph (b) of this section is considered a tax that is not an income, war profits, or excess profits tax. This amount will be treated as a business expense deduction.

(d) *Examples.* The provisions of this section may be illustrated by the following examples:

Example (1)—(i) *Facts.* X, a U.S. corporation that uses the accrual method of accounting and the calendar year as its taxable year, extracts oil in foreign country FC, transports it via pipeline to a refinery located in FC, and sells it to Y, an unrelated corporation that operates the refinery. X is a dual capacity taxpayer as defined in § 1.901-2(a)(2)(ii)(A). The only income X has that is taxed by FC is its income from the sale of oil to Y. FC imposes a generally applicable tax at the rate of 45% on the net income derived by foreign corporations from a trade or business carried on in FC. That tax is an income tax within the meaning of section 901. Taxable FOGEI and taxable FORI are determined under foreign law which, for purposes of this example, is assumed to be the same as United States law. X is subject to this generally applicable tax except that it is subject to a 60%, rather than a 45%, rate. For 1985, assume the following additional facts:

X's total gross income from sales to Y	1,000
Gross income attributable to extraction (FOGEI)	700
Gross income attributable to transportation (FORI)	300
Deductions incurred deriving FOGEI	525
Deductions incurred deriving FORI	225
Taxable FOGEI under FC law	175
Taxable FORI under FC law	75
Accrued tax to FC (under FC law) (.60 × (1000 − 750)	150

(ii) *Computation of section 901 tax without regard to section 907(b).* Because X is a dual capacity taxpayer, it is subject to the rules of § 1.901-2A. X has chosen to establish the amount of its payment to FC that is tax by using the facts and circumstances method of § 1.901-2A(c)(2). Under this method, X claims that 110 of the 150 is paid to FC is tax. The remainder (40) is considered an amount paid in exchange for a specific economic benefit X is receiving from FC.

(iii) *Determination of FORI tax accrued in 1985.* For purposes of this example it is assumed that the 40 determined in subdivision (ii) to be paid in exchange for a specific economic benefit relates only to X's FOGEI activities. Therefore, of the total payment to FC of 150, the part that is FORI tax for United States purposes is determined by the following equation:

FORI tax for United States purposes = (Total tax) × (Taxable FORI under FC law/ total taxable income under FC law)

Accordingly, for 1985, FORI tax for U.S. purposes is 45, computed as follows:

45 = (150) × (75/250).

(iv) *Application of section 907(b).* Pursuant to paragraph (b) of this section, the portion of FORI tax for U.S. purposes for 1985 (45) that will be considered an income tax for purposes of section 901 after application of section 907(b) is determined by applying the safe harbor formula of § 1.901-2A(e), as follows:

(A−B−C) × D/(1−D)

A = Gross income attributable to FORI = 300

B = Deductions incurred deriving FORI = 225

C = FORI tax for U.S. purposes = 45

D = Generally applicable tax rate = 45%

24.55 = (300−225−45) × .45/(1−.45)

The remainder (20.45) is not an income tax and is deductible, for U.S. tax purposes, as a business expense.

Example (2)—(i) *Facts.* Y, a U.S. corporation that uses the accrual method of accounting and the calendar year as its taxable year, operates the refinery mentioned in *Example* (1). Y is not receiving a specific economic benefit from FC. Since § 1.901-2(a)(2)(ii)(E), relating to the indirect receipt of a specific economic benefit, does not apply to Y, Y is not a dual capacity taxpayer with respect to FC. The only income Y has that is taxed by FC is its income from the sale of refined oil. All of this income is FORI as defined in section 907(c)(2)(A). Y is subject to the generally applicable tax mentioned in *Example* (1) except that Y is subject to a 50%, rather than a 45%, rate. For 1985, Y has accrued tax to FC of 25 based on the following additional facts:

Y's gross receipts—sales of refined oil	1,200
Cost of purchases of oil	1,000
Expenses from refining operations	150
Taxable income	50
Accrued tax	25

(ii) *Computation of section 901 tax without regard to section 907(b).* Because Y is not a dual capacity taxpayer, it is not subject to the rules of § 1.901-2A. Thus, none of the tax accrued to FC(25) is paid in exchange for a specific economic benefit. Therefore, the entire 25 is creditable under section 901 if section 907(b) does not apply.

(iii) *Determination of FORI tax accrued in 1985.* All of the tax accrued to FC was accrued with respect to processing income described in section 907(c)(2)(A), and, thus, all of it is FORI tax.

(iv) *Application of section 907(b).* Pursuant to paragraph (b) of this section, the portion of FORI tax accrued by Y for 1985 that will be considered an income tax for purposes of section 901 after application of section 907(b) is determined by applying the safe harbor formula in § 1.901-2A(e), as follows:

(A − B − C) × D/(1−D)

A = Gross income attributable to FORI = 1,200

B = Deductions incurred deriving FORI = 1,150

C = FORI tax for U.S. purposes = 25

D = Generally applicable tax rate = 45%

20.45 = (1,200 − 1,150 − 25) × .45/(1−.45)

Accordingly, 20.45 is an income tax and the remainder (4.55) is not an income tax and is deductible, for U.S. tax purposes, as a business expense.

§ 1.907(c)-1T Definitions relating to FOGEI and FORI (for taxable years beginning after December 31, 1982 (Temporary regulations).

(a) *Scope.* This section explains the meaning to be given certain terms and items in section 907(c) (1), (2), and (4). See also § 1.907 (a)-oT (b) for further definitions.

(b) *FOGEI*—(1) *General rule.* Under section 907(c)(1), FOGEI means taxable income (or loss) derived from sources outside the United States and its possessions from the extraction (by the taxpayer or any other person) of minerals from oil or gas wells located outside the United States and its possessions or from the sale or exchange of assets used by the taxpayer in extraction of those minerals. Extraction of minerals from oil or gas wells will result in gross income from extraction in every case in which that person has an economic interest in the minerals in place. For other circumstances in which gross income from extraction may arise, see paragraph (b)(3) of this section. For determination of the amount of gross income from extraction, see paragraph (b)(2) of this section. For definition of the phrase "assets used by the taxpayer in the trade or business" and for rules relating to that type of FOGEI, see paragraph (e)(1) of this section. The term "minerals" is defined in paragraph (f)(1) of this section. For determination of taxable income, see paragraph (f)(2) of this section. FOGEI includes, in addition, items listed in section 907(c)(3) (relating to dividends, interest, partnership distributions, etc.) and explained in § 1.907(c)-2T. For the reduction of what would otherwise be FOGEI by losses incurred in a prior year, see section 907(c)(4) and paragraph (c) of this section.

(2) *Amount.* The gross income from extraction is determined by reference to the fair market value of the minerals in the immediate vicinity of the well. Fair market value is determined under paragraph (b)(6) of this section.

(3) *Other circumstances.* Gross income from extraction or the sale or exchange of assets described in section 907(c)(1)(B) includes income from any arrangement, or a combination of arrangements or transactions, to the extent the income is in substance attributable to the extraction of minerals or such a sale or exchange. For instance, a person may have gross income from such a sale or exchange if the person purchased minerals from a foreign government at a discount and the discount reflects an arm's-length amount in consideration for the government's nationalization of assets that person owned and used in the extraction of minerals.

(4) *Income directly related to extraction.* Gross income from extraction includes directly related income under paragraph (g) of this section.

(5) *Income not included.* FOGEI as otherwise determined under this paragraph (b), nevertheless, does not include income to the extent attributable to marketing, distributing, processing or transporting minerals or primary products. Income from the purchase and sale of minerals is not ordinarily FOGEI. If the foreign taxes paid or accrued in connection with income from a purchase and sale are not creditable by reason of section 901(f), that income is not FOGEI. A taxpayer to whom section 901(f) applies is not a producer.

(6) *Fair market value.* For purposes of this paragraph (b), the fair market value of oil or gas in the immediate vicinity of the well depends on all of the facts and circumstances as they exist relative to a party in any particular case. The facts and circumstances that may be taken into account include, but are not limited to, the following—

(i) The facts and circumstances pertaining to an independent market value (if any) in the immediate vicinity of the well,

(ii) The facts and circumstances pertaining to the relationships between the taxpayer and the foreign government. If an independent fair market value in the immediate vicinity of the well cannot be determined but fair market value at the port, or a similar point, in the foreign country can be determined (port price), an analysis of the arrangements between the taxpayer and the foreign government that retains a share of production could be evidence of the appropriate, arm's-length difference between the port price and the field price, and

(iii) The other facts and circumstances pertaining to any difference in the producing country between the field and port prices.

(7) *Economic interest.* For purposes of this paragraph (b), the term "economic interest" means an economic interest as defined in § 1.611-1(b)(1), whether or not a deduction for depletion is allowable under section 611.

(c) *Carryover of foreign oil extraction losses*—(1) *In general.* Pursuant to section 907(c)(4), the determination of FOGEI for a particular taxable year takes into account a foreign oil extraction loss incurred in prior taxable years beginning after December 31, 1982. There is no time limitation on this carryover of foreign oil extraction losses. Section 907(c)(4) does not provide for any carryback of these losses. Section 907(c)(4) operates solely for purposes of determining FOGEI and thus operates independently of section 904(f).

(2) *Reduction.* That portion of the income of the taxpayer for the taxable year which but for this paragraph (c) would be treated as FOGEI is reduced (but not below zero) by the excess of—

(i) The aggregate amount of foreign oil extraction losses for preceding taxable years beginning after December 31, 1982, over

(ii) The aggregate amount of reductions under this paragraph (c) for preceding taxable years beginning after December 31, 1982.

(3) *Foreign oil extraction loss defined*—(i) *In general.* For purposes of this paragraph (c), the term "foreign oil extraction loss" means the amount by which the gross income for the taxable year that is taken into account in determining FOGEI for that year is exceeded by the sum of the deductions properly allocated and apportioned to that gross income (as determined under paragraph (f)(2) of this section). A person can have a foreign oil extraction loss for a taxable year even if the person has not chosen the benefits of section 901 for that year.

(ii) *Items not taken into account.* For purposes of subdivision (i) of this paragraph, the following items are not taken into account—

(A) The net operating loss deduction allowable for the taxable year under section 172(a),

(B) Any foreign expropriation loss (as defined in section 172(h)) for the taxable year, and

(C) Any loss for the taxable year which arises from fire, storm, shipwreck, or other casualty, or from theft.

A loss mentioned in subdivision (ii) (B) or (C) of this paragraph is taken into account, however, to the extent compensation (for instance by insurance) for the loss is included in gross income.

(4) *Affiliated groups.* The foreign oil extraction loss of an affiliated group of corporations (within the meaning of section 1504(a)) that files a consolidated return is determined on a group basis. If the group does not have a foreign oil extraction loss, the foreign oil extraction loss of a member of that group will not reduce on a separate basis that member's FOGEI for a later taxable year.

(5) *FOGEI taxes.* If FOGEI is reduced pursuant to this paragraph (c) (and thereby recharacterized as non-FOGEI income), any foreign taxes imposed on the FOGEI that is recharacterized as other income retain their character as FOGEI taxes. See section 907(c)(5).

(6) *Examples.* The provisions of this paragraph (c) may be illustrated by the following examples.

Example (1)—(i) *Facts.* X, a U.S. corporation using the accrual method of accounting and the calendar year as its taxable year, is engaged in extraction activities in three foreign countries. X has only the following combined foreign tax items for the three countries (prior to the application of this paragraph (c)) for 1983, 1984, and 1985:

	1983	1984	1985
FOGEI	($700)	$100	$450
FOGEI taxes	10	60	200
Net operating loss deduction	(200)	0	0
Foreign oil extraction loss allowable after adjustment for paragraph (c)(3)(ii) amounts	(500)	0	0

(ii) *1983.* Because X's FOGEI for 1983 is a loss of $700, X's section 907(a) limitation for 1983 is $0 (.45×$0). Thus, none of the FOGEI taxes paid or accrued in 1983 ($10) can be credited in 1983. They can, however, be carried back pursuant to the provisions of section 907(e)(2) and § 1.907(e)–1T and carried forward pursuant to the provisions of section 907(f) and § 1.907(f)–1T.

(iii) *1984.* X's FOGEI for 1984, prior to the application of this paragraph (c), is $100. X has a foreign oil extraction loss for 1983 of $(500). This loss must be applied against X's preliminary FOGEI of $100 for 1984. Thus, X's FOGEI for 1984 is $0 and X has $400 (500–$100) of foreign oil extraction loss from 1983 to be carried to 1985. Because X's FOGEI for 1984 is $0, its section 907(a) limitation is $0 (.46×$0). Therefore, none of the FOGEI taxes paid or accrued in 1984 ($60) can be credited in 1984. They can, however, be carried back to 1982 pursuant to the provisions of section 907(e)(2) and § 1.907(e)–1T and carried forward pursuant to the provisions of section 907(f) and § 1.907(f)–1T.

(iv) *1985.* X's FOGEI for 1985, prior to the application of this paragraph (c), is $450. X's remaining foreign oil extraction loss carryover from 1983 is $400 and this must be applied against X's preliminary FOGEI of $450 for 1985. Thus, X's FOGEI for 1984 is $50 ($450–$400). X's section 907(a) limitation is $23 (.46×$50). Therefore, $23 of the FOGEI taxes paid or accrued in 1985 can be credited in 1985, subject to the general limitation of section 904(d)(1)(E). The excess of FOGEI taxes, $177 ($200–$23), can be carried forward pursuant to the provisions of section 907(f) and § 1.907(f)–1T.

Example (2)—(i) *Facts.* The facts are the same as in *Example* (1) except that X's paragraph (c)(3)(ii) items for 1983 allocable to FOGEI are $(800) instead of $(200). FOGEI remains a loss of $700. Thus, X does not have a foreign oil extraction loss for 1983 because it has $100 of FOGEI when its paragraph (c)(3)(ii) items are not taken into account ($(700)+$800).

(ii) *1983.* The results are the same as in *Example* (1).

(iii) *1984.* Although X had a FOGEI loss of $(700) in 1983, there is not a loss that can be carried forward after adjustment for paragraph (c)(3)(ii) items. Thus, X's FOGEI for 1984 is not reduced by the 1983 loss. X's section 907(a) limitation for 1984 is $46 (.46×$100). Therefore, $46 of the FOGEI taxes paid or accrued in 1984 can be credited in 1984, subject to the general limitation of section 904(d)(1)(E). The excess of $14 ($60–$46) can be carried back to 1982 pursuant to the provisions of section 907(e)(2) and § 1.907(e)–1T and carried forward pursuant to the provisions of section 907(f) and § 1.907(f)–1T.

(iv) *1985.* Since there is no foreign oil extraction loss for either 1983 or 1984 to be applied in 1985, X's FOGEI for 1985 is $450. Thus, its section 907(a) limitation for 1985 is $207 (.46×$450) and all of its FOGEI taxes paid or accrued in 1985 ($200) can be credited in 1985, subject to the general limitation of section 904(d)(1)(E). FOGEI taxes in the amount of $10 from 1983 and $14 from 1984 may be carried forward to 1985 if they have not been used in carryback years. However, because the excess section 907(a) limitation for 1985 is only $7, that is the maximum potential FOGEI taxes that may be used in 1985.

Example (3)—(i) *Facts.* Y, a U.S. corporation using the accrual method of accounting and the calendar year as its taxable year, is engaged in extraction activities in three foreign countries. Y's only foreign taxable income is income subject to the general limitation of section 904(d)(1)(E) and Y has no paragraph (c)(3)(ii) items. Y has the following foreign tax items for 1983 and 1984:

	1983	1984
FOGEI	$ (400)	$ 300
Other foreign taxable income	250	200
U.S. taxable income	1,000	1,100
Worldwide taxable income	850	1,600
FOGEI taxes	10	180
Foreign oil extraction loss	(400)	0

(ii) *1983*—(A) *Section 907 (a) limitation.* Because Y's FOGEI for 1983 is a loss of $(400), Y's section 907(a) limitation for 1983 is $0. Thus, none of the FOGEI taxes paid or accrued in 1983 ($10) can be credited in 1983. They can, however, be carried back pursuant to the provisions of section 907(e)(2) and § 1.907(e)–1T and carried forward pursuant to the provisions of section 907(f) and § 1.907(f)–1T.

(B) *Section 904 (d) fraction.* Y has a foreign loss of $(150) ($(400) + $250) for 1983. Thus,

its fraction for purposes of determining its general limitation of section 904(d)(1)(E) is $0/$850.

(iii) *1984*—(A) *Section 907(a) limitation.* Y's foreign oil extraction loss for 1983 is $(400). Applying this loss to its preliminary FOGEI for 1984 ($300) eliminates all of Y's FOGEI for 1984. Because Y's FOGEI for 1984 is $0, its section 907(a) limitation is also $0. Thus, none of the FOGEI taxes paid or accrued in 1984 ($180) can be credited in 1984. They can, however, be carried back to 1982 pursuant to the provisions of section 907(e)(2) and § 1.907(e)-1T and carried forward pursuant to the provisions of section 907(f) and § 1.907(f)-1T. Y has a remaining foreign oil extraction loss of $(100) from 1983 to be carried to 1985.

(B) *Section 904(d) fraction.* Y's preliminary foreign taxable income for purposes of determining its general limitation of section 904(d)(1)(E) is $500 ($300+$200). However, Y has an overall foreign loss from 1983 of $(150) ($(400)+$250) and thus, pursuant to section 904 (f), Y must recharacterize $150 (lesser of $150 or 50% of $500) of its 1984 foreign taxable income as U.S. taxable income. Thus, Y's fraction for purposes of determining its general limitation of section 904(d)(1)(E) for 1984 is $350/$1,600.

(d) *FORI*—(1) *In general.* Section 907(c)(2) defines FORI to include taxable income from the processing of oil and gas into their primary products, from the transportation or distribution and sale of oil and gas and their primary products, from the disposition of assets used in these activities and from the performance of any other related service. FORI may also include, under section 907(c)(3), certain dividends, interest, or amounts described in section 951(a). This paragraph (d) defines certain terms and items applicable to FORI.

(2) *Transportation.* Gross income from transportation of minerals or primary products ("gross transportation income") is gross income arising from carrying minerals or primary products between two places (including time or voyage charter hires) by any means of transportation, such as a vessel, pipeline, truck, railroad, or aircraft. Except for directly related income under paragraphs (d)(7) and (g) of this section, gross transportation income does not include gross income received by a lessor from a bareboat charter hire of a means of transportation, certain other rental income, or income from the performance of certain services.

(3) *Distribution or sale.* The term "distribution or sale" means the sale or exchange of minerals or primary products to processors, users who purchase, store, or use in bulk quantities, other persons for further distribution, retailers, or consumers. Gross income from distribution or sale includes interest income attributable to the distribution of minerals or primary products on credit.

(4) *Processing.* The term "processing" means the destructive distillation, or a process similar in effect to destructive distillation, of crude oil and the processing of natural gas into their primary products including processes used to remove pollutants from crude oil or natural gas.

(5) *Primary product from oil.* The term "primary product" (in the case of oil) means all products derived from the processing of crude oil, including volatile products, light oils (such as motor fuel and kerosene), distillates (such as naphtha), lubricating oils, greases and waxes, and residues (such as fuel oil).

(6) *Primary product from gas.* The term "primary product" (in the case of gas) means all gas and associated hydrocarbon components from gas wells or oil wells, whether recovered at the lease or upon further processing, including natural gas, condensates, liquefied petroleum gases (such as ethane, propane, and butane), and liquid products (such as natural gasoline).

(7) *Directly related income.* FORI also includes directly related income under paragraph (g) of this section.

(e) *Assets used in a trade or business*—(1) *In general.* The term "assets used by the taxpayer in the trade or business" in section 907(c)(1)(B) and (2)(D) means property primarily used in one or more of the trades or businesses that are section 907(c) activities. For purposes of this paragraph (e), assets used in a trade or business are assets described in section 1231(b) (applied without regard to any holding period or the character of the asset as being subject to the allowance for depreciation under section 167).

(2) *Section 907(c) activities.* Section 907(c) activities are those described in section 907(c)(1)(A) (for FOGEI) or (c)(2)(A) through (C) (for FORI). If an asset is used primarily in one or more section 907(c) activities, then the entire gain (or loss) will be considered attributable to those activities. For example, if a person uses a service station primarily to distribute primary products from oil, then all of the gain (or loss) on the sale of the station is FORI even though the person uses the station to distribute products that are not primary products (such as tires or batteries). If an asset is not primarily used in one or more section 907(c) activities, then the entire gain or loss will not be FOGEI or FORI.

(3) *Stock.* Stock of any corporation (whether foreign or domestic) will not be treated as an asset used by a person in section 907(c) activities.

(4) *Losses on sale of stock.* If, under § 1.861-8(e)(7), a loss on the sale, exchange, or disposition of stock is considered a deduction which is definitely related and allocable to FOGEI or FORI, then notwithstanding § 1.861-8 (e)(7) and paragraph (f)(2) of this section, this loss shall be allocated and apportioned to the same class of income that would have been produced if there were capital gain from the sale, exchange or disposition.

(5) *Character of gain or loss.* Except in the case of stock, gain or loss from the sale, exchange or disposition of assets used in the trade or business may be FORI or FOGEI to the extent taken into account in computing taxable income for the taxable year, whether or not the gain or loss is ordinary income or ordinary loss.

(6) *Allocation of amount realized.* The amount realized from the sale, exchange or disposition of several assets in one transaction is allocated among them in proportion to their respective fair market values. This allocation is made under the principles set forth in § 1.1245-1(a)(5) (relating to allocation between section 1245 property and non-section 1245 property).

(7) *Interest.* Gross income from the sale, exchange or disposition of an asset used in a section 907(c) activity includes interest income from such a sale, exchange or disposition.

(f) *Terms and items common to FORI and FOGEI*—(1) *Minerals.* The term "minerals" means hydrocarbon minerals extracted from oil and gas wells, including crude oil or natural gas (as defined in section 613A(e)). The term includes incidental impurities from these wells, such as sulphur, nitrogen, or helium. The term does not include hydrocarbon minerals derived from shale oil or tar sands.

(2) *Taxable income.* Deductions to be taken into account in computing taxable income or net operating loss attributable to FOGEI or FORI are determined under the principles of § 1.861-8. For an exception with regard to losses, see paragraph (e)(4) of this section.

(3) *Interest on working capital.* FORI and FOGEI may include interest on bank deposits or on any other temporary investment which is not in excess of funds reasonably necessary to meet the working capital requirements and the specifically anticipated business needs of the person that is engaged in the conduct of the activities described in section 907(c) (1) or (2).

(4) *Exchange gain or loss.* Exchange gain (and loss) may be FORI and FOGEI.

(5) *Allocation.* Interest income and exchange gain (or loss) described, respectively, in paragraph (f) (3) and (4) of this section are allocated among

FORI, FOGEI, and any other class of income relevant for purposes of the foreign tax credit limitations under any reasonable method which is consistently applied from year to year.

(6) *Facts and circumstances.* Income not described elsewhere in this section may be FOGEI or FORI if, under the facts and circumstances in the particular case, the income is in substance directly attributable to the activities described in section 907(c) (1) or (2). For example, assume that a producer in the North Sea suffers a casualty caused by an explosion, fire, and resulting destruction of a drilling platform. Insurance proceeds received for the platform's destruction in excess of the producer's basis is extraction income if the excess constitutes income from sources outside the United States. In addition, income from an insurance policy for business interruption may be extraction income to the extent the payments under the policy are geared directly to the loss of income from production and are treated as income from sources outside the United States. Also, if an oil company's oil concession or assets used in extraction activities described in section 907(c)(1)(A) and located outside the United States are nationalized or expropriated by a foreign government, or instrumentality thereof, income derived from that nationalization or expropriation (including interest on the income paid pursuant to the nationalization or expropriation) is FOGEI. Likewise, if a company's assets used in the activities described in section 907(c)(2) (A) through (C) and located outside the United States are nationalized or expropriated by a foreign government, or instrumentality thereof, income (including interest on the income paid pursuant to the nationalization or expropriation) derived from the nationalization or expropriation will be FORI. Nationalization or expropriation is deemed to be a sale or exchange for purposes of section 907(c)(1)(B) and a disposition for purposes of section 907(c)(2)(D). In further example, assume that an oil company has an exclusive right to buy all the oil in country X from Y, an instrumentality of the foreign sovereign which owns all of the oil in X. The oil company does not have an economic interest in any oil in country X. Y has a temporary cash-flow problem and demands that the oil company make advance deposits for the purpose of oil not yet delivered. In return, Y grants the oil company a discount on the price of the oil when delivered. Income represented by the discount on the later disposition of the oil is FORI described in section 907(c)(2)(C). The result would be the same if Y credited the oil company with interest on the advance deposits, which had to be used to purchase oil (the interest income would be FORI).

(g) *Directly related income*—(1) *In general.* Section 907(c)(2)(E) and this paragraph (g) include in FORI, and this paragraph (g) includes in FOGEI, income from the performance of directly related services (as defined in paragraph (g)(2) of this section). This paragraph (g) also includes in FORI and FOGEI income from the lease or license of related property (as defined in paragraph (g)(3) of this section). Section 907(c)(2)(E) with regard to FORI and this paragraph (g) with regard to both FORI and FOGEI do not apply to a person if—

(i) Neither that person nor a related person (as defined in paragraph (g)(4) of this section) has FOGEI described in paragraph (b) of this section (other than paragraph (b)(4) thereof relating to directly related income) or FORI described in paragraph (d) of this section (other than paragraph (d)(7) thereof relating to directly related income), or

(ii) Less than 50 percent of that person's gross income from sources outside the United States which is related exclusively to the performance of services and from the lease or license of property described in paragraph (g) (2) and (3) of this section, respectively, is attributable to services performed for (or on behalf of), leases to, or licenses with, related persons, but

(iii) Subdivision (ii) of this paragraph (g)(1) will not apply to a person if 50 percent or more of that person's total gross income from sources outside the United States is FOGEI and FORI (as both are described in subdivision (i) of this paragraph (g)(1)).

A person described in subdivision (i) or (ii) of this paragraph will, however, have directly related services income which is FOGEI if the income is so classified by reason of the income based on output test set forth in paragraph (g)(2)(i)(B) of this section.

(2) *Directly related services*—(i) *FOGEI.* (A) Income from directly related services will be FOGEI, as that term is defined in paragraph (b) (1) and (3) of this section, if those services are directly related to the active conduct of extraction (including exploration) of minerals from oil and gas wells. Paragraph (b)(1) of this section provides that, in order to have extraction income, a person must have an economic interest in the minerals in place. However, paragraph (b)(3) of this section recognizes that income arising from "other circumstances" is extraction income if that income is in substance attributable to the extraction of minerals.

(B) An example of "other circumstances" under paragraph (b)(3) of this section is the "income based on output test." This income based on output test provides that, if the amount of compensation paid or credited to a person for services is dependent on the amount of minerals discovered or extracted, the income of the person from the performance of the services will be directly related services income which is FOGEI. This test will apply whether or not the person performing the services has, or had, an economic interest in the minerals discovered or extracted.

(ii) *FORI.* With regard to the determination of directly related services income which is FORI, directly related services are those services directly related to the active conduct of the operations described in section 907(c)(2) (A) through (C). Those services include, for example, services performed in relation to the distribution of minerals or primary products or in connection with the operation of a refinery, or the types of services described in § 1.954-6(d) (other than paragraph (d)(4) thereof) which relate to foreign base company shipping income.

(iii) *Recipient of the services.* Directly related services described in paragraph (g)(2) (i) and (ii) of this section may be performed for any person without regard to whether that person is a related person.

(iv) *Excluded services*—(A) *FOGEI.* Directly related services which produce FOGEI do not include insurance, accounting or managerial services.

(B) *FORI.* Directly related services income which produce FORI do not, generally, include insurance, accounting or managerial services. These services will, however, produce FORI if they are performed by the person performing the operations described in section 907(c)(2) (A) through (C). For these purposes, insurance income which is FORI means taxable income as defined in section 832(a).

(3) *Leases and licenses.* A lease or license of related property is the lease or license of assets used (or held for use) by the lessor, licensor, or another person (including the lessee or a sublessee) in the active conduct of the activities described in section 907 (c)(1)(A) or (c)(2) (A) through (C). The leases or licenses described in this paragraph (g)(3) include, for example, a lease of a means of transportation under a bareboat charter hire, of drilling equipment used in extraction

operations, or the license of a patent, know-how, or similar intangible property used in extracting, transporting, distributing or processing minerals or primary products. This paragraph (g)(3) applies without regard to whether the parties are related persons.

(4) *Related person.* A person will be treated as a related person for purposes of this paragraph (g) if (i) that person would be so treated within the meaning of section 954(d)(3) (as applied by substituting the word "corporation" for the word "controlled foreign corporation") or (ii) that person is a partnership or partner described in section 707(b)(1).

(5) *Gross income.* A foreign corporation shall be treated as a domestic corporation for the purpose of applying the gross-income rules in paragraph (g)(1) (ii) and (iii) of this section.

(h) *Coordination with other provisions*—(1) *Certain adjustments.* The character of income as FOGEI or FORI is determined before making any adjustment under section 482 or section 907(d). For example, assume that X and Y are related parties, Y's only income is from the sale of oil that Y purchased from X, and FOGEI from X is diverted to Y through an arrangement described in paragraph (b)(3) of this section. Accordingly, Y has FOGEI. If under section 482 the Commissioner reallocates the FOGEI from Y to X, then Y's remaining income represents only a profit from distributing the oil, and thus is FORI. If the foreign taxes paid by Y on this income are otherwise creditable under section 901, the foreign taxes that are not refunded to Y retain their characterization as FOGEI taxes.

(2) *Section 901(f).* Section 901(f) (relating to certain payments with respect to oil and gas not considered as taxes) applies before section 907. Taxes disallowed by section 901(f) are added to the cost or inventory amount of oil or gas.

§ 1.907(c)-2T Section 907(c)(3) items (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) *Scope.* This section provides rules relating to certain items listed in section 907(c)(3). The rules of this section are expressed in terms of FORI but apply for determining FOGEI by substituting "FOGEI" for "FORI" whenever appropriate. FOGEI does not include interest described in section 907(c)(3)(A) or dividends described in section 907(c)(3)(B).

(b) *Dividend*—(1) *Section 1248 dividend.* A section 1248 dividend is a dividend described in section 907(c)(3)(A). Except as otherwise provided in this paragraph (b)(1) or in § 1.907(c)-1T(e)(3), gain (or loss) from the disposition of stock in any corporation is not FOGEI or FORI.

(2) *Section 78 dividend.* A section 78 dividend is FORI to the extent it arises from a dividend described in section 907(c)(3)(A), or an amount described in section 907(c)(3)(C).

(c) *Taxes deemed paid*—(1) *Voting stock test.* Items described in section 907(c)(3) (A) or (C) are FORI only if a deemed-paid-tax test is met under the criteria of section 902 or 960. The purpose of this test is to require minimum direct or indirect ownership by a domestic corporation in the voting stock of a foreign corporation as a prerequisite for the item to qualify as FORI in the hands of the domestic corporation. The test is whether a domestic corporation would be deemed to pay any taxes of a foreign corporation when a dividend or an amount described in section 907(c)(3) (A) or (C), respectively, is included in the domestic corporation's gross income. In the case of interest described in section 907(c)(3)(A), the test is whether any taxes would be deemed paid if there were a hypothetical dividend.

(2) *Dividends and interest.* For purposes of section 907(c)(3)(A), a domestic corporation is deemed under section 902 to pay taxes in respect of dividends and interest received from a foreign corporation if the following condition is met: the domestic corporation would be deemed under section 902 to pay taxes in respect of dividends received from the foreign corporation whether or not the foreign corporation—

(i) Actually pays or is deemed to pay taxes, or

(ii) In the case of interest, actually pays dividends.

This paragraph (c)(2) also applies to dividends received by a foreign corporation from a second-tier or third-tier foreign corporation (as defined in § 1.902-1(a) (3)(i) and (4), respectively). In the case of interest received by a foreign corporation from another foreign corporation, this paragraph (c)(2) applies if the taxes of both foreign corporations would be deemed paid under section 902 (a) or (b) for purposes of applying section 902(a) to the same taxpayer which is a domestic corporation. In the case of interest received by any corporation (whether foreign or domestic), all members of an affiliated group filing a consolidated return will be treated as the same taxpayer under section 907(c)(3)(A) if the foreign taxes of the payor and (if the recipient is a foreign corporation) the foreign taxes of the recipient would be deemed paid under section 902 by at least one member. The term "member" is defined in § 1.1502-1(b). Thus, for example, assume that P owns all of the stock of D1 and D2 and P, D1, and D2 are members of an affiliated group filing a consolidated return. Assume further that D1 owns all of the stock of F1 and D2 owns all of the stock of F2, where F1 and F2 are foreign corporations. Interest paid by F1 to P, D2, or F2 may be FORI.

(3) *Amounts included under section 951(a).* For purposes of section 907(c)(3)(C), a domestic corporation is deemed under section 960 to pay taxes in respect of a foreign corporation, whether or not the foreign corporation actually pays taxes on the amounts included in gross income under section 951(a).

(d) *Amount attributable to certain items*—(1) *Certain dividends*—(i) *General rule.* The portion of a dividend described in section 907(c)(3)(A) that is FORI equals—

Amount of dividend x a/b

a = FORI accumulated profits in excess of FORI taxes paid or accrued, and

b = Total accumulated profits in excess of total foreign taxes paid or accrued.

This paragraph (d)(1)(i) applies even though the FORI accumulated profits arose in a taxable year of a foreign corporation beginning before January 1, 1983. Determination of the FORI amount of dividends under this paragraph (d)(1)(i) must be made separately for FORI accumulated profits and total accumulated profits that arose in taxable years beginning before January 1, 1987, and for FORI accumulated profits and total accumulated profits that arose in taxable years beginning after December 31, 1986. Dividends are deemed to be paid first out of FORI and total accumulated profits that arose in taxable years beginning after December 31, 1986. With regard to FORI accumulated profits and total accumulated profits that arose in taxable years beginning after December 31, 1986, the portion of a dividend that is FORI equals—

Amount of dividend x a/b

a = Post-1986 undistributed FORI earnings determined under the principles of section 902(c)(1), and

b = Post-1986 undistributed earnings determined under the principles of section 902(c)(1).

(ii) *Cross-references.* See § 1.902-1(g) for the determination of a foreign corporation's earnings and profits and of those out of which a dividend is paid.

See § 1.1248–2 or 1.1248–3 for the determination of the earnings and profits attributable to the sale or exchange of stock in certain foreign corporations.

(2) *Interest received from certain foreign corporations.* Interest described in section 907(c)(3)(A) is FORI to the extent the corresponding interest expense of the paying corporation is properly allocable and apportionable to the gross income of the paying corporation that would be FORI were that corporation a domestic corporation. This allocation and apportionment is made in a manner consistent with the rules of section 954(b)(5) and § 1.861–8(e)(2).

(3) *Dividends from domestic corporation.* A dividend from a corporation described in section 907(c)(3)(B) that is FORI is determined under the principles of paragraph (d)(1)(i) of this section with respect to its current earnings and profits under section 316(a)(2) or its accumulated earnings and profits under section 316(a)(1), as the case may be.

(4) *Amounts with respect to which taxes are deemed paid under section 960(a)*—(i) *Portion attributable to FORI.* The portion of an amount described in section 907(c)(3)(C) that is FORI equals:

Amount described in section 907(c)(3)(C) times FORI earnings and profits divided by total earnings and profits.

For taxable years ending after January 23, 1989, the facts and circumstances will be used to determine what part of the amount of the section 907(c)(3)(C) amount is directly attributable to FOGEI, FORI and other income.

(ii) *Earnings and profits.* Total earnings and profits are those of the foreign corporation for a taxable year under section 964 and the regulations under that section.

(5) *Section 78 dividend.* The portion of a section 78 dividend that will be considered FORI will equal the amount of taxes deemed paid under either section 902(a) or section 960(a)(1) with respect to the dividend to the extent the taxes deemed paid are FORI taxes under § 1.907(c)–3T (b) or (c). See § 1.907(c)–3T(a)(1).

(6) *Special rule.* (i) No item in the formula described in paragraph (d)(1)(i) of this section includes amounts excluded from the gross income of a United States shareholder under section 959(a)(1).

(ii) With respect to a foreign corporation, earnings and profits in the formula described in paragraph (d)(4)(i) of this section do not include amounts excluded under section 959(b) from its gross income.

(7) *Deficits.* In a taxable year, a deficit in earnings and profits in a separate category under section 904(d) (including a deficit in another separate category that is allocated under sections 902 and 960 pursuant to Notice 88–71, 1988–27 I.R.B. 17, to the first separate category) that is not attributable to FOGEI or FORI is to be allocated ratably between, and reduce, FOGEI earnings and profits and FORI earnings and profits within the first separate category. However, any deficit in earnings and profits within a separate category for the taxable year attributable either to FOGEI or FORI is to be allocated first to FORI or FOGEI (as the case may be) earnings and profits within a separate category before the deficit is allocated in that taxable year to earnings and profits that are not attributable to FORI and FOGEI, within the same separate category. Any deficit in FORI or FOGEI earnings and profits remaining after allocation within the first separate category will be allocated on a pro rata basis to other separate categories and will be allocated within those separate categories, first, to earnings and profits attributable to FORI or FOGEI depending on to which type of earnings and profits the deficit is attributable, second, to earnings and profits attributable to FORI and FOGEI, and, third, to other earnings and profits. For taxable years beginning before January 1, 1987, any deficit in FORI or FOGEI earnings and profits remaining after allocation within the first separate category will be allocated against earnings and profits attributable to United States source income and then to other separate categories pursuant to the preceding sentence. FORI earnings and profits are the earnings and profits attributable to FORI as defined in section 907(c) (2) and (3). FOGEI earnings and profits are the earnings and profits attributable to FOGEI as defined in section 907(c)(1)(3).

(8) *Illustrations.* The application of this paragraph (d) is illustrated by the following examples.

Example (1). X, a domestic corporation, owns all of the stock of Y, a foreign corporation organized in country S. Y owns all of the stock of Z, a foreign corporation also organized in country S. Each corporation uses the calendar year as its taxable year. In 1983, Z has $150 of FOGEI earnings and profits and $250 of earnings and profits other than FOGEI or FORI. Assume that Z paid no taxes to S and X must include $100 in its gross income under section 951(a) with respect to Z. Under paragraph (d)(4)(i) of this section, $37.50 of the amount described in section 951(a) is FOGEI ($100×$150/$400). The remaining $62.50 of the section 951(a) amount represents other income.

Example (2). Assume the same facts as in *Example* (1) except that the taxable year in question is 1988. In addition, under the facts and circumstances, it is determined that of the $100 section 951(a) amount included in X's gross income, $30 is directly attributable to Z's FOGEI activity, $60 is directly attributable to Z's FORI activity and $10 is directly attributable to Z's other activity. Accordingly, under paragraph (d)(4)(i), $30 will be FOGEI and $60 will be FORI to X.

Example (3). (i) Assume the same facts as in *Example* (1). Assume further that, in 1983, Z distributes its entire earnings and profits ($400) to Y, which consists of a dividend of $300 and a section 959(a)(1) distribution of $100. Y has no other earnings and profits during 1983. Assume that the dividend and distribution are not foreign personal holding company income under section 954(c). Y pays no taxes to S. In 1983, Y distributes its entire earnings and profits to X.

(ii) Under paragraphs (c)(2) and (d)(1)(i) of this section, Y has FOGEI of $112.50, *i.e.*, the amount of the dividend received by Y ($300) multiplied by the fraction described in paragraph (d)(1)(i). The numerator of the fraction is Z's FOGEI accumulated profits in excess of the FOGEI taxes paid ($112.50) and the denominator is Z's total accumulated profits in excess of total foreign taxes paid ($400) minus the amount excluded from Y's gross income under section 959(a)(1) ($100). The rule of paragraph (d)(6)(ii) of this section does not apply since X does not include any amount in its gross income under section 951(a) with respect to Y. If Y paid taxes to S, this paragraph (9d) would apply to characterize those taxes as FOGEI taxes or other taxes. See § 1.907(c)–3T(a)(8) and *Example* 2(iii) under § 1.907(c)–eT(e).

(iii) The distribution from Y to X is a dividend to the extent of $300, *i.e.*, the amount of the distribution ($400) minus the amount excluded from X's gross income under section 959(a)(1) ($100). Under paragraphs (d)(1)(i) and (6)(i) of this section, $112.50 of the dividend is FOGEI, *i.e.*, the amount of the dividend ($300) multiplied by a fraction. The numerator of the fraction is $112.50, *i.e.*, the FOGEI accumulated profits of Y in excess of FOGEI taxes paid ($150) minus the FOGEI accumulated profits of Y in excess of FOGEI taxes paid excluded from X's gross income under section 959(a)(1) ($37.50). The denominator of the fraction is $300, *i.e.*, the total accumulated profits of Y in excess of taxes paid ($400) minus the amount excluded from X's gross income under section 959(a)(1) ($100).

Example (4). Assume the same facts as in *Example* (1) with the following modifications: In 1983, Z's only earnings and profits are FORI earnings and profits which are included in X's gross income under section 951(a). Z distributes its entire earnings and profits to Y. In 1983, Y has total earnings and profits of $100 without regard to the dividend from Z, $60 of which are FORI earnings and profits. Y also has $40 which is included in X's gross income under section 951(a). Under paragraph (d)(6)(ii) of this section, the dividend from Z is disregarded for purposes of applying paragraph (d)(4)(i) of this section to the $40 included in X's gross income under section 951(a) with respect to Y. Accordingly, $24 of the amount described in section 951(a)

is FORI ($40×$60/$100). Had these circumstances existed in 1988, and if the $40 included in X's gross income under section 951(a) was directly attributable to FORI activity, all of that income would be FORI to X.

(e) *Dividends, interest, and other amounts from sources within a possession.* FORI includes the items listed in section 907(c)(3) (A) and (C) to the extent attributable to FORI of a corporation that is created or organized in or under the laws of a possession of the United States.

(f) *Income from partnerships, trusts, etc.* FORI and FOGEI include a person's distributive share (determined under the principles of section 704) of the income of any partnership and amounts included in income under subchapter J of chapter 1 of the Code (relating to the taxation of trusts, estates, and beneficiaries) to the extent the income and amounts are attributable to FORI and FOGEI.

§ 1.907(c)-3T FOGEI and FORI taxes (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) *Tax characterization, allocation and apportionment*—(1) *Scope.* Paragraphs (a) (2) through (6) of this section provides rules for the characterization, allocation, and apportionment of the income taxes (other than withholding taxes) paid or accrued to a foreign country among FOGEI, FORI, and other income relevant for purposes of sections 907 and 904. Some of the rules in this section are expressed in terms of FOGEI taxes but they apply to FORI taxes by substituting "FORI taxes" for "FOGEI taxes" whenever appropriate. For the treatment of withholding taxes, see paragraph (a)(8) of this section. FOGEI taxes are determined without any reduction under section 907(a). In addition, determination of FOGEI taxes will not be affected by recharacterization of FOGEI by section 907(c)(4). See § 1.907(c)-1T(c)(5). Foreign taxes will not be characterized as creditable FORI taxes if section 907(b) and § 1.907(b)-1T apply.

(2) *Three classes of income.* There are three classes of income: FOGEI, FORI, and other income.

(3) *More than one class in a foreign tax base.* If more than one class of income is taxed under one tax base under the law of a foreign country, the amount of pre-credit foreign tax for each base must be determined. This amount is the foreign taxes paid or accrued to that country for the base as increased by the tax credits (if any) which reduced those taxes and were allowed in the country for that tax. More than one class of income is taxed under the same base, if, under a foreign country's law, deductions from one class of income may reduce the income of any other class and the classes are subject to foreign tax at the same rates.

(4) *Allocation of tax within a base.* If more than one class of income is taxed under the same base under a foreign country's law, the pre-credit foreign tax for the base is apportioned to each class of income in proportion to the income of each class. Tax credits are then allocated (under paragraph (a)(6) of this section) to the apportioned pre-credit tax. Income of a class is the excess of modified gross income for a class over the deductions allowed under foreign law for, and which are attributable to, that class.

(5) *Modified gross income.* Modified gross income is not necessarily the same as gross income as defined for purposes of chapter 1 of the Internal Revenue Code. Modified gross income is determined with reference to the foreign tax base for gross income (or its equivalent). However, the characterization of the base as a particular class of income is governed by general principles of U.S. tax law. Thus, for example—

(i) Gross income from extraction is the fair market value of oil or gas in the immediate vicinity of the well (as determined under § 1.907(c)-1T(b)(6) (without any deductions)).

(ii) Whether cost of goods sold (or any other deduction) is a deduction from modified gross income and the amount of such a deduction is determined under foreign law.

(iii) Modified gross income includes items that are part of the foreign tax base even though they are not gross income under U.S. law so long as the foreign taxes paid on the base constitute creditable taxes under section 901 (including taxes described in section 903). For example, if a foreign country imposes a tax (creditable under section 901) on a tax base that includes in small part a percentage of the value of a company's oil reserves in place, modified gross income from extraction includes such a percentage of value solely for purposes of making the tax allocation in paragraph (a)(4) of this section.

(iv) Modified gross income from extraction is increased for purposes of this paragraph (a)(5) by the entire excess of the posted price over fair market value if the foreign country uses a posted price system or other pricing arrangement described in section 907(d) in imposing its income tax.

(v) Modified gross income from FORI is that income attributable to the activities in section 907(c)(2) (A) through (C) and (E).

(vi) Modified gross income for any class may not include gross income that is not subject to taxation by the foreign country.

(6) *Allocation of tax credits.* The foreign taxes paid or accrued on a particular class of income equals the pre-credit tax on the class reduced (but not below zero) by the credits allowed under foreign law against the foreign tax on the particular class. Any tax credit attributable to a class that is not allocated to that class is allocated to the other class in the base or, if there are three classes in the base, is apportioned ratably among the taxes paid or accrued on the other two classes (as reduced in accordance with the preceding sentence).

(7) *Withholding taxes.* Paragraph (a) (2) through (6) of this section does not apply to withholding taxes imposed by a foreign country. FOGEI taxes may include withholding taxes imposed with respect to a distribution from a corporation. The portion of the total withholding taxes on a distribution that constitutes FOGEI taxes is determined by the portion of the distribution that is FOGEI. In addition, FOGEI taxes may include taxes imposed on a distribution described in section 959(a)(1) or on amounts described in section 959(b). The portion of the total withholding taxes imposed on a distribution described in section 959(a)(1) or on amounts described in section 959(b) is determined by reference to the portion of the amount included in gross income under section 951(a) that was FOGEI.

(b) *Dividends*—(1) *In general.* FOGEI taxes deemed paid with respect to a dividend equal the total taxes deemed paid with respect to the dividend multiplied by the fraction:

$$\frac{\text{FOGEI taxes paid or accrued by the payor}}{\text{Total foreign taxes paid or accrued by the payor.}}$$

With regard to dividends received in taxable years beginning after December 31, 1986, FOGEI taxes deemed paid with respect to a dividend equal the total taxes deemed paid with respect to the portion of the dividend within a separate category multiplied by the fraction:

Post-1986 FOGEI taxes as determined under the principles of section 902(c)(2) that are allocable to that separate category

Post-1986 foreign income taxes as determined under the principles of section 902(c)(2) that are allocable to that separate category.

This paragraph (b) applies to a dividend described in section 907(c)(3)(A) (including a section 1248 dividend) with reference to the particular taxable year or years of those accumulated profits out of which a dividend is paid. Determination of FOGEI taxes under this paragraph (b) must be made separately (i) for FOGEI taxes paid on FOGEI accumulated profits and total taxes paid on accumulated profits that arose in taxable years beginning before January 1, 1987, and (ii) for FOGEI taxes paid on FOGEI accumulated profits and total taxes paid on accumulated profits that arose in taxable years beginning after December 31, 1986. For purposes of these determinations, dividends are deemed to be paid first out of FOGEI and total accumulated profits that arose in taxable years beginning after December 31, 1986. See § 1.097(c)–2T (d)(1)(i). See section 960(a)(3) and § 1.960–2 relating to distributions that are treated as dividends for purposes of section 902.

(2) *Section 78 dividend.* There are no FOGEI taxes with respect to section 78 dividends.

(c) *Includible amounts under section 951(a).* FOGEI taxes deemed paid with respect to an amount includible in gross income under section 951(a) equal the total taxes deemed paid with respect to that amount multiplied by the fraction:

FOGEI taxes paid or accrued by the foreign corporation

Total foreign taxes paid or accrued by the foreign corporation.

With regard to an amount includible in gross income under section 951(a) in taxable years beginning after December 31, 1986, FOGEI taxes deemed paid with respect to that amount equal the total taxes deemed paid with respect to that amount within a separate category multiplied by the fraction:

Post-1986 FOGEI taxes as determined under the principles of section 902(c)(2) that are allocable to that separate category

Post-1986 foreign income taxes as determined under the principles of section 902(c)(2) that are allocable to that separate category.

Taxes in this fraction include only those foreign taxes that may be deemed paid under section 960(a) by reason of such inclusion. See §§ 1.960–1(c)(3) and 1.960–2(c).

(d) *Partnerships.* A partner's distributive share of the partnership's FOGEI taxes is determined under the principles of section 704.

(e) *Illustrations.* The application of this section may be illustrated by the following examples.

Example (1). X, a domestic corporation, owns all of the stock of Y, a foreign corporation organized in country S. Y owns all of the stock of Z, a foreign corporation organized in country T. Each corporation used the calendar year as its taxable year. In 1983, X includes in its gross income an amount described in section 951(a) with respect to Z. Assume that the taxes deemed paid under section 902(a) by X by reason of such an inclusion is $70. Assume further that Z paid total taxes of $120, $80 of which is FOGEI tax. Under paragraph (c) of this section, the FOGEI tax deemed paid is $46.67 (*i.e.*, $70 x $80/$120). This $46.67 is also FOGEI under § 1.907(c)–2T(d)(5) because it must be included in X's gross income under section 78.

Example (2). (i) Assume the same facts as in *Example* (1). Assume further that in 1983, Z distributes its entire earnings and profits to Y. Y has no earnings and profits during 1983 other than this dividend. Y paid a tax of $50 to S. Assume that Y is deemed under section 902(b)(1) to pay $50 of the tax paid by Z which was not deemed paid by X under section 960(a)(1) in 1983. In 1983, Y distributes its entire earnings and profits to X. Assume that X is deemed under section 902(a) to pay $100 of the taxes actually paid, and deemed paid, by Y.

(ii) Paragraph (b)(1) of this section applies to characterize the $50 tax of Z that Y is deemed to pay under section 902(b)(1). Y is deemed to pay $33.33 of FOGEI tax, *i.e.*, the amount of the tax deemed paid by Y ($50) multiplied by a fraction. The numerator of the fraction is the amount of Z's FOGEI tax ($80) and the denominator is the total taxes paid by Z ($120).

(iii) Under paragraph (a)(8) of this section, a portion of the $50 tax actually paid by Y on the earnings and profits received from Z is FOGEI tax. The amount of tax actually paid by Y that is FOGEI tax depends on the amount of the distribution from Z that is FOGEI (see § 1.907(c)–2T(d)(1)(i) and *Example* (2) (ii) under § 1.907(c)–2T(d)(8)). This result does not depend upon whether a portion of the distribution from Z is described in section 959(b) and it follows even though a portion of Y's earnings and profits will be excluded from X's gross income under section 959(a)(1) when distributed by Y. Assume that $12.50 of the $50 tax actually paid by Y is FOGEI tax.

(iv) Under paragraph (b)(1) of this section, X is deemed to pay $45.83 of FOGEI tax by reason of the distribution from Y. This amount is determined by multiplying the total taxes deemed paid by X by reason of such distribution ($100) by a fraction. The numerator of the fraction is the FOGEI tax paid, and deemed paid, by Y ($45.83, *i.e.*, $33.33 under subdivision (ii) of this example plus $12.50 under subdivision (iii) of this example). The denominator of the fraction is the total taxes paid, and deemed paid, by Y ($100). This $45.83 is FOGEI under § 1.907(c)–2T(d)(5) because it is included in X's gross income as a section 78 dividend.

Example (3). (i) X, a domestic corporation, has a concession with foreign country Y that gives it the exclusive right to extract and export the crude oil and natural gas owned by Y. The concession agreement and location of the oil and gas wells mandate that X construct a system of pipelines to transport the minerals that are extracted to a port where they are loaded onto tankers for export. X owns the transportation facilities. Y has an income tax system under which income from mineral operations is subject to a 50 percent tax rate. The taxation by Y of the mineral operations is a separate tax base under paragraph (a)(3) of this section. Under this system, Y imposes the tax at the port prior to export and it establishes a posted price of $12 per barrel. Y also collects royalties of $1.44 per barrel (*i.e.*, 12 percent of this posted price) which is deductible in computing the petroleum tax. Y also allows X deductible lifting costs of $.20 per barrel and deductible transporting costs of $.80 per barrel. Y does not allow any credits against the mineral tax. Assume that X does not have any income in Y other than the mineral income. (In 1983, X extracts, transports, and exports 10,000,000 barrels of crude oil, but for convenience, all computations are in terms of one barrel). X pays foreign taxes of $4.78 per barrel, computed as follows:

Sales		$12.00
Royalties	$1.44	
Lifting	.20	
Transporting	.80	
	2.44	(2.44)
Income base		9.56
Tax rate (percent)		.50
Tax		4.78

Assume that these taxes are creditable taxes under section 901, that the fair market value of the oil at the port is $10 per barrel, and that under § 1.907(c)–1T(b)(6) fair market value in the immediate vicinity of the oil wells is $9 per barrel. Thus, at the port, the excess of posted price ($12) over fair market value ($10) is $2.

(ii) The $4.78 foreign tax paid to Y is allocated to FOGEI and FORI in accordance with the rules in paragraph (a) (2) through (5) of this section.

(iii) Under paragraph (a)(3) of this section, FOGEI and FORI are subject to foreign taxation under one tax base. This foreign tax is allocated between FOGEI tax and FORI tax in accordance with paragraph (a) (4) and (5) of this section.

(iv) The modified gross income for FOGEI is $11, *i.e.*, fair market value in the immediate vicinity of the well ($9) plus the excess at the port of posted price over fair market value

($2). The modified gross income for FORI is $1, *i.e.*, value added to the oil beyond the wellhead which is part of Y's tax base ($10–$9).

(v) The royalty deductions are all directly attributable to FOGEI.

(vi) Under paragraph (a)(4) of this section, the income of each class is determined as follows:

	FOGEI	FORI
Modified gross income	$11.00	$1.00
Deductions:		
Royalties	1.44	0
Lifting	.20	0
Transporting	0	.80
Total	1.64	.80
Net income	9.36	.20

(vii) Under paragraph (a)(4) of this section, the total tax paid to Y is allocated to FOGEI and FORI in proportion to the income in each class. The calculation is as follows:

FOGEI tax =$4.78×$9.36/$9.56=$4.68
FORI tax =$4.78×$0.20/$9.56=$0.10

Thus, for the 10,000,000 barrels, the FOGEI tax is $46,800,000 and the FORI tax is $1,000,000.

(viii) The allocation under paragraph (a)(4) of this section, rather than the direct application of stated foreign tax rates to foreign-law taxable income in each class of income (which would produce the same results in the facts of this example), is necessary when a foreign country taxes more than one class of income under a progressive rate structure. See *Example* (4) in this paragraph (e).

Example (4). Assume the same facts as in *Example* (3) except that Y's tax is imposed at 40 percent for the first $20,000,000 of income and at 60 percent for all other income. The foreign taxes are allocated under paragraph (a)(4) of this section between FOGEI and FORI in the same manner as in subdivisions (vi) and (vii) of *Example* (3), as follows:

(1) Taxable income		$95,600,000
(2) Tax:		
(a) 40% of $20,000,000	$8,000,000	
(b) 60% of $75,600,000	45,360,000	
(c) Total tax		53,360,000
(3) FOGEI tax (line 2(c)×$9.36/$9.56)		52,243,680
(4) FORI tax (line 2 (c)×$0.20/$9.56)		1,116,320

Example (5). Assume the same facts as in *Example* (3). Assume further that X refines the crude oil into primary products prior to export and Y imposes its tax on the basis of crude oil equivalences of $12 per barrel, rather than the value of the primary products, to establish port prices. Assume that this arrangement is a pricing arrangement described in section 907(d). Thus, Y does not tax the refinery income. The results are the same as in *Example* (3) even if $12 per barrel is equal to, more than, or less than, the value of the primary products at the port. See paragraph (a)(5)(vi) of this section.

§ 1.907(d)-1T Disregard of posted prices for purposes of chapter 1 of the Code (for taxable years beginning after December 31, 1982) (Temporary regulations).

(a) *In general*—(1) *Scope.* Section 907(d) applies if a person has FOGEI from the—

(i) Acquisition (other than from a foreign government) or

(ii) Disposition of minerals at a posted price that differs from the fair market value at the time of the transaction. Also, if a seller (other than a foreign government) derives FOGEI upon a disposition described in the preceding sentence, section 907(d) applies to the acquisition by the purchaser whether or not the purchaser has FOGEI. Thus, section 907(d) may apply in determining a person's FORI.

(2) *Initial computation requirement.* If section 907(d) applies to any person, income on the transaction as initially reflected on the person's return shall be computed as if the transaction were effected at fair market value. This requirement applies the first time a person has taxable income derived from either the transaction or an item (such as a dividend described in section 907(c)(3)(A)) determined with reference to that income.

(3) *Burden of proof.* The taxpayer must be able to demonstrate the transaction as it actually occurred and the basis for reporting the transaction under the principles of paragraph (a)(2) of this section.

(4) *Related parties.* Section 907(d) (as a rule of characterization) applies whether or not the parties to the transaction are related. Thus, the excess of the posted price over the fair market value may never be taken into account in determining a person's FOGEI under section 907(a) but may be taken into account in determining a person's FORI.

(b) *Adjustments.* If a taxpayer does not comply with the initial requirement of paragraph (a)(2) of this section, adjustments under section 907(d) may be made only by the Commissioner in the same manner that section 482 is administered. Correlative and similar adjustments consistent with the substantive and procedural principles of section 482 and § 1.482–1(d) apply. However, section 907(d) is not a limitation on section 482. If a taxpayer disposing of minerals at a posted price does comply with the initial computation requirement of this section, adjustments and correlative and similar adjustments consistent with the substantive and procedural aspects of section 482 and § 1.482–1(d) shall apply, whether made on the return by the taxpayer or on a later audit. This paragraph (b) does not apply to an actual sale or exchange of minerals made between persons with respect to whom adjustments under section 482 would never apply (but see paragraph (a)(4) of this section).

(c) *Definitions.* For purposes of this section—

(1) *Foreign government.* The term "foreign government" means only the integral parts or controlled entities of a foreign sovereign and political subdivisions of a foreign country.

(2) *Minerals.* The term "minerals" has the same meaning as in § 1.907(c)–1T(f)(1).

(3) *Posted price.* The term "posted price" means the price set by, or at the direction of, a foreign government (i) to calculate income for purposes of its tax or (ii) at which minerals must be sold.

(4) *Other pricing arrangement.* The term "other pricing arrangement" in section 907(d) means a pricing arrangement having the effect of a posted price.

(5) *Fair market value.* The term "fair market value", whether or not at the port prior to export, is determined in the same way that the wellhead price is determined under § 1.907(c)–1T(b)(6).

§ 1.907(e)-1T Transitional rules (for amounts carried between a taxable year beginning before January 1, 1983, and a taxable year beginning after December 31, 1982) (Temporary regulations).

(a) *General Rule.* Section 907(e)(1) provides rules for carryovers of FOGEI and FORI taxes from taxable years beginning before January 1, 1983 (the general effective date of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)), to taxable years beginning after December 31, 1982. Section 907(e)(2) provides for carrybacks of those taxes from taxable years beginning after December 31, 1982, to taxable years beginning before January 1, 1983. Both the carryover and carryback amounts shall not exceed the lesser of the amount deemed paid or accrued which would have been deemed paid or accrued under the carryback and carryover rules of section 907(f) and § 1.907(f)–1T (covering carryback and carryover of taxes that both begin after December 31, 1982) or the amount which would have been deemed paid or accrued if—

(1) Pre-TEFRA section 907(b) (which provided for a separate section 904 limitation for FORI taxes),

(2) Pre-TEFRA section 907(f) (which limited the carryback and carryover of

FOGEI taxes to 2% of FOGEI for the year of origin), and

(3) Pre-TEFRA section 904(f)(4) (which dealt with the determination of foreign oil related loss if section 907 applied) had remained in effect for taxable years beginning after December 31, 1982.

(b) *Rules for carryover of FORI and pre-TEFRA non-FORI taxes*—(1) Under this section, in general—

(i) The amount of unused pre-TEFRA FORI taxes that may be carried forward to any carryover year may not exceed the excess section 907(b) limitation, as in effect prior to the general effective date of TEFRA, for that carryover year;

(ii) The amount of unused pre-TEFRA, non-FORI taxes that may be carried forward to any carryover year may not exceed the excess section 904(d) general limitation, as in effect before the general effective date of TEFRA for that carryover year; and

(iii) The total of the amounts carried forward under subdivisions (i) and (ii) of this paragraph (b)(1) to any carryover year may not exceed the excess section 904(d) general limitation, as in effect after the general effective data of TEFRA, for that carryover year.

(2) The amount of unused pre-TEFRA FORI taxes that may be carried forward to any succeeding carryover year is the total of those taxes, less the amount of those taxes deemed accrued in the carryover year after reduction in accordance with paragraph (b)(1)(i) of this section (if applicable).

(3) The amount of unused pre-TEFRA, non-FORI taxes that may be carried forward to any succeeding carryover year is the total of those taxes, less the amount of those taxes deemed accrued in the carryover year after reduction in accordance with paragraph (b)(1)(ii) of this section (if applicable).

(c) *Examples*. The provisions of section 907(e)(1) may be illustrated by the following examples. For purposes of these examples, assume the following:

(1) The corporation's preliminary U.S. tax liability is computed at an effective rate of 46%;

(2) A term modified by "old" refers to the meaning the term had prior to the general effective date of TEFRA;

(3) The only foreign source income which the corporation had prior to 1983 is old FORI (which included FOGEI and other FORI) and old section 904(d)(1)(C) income (*i.e.*, income other than interest, DISC dividends and FORI); and

(4) The only foreign source income the corporation had during 1983 and 1984 was section 904(d)(1)(C) income (*i.e.*, income other than interest and DISC dividends) as applicable during those years.

Example (1)—(i) *Facts*. X, a calendar year U.S. corporation organized on January 1, 1982, uses the accrual method of accounting. For 1982, X had the following relevant tax items:

	1982
FOGEI	$500
FOGEI taxes	265
Section 907(a) limitation (46×$500)	230
Unused FOGEI tax	35
Old section 907(f)(1) limitation (2%×$500)	10
Unused old section 907(b) limitation FORI taxes (not including unused FOGEI taxes)	63
Unused old section 904(d)(1)(C) taxes	20

X's tax items for 1983 and 1984 under the Code provisions applicable to those years were as follows:

TABLE I

	1983	1984
(a) FOGEI	$1,000	$1,200
(b) FORI	400	350
(c) Other foreign taxable income	122	250
(d) Total taxable income (domestic and foreign)	2,000	2,500
(e) FOGEI taxes	750	500
(f) FORI taxes	140	62
(g) Other foreign taxes	50	31
(h) Section 907(a) limitation (46%×(a))	460	552
(i) Total creditable foreign taxes (after section 907(a) limitation excluding carryovers)	650 ((f)+(g)+(h))	593 ((e)+(f)+(g))
(j) Preliminary U.S. tax (46%×(d))	920	1,150
(k) Section 904(d) overall limitation ((j)×(a)+(b)+(c)÷(d))	700	828
(l) Excess FOGEI taxes (or excess limitation) ((e)−(h))	290	(52)
(m) Excess section 904(d) taxes (or excess limitation) ((i)−(k))	(50)	(235)

X's foreign tax items for 1983 and 1984, had old sections 907 (b) and (f) and 904(f)(4) applied, would have been as follows:

TABLE II

	1983	1984
(a) FOGEI	$1,000	$1,200
(b) Old FORI (less FOGEI)	400	350
(c) Other foreign taxable income	122	250
(d) Total taxable income (domestic and foreign)	2,000	2,500
(e) FOGEI taxes	750	500
(f) Old FORI taxes (less (e))	140	62
(g) Other foreign taxes	50	31
(h) Section 907(a) limitation (46%×(a))	460	552
(i) Old FORI taxes (after section 907(a) limitation excluding carryovers)	600	562

TABLE II—Continued

	1983	1984
	((f)+(h))	((e)+(f))
(j) Old section 904(d)(1)(C) taxes ((g))	50	31
(k) Preliminary U.S. tax (46%×(d))	920	1,150
(l) Old FORI section 907(b(limitation ((k)×(a)+(b)÷(d))	644	713
(m) Old section 904(d)(1)(C) limitation ((k)×(c)÷(d))	56	115
(n) Excess FOGEI taxes (or excess limitation) ((e)−(h))	290	(52)
(o) Excess old FORI taxes (or excess limitation) ((i)−(l))	(44)	(151)
(p) Excess old section 904(d)(1)(C) taxes (or excess limitation) ((j)−(m))	(6)	(84)

(ii) *Carryover from 1982 to 1983*—(A) *Unused FOGEI taxes*. X has $35 of unused FOGEI taxes available for carryover from 1982. Pursuant to section 907(f)(3)(A), X must determine its section 907(f) FOGEI tax carryover (taking into account the section 907(e) transition rules) from 1982 to 1983 before it determines its section 904(c) general foreign tax carryover. In determining the carryover from 1982 to 1983, section 907(e)(1) requires that the old section 907(f)(1) limitation be applied. Under the old section 907(f)(1), FOGEI taxes in excess of the section 907(a) limitation could only be carried over to succeeding years in an amount equal to 2% of the FOGEI ($10 in this example) in the year of origin. See § 1.907(f)–1A(b)(2). The $10 is not deemed accrued, however, in 1983 because FOGEI taxes paid or accrued in 1983 ($750) exceed the section 907(a) limitation ($460) for 1983 (Table I, 1983, line (1)).

(B) *Unused FORI taxes*. X has $63 of unused old section 907(b) limitation FORI taxes available for carryover from 1982. Pursuant to section 907(e)(1), the amount of unused FORI taxes that may be carried over from 1982 to 1983 may not exceed the excess old section 907(b) limitation for 1983. Since the excess 1983 old section 907(b) limitation is $44 (Table II, 1983, line (o)), only that amount of the $63 of total unused 1982 FORI taxes (not including unused FOGEI taxes) may be carried over and deemed accrued in 1983. Therefore, X has unused 1982 old section 907(b) limitation FORI taxes (not including unused FOGEI taxes) in the amount of $19 ($63 less $44) available for carryover to 1984.

(C) *Unused other foreign taxes*. X has $20 of unused old section 904(d)(1)(C) taxes available for carryover from 1982. However, only $6 may be deemed accrued in 1983 since for 1983 the excess old section 904(d)(1)(C) limitation was only $6 (Table II, 1983, line (p)). Therefore, X has unused 1982 old section 904(d)(1)(C) taxes in the amount of $14 ($20 less $6) available for carryover to 1984.

(iii) *Carryover from 1982 to 1984*—(A) *Unused FOGEI taxes*. The unused FOGEI tax

carryover from 1982 of $10 will be deemed accrued in 1984 since the limitations of both old and new section 907(f)(2) do not limit the deemed accrual. The $10 amount is not as great as the lesser of the excess extraction limitation under new section 907(f)(2)(A), $52 (Table I, 1984, line (l)) and the excess overall limitation under new section 907(f)(2)(B), $235 (Table I, 1984, line (m)). Likewise, the $10 amount is not as great as the lesser of the excess extraction limitation under old section 907(f)(2)(A), $52 (Table II, 1984, line (n)) and the excess oil related limitation under old section 907(f)(2)(B), $151 (Table II, 1984, line (o)).

(B) *Unused FORI taxes.* The $29 of 1982 unused old section 907(b) limitation FORI taxes (including $10 of unused FOGEI taxes) are deemed accrued in 1984 since they do not exceed the excess old section 907(b) limitation for 1984, $151 (Table II, 1984, line (o)).

(C) *Unused other foreign taxes.* X's $14 of unused 1982 old section 904(d)(1)(C) taxes are deemed accrued in 1984 since they do not exceed the old section 904(d)(1)(C) limitation, $84 (Table II, 1984, line (p)).

Example (2)—(i) *Facts.* Assume the same facts as in *Example* (1) except that X's other foreign taxable income for 1983, line (c) in both tables in *Example* (1), is $46. It is assumed that total taxable income remains the same as in *Example* (1).

(ii) *Carryover from 1982 to 1983*—(A) *Unused FOGEI taxes.* Same result as in *Example* (1). None of the $10 of unused FOGEI taxes carried over from 1982 may be deemed accrued in 1983.

(B) *Unused FORI and other foreign taxes.* The old excess section 907(b) limitation for 1983 remains at $44 (Table II, 1983, line (o)). There is, however, no old excess section 904(d)(1)(C) limitation for 1983 (Table II, 1983, line (p)). The tentative carryovers are therefore $44 of FORI taxes and $0 of section 904(d)(1)(C) taxes. In addition, the excess section 904(d) overall limitation (Table I, 1983, line (m)) is now only $15. Accordingly, under paragraph (b)(1)(D) of this section, the maximum amount of FORI taxes and old section 904(d)(1)(C) taxes that may be carried forward to 1983 is $15.

Therefore, $15 of the $63 of total unused 1982 FORI taxes (not including unused FOGEI taxes) may be carried over from 1982 and deemed accrued in 1983. X has unused 1982 old section 907 (b) limitation FORI taxes (not including unused FOGEI taxes) in the amount of $48 available for carryover to 1984. X need not reduce the unused 1982 FORI taxes by the amount ($44) which would have been deemed accrued had the old excess section 907 (b) limitation applied.

Example (3)—(i) *Facts.* Y, a U.S. corporation organized on January 1, 1982, uses the accrual method of accounting and the calendar year as its taxable year. For 1982, Y had the following tax items:

TABLE I

(a) FOGEI	$900
(b) Old FORI (less FOGEI)	250
(c) Other foreign taxable income	200
(d) World wide taxable income	2,050
(e) FOGEI taxes	300
(f) Old FORI taxes (less (e))	130
(g) Other foreign taxes	170
(h) Section 907(a) limitation (46% x (a))	414
(i) Old FORI taxes (after section 907 (a) limitation) (lesser of (e) or (h) plus (f))	430
(j) Old section 904(d)(1)(C) taxes ((g))	170
(k) Preliminary U.S. tax (46% x (d))	943
(l) Old FORI section 907(b) limitation ((k) x (a) + (b) ÷ (d))	529
(m) Old section 904(d)(1)(C) limitation ((k) x (c) ÷ (d))	92
(n) Excess FOGEI taxes (or excess limitation) ((e) − (h))	(114)
(o) Excess old FORI taxes (or excess limitation) ((i) − (1))	(99)
(p) Excess old section 904 (d)(1)(C) taxes (or excess limitation) ((j) − (m))	78

Y's tax items for 1983 and 1984 under the Code provisions applies to those years were as follows:

TABLE II

	1983	1984
(a) FOGEI	$1,000	$1,200
(b) FORI	300	450
(c) Other foreign taxable income (loss)	200	150
(d) Total taxable income (domestic and foreign)	2,200	2,500
(e) FOGEI taxes	400	750
(f) FORI taxes	180	290
(g) Other foreign taxes	60	90
(h) Section 907(a) limitation (46% x (a))	460	552
(i) Total creditable foreign taxes (after section 907(a) limitation excluding carryovers)	640 ((e) + (f) + (g))	932 ((f) + (g) + (h))
(j) Preliminary U.S. tax (46% x (d))	1,012	1,150
(k) Section 904(d) overall limitation ((j) x (a) + (b) + (c) ÷ (d))	690	828
(l) Excess FOGEI taxes (or excess limitation) ((e) − (h))	(60)	198
(m) Excess section 904 taxes (or excess limitation) ((i) − (k))	(50)	104

Y's foreign tax items for 1983 and 1984, had old sections 907 (b) and (f) and 904(f)(4) applied, would have been as follows:

TABLE III

	1983	1984
(a) FOGEI	$1,000	$1,200
(b) Old FORI (less FOGEI)	300	450
(c) Other foreign taxable income	200	150
(d) Total taxable income (domestic and foreign)	2,200	2,500
(e) FOGEI taxes	400	750
(f) Old FORI taxes (less (e))	180	290
(g) Other foreign taxes	60	90
(h) Section 907 (a) limitation (46% x (a))	460	552
(i) Old FORI taxes (after section 907(a) limitation excluding carryovers	580 ((f) + (e))	842 ((f) + (h))
(j) Old section 904(d)(1)(C) taxes ((g))	60	90
(k) Preliminary U.S. tax (46% x (d))	1,012	1,150
(l) Old FORI section 907(b) limitation ((k) x (a) + (b) ÷ (d))	598	759
(m) Old section 904(d)(1)(C) limitation ((k) x (c) ÷ (d))	92	69
(n) Excess FOGEI taxes (or excess limitation) ((e) − (h))	(60)	198
(o) Excess old FORI taxes (or excess limitation) ((i) − (1))	(18)	83
(p) Excess old section 904(d)(1)(C) taxes (or excess limitation) ((j) − (m))	(32)	21

(ii) *Carryover from 1982 to 1983*—(A) *Unused FOGEI taxes.* For 1982, Y has no unused FOGEI taxes (Table I, 1982, line (n)) since FOGEI taxes paid, $300 (Table I, 1982, line (e)) is less than the section 907(a) limitation, $414 (Table I, 1982, line (h)).

(B) *Unused FORI taxes.* For 1982, Y has no unused old FORI taxes (Table I, 1982, line (o)) since the old FORI section 907(b) limitation, $529 (Table I, 1982, line (1)) exceeds old FORI taxes for 1982, $430 (Table I, 1982, line (i)).

(C) *Unused other foreign taxes.* For 1982, Y has $78 of unused old section 904(d)(1)(C) taxes (Table I, 1982, line (p)). The unused old section 904(d)(1)(C) taxes from 1982 are deemed accrued in 1983 only to the extent of the excess old section 904(d)(1)(C) limitation for 1983, $32 (Table III, 1983, line (p)). Thus, $32 of the unused old section 904(d)(1)(C) taxes for 1982 are deemed accrued in 1983 and $46 are available for carryover to 1984.

(iii) *Carryback of unused FOGEI taxes from 1984 to 1982.* Y has $198 of unused FOGEI taxes for 1984 (Table II, 1984, line (1)). These taxes are deemed accrued in 1982 only to the extent they would have been deemed accrued in 1982 had old section 907(f) remained in effect for 1984. Under old section 907(f), Y's carryback of unused FOGEI taxes would have been limited to $24, 2% of its FOGEI for 1984. All of the $24 is deemed accrued in 1982 because Y's excess section 907(a) limitation for 1982 is $114 (Table I, line (n)) and its excess old FORI section 907(b) limitation for 1982 is $99 (Table I, line (o)).

(iv) *Carryback of unused section 904(d)(1)(C) taxes from 1984 to 1982.* Y has $104 of unused section 904(d)(1)(C) taxes for 1984 (Table II, 1984, line (m)). Those taxes may be carried from 1984 to 1982 but only to the extent of the amount of unused old FORI taxes and unused old section 904(d)(1)(C) taxes from 1984 that would have been deemed accrued in 1982 had old sections 907 (b) and (f) and 904(f)(4) remained in effect for 1984. The amount of unused old FORI taxes from 1984, $83 (Table III, 1984, line (o)), that would have been deemed accrued in 1982 is $75, the excess old FORI section 907(b) limitation for 1982, $99 (Table I, line (o)) less $24 of carryback of unused FOGEI taxes from subdivision (iii) above. Unused FOGEI taxes

carried back to an excess limitation year are applied before unused other old FORI taxes. See § 1.907(b)–2A(d)(1)(ii). Although Y has $21 of unused old section 904(d)(1)(C) taxes for 1984 (Table III, 1984, line (p)) none are deemed accrued in 1982 because there is no excess old section 904(d)(1)(C) limitation for 1982 (Table I, line (p)). Thus, only $75 of the $104 of unused section 904(d)(1)(C) taxes from 1984 are deemed accrued in 1982.

§ 1.907(f)–1T Carryback and carryover of credits disallowed by section 907(a) (for amounts carried between taxable years that each begin after December 31, 1982) (Temporary regulations).

(a) *In general.* If a taxpayer chooses the benefits of section 901, any unused FOGEI tax paid or accrued in a taxable year beginning after December 31, 1982, may be carried to the taxable years specified in section 907(f) under the carryback and carryover principles of this section and § 1.904–2(b). See section 907(e) and § 1.907(e)–1T for transitional rules that apply to unused FOGEI taxes carried back or forward between a taxable year beginning before January 1, 1983, and a taxable year beginning after December 31, 1982.

(b) *Unused FOGEI tax*—(1) *In general.* The "unused FOGEI tax" for purposes of this section is the excess of the FOGEI taxes for a taxable year (year of origin) over that year's limitation level (as defined in § 1.907(a)–1T(b)).

(2) *Year of origin.* The term "year of origin" in the regulations under section 904 corresponds to the term "unused credit year" under section 907(f).

(c) *Tax deemed paid or accrued.* The unused FOGEI tax from a year of origin that may be deemed paid or accrued under section 907(f) in any preceding or succeeding taxable year ("excess limitation year") may not exceed the lesser of—

(1) The excess extraction limitation for the excess limitation year, or

(2) The excess general section 904 limitation for the excess limitation year.

(d) *Excess extraction limitation.* Under section 907(f)(2)(A), the "excess extraction limitation" for an excess limitation year is the amount by which that year's section 907(a) extraction limitation exceeds the sum of—

(1) The FOGEI taxes paid or accrued, and

(2) The FOGEI taxes deemed paid or accrued in the year by reason of a section 907(f) carryback or carryover from preceding years of origin.

(e) *Excess general section 904 limitation.* Under section 907(f)(2)(B), the "excess general section 904 limitation" for an excess limitation year is the amount by which that year's section 904 general limitation exceeds the sum of—

(1) The general limitation taxes paid or accrued (or deemed to have been paid under section 902 or 960) to all foreign countries and possessions of the United States during the taxable year,

(2) The general limitation taxes deemed paid or accrued in such taxable year under section 904(c) and which are attributable to taxable years preceding the unused credit year, plus

(3) The FOGEI taxes deemed paid or accrued in that year by reason of a section 907(f) carryover (or carryback) from preceding years of origin.

(f) *Section 907(f) priority.* If a taxable year is a year of origin under both section 907(f) and section 904(c), section 907(f) applies first. See section 907(f)(3)(A).

(g) *Cross-reference.* In computing the carryback and carryover of disallowed credits under section 907(f), the principles of § 1.904–2 (d), (e), and (f) apply.

(h) *Example.* The following example illustrates the application of section 907(f).

Example. X, a U.S. corporation organized on January 1, 1983, uses the accrual method of accounting and the calendar year as its taxable year. X's only income is income which is not subject to a separate tax limitation under section 904(d). X's preliminary U.S. tax liability indicates an effective rate of 46% for taxable years 1983–1985. X has the following foreign tax items for 1983–1985:

EXAMPLE

	1983	1984	1985
1. FOGEI	$15,000	$20,000	$10,000
2. FOGEI taxes	7,500	9,200	4,200
3. Other foreign taxable income	8,000	5,000	10,000
4. Other foreign taxes	3,200	2,000	3,000
5. (a) Section 907(a) limitation (.46 × Line 1)	6,900	9,200	4,600
(b) General section 904 limitation (.46 × (line 1 plus line 3))	10,580	11,500	9,200
6. (a) Unused FOGEI taxes (excess of line 2 over line 5(a))	600	0	0
(b) Unused general limitation taxes (excess of line 4 plus lesser of line 2 or line 5(a) over line 5(b))	0	0	0
7. (a) FOGEI taxes from years preceding 1983 deemed accrued under section 907(f)	0	0	0
(b) Section 904 general limitation taxes from years preceding 1983 deemed accrued under section 904(c)	0	0	0
8. (a) Excess section 907(a) limitation (excess of line 5(a) over sum of line 2 and line 7(a))	0	0	400
(b) Excess section 904 general limitation (excess of line 5(b) over sum of line 4, lesser of line 2 and line 5(a), and line 7(b))	480	300	2,000
9. Limit on FOGEI taxes that will be deemed accrued under section 907(f) (lesser of line 8(a) and line 8(b))	0	0	400

X has unused 1983 FOGEI taxes of $600. Since the excess section 907(a) limitation for 1984 is zero, the unused FOGEI taxes are carried to 1985. Of the $600 carryover, $400 is deemed accrued in 1985 and the balance of $200 is carried to following years (but not to a year after 1988). After the carryover from 1983 to 1985, the excess section 904 general limitation for 1985 (line 8(b)) is reduced by $400 to $1,600 to reflect the amount of 1983 FOGEI taxes deemed accrued in 1985 under section 907(f).

Par. 10. A new center heading is added to precede § 1.911–1 to read as follows:

Earned Income of Citizens or Residents of United States

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved: September 15, 1988.

O. Donaldson Chapoton,

Assistant Secretary of the Treasury.

[FR Doc. 89–449 Filed 1–19–89; 8:45 am]

BILLING CODE 4830-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2702

Regulations Implementing the Freedom of Information Reform Act of 1986

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: This rule adopts, with minor stylistic changes, an interim rule that revised the Commission's regulations concerning fees and fee waivers for processing Freedom of Information Act requests in accordance with the standards required by the Freedom of Information Reform Act of 1986.

EFFECTIVE DATE: Final rule effective January 23, 1989.

FOR FURTHER INFORMATION CONTACT: L. Joseph Ferrara, General Counsel, Office of the General Counsel, 1730 K Street, NW, 6th Floor, Washington, DC 20006, telephone: 202-653-5610 (202-566-2673 for TDD Relay). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Freedom of Information Reform Act of 1986, Pub. L. 99-570, sections 1801-1804, 100 Stat. 3207, 3207-48 (1986) (FOIA Reform Act), amended the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and established a new fee structure for fees generally as well as for certain categories of requests. In addition, a revised statutory standard governing the waiver of FOIA fees was established.

On January 12, 1988 the Commission published at 53 FR 737 through 739 an interim rule effective February 11, 1988, revising the Commission's regulations at 29 CFR Part 2702 concerning fees and fee waivers for processing FOIA requests in accordance with the standards required by the FOIA Reform Act. The interim rule revised 29 CFR 2702.5 and added new §§ 2702.6 through 2702.8. Comments were requested.

The Commission has found that the interim regulations have operated effectively since they became operative more the eleven months ago. No comments were received in response to the January 12, 1988 notice. Accordingly, with minor stylistic changes, the interim rule amending 29 CFR Part 2702, which was published at 53 FR 737 through 739 on January 12, 1988, is adopted as a final rule.

List of Subjects in 29 CFR Part 2702

Freedom of information.

Accordingly, 29 CFR Part 2702 is amended as follows:

1. The authority citation for Part 2702 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A)

2. Section 2702.5 is revised to read as follows:

§ 2705.5 Fees applicable—categories of requesters.

(a) When documents are requested for commercial use, requesters will be assessed the full direct costs of searching for, reviewing for release, and duplicating the records sought.

(b) When records are being requested by educational or noncommercial scientific institutions whose purpose is scholarly or scientific research, and not for commercial use, the requester will be assessed only for the cost of duplicating the records sought, but no charge will be made for the first 100 paper pages reproduced.

(c) When records are being requested by representatives of the news media, the requester will be assessed only for the cost of duplicating the records sought, but no charge will be made for the first 100 paper pages reproduced.

(d) For any other request not described in paragraphs (a) through (c) of this section, the requester will be assessed the full direct costs of searching for and duplicating the records sought, except that the first two hours of manual search time and the first 100 paper pages of reproduction shall be furnished without charge.

(e) For purposes of paragraphs (b) through (d) of this section, whenever it reasonably appears that a requester of records or a group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, such requests will be aggregated and fees assessed accordingly.

3. Sections 2702.6 through 2702.8 are revised to read as follows:

§ 2702.6 Fee schedule.

(a) *Search fee.* The fee for searching for information and records shall be $10 per hour for clerical time and $20 per hour for professional time. Fees for searches of computerized records shall be the actual cost to the Commission but shall not exceed $300 per hour. This fee includes machine time and that of the operator and clerical personnel. The fee for computer printouts shall be $.40 per page. If search charges are likely to exceed $25, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Time spent on unsuccessful searches shall be fully charged.

(b) *Review fee.* The review fee shall be charged for the initial examination by the Executive Director of documents located in response to a request in order to determine if it may be withheld from disclosure, and for the deletion of portions that are exempt from disclosure, but shall not be charged for review by the Chairman or the Commissioners. *See* § 2702.3. The review fee is $30 per hour.

(c) *Duplicating fee.* The copy fee for each page of paper up to 8½" X 14" shall be $.15 per copy per page. Any private sector services required will be assessed at the charge to the Commission. If duplication charges are likely to exceed $25, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

§2702.7 No fees; waiver or reduction of fees.

(a) No fees shall be charged to any requester, including commercial use requesters, if the anticipated cost of processing and collecting the fee would be equal to or greater than the fee itself. Accordingly, the Commission has determined that fees of less than $10 shall be waived.

(b) Documents shall be furnished without any charge or at a charge reduced below the fees otherwise applicable if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(1) The following six factors will be employed in determining when such fees shall be waived or reduced:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding";

(iv) The significance of contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;

(v) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(vi) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commerical interest of the requester."

(2) The Executive Director, upon request, shall determine whether a waiver or reduction of fees is warranted. Requests shall be made concurrently with requests for information under § 2702.3. Appeals of adverse decisions may be made to the Chairman within 5 working days. Determination of appeals will be made by the Chairman within 10 working days of receipt.

§ 2702.8 Advance payment of fees; interest; debt collection procedures.

(a) Advance payment of fees generally will not be required. However, an advance payment (before work is commenced or continued on a request) may be required if the charges are likely to exceed $250.

(b) Requesters who have previously failed to pay a fee charged in timely fashion (i.e., within 30 days of the date of billing) may be required first to pay that amount plus any applicable interest (or demonstrate that the fee has been paid) and then make an advance payment of the full amount of the estimated fee before the new or pending request is processed.

(c) Interest charges may be assessed on any unpaid bill starting on the 31st day following the day on which the billing was sent at the rate presecribed in 31 U.S.C. 3717 and will accrue from the date of billing.

(d) The Debt Collection Act of 1982, Pub. L. 97-365, including disclosure to consumer credit reporting agencies and the use of collection agencies will be utilized to encourage payment where appropriate.

Dated: January 12, 1989.

Ford B. Ford,

Chairman, Federal Mine Safety and Health Review Commission.

[FR Doc. 89-1286 Filed 1-19-89; 8:45 am]

BILLING CODE 6735-01-M

DEPARTMENT OF THE TREASURY

31 CFR Part 103

Amendment to the Bank Secrecy Act Regulations Relating to Domestic Currency Transactions

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Two amendments are being made to the Bank Secrecy Act regulations, 31 CFR Part 103. The first amendment to 31 CFR 103.27 clarifies that a person conducting currency transactions for another person must report on the Currency Transaction Report (Form 4789, the "CTR") the name of the person on whose behalf the transaction was conducted. The second amendment adds a definition of "structuring" to the anti-structuring provision of 31 CFR 103.53, which prohibits a person from structuring or assisting in structuring, or attempting to structure or assist in structuring, any transaction with one or more domestic financial institutions for the purpose of evading the reporting requirements.

DATE: These amendments are effective on or before February 22, 1989.

ADDRESS: Amy G. Rudnick, Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury, Room 4320, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Kathleen A. Scott, Attorney Advisor, Office of the Assistant General Counsel (Enforcement), (202) 566-9947.

SUPPLEMENTARY INFORMATION:

Notice of Proposed Rulemaking

The Bank Secrecy Act, Pub. L. No. 91-508 (codified at 12 U.S.C. 1829b, 12 U.S.C. 1951 *et seq.*, and 31 U.S.C. 5311-5324), authorizes the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax, or regulatory matters. Pursuant to 31 U.S.C. 5313 and the regulations thereunder, financial institutions are required to file Currency Transaction Reports with Treasury on transactions in currency in excess of $10,000 "by, through or to such financial institutions." 31 CFR 103.22(a).

Two amendments were proposed to the Bank Secrecy Act regulations on June 21, 1988 (53 FR 23289). The first amendment proposed would clarify what is meant by the phrase in 31 CFR 103.27 that a financial institution shall verify the identification of "any person or entity for whose or which *account*" a transaction reportable under § 103.22 is to be effected. (Emphasis added). Two cases (*United States* v. *Murphy*, 809 F.2d 1427 (9th Cir. 1987) and *United States* v. *Gimbel*, 632 F. Supp. 713 (E.D. Wis. 1984)), have held that the Bank Secrecy Act regulations and the Currency Transaction Report do not require that the name of the person for whom the transaction is being carried out be disclosed by the person conducting the transaction. Treasury's use of the term "account" in the phrase "for whose or which account" in 31 CFR 103.27 was not meant to identify a customer account relationship with a financial institution, but always has been interpreted by Treasury to be synonymous with "on behalf of," as required by the Bank Secrecy Act itself, 31 U.S.C. 5313. Section 5313 states that "a participant acting for another person shall make the report as agent or bailee of the person and identify the person for whom the transaction is being made." Many currency transactions never involve any sort of customer bank account at all (*e.g.*, purchasing money orders with cash).

Although no other courts have adopted the holdings of *Murphy* and *Gimbel*, in order to clarify any lingering ambiguity in § 103.27, and to conform the regulation more closely to the statute, Treasury proposed to change the phrase "for whose or which account" to "on whose behalf." This change makes clear that the financial institution must obtain the identity of and other required information about the person for whom the currency transaction was conducted. This was not intended to be, and indeed is not, a new requirement; financial institutions should have been obtaining this information all along, and placing it in Part II of Form 4789, the Currency Transaction Report (CTR).

The second proposal dealt with the "anti-structuring" provision, 31 U.S.C. 5324, added by the Money Laundering Control Act, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 (October 27, 1986). Section 5324 prohibits any person from structuring or assisting in structuring, or attempting to structure or assist in structuring, transactions "for the purpose of evading" the currency transaction reporting requirements, and also prohibits a person, for the same purpose, from causing or attempting to cause a financial institution to fail to file a CTR or to file a CTR that contains a material omission or misstatement of fact. The enactment of section 5324 clarified that all currency transaction structuring schemes designed to evade the reporting requirements are unlawful, regardless of whether the $10,000 threshold is met at a single financial institution on a single day. *See* H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-20 (1986); S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986).

Since the structuring provision was enacted, there has been some concern by financial institutions that neither the statute itself nor the regulation gives a formal definition of "structure" or "structuring," although the only court to consider the question ruled that the absence of a definition for the term "structuring" does not render the statute unconstitutionally vague. *U.S.* v. *Scanio*, No. CR 88-64T (W.D.N.Y. Sept. 22, 1988.) Treasury has received many inquiries since this provision was passed into law in 1986 as to exactly what the term

"structuring" means. In response to these requests, Treasury proposed for inclusion in the Bank Secrecy Act regulations a definition of "structure" or "structuring," after consultation with the Internal Revenue Service, the Department of Justice and the other Bank Secrecy Act regulatory agencies. The proposed definition provided that a person structures a transaction if:

(1) Acting alone, or in conjunction with, or on behalf of, other persons;
(2) He conducts, attempts to conduct or assists in conducting;
(3) One or more transactions in currency;
(4) In any amount;
(5) At one or more financial institutions;
(6) On one or more days;
(7) In any manner;
(8) For the purpose of evading the reporting requirements of 31 CFR 103.22.

The phrase "in any manner" is defined to include, but is not limited to, all schemes involving the breaking down of sums of currency larger than $10,000 into sums, including sums at or below $10,000, or through the conducting of a series of related currency transactions, including transactions at or below $10,000, at one financial institution or multiple financial institutions on one or more days. The definition also states that "[t]he transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition." This makes it clear that structuring is not limited to multiple transactions conducted on the same day at a single financial institution.

Discussion of Comments

Forty comments were received in response to the Notice of Proposed Rulemaking. Many of the comments were negative, but the issues the comments focused on indicated a need for clarification of the responsibilities under these amendments, rather than a need to change the proposals themselves.

Proposed Amendment to § 103.27

New Obligations

There was much confusion on the part of the commenters on this particular proposal. On an initial note, many seemed to feel that a new obligation was being proposed.

In response to these comments, Treasury stresses at the outset that this amendment does not impose a new obligation upon any financial institution; it merely clarifies the regulation to state more clearly the statutory requirement that "a participant acting for another person shall make the report as agent or bailee of the person and identify the person for whom the transaction is being made." 31 U.S.C. 5313. Treasury always has intended, and consistently has stated, that the phrase "of any person or entity for whose or which account such transaction is to be effected" refers to all transactions conducted by one person for another, *i.e.*, as an agent or bailee, not just those that are run through accounts. Many transactions conducted on behalf of others never involve an account at all. Part II of the CTR also clearly states that the financial institution must identify the individual or organization for whom a transaction is conducted. Therefore, this should not be seen as a new obligation for financial institutions, but a clarification of an existing one.

Beneficial Owner

Many questioned the use of the term "beneficial owner" and whether that meant, for example, that transactions on behalf of corporations would need to have the stockholders of the corporation listed in Part II of the CTR.

In Part II of the CTR, the financial institution identifies the individual or organization on whose behalf the transaction was conducted. The definition of "person" for purposes of the Bank Secrecy Act regulations, 31 CFR 103.11(l), should be consulted for guidance:

> An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Thus, if a currency transaction in excess of $10,000 is being conducted for a corporation, only the information on the corporation itself is needed for Part II of the CTR, and there is no need to determine the names of the stockholders in order to complete the CTR. In order to be consistent with the regulations, the CTR is being revised to reference the term "person."

The term "beneficial owner" was used in the Notice as merely another term to designate the person on whose behalf the transaction was conducted.

Knowledge Requirement

Many commenters questioned how a financial institution was to gain knowledge of whether a person is doing the transaction for someone else. Some commenters wondered if Treasury was imposing a positive duty to inquire of every customer if the transaction was being conducted on behalf of someone else.

The Bank Secrecy Act requires financial institutions to file complete and accurate CTR's. Section 5313 clearly requires the financial institution to ascertain the real party in interest where an agency relationship exists. Asking the customer clearly is one way of obtaining the information needed to complete the CTR. Treasury currently is considering future regulatory and administrative action to require tellers to inquire of each of their customers for the information needed to complete the CTR, if that information cannot otherwise be obtained from customer records. In the meantime, Treasury recommends that tellers ask their customers for the information they need to complete the CTR, if they do not already have that information in customer records, and to ask each customer for each transaction if he is conducting the transaction on behalf of someone else, as that information is unique to each transaction and will not appear on a customer's signature card or other records.

In addition, as Treasury has consistently stated in the past, "knowledge" clearly also includes the concept of "willful blindness" articulated in the case of *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). This concept applies to a person who has deliberately avoided positive knowledge. As the court stated in the *Jewell* case, "if a person has his suspicions aroused but then deliberately omits to make further inquiries because he wishes to remain in ignorance, he is deemed to have knowledge." Thus, if a financial institution suspects that someone may be either conducting currency transactions or having them conducted on his behalf, in amounts totaling more than $10,000, but deliberately refuses to ask questions because it wants to remain ignorant, and therefore "innocent," the financial institution will be deemed to have knowledge for purposes of assessing liability under the Bank Secrecy Act.

Practicalities of Compliance

Many comments raised questions of the practicalities of complying with the requirement. Some pointed out that this information could not be obtained if the deposit was made by use of an automated teller machine or a night depository, or handled by a courier. Some commenters asked whether they could rely on the information given to them by the person conducting the transaction and/or the information in

the file on the person on whose behalf the transaction was being conducted. Several commenters inquired what they should do if a customer either refuses to give the needed information or does not have the information to give. Treasury notes that these questions are not unique to this amendment and have been raised before with respect to the various requirements of the Bank Secrecy Act generally.

In response to these comments, Treasury notes that a financial institution may rely on the information contained in its records if the customer conducting the currency transaction does so on behalf of a person on whom the financial institution has records. Financial institutions also may rely on the information given to them by someone conducting a currency transaction on behalf of another unless the financial institution has knowledge that the information is incorrect. If the transaction is conducted by use of an automated teller machine or a night depository, or by a courier and the information on the person on whose behalf the transaction was conducted is fragmentary, then the CTR should be filled out as completely as possible, using the information accompanying the transaction and filling in what can be obtained from customer records at the financial institution. The CTR has a block to check to indicate that the transaction was conducted through a night depository, automatic teller machine, or armored car service, all of which could account for an incomplete CTR.

In transactions conducted by a courier, the information concerning the courier is placed in Part I of the CTR, and the information on the person on whose behalf the transaction is being conducted (for example, a deposit to a corporation's checking account) goes in Part II. If the courier is conducting currency transactions for more than one person, which either separately or together aggregate to more than $10,000, then the information concerning the additional persons on whose behalf the transactions are being done is entered on the back of the CTR or on an addendum to the CTR.

Several commenters raised the question of whether a financial institution must refuse a transaction if the person conducting the transaction cannot provide needed information on the person on whose behalf the transaction is being conducted, and the financial institution does not have account records on that person to supply the required information. The Bank Secrecy Act neither requires nor prohibits a financial institution to refuse a currency transaction when the financial institution cannot obtain the information necessary to complete the CTR. However, under the Act and the regulations, financial institutions are responsible for filing complete and accurate CTR's. Section 103.26 of the regulations specifically requires that all information on the CTR be furnished. The Act and regulations further provide for both criminal and civil sanctions for willful violation of any provision of the regulations. Thus, failure to obtain complete information could result in criminal and/or civil liability for financial institutions.

Examples

Finally, many commenters asked for examples of what the amendment means. While Treasury cannot compile an exhaustive list of the various ways that a person can conduct a transaction for another, listed below are several simple examples the illustrate various ways of performing transactions for others and the financial institution's corresponding Bank Secrecy Act responsibilities. While for consistency purposes, all the financial institutions listed in the examples are banks, these examples generally are applicable to other financial institutions.

—Mary Jones walks into the bank, and deposits $15,000 into her personal checking account. If she is conducting the transaction for herself, the amendment is not relevant, because Part II of the CTR does not need to be completed.

—John Stevens comes into the bank and deposits $18,000 into Mary Jones' savings account. Because this currency transaction may be on behalf of another person, Treasury recommends that the bank ask Mr. Stevens if he is conducting the transaction on behalf of another. If John Stevens is performing the transaction on behalf of someone other than himself, the identification information on him would be placed in Part I of the CTR (which asks for information concerning the person conducting the transaction with the financial institution) and the information on the person on whose behalf the transaction was conducted is placed in Part II of the CTR (which asks for information concerning the person on whose behalf the transaction was conducted).

—William Evans comes into the bank and deposits $15,000, representing fees paid to a law firm partnership, of which he is a member, into the law firm partnership's operating account. The information on Mr. Evans would go in Part I of the CTR, while the information on the law firm partnership itself (a "person" under § 103.11(1)) would go in Part II. The bank does not list all the law firm partnership's partners in Part II.

—Mr. Evans comes in the next day and deposits $25,000 into three of the law firm partnership's trust accounts on behalf of three of the law firm partnership's clients. The bank accounts are clearly labeled as trust accounts. The financial institution should list the information on Mr. Evans in Part I of the CTR, and the information on each of the law firm partnership's clients in Part II of the CTR, because the money is theirs, not the law firm partnership's. In addition, the new CTR form, which is expected to be available in January 1989, will require the information on the law firm partnership itself also to be listed in Part II, on the back of the CTR.

—Angela Brown, the manager of Lee's Bakery, presents a check made payable to cash and drawn on the bakery's account. Because the customer conducting the transaction is not the same as the name of the account holder, the bank should inquire of Ms. Brown if she is cashing the check on the bakery's behalf. If she is cashing the check on the bakery's behalf, the information on the bakery would be placed in Part II, and the information on Ms. Brown would be placed in Part I.

—Monica Roberts, a courier, comes into the bank and deposits $50,000 into the Sunshine Corporation checking account. Treasury recommends that the bank ask the courier whether she is acting on behalf of Sunshine Corporation. The information on the courier goes in Part I. The information on the person on whose behalf the courier is making the deposit, whether obtained from the courier or the bank's records, goes in Part II. (A corporation is considered a person under § 103.11(1). The bank would not list all of the corporation's stockholders.)

—Jim Green comes into the bank with $25,000 in cash and purchases a bank check with himself named as payee. In order to ensure an accurate CTR, Treasury recommends that the bank ask the customer for whom the transaction is being conducted. If Mr. Green is conducting the transaction for himself, the bank will not fill out Part II. If he is conducting it on behalf of another, the bank must complete Part II with the information on the person on whose behalf the transaction is being conducted.

—Jim Green comes into the bank with $30,000 in currency and purchases a bank check with Susan Smith listed as the payee. Because Mr. Green may be performing this transaction for someone other than himself, Treasury recommends that the bank ask Mr. Green if he is conducting the transaction on behalf of another. If he is conducting the transaction on behalf of another, the information on Mr. Green is placed in Part I and the information on the person on whose behalf the transaction is being conducted is placed in Part II.

—Susan Smith comes into the bank and purchases bearer money orders with $25,000 in cash. The bank has knowledge that she is a frequent customer and often carries large amounts of money to buy bearer money orders. When asked, she give her occupation as "unemployed." Because this currency transaction may be on behalf of another person, Treasury recommends that the bank ask Susan Smith if she is conducting the transaction on behalf of another.

Proposed Structuring Definition

Most of the comments on the proposed structuring definition centered around perceived additional duties on the part of financial institutions, and whether Treasury could give additional guidance on the question of "assisting" in structuring.

Additional Duties

Some financial institutions were concerned that this amendment would place additional responsibilities upon financial institutions to track currency transactions that take place over more than one business day to ascertain whether there has been structuring, just as they are currently required to aggregate currency transactions of which they are aware that take place during the same business day to determine whether the reporting threshold under § 103.22 had been reached.

In response to these comments, Treasury notes that this amendment places no new additional duties upon financial institutions; it merely codifies the existing interpretation of structuring. The amendment also imposes no additional recordkeeping or tracking responsibilities. There is no need to set up separate tracking systems to detect currency transactions that aggregate to more than $10,000 over more than one business day because financial institutions are required to file CTR's only when a currency transaction is conducted which exceeds $10,000 on one business day.

If the financial institution suspects, either because of the personal knowledge of its employees or because of its computer or other recordkeeping system, that structuring is taking place, the financial institution should check its records to ascertain whether currency transactions have taken place that must be reported pursuant to 31 CFR 103.22(a), and should report its suspicion that structuring has taken place to the local office of the Internal Revenue Service's Criminal Investigation Division. *See* BSA Administrative Ruling 88-1, June 22, 1988, published at 53 FR 40062, 40064 (October 13, 1988).

Any information provided to the IRS should be given within the confines of section 1103(c) of the Right to Financial Privacy Act. 12 U.S.C. 3401-3422. Section 1103(c) of that Act permits a financial institution to notify a government authority of certain information relevant to a possible violation of any statute or regulation. Such information may consist of the names of any individuals or corporate entities involved in the suspicious transactions; account numbers; home and business addresses; social security numbers; type of account; interest paid on account; location of the branch or office where the suspicious transaction occurred; a specification of the offense that the financial institution believes has been committed; and a description of the activities giving rise to the bank's suspicion. S. Rep. 99-433, 99th Cong., 2d Sess., 15-16.

Additionally, a financial institution many be required, by the Federal regulatory agency that supervises it, to submit a criminal referral form. Thus, a financial institution should check with its regulatory agency to determine whether a referral form should be submitted.

Assisting in Structuring

Another point that some commenters raised, not directly related to the definition of "structuring," was that some financial institutions were concerned that there were no guidelines to help the financial institution in determining what "assisting" in structuring meant, and that they would be subject to penalties if a financial institution merely explained the structuring prohibition to its customers.

In response, Treasury emphasizes that the structuring activity must be for the purpose of evading the reporting requirements of § 103.22. Thus, before a financial institution may be held liable, either criminally or civilly, for assisting a customer in structuring transactions, the financial institution must have knowledge that its customer is attempting to circumvent the § 103.22 reporting requirement and the financial institution must assist, that is, aid or help, the customer in that attempt. If a customer disguises multiple cash transactions at a financial institution, without the complicity of any officer or employee of the institution, and the financial institution after diligent use of its manual or automated aggregation systems (or any other means) has no knowledge that these transactions were by or on behalf of the same customer, the financial institution has not knowingly and willfully violated the "assisting in structuring" provision of the Bank Secrecy Act. However, if a financial institution suspects a customer of structuring, perhaps because of repeated transactions just under $10,000, but refuses to investigate further because it wants to remain in ignorance, the financial institution may be deemed to have knowledge of structuring by virtue of its "willful blindness." *See United States* v. *Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

Although the term "assist in structuring" encompasses a wide range of actions that no single definition can fully address, a distinction can be drawn between merely explaining the requirements of this particular law, which is permissible, and advising the customer how to evade those requirements, which clearly would be a violation of the Bank Secrecy Act. For example, a bank employee, in response to a customer's questions, explained that all same business-day cash transactions in excess of $10,000 had to be reported to the government, that any transaction of less than $10,000 need not be reported, and that structuring of transactions to evade the reporting requirement is illegal. By merely explaining the law to the customer, the bank has not assisted the customer in structuring the transaction. Moreover, if the customer then decided to deposit only $9,000, the bank is not required to file a report under § 103.22. A financial institution is required to file a report only if a single currency transaction, or aggregated multiple currency transactions of which the financial institution has knowledge, exeeds $10,000 during a single business day. However, if in that latter example, there were circumstances leading the financial institution to believe that the customer was structuring his transactions to avoid the filing of a CTR, then it should report that fact to the local Internal Revenue Service Criminal Investigation Division, along with the information, noted above, which is permissible to disclose under the Right to Financial Privacy Act. *See* BSA Administrative Ruling 88-1, June 22, 1988.

Examples

Finally, some commenters asked for some examples of structuring. While the following examples are by no means exhaustive, the following acts are characteristic of persons who are seeking to structure transactions to avoid the reporting requirements of § 103.22:

—The person, after being informed that the institution intends to file a report on the transaction, seeks to take back part of the currency in order to reduce the amount of the transaction to $10,000 or less.

—The person conducts multiple transactions

—Each involving less than $10,000, but totaling more than $10,00—over the course of several consecutive or near-consecutive days (*e.g.*, Monday, Wednesday, and Friday), whether at the same financial institution, different branches of the same institution, or different institutions.

—Two or more persons enter a financial institution together and separately make cash purchases of instruments such as cashier's checks that individually do not exceed $10,000, but that total more than $10,000, from different tellers in the same institution.

—A customer makes a $9,000 deposit at 1:59 p.m. and a second deposit of $9,000 at 2:01 p.m. when the bank's business day changes at 2 p.m.

—A customer comes into the bank on Monday, Tuesday, Wednesday and Thursday, and each time deposits $8,000 into his checking account. On Friday, the customer comes in and orders that the $32,000 he deposited over the course of those four days be wire-transferred out of the country.

Conclusion

After consideration of all the comments submitted, Treasury is adopting the amendments as proposed, without change. The Authority paragraph is also revised to reflect the proper statutory references, to include the recent amendments made to the Bank Secrecy Act by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, November 18, 1988.

Executive Order 12291

This final rule is not a major rule for purposes of Executive Order 12291. It is not anticipated to have an annual effect on the economy of $100 million or more. It will not result in a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. It will not have any significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets. A Regulatory Impact Analysis therefore is not required.

Regulatory Flexibility Act

It is hereby certified under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, that this final rule will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document is the Office of the Assistant General Counsel (Enforcement). However, personnel from other offices participated in its development.

List of Subjects in 31 CFR Part 103

Authority delegations (Government agencies), Banks and banking, Currency, Foreign banking, Investigations, Law enforcement, Reporting and recordkeeping requirements, Taxes.

Amendment

For the reasons set forth above, 31 CFR Part 103 is amended as set forth below:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for Part 103 is revised to read as follows:

Authority: Pub. L. 91-508, Title I, 84 Stat. 1114 (12 U.S.C. 1730d, 1829b and 1951-1959); and the Currency and Foreign Transactions Reporting Act, Pub. L. 91-508, Title II, 84 Stat. 1118, as amended (31 U.S.C. 5311-5326).

§ 103.27 [Amended]

2. The first sentence of § 103.27 is amended by removing "for whose or which account" and adding in its place "on whose behalf".

3. Section 103.11 is amended by redesignating paragraphs (n), (o), (p), (q) and (r) as (o), (p), (q), (r) and (s) respectively, and by adding a new paragraph (n) to read as follows:

§ 103.11 Meaning of terms.

* * * * *

(n) *Structure (structuring).* For purposes of section 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

* * * * *

§ 103.53 [Amended]

4. Section 103.53 is amended by adding "(as that term is defined in § 103.11(n) of this Part)" after the word "Structure" in paragraph (c).

Dated: December 21, 1988.

Salvatore R. Martoche,

Assistant Secretary (Enforcement).

[FR Doc. 89-1344 Filed 1-19-89; 8:45 am]

BILLING CODE 4810-25-M

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 203

[ER 500-1-1]

Emergency Employment of Army and Other Resources, Natural Disaster Procedures

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: These changes amend the regulation dated December 21, 1983, and provide revised procedures for the Corps of Engineers in conducting certain emergency activities pursuant to Public Law (Pub L.) 84-99.

This action provides minor modifications to clarify previous rules on Corps of Engineers emergency operations activities in support of state and local flood fight efforts. The amended rules implement procedures for assistance under the expanded authority provided by section 917, Pub. L. 99-662, amendment to Pub. L. 84-99. Notice of these amendments, inviting public comments was published as an Interim Final Rule in the Federal Register on February 2, 1988. No public comments were received.

EFFECTIVE DATE: January 23, 1989.

ADDRESS: For further information write to: HQUSACE (CECW-OE-D), Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. Gary M. Campbell, (202) 272-0251.

SUPPLEMENTARY INFORMATION: The Corps of Engineers has authority under Pub. L. 84-99 to supplement state and local flood fight activities. However, prior to November 17, 1986, there was no authority to continue supplemental assistance in response to life and improved property threatening situations after flood waters had receded. Section 917, Pub. L. 99-662 expanded the authority to include activities that are necessary to protect life and improved property from a threat resulting from a major flood or coastal storm. The amendment established the basis for requesting assistance, time limitation on providing assistance, and types of potential assistance.

Note: The U.S. Army Corps of Engineers has determined that this regulation is not a major rule under Executive Order 12291. I certify that under the criteria of the Regulatory Flexibility Act that this Final Rule will not have a significant impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 203

Disaster assistance, flood assistance, and drought assistance.

For the reasons set forth in the preamble, 33 CFR Part 203 is amended as follows:

PART 203—EMERGENCY EMPLOYMENT OF ARMY AND OTHER RESOURCES, NATURAL DISASTER PROCEDURES

1. The authority citation for 33 CFR Part 203 continues to read as follows:

Authority: Pub. L. 84–99, 69 Stat. 186; U.S.C 701n.

2. Sections 203.12 and 203.13(b) are revised to read as follows:

§ 203.12 Authority.

Flood and coastal storm emergencies (33 U.S.C. 701n (69 Stat. 186) (Pub. L. 84–99). An emergency fund is authorized to be expended at the discretion of the Chief of Engineers for: flood emergency preparation; flood fighting and rescue operations; repair or restoration of flood control works threatened, damaged, or destroyed by flood; emergency protection of federally authorized hurricane or shore protection projects damaged or destroyed by wind, wave, or water of other than an ordinary nature. The law, as amended, includes provision of emergency supplies of clean water when a contaiminated source threatens the public health and welfare of a locality and activites necessary to protect life and improved property from a threat resulting from a major flood or coastal storm. The law, as amended, authorizes the Secretary of the Army to construct wells and to transport water within areas he determines to be drought-distressed.

§ 203.13 Non-Federal interests responsibilities.

* * * * *

(b) *Emergency operations.* During emergency operations, including flood response (flood fight and rescue operations) and post flood response, non-Federal interests must commit available resources to include: manpower, supplies, equipment, and funds.

Requests for Corps assistance will be in writing from the Governor or his/her authorized representative. Non-Federal interests must furnish formal written assurances of local cooperation which are detailed in Subpart G of this regulation. Following a flood response, it is a non-Federal responsibility to remove expedient flood control structures installed by the Corps under Pub. L. 84–99.

* * * * *

3. Subpart C consisting of §§ 203.31 and 203.32 are revised to read as follows:

§ 203.31 Authorities.

This authority applies to flood response and post flood response activities. Flood response activities include flood fighting, rescue operations, and protection of Corps constructed hurricane and shore protection projects. Flood fighting measures are applicable to any flood control structure (Federal, state, local, and private) where assistance in supplemental to state and local efforts. Corps assistance is not appropriate to protect flood control structures constructed and/or maintained by other Federal agencies where those agencies have emergency authority.

(a) *Flood response.* Corps assistance in support of other Federal agencies or state and local interests may include the following: technical advice and assistance; loaning of flood fight supplies, e.g., sandbags, polyethylene sheeting, lumber, stone; loaning of Corps-owned equipment; hiring of equipment and operators for flood fight operations; emergency contracting.

(b) *Post flood response.* Corps divisions/districts are provided authority to furnish assistance for a period not to exceed 10 days in response to a Governor's request. This assistance may include the following: Provision of technical advice and assistance; clearing of drainage channels, bridge openings, or structures blocked by debris deposited during a flood event; removal of debris blockages of critical water supply intakes, sewer outfalls, etc.; removal of minimum debris necessary to reopen critical transportation routes; temporary construction to restore critical transportation routes or public services/facilities; other assistance required to prevent imminent loss of life or public property.

§ 203.32 Policy.

During or immediately following a flood or coastal storm, emergency operations may be undertaken by the Corps to supplement state and local activities. Corps assistance is limited to the preservation of life and improved property, i.e., residential/commercial developments and public facilities/services. Direct assistance to individual homeowners or businesses is not permitted. Assistance will be temporary, meet the immediate threat, and is not intended to provide permanent solutions. All Corps activities will be coordinated with the State Office of Emergency Services or equivalent. Reimbursement of state or local emergency costs is not authorized. The assurances required for the provision of Corps assistance apply only to the work performed under Pub. L. 84–99 and will not prevent state or local governments from receiving other Federal assistance.

(a) *Flood response.* Request for Corps assistance will be in writing from the Governor or his/her authorized representative. When time does not permit a written request, a verbal request from either a responsible state or local official will be accepted followed by a written confirmation from the state. Corps assistance may include operational control of flood response activities, if requested by the responsible state official. However, legal responsibility remains with state and local officials. Corps assistance will be terminated when the flood waters recede below bankfull. Removal of ice jams is a local responsibility; however, Corps technical advice and assistance, as well as assistance with flood fight operations can be provided to supplement state and local efforts. The Corps will normally not perform ice jam blasting operations.

(b) *Post flood response.* A written request from the Governor to the district or operating division commander is required to receive Corps assistance. Corps assistance will be limited to major flood or coastal storm disasters resulting in life threatening situations. The Governor's request should include: verification that the Federal Emergency Management Agency (FEMA) has been requested to initiate Preliminary Damage Assessments (PDA); statement that assistance required is beyond the State's capability; specific damage locations; extent of Corps assistance required to supplement state and local efforts. The Governor's request should be transmitted concurrently with the request to FEMA for PDA. Corps assistance is limited to 10 days following receipt of the Governor's written request or on assumption of activities by State and local interests, whichever is earlier. After a Governor's request has triggered the 10-day period, subsequent request(s) for additional assistance resulting from the same flood or coastal storm event will not extend the 10-day period or trigger a new 10-day period. The Corps will deny a Governor's request if it is received subsequent to a Presidential declaration or denial. Shoreline or beach erosion damage reduction/prevention will not be undertaken unless there is an

immediate threat to life or critical public facilities.

(c) *Loan or issue of supplies and equipment.* Issuance of Government owned equipment or materials to non-Federal interests is authorized only in actual emergencies. Providing Government supplies is authorized only after local resources have been fully committed. Equipment which is loaned should be returned to the Corps immediately after the flood operation ceases in a fully maintained condition. Expendable supplies such as sandbags will be replaced in kind or paid for by local interests to the extent considered feasible and practicable by the division or district commander. All unused expendable supplies will be returned to the Corps when the operation is terminated.

Dated: December 12, 1988.

Approved.

Robert W. Page,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 89-684 Filed 1-19-89; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF EDUCATION

34 CFR Part 707

Regional Educational Laboratories

AGENCY: Department of Education.

ACTION: Final regulations; technical amendments.

SUMMARY: The Secretary amends the Regional Educational Laboratories Program final regulations to add the Northern Mariana Islands as an eligible recipient of laboratory services. This amendment is needed to correct the omission of the Northern Mariana Islands from the Regional Educational Laboratories Region 10. The Northern Mariana Islands are a commonwealth of the United States and are eligible to receive services under the Regional Educational Laboratories Program.

EFFECTIVE DATE: The regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Helen O'Leary, Office of Research, Office of Educational Research and Improvement, U.S. Department of Education, 555 New Jersey Avenue NW., Suite 610, Washington, DC 20208-5573. Telephone number: (202) 357-6247.

SUPPLEMENTARY INFORMATION: The Regional Educational Laboratories Program provides financial assistance to regional educational laboratories established by public agencies or private nonprofit institutions. Each laboratory, under the sole guidance of a regionally representative governing board, serves the education needs of a specific geographic region of the Nation. Final regulations for the Regional Educational Laboratories and Research and Development Centers Programs were published on August 15, 1988 (53 FR 30790). The Northern Mariana Islands were not listed in § 707.2(a)(10) of the regulations. A technical amendment corrects that omission. A citation in § 707.1 is also corrected.

It is the policy of the Secretary in accordance with section 431(b)(2)(A) of the General Education Provisions Act, to request comment on proposed regulations of the Department. However, these amendments to the regulations correct an omission and a citation, are technical in nature, and do not change the applicable law. In consideration of these factors, the Secretary has determined that notice and public comment are unnecessary and contrary to the public interest and, for good cause, waives proposed rulemaking under 5 U.S.C. 553(b)(B).

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major regulations because they do not meet the criteria for major regulations established in that Order.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. These regulations are technical in nature and nonsubstantive.

Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Education Impact

The Secretary has determined that regulations in this document would not require transmission of information that is being gathered or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 707

Colleges and universities, Education, Educational research, Grant programs—education, Local educational agencies, Nonprofit organizations, Northern Mariana Islands, Reporting and recordkeeping requirements, State educational agencies.

Dated: January 9, 1989.

Lauro F. Cavazos,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number: 84.117—Regional Educational Laboratories and Research and Development Centers Programs)

The Secretary amends Title 34 of the Code of Federal Regulations by amending Part 707 as follows:

PART 707—REGIONAL EDUCATIONAL LABORATORIES

1. The authority citation for Part 707 continues to read as follows:

Authority: 20 U.S.C. 1221e, unless otherwise noted.

§ 707.1 [Amended]

2. In § 707.1, "706.5" is removed and "706.4" is added in its place.

§ 707.2 [Amended]

3. In § 707.2, paragraph (a)(10) is amended by adding "the Northern Mariana Islands," after "Hawaii,".

[FR Doc. 89-1420 Filed 1-19-89; 8:45 am]

BILLING CODE 4000-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3495-7]

Approval and Promulgation of Implementation Plans for Pennsylvania; Philadelphia Stack Height Regulation SIP

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA hereby approves a revision to the Philadelphia portion of the Pennsylvania State Implementation Plan (SIP) which incorporates the EPA's Good Engineering Practice (GEP) stack height regulations by reference. The Philadelphia Air Management Services (AMS) revised its regulations following EPA's promulgation of the revised stack height rules on July 8, 1986 (50 FR 27892). Pennsylvania submitted the revision for approval on June 20, 1986.

EFFECTIVE DATE: February 22, 1989.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal

business hours at the following locations:

U.S. Environmental Protection Agency, Region III, Air Management Division, 841 Chestnut Building, Philadelphia, PA 19107, Attn: Esther Steinberg (3AM11).

Pennsylvania Department of Environmental Resources, Bureau of Air Quality Control, Fulton Bank Building, Third & Locust Streets, Harrisburg, PA 17120, Attn: Ralph Scanlan.

Philadelphia Department of Public Health, Air Management Services, 500 South Broad Street, Philadelphia, PA 19146, Attn: Robert Ostrowski.

Public Information Reference Unit, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Denis M. Lohman at the EPA, Region III address shown above on telephone (215) 597-8375.

SUPPLEMENTARY INFORMATION:

Background

Section 123 of the Clean Air Act requires EPA to promulgate rules to assure that the degree of emission limitation required for the control of any air pollutant under an applicable SIP is not affected by stack heights exceeding good engineering practice (GEP) height or by any other dispersion technique.

The EPA originally promulgated regulations to implement Section 123 requirements on February 8, 1982 (47 FR 5864). Those regulations were challenged by the Sierra Club Legal Defense Fund, Inc., the Natural Resources Defense Council, Inc., and the Commonwealth of Pennsylvania. Subsequently, on October 11, 1983, the U.S. Court of Appeals for the D.C. Circuit remanded portions of the regulations for reconsideration, reversing two portions and upholding certain other [*Sierra Club* v. *EPA*, 719 F. 2d 436 (1983)]. The EPA proposed revisions to the stack height rules on November 9, 1984 (49 FR 44878). The EPA promulgated final revisions to the rules on July 8, 1985 (50 FR 27892). The final rules contain changes made in response to comments submitted on the proposal.

Pursuant to section 406(d)(2) of the Clean Air Act, the July 8, 1985 Notice required all States to review and revise, as necessary, their SIP's to include provisions that limit stack height credits and dispersion techniques in conformance with revised rule.

Pennsylvania approved and submitted the proposed revision for Philadelphia on June 2, 1986. Pennsylvania's revision amends Air Management Regulation I, (Section XI. Compliance with Federal Regulations), incorporating by reference Part 51 in its entirety, and requires the Philadelphia Department of Public Health to implement the provisions contained therein, including any future additions and amendments to the referenced Parts of 40 CFR.

These rules apply to all new sources and modifications in Philadelphia, Pennsylvania as required in 40 CFR 51.164 as well as existing sources as required in 40 CFR 51.118. This means that this rule applies to all sources that were constructed, reconstructed, or modified subsequent to December 31, 1970.

Solicitation of Public Comment

The Philadelphia Air Pollution Control Board conducted a public hearing on the, then proposed, regulation on December 13, 1983. No public comment was presented before the Board or submitted to AMS.

In a **Federal Register** Notice (52 FR 23485) published June 22, 1987, EPA proposed to approve the GEP revisions, and a 30 day public comment period was announced. No public comments were received regarding the proposed approval of the regulation amendment.

Stack Height Remand

The EPA's stack height regulations were challenged in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988). On January 22, 1988, the U.S. Court of Appeals for the D.C. Circuit issued its decision affirming the regulations in large part, but remanding three provisions to the EPA for reconsideration. These are:

1. Grandfathering pre-October 11, 1983, within-formula stack height increases from demonstration requirements (40 CFR 51.100(kk)(2));
2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks (40 CFR 51.100(hh)(2)(ii)(A)); and
3. Grandfathering pre-1979 use of the refined H+1.5L formula (40 CFR 51.100(ii)(2)).

Although the EPA generally approves Philadelphia's stack height rules on the grounds that they satisfy 40 CFR Part 51, the EPA also provides notice that this action may be subject to modification when EPA completes rulemaking to respond to the decision in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988). If the EPA's response to the *NRDC* remand modifies the July 8, 1985, regulations, the EPA will notify the State of Pennsylvania and Philadelphia that its rules must be changed to comport with the EPA's modified requirements. This may result in revised emission limitations or may affect other actions taken by Philadelphia source owners or operators.

Final Action

EPA has reviewed the revisions to the AMS regulations and has determined that they are consistent with the regulation for GEP stack height and dispersion techniques as revised on July 8, 1986. Therefore, EPA is approving the revision. The GEP stack height regulations of 40 CFR Part 51 are incorporated into section XI of the AMS's Air Management Regulation I in the Pennsylvania SIP.

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 24, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Sulfur dioxide.

Note: Incorporation by reference of the State Implementation Plan for the State of Pennsylvania was approved by the Director of the Federal Register on July 1, 1982.

Date: December 15, 1988.

Lee M. Thomas,

Administrator.

40 CFR Part 52, Subpart NN, is amended as follows:

PART 52—[AMENDED]

Subpart NN—Pennsylvania

Authority: 42 U.S.C. 7401-7642.

Section 52.2020 is amended by adding paragraph (c)(70) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(70) Revisions to the Philadelphia Regulations incorporating stack height regulations, submitted by Pennsylvania on June 2, 1986.

(i) *Incorporation by reference.* (A) Amendment to Philadelphia, Pennsylvania, Air Management Regulation I, Section XI, "Compliance with Federal Regulations", effective on March 27, 1986.

[FR Doc. 89-1432 Filed 1-19-89; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 52

[FRL-3496-3; TN-073]

Approval and Promulgation of Implementation Plans for Tennessee; Avco Aerostructures/Textron Bubble

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Tennessee for the Metropolitan Health Department of Nashville and Davidson County. The SIP revision would provide for the Avco Aerostructures/Textron (AVCO) facility in Nashville, Tennessee (Davidson County) to achieve compliance with the applicable volatile organic compound (VOC) reasonably available control technology (RACT) regulations by averaging or "bubbling" of emissions within the facility. The bubble is consistent with current Agency policy.

DATES: This action will become effective on February 22, 1989.

ADDRESSES: Copies of the material submitted by Tennessee may be examined during normal business hours at the following locations:

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street NE., Atlanta, Georgia 30365.

Tennessee Air Pollution Control Board, 4th Floor, Customs House, 701 Broadway, Nashville, Tennessee 37219.

Metropolitan Health Department, Bureau of Pollution Control, 311—23rd Avenue, North, Nashville, Tennessee 37203.

Public Information Reference Unit, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kay T. Prince, Air Programs Branch, EPA Region IV, at the above address and telephone number (404) 347-2864 or FTS 257-2864.

SUPPLEMENTARY INFORMATION: The Avco facility in Nashville contains nineteen spray booths where miscellaneous aircraft and aerospace parts are coated. Such operations are generally covered by Section 7-20 of the Metropolitan Health Department Pollution Control Division's VOC regulations. Regulation No. 7, Section 7-20 established the following VOC emission limitations for aerospace coatings:

Topcoatings—5.0 lbs/gal coating applied
Temporary Topcoatings—2.1 lbs/gal coating applied
Strippers—3.3 lbs/gal coating applied
Primers—2.9 lbs/gal coating applied

Fuel Tank and space vehicle coatings are exempt from the requirements of Regulation No. 7, Section 7-20.

On February 25, 1988, the State of Tennessee, through the Department of Health and Environment, officially submitted a source-specific SIP revision prepared by the Metropolitan Health Department for the Avco facility. The revision was adopted by the Metropolitan Board on February 9, 1988, and by the Tennessee Air Pollution Control Board on February 17, 1988. Although high solids coatings have successfully been used on aircraft wings supplied to Avco's civilian customers, the United States Air Force refuses to accept these coatings, thus causing the need for a bubble. The SIP revision would permit Avco to average or "bubble" VOC emissions from the nineteen spray booths in lieu of achieving compliance with Regulation 7-20, Section 7 on a line-by-line basis. This would allow Avco to compensate for continued use of non-complying coatings on certain days at some of their spray booths by surpassing the emission reduction requirements applicable to other coatings used on those same days, with the result that total daily emissions from the facility as a whole do not exceed the original limits.

For a more detailed discussion please refer to the September 8, 1988, **Federal Register** (53 FR 34786). Further details pertaining to this Avco bubble are contained in the Technical Support Document which is available at the EPA Region IV office.

When Avco and the State of Tennessee began serious discussions with EPA about the bubble during 1986, Nashville was classified as a nonattainment area with an approved attainment demonstration. As the discussions concerning the bubble continued into 1987, it became apparent that the area could be reclassified as a nonattainment area needing but lacking an approved attainment demonstration. Accordingly, the State and Avco agreed to restructure the bubble by using the lowest of actual, SIP-allowable, or RACT-allowable emissions as a baseline and adding the 20% progress requirement. The State formally submitted the bubble to EPA in February 1988, after EPA issued the Final Emissions Trading Policy Statement (ETPS) and after EPA stated in the November 24, 1987, **Federal Register** notice describing the Proposed Ozone Strategy that a SIP call would be issued for the area, but before EPA issued the SIP call on May 26, 1988.

As noted above, at the time Tennessee first began serious discussions with EPA about the bubble during 1986, Nashville was classified as a nonattainment area with an approved attainment demonstration ("NAWAD"); but currently, since it received the SIP call, Nashville is classified as a nonattainment area lacking an approved attainment demonstration ("NALAD"). Under the ETPS, EPA policy for approving bubbles differs depending on whether the bubble is a NAWAD or a NALAD.

A bubble in a NAWAD is approvable if the baseline is consistent with the assumptions used in the approved SIP, and the bubble does not interfere with attainment of the ozone NAAQS. (51 FR 43838, col. 3.)

A bubble in a NALAD is approvable only if it meets the following three requirements (51 FR 43839-40):

(i) The baseline must be calculated using the lower of actual, SIP-allowable, or Reasonably Available Control Technology (RACT)-allowable values for each baseline factor, determined as of the date the source submitted the bubble application to the state.

(ii) The bubble must produce a reduction of at least 20% in the emissions remaining after application of the baseline specified above.

(iii) The state must provide assurances that the proposed trade will be consistent with its efforts to attain the ambient standard. The ETPS sets out five representations that the state must make.

EPA believes that these NALAD policy elements are necessary to insure that the bubble will not interfere with attainment as expeditiously as practical, as required under 42 U.S.C. 7410(a)(2) and 7502.

Because the ETPS is a policy statement, it does not set out requirements that apply with equal force in all circumstances. Beyond this, the actions proposed in today's notice are consistent with the principles of grandfathering that the Court of Appeals for the District of Columbia Circuit has applied when an agency changes policy requirements, but seeks to apply the former to certain actions pending before the agency at the time of the policy change. Under these principles, the agency may apply the former policy when: (i) The new policy represents an abrupt departure from well-established practice; (ii) affected parties have relied on the old policy; (iii) the new policy imposes a large burden on those affected; and (iv) there is no strong statutory interest in applying the new policy generally. (*Sierra Club v. EPA,*

719 F.2d 436 (D.C. Cir. 1982), *cert. den.* 468 U.S. 1204 (1984).)

Although Nashville is currently classified as a NALAD, EPA is proposing to approve the Avco bubble without requiring the State to provide the assurances found in the ETPS that are generally applicable to bubbles in area classified as a NALAD. This result is consistent with both (i) the notion that the ETPS does not set out inflexible requirements; and (ii) grandfathering principles. Specifically, EPA believes that because Avco and the source initiated discussions with EPA concerning the bubble before the area's conversion to a NALAD came clearly into the picture, and because the bubble was submitted before EPA formally issued the SIP call, it is fair to conclude that the State and Avco relied on the area's classification as a NAWAD, and that the conversion to a NALAD represented a significant change. Further, the fact that the bubble employs the lowest of actual, SIP-allowable, or RACT-allowable emissions as a baseline, with 20% progress and adequately adheres to the statutory requirement that the bubble not interfere with attainment as expeditiously as practicable; state assurances are not as essential as they would be if the bubble did not meet the strict baseline and progress tests. Since requiring the state assurances would impose some burden on the State, and because the statutory interest is protected by virtue of the bubble's satisfaction of the baseline and progress requirements, EPA believes it appropriate not to apply the state assurances requirement to the Avco bubble.

On September 8, 1988 (53 FR 34786), EPA proposed to approve the bubble for Avco Aerostructures/Textron in Nashville, Tennessee. Approval of this bubble was contingent upon the County's revising the permit to say that this requirement applies to Booths 7 and 9 and EPA cannot take final action until the permit is revised. The permit has been revised and submitted to EPA. The public was invited to submit written comments on the proposed action. However, no comments were received.

Final Action: EPA is approving the revision to the Nashville and Davidson County portion of the Tennessee SIP. The Avco bubble is consistent with EPA's Emissions Trading Policy Statement.

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

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Note: Incorporation by reference of the State Implementation Plan for the State of Tennessee was approved by the Director of the Federal Register on July 1, 1982.

Date: December 14, 1988.

Lee M. Thomas,

Administrator.

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

PART 52—[AMENDED]

Subpart RR—Tennessee

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 52.2220 is amended by adding paragraph (c)(87) to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

(87) A certificate of alternate control of volatile organic compound emissions for Avco Aerostructures/Textron was submitted to EPA on February 25, 1988, by the State of Tennessee for the Metropolitan Health Department of Nashville and Davidson County.

(i) *Incorporation by reference.* (A) Letter of February 25, 1988, from the State of Tennessee Air Pollution Control Board.

(B) Certificate of alternate control of volatile organic compound (VOC) emissions for Avco Aerostructures/Textron, adopted by the Metropolitan Board of Health on February 9, 1988.

(C) Avco Aerostructures/Textron operating permit numbers 42–3, 42–4, 42–5, 42–6, 42–7, 42–8, 42–9, 42–10, 42–18, 42–19.

[FR Doc. 89–1431 Filed 1–19–89; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 220

Temporary Relocation Assistance

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: This rule establishes the Federal Emergency Management Agency (FEMA) regulations for the Temporary Relocation Program under Executive Order 12580. "Temporary Relocation" is provided to individuals threatened by a hazardous materials incident, and not otherwise provided for as part of a hazardous materials response action taken under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (CERCLA) *as amended*, 42 U.S.C. 9601, *et seq.*

This regulation provides for consistent implementation of the program whether administered directly by FEMA or the states.

EFFECTIVE DATE: This rule is effective February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Karen Forbes, Superfund and Relocation Assistance Branch, Federal Emergency Management Agency, Room 710, 500 "C" Street, SW., Washington, DC 20472, (202) 646–3805.

SUPPLEMENTARY INFORMATION: On June 10, 1986, FEMA published a proposed rule relating to temporary relocation assistance at 51 FR 20995. Seven comments were received. One commenter stated that the proposed definitions of "evacuation" and "transient accommodations" imply that the costs of transient accommodations in the context of evacuations will not be eligible for reimbursement. The commenter also stated that reimbursement to individuals, local governments, and states for costs they incur during an evacuation should be eligible.

"Evacuation" means the emergency relocation of threatened individuals from an area. Evacuation activities are carried out by State and local governments pursuant to their public health and safety responsibilities. Evacuation costs incurred by individuals and State and local governments will not be eligible for reimbursement under these regulations because evacuation activities are uniquely State and local governmental responsibilities. However, section 123(a) of the Superfund Amendments and Authorization Act of 1986, Pub. L. 99–499 (SARA) states: "Any general purpose unit of local government for a political subdivision which is affected by a release or threatened release at any facility may apply to the President for reimbursement under this section." Executive Order 12580 delegates the responsibility for implementation of section 123 to EPA and is therefore not addressed by FEMA.

"Transient accommodations" means hotels, motels, or similar

accommodations which are used to assist eligible applicants who require temporary housing for a short period of time—usually up to 30 days. When it is determined by the lead agency that temporary relocation assistance is needed only for a short period of time, transient accommodations are used. Transient accommodation expenses will be reimbursed pursuant to these regulations.

At the time these proposed regulations were published in 1986, the Superfund Amendments and Reauthorization Act of 1986 had not been enacted, and Executive Order 12580 has not been issued by the President. The previous Executive Order 12316 had delegated the responsibility for determining the need for temporary relocation to FEMA. FEMA had found it necessary to redelegate this responsibility to the Environmental Protection Agency (EPA). Executive Order 12580 makes it unnecessary for FEMA to redelegate this responsibility to EPA, because that Executive Order delegates the responsibility directly to the EPA.

The lead agency notifies FEMA of the need to provide temporary relocation assistance. An interagency agreement (IAG) is signed by the lead agency and FEMA. In addition to EPA, the lead agency may be United States Coast Guard (USCG), Department of Defense (DOD), Department of Energy (DOE), Department of Interior (DOI), or other federal agencies. The IAG provides funds to FEMA to provide temporary relocation assistance, outlines the scope of work, and identifies eligible applicants for temporary relocation assistance.

One commenter requested that a definition of "occupancy" be included. The definition of an "occupant" is already addressed in the regulation. Therefore, further clarification is unnecessary.

Comments were received regarding how much FEMA will pay when the applicant elects to share accommodations with family and friends. Sharing of accommodations with family and friends is an appropriate method of assistance under transit accommodations. This type of assistance must be chosen by the applicant. FEMA has updated its Temporary Relocation Assistance Manual, which outlines the procedures for providing a subsistence payment to eligible applicants placed in transient accommodations. The subsistence payment provides funds for food and incidentals which are beyond or in addition to the living costs that the applicant would have incurred in their normal living arrangement. When FEMA administers the program, the payment will be based on FEMA Manual 6200.1, Travel Regulations.

A commenter asked if the moving of mobile homes to commercial parks and back to the original sites as part of a temporary relocation response action would be an eligible expense. The commenter felt that this could be accomplished at a lower cost than could other forms of temporary housing. However, moving mobile homes in a temporary relocation cannot be addressed as general policy for several reasons: (1) The appropriate agency would have to determine if the mobile home was contaminated; (2) while some states classify mobile homes as real property, others classify mobile homes as personal property (and moving real property in a temporary relocation is not an eligible category of assistance); and (3) additional mobile home sites may not be available nearby, and the construction of new sites would be very costly and unnecessary for a temporary relocation project. For these reasons, the mobile home issue will continue to be evaluated on a case-by-case basis. However, under certain circumstances such costs might be eligible.

A commenter asked for a definition of "basic minimum costs" for utilities and whether these include gas or electricity in the winter to keep plumbing from freezing. "Basic minimum costs" is not an accepted phrase in the temporary relocation assistance program. In temporary relocation, FEMA refers to "essential utilities." "Essential utilities" are defined as gas, electricity, oil, water, sewer, and telephone. Costs for "essential utilities" at the primary residence, during the period of temporary relocation, may be authorized since these costs are in addition to the cost for utilities at the temporary residence.

Costs for utilities at the temporary residence are the responsibility of the occupant. If cost effective, winterization costs may be paid as an alternative to, or in conjunction with, the utility subsidy. For example, at one relocation site, the plumbing was drained and winterized to prevent damage to plumbing fixtures. The degree of winterization is not defined, as it would vary with different sections of the country. When evaluating the different methods of winterization, cost effectiveness is an important consideration.

A commenter stated that the use of a home located in the floodplain is not an issue in temporary relocation. In the temporary relocation program, FEMA has exempted temporary relocation assistance from the requirements of Floodplain Management and Protection of Wetlands, 44 CFR Part 9. However, every effort shall be made to place families in existing resources within communities participating in the National Flood Insurance Program. Acquiring the appropriate flood insurance coverage is the responsibility of the homeowner.

The same commenter felt that site security is the responsibility of the EPA. The FEMA/EPA Memorandum of Understanding (MOU) is currently being revised and will state that site security is the EPA's responsibility.

Two sections have been added to this final rule. Section 220.5, Site Specific Plan, requires the FEMA Regional Office to submit a relocation plan as outlined under State Administration of Temporary Relocation Assistance, § 220.18. The second addition, Cost Sharing, § 220.17, identifies the need for State cost sharing during a remedial action and references 44 CFR Part 222, "Cost Share Eligibility Criteria for Permanent and Temporary Relocation."

The general intent of FEMA's Superfund temporary relocation assistance program is to provide temporary relocation assistance to individuals who have been identified by the EPA as living in a hazardous substance affected area, and who should be temporarily relocated to protect their health and safety during EPA's cleanup operations. Assistance covers reasonable living expenses which are additional to expenses incurred prior to displacement. The method of taking applications may vary among relocation sites. Potential relocatees generally will be personally notified by the administering entity. However, in larger operations, availability of assistance may be announced through the media.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this final rule under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, *et seq.* and has assigned OMB control numbers 3067–0156, 3067–0168 and 3067–0184.

Environmental considerations

Based on an environmental assessment, FEMA has determined that there will be no significant impact on the environment caused by implementation of this regulation. An Environmental Impact Statement will not be prepared.

Regulatory Flexibility Act

The Agency has determined that this rule is not a major rule under Executive

Order 12291, and I certify that the rule will not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. Hence, no regulatory impact analyses have been prepared.

Federalism Assessment

I certify that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment pursuant to Executive Order 12612.

List of Subjects in 44 CFR Part 220

Relocation assistance, Grants administration, Hazardous substances, Superfund.

Accordingly, Subchapter D of Chapter I of Title 44, Code of Federal Regulations is amended by adding a new Part 220, as follows:

PART 220—TEMPORARY RELOCATION ASSISTANCE

Sec.

220.1 Purpose.
220.2 Definitions.
220.3 Program intent.
220.4 Duplication of Benefits.
220.5 Site Specific Plan.
220.6 Applications.
220.7 Eligibility Criteria.
220.8 Eligible categories of assistance.
220.9 Ineligible categories.
220.10 Site security.
220.11 Fair market rent guidelines.
220.12 Transfer of occupants.
220.13 Personal property acquisition.
220.14 Floodplain management guidelines.
220.15 Effective date of assistance.
220.16 Termination of assistance.
220.17 Cost sharing.
220.18 State administration of temporary relocation assistance.
220.19 Reports.

Authority: 42 U.S.C. 9601 *et seq.*; E.O. 12580, 3 CFR Part 1987, Comp., p. 193.

§ 220.1 Purpose.

This regulation prescribes the policies to be followed by the Federal Emergency Management Agency (FEMA) or any State or local government when implementing Temporary Relocation Assistance under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), *as amended,* 42 U.S.C. 9601, *et seq.,* also known as Superfund.

§ 220.2 Definitions.

"Cost Share" means the portion of the allowable project cost which is not derived from Federal assistance.

"Evacuation" means the emergency relocation of threatened individuals from an area. This activity is normally carried out by the State as part of its public health and safety responsibility.

"Fair market rent" means a reasonable amount to pay in the local area for the size and type of accommodations provided. (The formula is provided in § 220.11of this part.)

"Household" means the residents of the pre-incident residence who are offered Temporary Relocation Assistance. It includes any authorized additions during the temporary housing period, such as children, spouses, or part-time residents who were not present at the time of the announcement, but who are expected to return during the temporary housing period.

"Occupant" means an eligible applicant residing in temporary housing.

"Primary residence" means the dwelling where the applicant normally resides during the major portion of the calendar year, or a dwelling which is required because of proximity to employment.

"Transient accommodations" means hotels, motels or other similar accommodations which are utilized to assist eligible applicants who require temporary housing for only a short period of time, or who require such assistance pending provision of another temporary housing resource. Transient accommodations may be provided for up to 30 days unless this period is extended by the FEMA Regional Director or official designee.

§ 220.3 Program intent.

Temporary Relocation Assistance is provided to eligible individuals, identified by EPA, who are displaced from their primary residence in connection with a hazardous substance response action, to relocate for their own health and safety, and/or to allow the EPA, or its agents to conduct clean-up activities. It is not intended to totally compensate these individuals for all expenses and losses associated with contamination of the site on which they reside. Assistance covers reasonable living expenses that are additional to the living expenses which existed prior to the relocation. Applicants are eligible only for categories of assistance where additional expenses are actually incurred. Nine categories of eligible assistance, designed to pay costs directly related to the temporary relocation program include: (a) Temporary housing in locally available private rentals; (b) subsistence payments for individuals placed in transient accommodations; (c) furniture assistance when individuals are placed in unfurnished temporary housing, or when the furniture at the permanent residence is contaminated; (d) transportation of household goods to temporary and back to permanent residence; (e) utility subsidy covering the costs for primary residence; (f) utility connection costs at the temporary housing residence; (g) kennel costs; (h) personal property purchase or decontamination costs; and (i) other expenses directly related to the relocation. The establishment of these categories of assistance does not prohibit advance of funds or establishment of fixed funding rates for certain categories of assistance, when it is determined to be appropriate and cost-effective.

§ 220.4 Duplication of benefits.

FEMA has determined that Temporary Relocation Assistance shall not be provided to an applicant if such assistance or its equivalent is received from any other source. This also prohibits duplication of benefits by receipt of temporary relocation assistance, and permanent relocation under CERCLA, or any disaster assistance. If any State or local government or volunteer agency is providing assistance for the same purpose as temporary relocation assistance, temporary relocation assistance under CERCLA, *as amended,* shall not begin until such other assistance is terminated. In the instance of insured applicants, assistance shall not be provided if insurance proceeds are available, unless there is a delay by the insurer in determining whether the proceeds will be available; there is ample reason to believe that payment of the proceeds may be significantly delayed; such proceeds have been exhausted; or, the proceeds are insufficient to provide the full cost of relocation benefits. Prior to provision of assistance, the insured applicant shall agree to repay FEMA from insurance proceeds he/she receives for additional living expenses, an amount equivalent to the assistance provided, or that portion of insurance proceeds, whichever is less.

§ 220.5 Site specific plan.

Each FEMA regional office must prepare a site specific Temporary Relocation Plan to be approved by the Regional Director or his or her official designee. The approved plan shall be submitted to the Assistant Associate Director, Disaster Assistance Programs (DAP), for review within seven days of signing an IAG with EPA. The Assistant Associate Director, DAP, or official designee, assumes Regional Director responsibilities when Headquarters is implementing temporary relocation. The

requirements of the plan are outlined in § 220.18.

§ 220.6 Applications.

Applications for Superfund Temporary Relocation Assistance under CERCLA, as amended, shall be accepted throughout the relocation period identified by EPA. Members of each household shall be included on a single application. Household members shall be provided a safe, sanitary and secure residence.

(Approved by the Office of Management and Budget under OMB Control Number 3067-0168)

§ 220.7 Eligibility criteria.

Temporary Relocation Assistance may be made available to those individuals displaced from this primary residence as a result of a determination by EPA that relocation is necessary. Temporary Relocation Assistance for a particular site shall be available only in the area identified by EPA through property addressed, site map or names of families.

§ 220.8 Eligible categories of assistance.

The following categories of assistance may be provided, based on individual needs:

(a) *Temporary housing.* This may include locally availble private rentals (houses and apartments), including hotels/motels (transient or other accommodations). Sharing of accommodations with family and friends is an allowable form of assistance only when an eligible applicant elects it as his/her form of assistance. FEMA will pay fair market value for existing resources in accordance with the criteria in § 220.11 of this part. When authorized by the FEMA Regional Director, security deposits may be paid. Pet fees/deposits are authorized. All deposits must be recovered from the owner/agent or occupant, before or at the time that assistance is terminated. Cleaning fees and laundry fees at the temporary housing residence are the responsibility of the occupant(s).

(b) *Subsistence payment.* A daily allotment may be provided to cover additional costs such as food and laundry expenses, when individuals are placed in hotels/motels or other transient accommodations. Allotment shall be based on the Federal per diem rate, when FEMA administers the program.

(c) *Furniture assistance.* When it is impractical to move furniture to the temporary housing or when EPA has determined that furniture is contaminated, essential furniture may be provided to eligible occupants of unfurnished temporary housing. Furniture items are provided on a loan basis for the duration of the temporary relocation. Items provided shall be of average construction and quality. Luxury items shall not be provided. Furniture rental assistance may be handled by direct reimbursement, or advancement of funds. Receipts must be provided by the applicant.

Items are to be provided in accordance with family size and needs, and include:

1 Sofa
1 Living room chair
1 Coffee table
2 End tables
2 Table lamps
1 Dining table
[1] Dining chairs
1 Range
1 Refrigerator
[1] Double bed (Mattress, box springs, frame)
[1] Single bed (Mattress, box springs, frame)
[1] Crib w/mattress
[1] Bunk bed set
1 Night table (per bedroom)
1 Table lamp (per bedroom)
[1] Chest of drawers
1 Television (Maximum 19")

[1] One per person.

(d) *Expenses for transportation of household goods.* This shall include the reasonable cost of moving to temporary housing and back to the primary residence or to another permanent residence. It shall also include one move to a permanent residence when the individuals displaced decide to forego a move to temporary housing and move to permanent housing instead.

(e) *Utility subsidy.* Costs for essential utilities at the primary residence, only during the period of temporary housing, may be authorized since these costs are additional to utility costs at the temporary housing resource, which are the responsibility of the occupant. Payment for essential utilities shall include gas, electricity, oil, water, sewer, and telephone. If cost effective, winterization costs may be paid as an alternative or in conjunction with the utility subsidy. this must be approved by the FEMA Regional Director or his/her representative. When permanent relocation is also authorized, utilities at the unoccupied primary residence should be disconnected, when practical, eliminating the need for utility subsidy.

(f) *Utility connection costs.* If the costs of connecting and/or disconnecting utilities cannot be waived by utility companies, the costs for connecting or disconnecting the essential utilities at the temporary housing residence shall be paid. Also, if cost effective when compared to utilities subsidy, reconnection costs shall be paid at the primary residence.

(g) *Kennel costs.* When necessary, payment of actual reasonable kennel and pasturing costs shall be authorized.

(h) *Personal property.* Contaminated personal property shall be decontaminated or acquired by FEMA or its agent when EPA specifically determines the need for decontamination or acquisition as part of temporary relocation. Only reasonable actual expenditures shall be paid for decontamination of property, excluding applicant labor.

(i) *Other expenses directly related to relocation.* When appropriate, the Regional Director may recommend that such other expenses directly related to the temporary relocation become eligible. This request must be approved by the Assistant Associate Director, Disaster Assistance Programs.

§ 220.9 Ineligible categories.

The following items shall *not* be eligible for payment under Temporary Relocation Assistance:

(a) Rental payments or mortgage payments for homes owned by the eligible applicant;

(b) Business losses. This does not prohibit use of a temporary housing residence for a home business. However, additional costs necessitated by the operation of a home business are not authorized;

(c) Personal transportation costs;

(d) Insurance premiums for the temporary housing unit and the primary residence; and

(e) Cleaning fees and laundry fees at the temporary relocation residence.

§ 220.10 Site security.

The EPA is responsible for site security.

§ 220.11 Fair market rent guidelines.

At each site, fair market rent guidelines for each size residence shall be established by averaging the cost of available residences per bedroom size for each locality where temporary housing will be provided. Where privately owned mobile homes are to be used, a separate guideline shall also be developed. Guidelines for hotel, motel and other short-term resources shall be developed only when there is a substantial variance in price among the available supply. The purpose of these fair market rent guidelines is to prevent development of an inflated rental market resulting from the incident and to insure cost-effectiveness. These guidelines reflect the desired maximum payment. Use of resources more costly

than the guidelines may be authorized by the FEMA Regional Director or official designee for full payment only when other existing resources are not available. When less than 10 families are being relocated, fair market rent guidelines may be established by a less time-consuming means, e.g., using an estimate provided by real estate agencies or conducting a sampling instead of a comprehensive survey.

§ 220.12 Transfer of occupants.

(a) *Transfers requested by occupants.* Occupants who request to transfer from one temporary housing unit to another, solely for their own convenience or for reasons necessitated through their fault, shall be responsible for all expenses associated with the move, including any increase in temporary housing rent.

(b) *Transfers for other reasons.* If FEMA initiates a transfer or if a transfer is necessitated for reasons which are not the fault of an occupant, all essential costs of the move shall be paid by FEMA. Such transfers shall be conducted in a manner that will cause minimum inconvenience to the occupants.

§ 220.13 Personal property acquisition.

Personal property identified by EPA as contaminated and unable to undergo a successful process of decontamination will be purchased. Such purchase will be contingent upon authorization in the site-specific interagency agreement. Possession or ownership of the acquired personal property shall pass directly to EPA from the seller. The acquisition of personal property shall be conducted along the following lines:

(a) An inventory of eligible personal property shall be prepared to include the manufacturer's name, model number and other information which might assist in establishing the quality and value of the property to be acquired.

(b) Payment shall be made for replacement value of similar items. With regard to valuable antiques, owners shall be paid whatever benefits they would have received if this loss had been exclusively covered by their homeowners insurance policy. If they do not have homeowners insurance for personal property, owners shall be paid the cost of replacement with an item of similar quality with the same functional use.

(c) An appraisal shall be required in all instances.

(d) Based on the appraisal, FEMA shall present the initial offer to acquire to the temporary relocation applicant. The offer to acquire shall be in writing and will include a list of items to be purchased. The total value of the listed items will be presented in the offer.

(e) A written sales contract shall specify what is being purchased and the terms and conditions of the sale, as well as the responsibilities of the seller.

(f) When negotiations fail, after a reasonable effort by both parties, an individual who disputes the amount of the offer to acquire shall have the right to submit a written appeal to the Regional Director. The Regional Director shall make a final decision concerning the offer to acquire within 10 business days from receipt of the written appeal. The decision of the Regional Director is final.

(g) FEMA may not move an applicant's contaminated furniture to the temporary relocation residence.

(h) FEMA shall not be responsible for management and/or disposition of the acquired property.

§ 220.14 Floodplain management guidelines.

FEMA has determined that placement of families in existing resources under Temporary Relocation Assistance is exempt from the floodplain management requirements of Part 9 in 44 CFR 9.5(c)(14), Floodplain Management and Protection of Wetlands. However, efforts shall be made to use existing resources outside of the floodplain when possible and families shall be notified in writing when they are referred by FEMA to existing resources which are in the floodplain. Referrals shall not be made to existing resources in the floodplain within communities which are not participating in the National Flood Insurance Program.

§ 220.15 Effective date of assistance.

The effective date of assistance is the date the applicant obtains his/her own authorized accommodations or the date FEMA provides other relocation assistance. Temporary Relocation Assistance may be provided as of the date identified by EPA in the FEMA/EPA Interagency Agreement.

§ 220.16 Termination of assistance.

Termination of temporary housing may be initiated with a 30-day written notice, after which the occupant shall be liable for such additional charges as are deemed appropriate by the Regional Director including, but not limited to, the fair market rental for the temporary housing residence. Termination may be in the form of eviction from temporary housing (if FEMA leased the housing) or termination of financial assistance (if cash payment is made to the occupant).

(a) *Grounds for termination.* Temporary housing (including transient accommodations) may be terminated for reasons, including, but not limited to, the following:

(1) A determination has been made by EPA that the residence from which the occupant was displaced is now available for occupancy.

(2) FEMA has determined that the temporary housing occupant has failed to comply with the terms of the lease or reimbursement agreement.

(3) An offer for permanent acquisition of the housing from which the individual has been displaced has been made (and the time period for temporary housing allocated by FEMA's permanent relocation plan for the specific location involved has passed). This includes an offer of relocation assistance, if appropriate.

(4) The temporary housing occupant has failed to take due care of the temporary dwelling.

(5) FEMA has determined that temporary housing was obtained through misrepresentation or fraud.

(6) The temporary housing occupant has failed to pay utilities or other charges, responsibility for which has been assigned by the lease or reimbursement agreement.

(7) FEMA has determined that the temporary housing occupant has permanently relocated to a new location.

(b) *Termination procedures.* These procedures shall be utilized in all instances, except when a State is administering the Temporary Relocation Assistance Program. States shall be subject to their own procedures provided they afford the occupant(s) due process safeguards described in paragraph (b)(5)(iv) of this section.

(1) *Notification of occupants.* Written notice shall be given by FEMA (or the entity designated to administer the program) to the occupant(s) at least 30 days prior to the proposed termination of assistance. This notice shall specify: The reasons for termination of assistance/occupancy; the date of termination, which shall not be less than 30 days after receipt of the notice; the administrative procedure available to the occupant(s) if he/she wishes to dispute the action; and the occupant's liability after the termination date for additional charges.

Exception: Where the temporary housing occupants have been informed in writing, prior to receiving assistance from FEMA that the duration of the temporary housing assistance will be 30 days or less, there is no requirement for a written notice. The notice of the limited duration of such assistance or occupancy will also serve as notice of termination of the assistance for occupancy.

Those occupants will be notified by telephone or personal conversation as to the exact date of termination of assistance. If occupying FEMA-leased housing, occupants shall be required to leave within 24 hours from the time of the conversation regarding termination.

(2) *Filing of appeal.* If the occupant desires to dispute the termination of temporary housing assistance, upon receipt of the written notice specified in paragraph (b)(1) of this section, he/she shall present the appeal in writing to the appropriate FEMA office in person or by mail within 5 business days. The appeal must be signed by the occupant and state the reasons why the assistance or occupancy should not be terminated. If a hearing is desired, the appeal should so state.

(3) *Response to appeal.* If a hearing pursuant to paragraph (b)(2) of this section has not been requested, the occupant will be deemed to have waived the right to a hearing. Under such circumstances, the appropriate FEMA official shall deliver or mail a written response to the occupant within 5 business days after the receipt of the appeal.

(4) *Request for a hearing.* If the occupant requests a hearing pursuant to paragraph (b)(2) of this section, FEMA shall schedule a hearing date within 10 days from the receipt of the appeal, at a time and place reasonably convenient to the occupant, who shall be notified promptly thereof in writing. The notice of hearing shall specify the procedure governing the hearing.

(5) *Hearing*— (i) *Hearing officer.* The hearing shall be conducted by a Hearing Officer who shall be designated by the FEMA Regional Director, and who shall not have been involved with the decision to terminate the occupant's temporary housing assistance, nor be a subordinate of any individual who was so involved.

(ii) *Due process.* The occupant shall be afforded a fair hearing and provided the basic safeguards of due process, including cross-examination of the responsible official(s), access to the documents on which FEMA is relying, the right to counsel at his/her expense, the right to present evidence, and the right to a written decision.

(iii) *Failure to appear.* If an occupant fails to appear at a hearing, the Hearing Officer may make a determination that the occupant has waived his/her right to a hearing, or may, for good cause shown, postpone the hearing for no more than 5 business days.

(iv) *Proof.* At the hearing, the occupant must first attempt to establish that continued assistance is appropriate; thereafter, FEMA must sustain the burden of proof in justifying that the termination is appropriate. The occupant shall have the right to present evidence and arguments in support of his/her complaint, to disprove evidence relied on by FEMA, and to confront in a reasonable manner and cross-examine all witnesses on whose testimony or information FEMA relies. The hearing shall be conducted by the Hearing Officer and any evidence pertinent to the facts and issues raised may be received without regard to its admissibility under rules of evidence employed in formal judicial proceedings.

(6) *Decision.* The decision of the Hearing Officer shall be based solely upon applicable Federal and State law, and FEMA regulations and requirements promulgated thereunder. The Hearing Officer shall prepare a written decision setting forth a statement of findings and conclusions together with the reasons therefore, concerning all material issues raised by the complainant within five business days after the hearing. The decision of the Hearing Officer shall be binding on FEMA which shall take all actions necessary to carry out the decision or refrain from any actions prohibited by the decision, unless the FEMA Regional Director determines and notifies the complainant in writing within 30 days, or such additional time as FEMA may for good cause allow, that the decision of the Hearing Officer is not supportable.

(i) If the determination is to evict, the decision shall include a notice to the occupant that he/she must vacate the premises within three days of receipt of the written notice or on the termination, as required in paragraph (b) of this section, whichever is later. If the occupant does not quit the premises, appropriate action shall be taken and, if suit is brought, the occupant may be required to pay court costs and attorney fees.

(ii) If the determination is to terminate financial assistance, such assistance shall be terminated in accordance with the original notice given pursuant to paragraph (b)(1) of this section. If the occupant is required to give a specific number of days notice to the landlord which exceeds the number of days in the termination notice, the Regional Director, may approve the payment of rent for this period of time if requested by the occupant.

§ 220.17 Cost sharing.

State cost sharing, during a temporary relocation, will be required when the temporary relocation is determined to be a remedial action. The cost sharing policies are outlined in the Superfund Cost Share Eligibility Criteria for Permanent and Temporary Relocation, 44 CFR Part 222.

§ 220.18 State administration of temporary relocation assistance.

When administering this program, the State must comply with FEMA regulations and policies. The State shall maintain adequate documentation to enable analysis of the program in accordance with regulations, manuals, handbooks and guidance.

(a) *Site specific plan.* When it is agreed that a State will adminster all or part of temporary relocation activity, the State must submit a site-specific Temporary Relocation Assistance Plan for approval by the Regional Director or official designee within seven days of the signing of the FEMA/State Cooperative Agreement. This plan shall include the items listed below, as appropriate:

(1) Budget and estimated outlay schedule, and allocation advice;

(2) Time frames within which tasks will be completed;

(3) Assignment of relocation responsibilities to State and/or local officials or agencies;

(4) Method for notifying affected residents and taking applications;

(5) Method for developing fair market rent guidelines;

(6) Requirement for transient accommodations;

(7) Amount of food subsidy and the method for development of same;

(8) Policy for paying utility subsidy and/or connection costs;

(9) Method for providing site security;

(10) Method for payment for acquisition of contaminated personal property, when required by FEMA;

(11) Termination procedures;

(12) Contracting procedures;

(13) Quality control procedures;

(14) Documentation and control system provisions; and

(15) Arrangements for program review.

(Approved by the Office of Management and Budget under OMB Control Number 3067-0156)

(b) *Authorized costs.* All expenditures associated with administering the relocation activity are authorized if in compliance with this part, applicable FEMA/State Cooperative Agreements, OMB Circular A-87 Revised, Costs Principles for State and Local Governments (46 FR 9548), OMB Circular A-102 Revised and FEMA regulations on Uniform Administrative Requirements for Grants and Cooperative Agreements (44 CFR Part 13), and other FEMA regulations, as applicable.

(c) *Federal monitoring and oversight.* The Regional Director shall monitor State-administered activities since he/she remains responsible for the delivery of Temporary Relocation Assistance. In addition, policy guidance and interpretations to meet specific needs of an incident shall be provided through the oversight function. As determined necessary by FEMA, monitoring and oversight functions shall include on-site program reviews.

(d) *Technical assistance.* The Regional Director shall provide technical assistance as necessary to support State-administered operations through training, policies and regulations and through the use of personnel for technical assistance to the State or local staff.

(e) *Audits.* The State shall conduct a program review of each operation. All site-specific activities are subject to Federal audit.

§ 220.19 Reports.

The Associate Director for State and Local Programs and Support and the Regional Director may require from field operations such reports, plans and evaluations as they deem necessary to carry out their responsibilities under these regulations.

Date: January 11, 1989.

Grant C. Peterson,

Associate Director, State and Local Programs and Support.

[FR Doc. 89-1197 Filed 1-19-89; 8:45 am]

BILLING CODE 6718-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 6

[CGD 88-070]

Editorial Changes Reflecting Recent Coast Guard Reorganization; Correction

AGENCY: Coast Guard, DOT.

ACTION: Final rule; correction.

SUMMARY: The Coast Guard is correcting an error to an amendatory instruction which appears in rule document 88-070 (FR Doc. 88-20180) published on Wednesday, September 7, 1988 at 53 FR 34532.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Don M. Wrye, Office of Chief Counsel, (202) 267-1534.

In rule document 88-070 beginning on page 34532 in the issue of Wednesday, September 7, 1988, make the following correction:

PART 6—[AMENDED]

1. Amendatory instruction 11 of rule document 88-070, (FR Doc. 88-20180), on page 34533 of the issue dated Wednesday, September 7, 1988, is revised to read as follows:

11. In the heading and in paragraphs (a), (b), and (d) of § 6.06, the words "Sea Transportation Service" are removed, and the words "Sealift Command" are added in their place.

Dated: January 13, 1989.

Joseph E. Vorbach,

Rear Admiral, U.S. Coast Guard.

[FR Doc. 89-1411 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-14-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 0

Editorial Amendment of List of Office of Management and Budget Approved Information Collection Requirements

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action amends the Commission's list of Office of Management and Budget approved information collection requirements contained in the Commission's Rules.

This action is necessary to comply with the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget for each agency information collection requirement.

This action will provide the public with a current list of information collection requirements in the Commission's Rules which have OMB approval.

EFFECTIVE DATE: January 23, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jerry Cowden, Office of Managing Director, (202) 632-7513.

SUPPLEMENTARY INFORMATION:

Order

Adopted: January 4, 1989.
Released: January 17, 1989.

1. Section 3507(f) of the Paperwork Reduction Act of 1980, as amended, 44 U.S.C. 3507(f), requires agencies to display a current control number assigned by the Director of the Office of Management and Budget ("OMB") for each agency information collection requirement.

2. Section 0.408 of the Commission's Rules displays the OMB control numbers assigned to the Commission's information collection requirements. OMB control numbers assigned to Commission forms are not listed in this section since those numbers appear on the forms.

3. This Order amends § 0.408 to remove listings of information collections which the Commission has eliminated or to add listings of new information collections which OMB has approved.

4. Authority for this action is contained in section 4(i) of the Communications Act of 1934 (47 U.S.C. 154(i)), as amended, and § 0.231(d) of the Commission's Rules. Since this amendment is editorial in nature, the public notice, procedure, and effective date provisions of 5 U.S.C. 553 do not apply.

5. Accordingly, IT IS ORDERED, THAT § 0.408 of the rules is AMENDED in accordance with the attached appendix, effective on the date of publication in the **Federal Register.**

6. Persons having questions on this matter should contact Jerry Cowden at (202) 632-7513.

Federal Communications Commission.

Edward J. Minkel,

Managing Director.

Appendix

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

§ 0.408 [Amended]

2. In 47 CFR 0.408, paragraph (b) is amended by removing footnote 2 and the following rule sections and their corresponding OMB control numbers:

Rule section No.	*OMB control No.*
87.35(e)	3060-0197
87.95	3060-0192
87.127	3060-0201
87.153	3060-0202
90.356	3060-0237
90.382	3060-0238
94.27(b)	3060-0312

3. In 47 CFR 0.408, paragraph (b) is amended by adding the following rule sections and their corresponding OMB control numbers:

Rule section No.	*OMB control No.*
1.720-1.734	3060-0411
76.33	3060-0416
76.94	3060-0419
76.155	3060-0419

76.157	3060-0419
76.159	3060-0419
80.227	3060-0388
87.31	3060-0197
87.37	3060-0202
87.103	3060-0192
94.27(a)(6)	3060-0312

[FR Doc. 89-1368 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 86-410; RM 5428, 5469, 5688, 5792]

Radio Broadcasting Services; Columbia, Eldon, Centralia, Mountain Grove and Cabool, MO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 224C2 for Channel 224A at Eldon, Missouri and modifies the license of Station KLDN (FM) to specify operation on the higher class co-channel, as requested by Southwest Communications Inc. The community could be provided with its first wide coverage area FM service. The station's current transmitter site meets the Commission's minimum separation requirements, at coordinates 38-20-27 and 92-35-33. In order to facilitate the change Channel 251A was substituted for Channel 292A at Cabool, Missouri, and the license of Station KVVC (FM) was modified to specify operation on the new channel. KVVC's current transmitter site meets the Commission's minimum distance separation requirements, at coordinates 37-07-58 and 92-08-04. Channel 293A was also substituted for Channel 224A at Mountain Grove, Missouri, and the license of Station KRFI was modified to specify operation on the new channel. KRFI's current transmitter site meets the Commission's minimum distance separation requirements, at coordinates 37-08-07 and 92-14-59. With this action, this proceeding is terminated.

EFFECTIVE DATE: February 27, 1989.

FOR FURTHER INFORMATION CONTACT: Arthur Scrutchins, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 86-410, adopted November 30, 1988, and released January 12, 1989.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154,303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended, under Missouri, by removing Channel 224A and adding Channel 224C2 at Eldon; removing Channel 292A and adding Channel 251A at Cabool; removing Channels 224A and adding 293A at Mountain Grove.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1369 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 675

Foreign Fishing, Groundfish for the Bering Sea and Aleutian Islands Area

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

ACTION: Notice of catch monitoring.

SUMMARY: NOAA announces that it will closely monitor incidental catches of Tanner crab (*Chionoecetes bairdi*), red king crab (*Paralithodes camtschatica*), and Pacific halibut (*Hippoglossus stenolepis*) (prohibited species) in fisheries for groundfish in the Bering Sea and Aleutian Islands (BSAI) area. Incidental catch of prohibited species must be minimized and must be returned immediately to the sea with a minimum of injury, unless retention is authorized by other applicable law. Further control on incidental catch of prohibited species in the BSAI area is anticipated for the 1989 fishing year through subsequent regulatory action which may include closed areas and prohibited species catch (PSC) limits. If such regulatory action occurs, any area closure or other constraint imposed on groundfish fisheries due to attainment of a PSC limit or portion thereof may be based on the accounting of prohibited species catch from the beginning of the 1989 fishing year.

This notice informs participants in the BSAI area groundfish fisheries that bycatch control regulations that are anticipated to be effective later in 1989 will be implemented by taking into account bycatches of the identified crab and halibut species since the beginning of 1989. The intended effect of this notice is to encourage groundfish fishermen to avoid, to the maximum extent possible, bycatches of prohibited species (the identified species of crabs and halibut in particular).

FOR FURTHER INFORMATION CONTACT: Jay J.C. Ginter (Fishery Management Biologist, NMFS), 907-586-7229.

SUPPLEMENTARY INFORMATION:

List of Subjects

50 CFR Part 611

Fisheries, Foreign relations, Reporting and recordkeeping requirements.

50 CFR Part 675

Fisheries, Reporting and recordkeeping requirements.

Dated: January 13, 1989.

Richard H. Schaefer,

Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-1422 Filed 1-19-89; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 54, No. 13
Monday, January 23, 1989

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

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 401

[Amendment No. 42; Doc. No. 5753S]

General Crop Insurance Regulations; Corn Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, by revising and reissuing § 401.111, Corn Endorsement. The intended effect of this rule is to: (1) Provided that, if the silage option is in effect, insurance ends September 30 even if the crop is "put to another use" and harvested later; (2) require written notice from the insured before consent is given to put the crop to another use; and (3) clarify the unit of measure (bushels or tons) which is to be used under bushel guarantee or tonnage guarantee for loss adjustment purpose.

DATE: Written comments, data, and opinions on this proposed rule must be submitted not later than February 22, 1989, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is April 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

In revising and reissuing the Corn Endorsement, FCIC proposes to make changes in the provisions for insuring corn as follows:

1. Section 4—Provides that if the silage option is in effect, insurance ends September 30 even if the crop is "put to another use" and harvested later.

2. Section 6—Require written notice from the insured before we will give consent to put the crop to another use.

3. Section 7—Language is clarified as to which unit of measure (bushels or tons) will be used in various situations and the use of a conversion factor.

FCIC is soliciting public comment on this proposed rule for 30 days following publication in the **Federal Register**. Written comments received pursuant to this proposed rule will be available for public inspection and copying in the Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

Crop insurance, Corn endorsement.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), to be effective for the 1990 and succeeding crop years, as follows:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR Part 401 is amended to revise § 401.111, Corn Endorsement, effective for the 1990 and Succeeding Crop Years, to read as follows:

§ 401.111 Corn Endorsement.

The provisions of the Corn Crop Insurance Endorsement for the 1990 and subsequent crop years are as follows:

Federal Crop Insurance Corporation

Corn Endorsement

1. Insured Corn

a. (The crop insured will be field corn ("corn") planted for harvest as grain (or silage if a corn silage option is obtained).

b. In addition to the crop not insurable under section 2 of the general crop insurance policy, we do not insure any corn:

(1) on which the corn was destroyed or put to another use for the purpose of conforming with any other program administered by the United States Department of Agriculture; or

(2) unless the acreage is planted in rows far enough apart to permit mechanical cultivation.

c. If the actuarial table for the county provides only a grain guarantee, the corn silage option is not available.

d. If the actuarial table for the county provides for both a grain and silage guarantee, all corn acreage will be insured under the provisions of this endorsement, unless you complete the corn silage option, which provides that all corn acreage will be insured under the provisions of the corn silage option.

e. If the actuarial table for the county provides a "silage only guarantee," coverage is only available with the completion of the silage option.

f. A late planting agreement will be available for corn.

2. Causes of Loss

The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

a. Adverse weather conditions;
b. Fire;
c. Insects;
d. Plant disease;
e. Wildlife;
f. Earthquake;
g. Volcanic eruption; or
h. If applicable, failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of planting;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

3. Annual Premium

a. The annual premium amount is computed by multiplying the production guarantee times the price election, times the premium rate, times the insured acreage, times your share at the time of planting.

b. If you are eligible for a premium reduction in excess of 5 percent based on your insurance experience through the 1983 crop year under the terms of the experience table contained in the corn policy for the 1984 crop year, you will continue to receive the benefit of the reduction subject to the following conditions:

(1) No premium reduction will be retained after the 1990 crop year;

(2) The premium reduction will not increase because of favorable experience;

(3) The premium reduction will decrease because of unfavorable experience in accordance with the terms of the policy in effect for the 1985 crop year;

4. Insurance Period

The calendar date for the end of the insurance period is the date immediately following planting as follows:

The calendar date for the end of the insurance period is the date immediately following planting as follows:

a. Val Verde, Edwards, Kerr, Kendall, Bexar, Wilson, Karnes, Goliad, Victoria, and Jackson Counties, Texas, and all Texas Counties lying south thereof—September 30;

b. Clark, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Pierce, Skagit, Snohomish, Thurston, Wahkiakum, and Whatcom counties, Washington—October 31;

c. All other counties where our acturial table shows:

(1) Only a silage guarantee; or

(2) Both a grain and a silage guarantee on any acreage if:

(i) The silage option is in effect or

(ii) The corn is harvested for silage—September 30;

d. All other counties and states—December 10.

5. Unit Division

Corn acreage that would otherwise be one unit, as defined in section 17 of the general crop insurance policy, may be divided into more than one unit if you agree to pay an additional premium if required by the actuarial table and if for each proposed unit you maintain written verifiable records of planted acreage and harvested production for at least the previous crop year. Production reports by unit based on those records should be filed as early as possible but must be filed no later than the date required by subsection 4.d. of the general crop insurance policy and either:

a. Acreage planted to the insured corn crop is located in separate, legally identifiable sections (except in Florida) or, in the absence of section descriptions (and in Florida) the land is identified by separate ASCS Farm Serial Numbers, provided:

(1) The boundaries of the section or ASCS Farm Serial Number are clearly identified, and the insured acreage can be easily determined; and

(2) The corn is planted in such a manner that the planting pattern does not continue into an adjacent section or ASCS Farm Serial Number; or

b. Acreage planted to the insured corn is located in a single section or ASCS Farm Serial Number and consists of acreage on which both irrigated and nonirrigated practices are carried out, provided:

(1) Corn planted on the irrigated acreage does not continue into nonirrigated acreage inb the same rows or planting pattern (Nonirrigated corners of a center pivot irrigation system planted to insured corn are part of the irrigated unit without regard to planting pattern. The production from the total unit, both irrigated and nonirrigated, is combined to determine your yield unit for the purpose of determining the guarantee for the unit.); and

(2) Planting, fertilizing, and harvesting are carried out in accordance with recognized good irrigated and nonirrigated farming practices for the area.

If you have a loss on any unit, production records for all harvested units must be provided. Production that is commingled between optional units will cause those units to be combined.

6. Notice of Damage or Loss

a. For purposes of section 8 of the general crop insurance policy the representative sample of the unharvested crop must be at least 10 feet wide and the entire length of the field.

b. In addition to the notices required by section 8.a. of the General policy, you must give us written notice if:

(1) You want our consent to harvest corn reported as grain for silage or;

(2) You want our consent to harvest corn reported as silage for grain. If timely notice is not given so we can appraise such corn and it is harvested in a manner not shown on the acreage report, it will be considered to have been destroyed without consent.

7. Claim for Indemnity

a. An indemnity may be determined for each unit by:

(1) Multiplying the insured acreage by the production guarantee;

(2) Subtracting therefore the total production to be counted.

(3) Multiplying this product by the applicable price election; and

(4) Multiplying this result by your share.

b. When the actuarial table provides a bushel guarantee only, all indemnity calculations will be in bushels.

c. When the actuarial table provides a bushel and tonnage guarantee, all indemnity calculations will be in bushels. If you have an approved corn silage option, all indemnity calculations will be in tons.

d. When the actuarial table provides a tonnage guarantee, and a corn silage option is in effect, all indemnity calculations will be on a tonnage basis.

e. The total production (bushels) to be counted for a unit will include:

(1) Production determination in bushels when the actuarial table provides a bushel guarantee only, or a bushel and tonnage guarantee (unless you have an approved Corn Silage Option) and may be adjusted for moisture or quality as follows:

(a) Mature grain which otherwise is not eligible for quality adjustment will be reduced .12 percent for each .1 percentage point of moisture in exces of 15.5 through 30.0 percent and .2 percent for each .1 percentage point of moisture from 30.1 through 40.0 percent; or

(b) Mature grain which, due to insurable causes, has moisture over 40 percent; test weight below 49 pounds per bushel; or kernel damage more than 10 percent as determined by a grain grader licensed by the Federal Grain Inspection Service or licensed under the United States Warehouse Act, will be adjusted by:

(i) Dividing the value per bushel of such corn by the price per bushel of U.S. No. 2 corn at 15.5% moisture; and

(ii) Multipying the result by the number of bushels of such corn.

The applicable price for No. 2 corn will be the local market price on the earlier of the day the loss is adjusted or the day such corn was sold.

(2) All appraised production which will include:

(a) Unharvested production on harvested acreage and potential production lost due to uninsured causes and failure to follow recognized good corn farming practices;

(b) Not less than the guarantee for any acreage which is abandoned or put to another use without our prior written consent or damaged solely by an uninsured cause; and

(c) Appraised production on unharvested acreage; and

(d) Appraised production on insured acreage for which we have given written consent to be put to another use unless such acreage is:

(i) Not put to another use before harvest of corn becomes general in the county and reappraised by us;

(ii) Further damaged by an insured cause and reappraised by us; or

(iii) Harvested.

(3) Where a conversion factor is shown on the actuarial table, indemnity calculations for any acreage of corn reported as grain and harvested as silage will be converted to a bushel basis.

c. A replanting payment is available under this endorsement if we determine it is practical to replant on a unit and our appraisal does not exceed 90 percent of the guarantee. The replanting payment will not exceed 8 bushels multiplied by the price election, multiplied by your share. When the crop is replanted by a broadcast method, the liability under this endorsement will be reduced by the amount of the replant payment.

8. Cancellation and Termination Dates

State and county	Cancellation and termination dates
Val Verde, Edwards, Kerr, Kendall, Bexar, Wilson, Karnes, Goliad, Victoria, and Jackson Counties, Texas, and all Texas counties lying south thereof.	February 15.
Alabama; Arizona; Arkansas; California; Florida; Georgia; Louisiana; Mississippi; Nevada; North Carolina; South Carolina; and El Paso, Hudspeth, Culberson, Reeves, Loving, Winkler, Ector, Upton, Reagan, Sterling, Coke, Tom Green, Concho, McCulloch, San Saba, Mills, Hamilton, Bosque, Johnson, Tarrant, Wise, Cooke Counties, Texas, and all Texas Counties lying south and east thereof to and including Terrell, Crockett, Sutton, Kimble, Gillespie, Blanco, Comal, Guadalupe, Gonzales, De Witt, Lavaca, Colorado, Wharton, and Matagorda Counties, Texas.	March 31.
All other Texas counties and other states.	April 15.

9. Contract Changes

Contract changes will be available at your service office by December 31 preceding the cancellation date for counties with an April 15 cancellation date and by November 30 preceding the cancellation date for all other counties.

10. Meaning of Terms

a. "Harvest" of corn on the unit means completion of combining and/or picking the corn for grain or the chopping of corn for silage purposes as applicable.

b. "Replanting" means performing the cultural practice necessary to replant insured acreage to corn.

c. "Silage" means corn harvested by severing the stalk from the land and chopping the stalk and the ear for the purpose of livestock feed.

d. "Section" is a unit of measure under the rectangular survey system describing a tract of land generally one mile square, usually containing approximately 640 acres.

Done in Washington, DC, on January 11, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1318 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

7 CFR Part 401

[Amdt. No. 18; Doc. No. 5955S]

General Crop Insurance Regulations; Cranberry Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, by adding a new section, 7 CFR 401.127, the Cranberry Endorsement. The intended effect of this rule is to provide the provisions of crop insurance protection on cranberries in an endorsement to the general crop insurance policy.

Comment Date: Written comments, data, and opinions on this proposed rule should be received not later than March 24, 1989, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC proposes to add to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.127, the Cranberry Endorsement, effective for the 1990 and succeeding crop years, to provide the provisions for insuring cranberries.

FCIC is soliciting public comment on this proposed rule for 60 days following publication in the **Federal Register**. Written comment should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

All written comments received pursuant to this proposed rule will be available for public inspection and copying in the Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

Crop Insurance; Cranberry Endorsement.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, as follows:

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR Part 401 is amended to add a new section to be known as 7 CFR 401.127, Cranberry Endorsement,

effective for the 1990 and Succeeding Crop Years, to read as follows:

§ 401.127 Cranberry Endorsement.

The provisions of the Cranberry Crop Insurance Endorsement for the 1990 and subsequent crop years are as follows:

Federal Crop Insurance Corporation Cranberry Endorsement

1. *Insured Crop.*

a. The crop insured will be cranberries which are grown for processing or fresh market.

b. Except by written agreement between you and us or unless provided by the actuarial table, we do not insure any acreage:

(1) Unless at least four growing seasons have elapsed between the date the vines were set out and the date insurance attaches;

(2) With less than 90 percent of a stand of bearing vines based on the original planting pattern; or

(3) That is being renovated and not being used to produce a full crop for the current year.

2. *Causes of Loss.*

a. The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

(1) Adverse weather conditions;

(2) Fire;

(3) Wildlife;

(4) Earthquake;

(5) Volcanic eruption;

(6) Insects;

(7) Plant disease;

(8) If applicable, failure of the irrigation water supply due to an unavoidable cause occurring after insurance attaches; or

(9) Failure or breakdown of irrigation equipment or facilities due to direct damage to the irrigation equipment or facilities from an insurable cause of loss if the cranberry crop is damaged by freezing temperatures within 72 hours of such equipment or facilities failure and the equipment or facilities could not have been made operational or replaced within the above 72-hour time period;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

b. We do not insure against any loss caused by the failure or breakdown of irrigation equipment or facilities except as provided in section 2.1.(9) above.

3. *Annual Premium.*

The annual premium amount is computed by multiplying the production guarantee times the price election, times the premium rate, times the insured acreage, times your share on the date insurance attaches.

4. *Insurance Period.*

a. In lieu of section 7 of the general crop insurance policy, insurance attaches for each crop year on November 21, if an application has been accepted by that date, and ends at the earliest of:

(1) Total destruction of the cranberry crop;

(2) The date harvest would normally start on the unit on any acreage which will not be harvested;

(3) Harvest of the cranberry crop;

(4) Final adjustment of a loss; or

(5) November 20 of the crop year.

b. If you purchase any insurable acreage of cranberries on or before January 5 of any crop year, insurance will be considered to have attached to such acreage at the beginning of the insurance period provided we have inspected and accepted such acreage in writing. If you sell any acreage of cranberries on or before January 5 of any crop year, insurance will not be considered to have attached to such acreage for that crop year.

5. *Unit Division.*

Cranberry acreage that would otherwise be one unit, as defined in section 17 of the general crop insurance policy, may be divided into more than one unit if you agree to pay an additional premium if required by the actuarial table and if for each proposed unit:

a. You maintain written verifiable records of acreage and harvested production for at least the previous crop year and production reports based on those records are timely filed to obtain an insurance guarantee; and

b. The acreage planted to insured cranberries in the county is located on non-contiguous land.

If you have a loss on any unit, production records for all harvested units must be provided. Production that is commingled between optional units will cause those units to be combined.

6. *Notice of Damage or Loss.*

In addition to section 8 of the general crop insurance policy, in case of damage or probable loss:

a. You must give us written notice of the loss or probable loss including the dates of damage immediately, if probable loss is determined within 15 days prior to or during harvest.

b. If you are going to claim an indemnity on any unit, you must give us notice not later than 72 hours after the earliest of:

(1) Total destruction of the cranberries on the unit;

(2) Discontinuance of harvest of any acreage on the unit; or

(3) The date harvest would normally start in the area if any acreage on the unit is not to be harvested.

c. Unless notice has been given under section b. avove, and in addition to the other notices required by this section, if you are going to claim an indemnity on any unit, you must give us written notice not later than 10 days after the earlier of:

(1) Harvest of the unit; or

(2) November 20 of the crop year.

7. *Claim for Indemnity.*

a. In addition to section 9 of the general crop insurance policy, we will not pay any indemnity unless you authorize us, in writing, to examine and obtain any records pertaining to the production and marketing of the insured cranberries.

b. The indemnity will be determined on each unit by:

(1) Multiplying the insured acreage by the production guarantee;

(2) Subtracting from that result the total production of cranberries to be counted (see subsection 7.c.);

(3) Multiplying the remainder by the price election; and

(4) Multiplying this result by your share.

c. The total production (in barrels) to be counted for a unit will include all harvested and appraised production.

(1) Cranberry production which, due to insurable causes, is determined not to meet quality requirements of the receiving handler, would not meet those requirements if properly handled, and has a value of less than 75 percent of the market price for cranberries meeting the minimum requirements will be adjusted by:

(a) Dividing the value per barrel of such cranberrries by the market price per barrel for cranberries meeting the minimum requirements; and

(b) Multiplying the result by the number of barrels of such cranberries.

(2) Appraised production to be counted will include:

(a) Potential production lost due to uninsured causes and failure to follow recognized good cranberry farming practices;

(b) Not less than the guarantee for any acreage which is abandoned, damaged solely by an uninsured cause or destroyed by you without our consent; and

(c) Any unharvested production.

(3) Any appraisal we have made on insured acreage will be considered production to count unless such acreage is:

(a) Not harvested before the harvest of cranberries becomes general in the county and reappraised by us;

(b) Further damaged by an insured cause and reappraised by us; or

(c) Harvested.

(4) We may determine the amount of production of any unharvested cranberries on the basis of field appraisals conducted after the end of the insurance period.

8. *Cancellation and Termination Date.*

The cancellation and termination date is November 20.

9. *Contract Changes.*

All contract changes will be available at your service office by August 31 preceding the cancellation date.

10. *Meaning of Terms.*

a. *"Barrel"* means 100 pounds of cranberries.

b. *"Direct damage"* means actual physical damage to the equipment or facilities which is the direct result of an insurable cause of loss.

c. *"Harvest"* means picking of the cranberries from the vines for the purpose of removal from the land.

d. *"Irrigation equipment, facilities, and water supply"* means the supply of water and the mechanical and constructed equipment and facilities used to deliver the water to the cranberry crop so as to prevent damage due to drought or freeze.

e. *"Non-contiguous land"* means land which is not touching at any point. Land that is separated only by a public or private right-of-way will be considered contiguous.

Done in Washington, DC, on January 11, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1428 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 401

[Amdt. 44; Docket No. 5760S]

General Crop Insurance Regulations; Florida Citrus Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, by adding a new section, 7 CFR 401.143, Florida Citrus Endorsement. The intended effect of this rule is to provide the regulations containing the provisions of crop insurance protection on Florida citrus as an endorsement to the general crop insurance policy.

DATES: Written comments, data, and opinions on this proposed rule must be submitted not later than February 22, 1989, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC, 20250.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1993.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith proposes to add to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.143, the Florida Citrus Endorsement, effective for the 1990 and succeeding crop years, to provide the provisions for insuring citrus in Florida.

Upon publication of 7 CFR 401.143 as a final rule, the provisions for insuring citrus contained therein will supersede those provisions contained in 7 CFR Part 410, the Florida Citrus Crop Insurance Regulations, effective with the beginning of the 1990 crop year. The present policy contained in 7 CFR Part 410 will be terminated at the end of the 1989 crop year and later removed and reserved. FCIC will propose to amend the title of 7 CFR Part 410 by separate document so that the provisions therein are effective only through the 1989 crop year.

Minor editorial changes have been made to improve compatibility with the new general crop insurance policy. These changes do not affect meaning or intent of the provisions. In adding the new Florida Citrus Endorsement to 7 CFR Part 401, FCIC proposes to make changes in the provisions for insuring citrus as follows:

1. Section 2—Add language to specifically state that we do not insure against inability to market fruit as a direct result of quarantine, boycott, or refusal of any entity to accept production unless the fruit has actual physical damage due to an insured cause. This change is standard in most policies.

2. Section 3—Add language requiring an annual acreage report. Language previously included in the policy required only a periodic acreage report. The general crop insurance policy requires an annual acreage report. An annual report will insure more accurate reporting of year to year changes in acreage, unit structure, etc.

3. Section 5—The premium adjustment table is removed from the policy. Provisions are included to continue premium reduction for 5 years subject to the conditions outlined in this section.

4. Section 7—Unit division provisions are included in the endorsement with language indicating that an additional premium may be required for unit division by noncontiguous land.

5. Section 9—Modify language to count as 100% damaged any citrus that is on the ground due to freeze and not picked up and marketed. This change was made because in the case of severe freeze it is inequitable to count the fruit 90% damaged when 100% of the fruit is lost.

6. Section 12—Add a definition of "noncontiguous land."

FCIC is soliciting public comment on this proposed rule for 30 days following publication in the **Federal Register**. Written comments received pursuant to this proposed rule will be available for public inspection and copying in the Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC. 20250, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

Crop insurance, Florida citrus.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), proposed to be effective for the 1990 and succeeding crop years, as follows:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR Part 401 is amended to add a new section to be known as 7 CFR 401.143, Florida Citrus Endorsement, effective for the 1990 and Succeeding Crop Years, to read as follows:

§ 401.143 Florida Citrus Endorsement.

The provisions of the Florida Citrus Endorsement for the 1990 and subsequent crop years are as follows:

Federal Crop Insurance Corporation

Florida Citrus Endorsement

1. Insured Crop

a. The crop insured will be any of the following citrus types you elect:

Type I Early and mid-season oranges;
Type II Late oranges;
Type III Grapefruit for which freeze damage will be adjusted on a juice basis for white grapefruit and on a fresh-fruit basis for pink and red grapefruit;
Type IV Navel oranges, tangelos and tangerines;
Type V Murcott Honey Oranges (also known as Honey Tangerines) and Temple Oranges;
Type VI Lemons; or
Type VII Grapefruit for which freeze damage will be adjusted on a fresh basis for all grapefruit.

If you insure grapefruit, you must insure all of your grapefruit under a single type designation (type III or type VII). "Meyer Lemons" and oranges commonly known as "Sour Oranges" or "Clementines" will not be included in any of the insurable types of citrus.

b. In addition to the citrus not insurable in section 2 of the general crop insurance policy, we do not insure any citrus:

(1) which cannot be expected to mature each crop year within the normal maturity period for the type;

(2) produced by trees that have not reached the tenth growing season after being set out, unless otherwise provided in the actuarial table or we agree to insure such citrus in writing;

(3) of the Robinson tangerine variety, for any crop year in which you have elected to exclude such tangerine from insurance (you must elect this exclusion prior to April 30 preceding the crop year for which the exclusion is to become effective);

c. Upon our approval, you may elect to insure or exclude from insurance for any crop year any insurable acreage in any unit which has a potential of less than 100 boxes per acre. If you:

(1) Elect to insure such acreage, we will increase the potential to 100 boxes per acre when determining the amount of loss;

(2) Elect to exclude such acreage, we will disregard the acreage for all purposes related to this contract; or

(3) Do not elect to insure or exclude such acreage:

(a) We will disregard the acreage if the production is less then 100 boxes per acre; or

(b) If the production from such acreage is 100 or more boxes per acre, we will determine the percent of damage on all of the insurable acreage for the unit, but will not allow the percent of damage for the unit to be increased by including such acreage.

d. We may exclude from insurance or limit the amount of insurance on any acreage which was not insured the previous crop year.

2. Causes of Loss

a. The insurance provided is against unavoidable loss of production resulting from the following causes occurring the insurance period:

(1) Fire;
(2) Freeze;
(3) Hail;
(4) Hurricane; or
(5) Tornado;

Unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

b. In addition to the causes of loss not insured against in section 1 of the general crop insurance policy, we will not insure against any loss of production due to:

(1) Any damage to the blossoms or trees;

(2) Fire, if weeds and other forms of undergrowth have not been controlled or tree pruning debris has not been removed from the grove;

(3) Inability to market the fruit as a direct result of quarantine, boycott, or refusal of any entity to accept production unless production has actual physical damage due to a cause specified in subsection 2.a.

3. Report of Acreage, Share, Type, and Practice (Acreage Report)

a. In addition to the information required in section 3 of the general crop insurance policy you must:

(1) Report the crop type; and

(2) Designate separately any acreage that is excluded under section 1 of this endorsement.

b. The date by which you must annually submit the acreage report is April 30.

4. Production Reporting

Production potential for each unit is determined during loss adjustment. Therefore, subsection 4.d. of the general crop insurance policy is not applicable to this endorsement. Production history is not required.

5. Annual Premium

a. The annual premium amount is computed by multiplying the amount of insurance times the premium rate, times the insured acreage, times your share at the time insurance attaches.

b. If you are eligible for a premium reduction in excess of 5 percent based on your insuring experience through the 1988 crop year under the terms of the experience table contained in the citrus policy for the 1989 crop year, you will continue to receive the benefit of the reduction subject to the following conditions:

(1) No premium reduction will be retained after the 1994 crop year;

(2) The premium reduction will not increase because of favorable experience;

(3) The premium reduction will decrease because of unfavorable experience in accordance with the terms of the policy in effect for the 1989 crop year;

(4) Once the loss ratio exceeds .80, no further premium reduction will apply; and

(5) Participation must be continuous.

6. Insurance period

a. The calendar date on which insurance attaches is May 1 for each crop year, except that for the first crop year, if the application is accepted by us after April 20, insurance will attach on the tenth day after the application is received in the service office.

b. The end of the insurance period is the date of the calendar year following the year of normal bloom as follows:

(1) January 31 for tangerines and navel oranges;

(2) April 30 for lemons, tangelos, early and mid-season oranges; and

(3) June 30 for late oranges, grapefruit, Temple and Murcott Honey Oranges.

7. Unit division

a. Citrus acreage that would otherwise be one unit, as defined in section 17 of the general crop insurance policy, may be divided by citrus type.

b. Citrus acreage that would otherwise be one unit as defined in section 17 of the general crop insurance policy and subsection 7.a. above may be divided into more than one unit, if you agree to pay additional premium if required by the actuarial table and if, for each proposed unit:

(1) You maintain written, verifiable records of acreage and harvested production for at least the previous crop year; and

(2) Acreage planted to insured citrus is located in separate, legally identifiable sections, provided:

(a) The boundaries of the sections are clearly identified and the insured acreage is easily determined; and

(b) The trees are planted in such a manner that the planting pattern does not continue into the adjacent section; or

(3) The acreage of insured citrus is located on noncontiguous land. If you have a loss on any unit, production records for all harvested units must be provided. Production that is commingled between optional units will cause those units to be combined.

8. Notice of damage or loss

In addition to the notices required in the general crop insurance policy and in case of damage or probable loss:

a. You must give us written notice of the date and cause of damage; and

b. If an indemnity is to be claimed on any unit you must give us notice by the calendar date for the end of the insurance period if harvest will not begin by that date.

9. Claim for indemnity

a. The indemnity will be determined on each unit by:

(1) Computing the average percent of damage to the citrus which (without regard to any percent of damage arrived at through prior inspections) will be the ratio of the number of boxes of citrus considered damaged from an insured cause to the potential rounded to the nearest tenth (.1) of a percent. Citrus will be considered undamaged potential if it is:

(a) Or could be marketed as fresh fruit;

(b) Harvested prior to an inspection by us; or

(c) Harvested within 7 days after a freeze;

(2) Multiplying the result in excess of 10 percent (e.g., 45%−10%=35% payable) times the amount of insurance for the unit (the amount of insurance for the unit is determined by multiplying the insured acreage on the unit times the applicable amount of insurance per acre); and

(3) Multiplying this product by your share.

b. Pink and red grapefruit of citrus Type III and citrus of Types IV, V, and VII which are seriously damaged by freeze (as determined

by a fresh-fruit cut of a representative sample of fruit in the unit, in accordance with the applicable provisions of the Florida Citrus Code), and are not or could not be marketed as fresh-fruit will be considered damaged to the following extent:

(1) If 15-percent or less of the fruit in a sample shows serious freeze damage, the fruit will be considered undamaged; or

(2) If 16 percent or more of the fruit in a sample shows serious freeze damage, the fruit will be considered 50 percent damaged, except that:

(a) For tangerines of citrus Type IV, damage in excess of 50 percent will be the actual percent of damaged fruit; and

(b) For other applicable varieties, if we determine that the juice loss in the fruit exceeds 50 percent, the amount so determined will be considered the percent of damage.

c. Notwithstanding the provisions of subsection 9.b., as to any pink and red grapefruit of Type III and citrus of Types IV, V, and VII in any unit which is mechanically separated (using the specific gravity "floatation" method) into undamaged and freeze-damaged fruit, the amount of damage will be the actual percent of freeze-damaged fruit not to exceed 50 percent and will not be affected by subsequent fresh-fruit marketing. The 50 percent limitation on freeze-damaged fruit, mechanically separated, will not apply to tangerines of citrus Type IV.

d. Any citrus of Types I, II, and VI and white grapefruit of Type III which is damaged by freeze, but may be processed by canning or processing plants, will be considered as marketable for juice. The percent of damage will be determined by relating the juice content of the damaged fruit as determined by test house analysis to:

(1) The average juice content based on acceptable records, furnished by you, showing the juice content of fruit produced on the unit for the three previous crop years; or

(2) If acceptable records are not furnished, the juice content for that type fruit established by the actuarial table.

e. Any citrus on the ground which is not picked up and marketed will be considered totally lost if the damage was due to an insured cause.

f. Any citrus which is unmarketable either as fresh fruit or for juice because it is immature, unwholesome, decomposed, adulterated, or otherwise unfit for human consumption due to an insured cause will be considered totally lost.

g. Pink and red grapefruit of citrus Type III and citrus of Types IV, V, and VII which are marketable as fresh fruit due to serious damage from hail as defined in United States Standards for grades of Florida fruit will be considered totally lost.

10. Cancellation and Termination Dates

The cancellation date is April 30 of the calendar year in which the crop normally blooms. The termination date is April 30 of the calendar year following the year of normal bloom.

11. Contract Changes

The date by which contract changes will be available in your service office is the April 15 immediately preceding the cancellation date.

12. Meaning of Terms

a. *"Box"* means a standard field box as prescribed in the Florida Citrus Code.

b. *"Crop year"* means the period beginning May 1 and extending through June 30 of the following year and will be designated by the calendar year in which the insurance period ends.

c. *"Harvest"* means the severance of citrus fruit from the tree either by pulling, picking, or severing by mechnical or chemical means or picking up the marketable fruit from the ground.

d. *"Noncontiguous land"* means any land owned by you and rented by you for cash, a fixed commodity payment or any consideration other than a share in the insured crop, whose boundaries do not touch at any point. Land which is separated by a public or private right-of-way, waterway or irrigation canal will be considered to be touching (contiguous).

e. *"Potential"* means production:

(1) Which would have been produced had damage not concurred and includes citrus which:

(a) Was picked before damage occurred;

(b) Remained on the three after damage occurred;

(c) Was lost from an insured cause; and

(d) Was lost from an uninsured cause.

(2) The potential will not include:

(a) Citrus lost before insurance attaches for any crop year;

(b) Citrus lost by normal dropping; or

(c) Any tangerines which normally would not, by the end of the insurance period for tangerines, meet the 210 pack size (2 and 9/16 inch minimum diameter) under United States Standards.

Done in Washington, DC, on January 11, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1429 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 401

[Amdt. No. 46; Doc. No. 5780S]

General Crop Insurance Regulations; Forage Seeding Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, by adding a new section, 7 CFR 401.145, to be known as the Forage Seeding Endorsement. The intended effect of this rule is to provide the regulations containing the provisions of crop insurance protection on forage crops in an endorsement to the general crop insurance policy.

DATES: Written comments, data, and opinions on this proposed rule must be submitted not later than February 22, 1989, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is April 1, 1993.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith proposes to add to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.145, the Forage

Seeding Endorsement, effective for the 1990 and succeeding crop years, to provide the provisions for insuring forage crops.

Upon publication of 7 CFR 401.145 as a final rule, the provisions for insuring forage crops contained therein will supersede those provisions contained in 7 CFR Part 414, the Forage Seeding Crop Insurance Regulations, effective with the beginning of the 1990 crop year. The present policy contained in 7 CFR Part 414 will be terminated at the end of the 1989 crop year and later removed and reserved. FCIC will propose to amend the title of 7 CFR Part 414 by separate document so that the provisions therein are effective only through the 1989 crop year.

Minor editorial changes have been made to improve compatibility with the new general crop insurance policy. These changes do not affect the meaning or intent of the provisions. In adding the new Forage Seeding Endorsement to 7 CFR Part 401, FCIC proposes to make changes in the provisions for insuring forage crops as follows:

1. Section 3—Remove the Premium Adjustment Table and add a provision providing for good insurance experience discount to the endorsement.

2. Section 6—Include unit division guidelines in the endorsement with language providing that an additional premium may be required for guideline unit division. Provide that nonirrigated corners of a center pivot irrigation system are part of the irrigated unit.

3. Section 7—Provide that insurance begins and ends on an individual unit or partial unit basis.

4. Section 8—Provide a cancellation and termination date of July 31 for New Hampshire, Pennsylvania, and Vermont.

5. Section 11—Add definitions of "Crop Year", "Forage", "Harvest", and "Reseed".

FCIC is soliciting public comment on this proposed rule for 30 days following publication in the **Federal Register**. Written comments received pursuant to this proposed rule will be available for public inspection and copying in the Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

General Crop Insurance Regulations; Forage Seeding.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), proposed to be effective for the 1990 and succeeding crop years, as follows:

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR Part 401 is amended to add a new section to be known as 7 CFR Part 401.145 Forage Seeding Endorsement, effective for the 1990 and succeeding crop years, to read as follows:

§ 401.145 Forage Seeding Endorsement

The provsions of the Forage Seeding Endorsement for the 1990 and subsequent crop years are as follows:

Federal Crop Insurance Corporation

Forage Seeding Endorsement

1. Insured Crop

a. The crop insured will be forage seeded (or reseeded the calendar year following seeding) to establish a stand of forage intended for harvest as livestock feed.

b. In addition to the acreage specified as not insurable in section 2 of the general crop insurance policy, we do not insure any acreage seeded with another crop, unless specifically allowed by the actuarial table.

2. Causes of Loss

The insuracne provided is against unavoidable loss of or failure to establish a stand of forage resulting from the following causes occurring within the insurance period:

a. Adverse weather conditions;
b. Fire;
c. Insects;
d. Plant disease;
e. Wildlife;
f. Earthquake;
g. Volcanic eruption; or
h. If applicable, failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of seeding;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

3. Annual Premium

a. The annual premium amount is computed by multiplying the amount of insurance per acre times the premium rate, times the insured acreage, times your share at the time of seeding.

b. If you are eligible for a premium reduction in excess of 5 percent based on your insurance experience through the 1988 crop year under the terms of the experience table contained in the forage seeding policy in effect for the 1989 crop year, you will continue to receive the benefit of that reduction subject to the following conditions:

(1) The premium reduction factor will not increase because of favorable experience;

(2) The premium reduction factor will decrease because of unfavorable experience in accordance with the terms of the policy in effect for the 1989 crop year;

(3) Once the loss ratio exceeds .80, no further premium reduction will apply;

(4) No premium reduction will be retained after the 1992 crop year.

(5) Participation must be continuous.

4. Insurance Period

The calendar date for the end of the insurance period is May 21 following the calendar year of seeding for spring-seeded forage or October 15 following the calendar year of seeding for fall-seeded forage.

5. Notice of Damage of Loss

In addition to the notices required in section 8 of the general crop insurance policy, you must give us written notice before you reseed the acreage in the spring if you will claim a reseeding payment.

6. Unit Division

a. In lieu of the unit definition in subsection 17.q. of the general crop insurance policy, a unit will be all insurable acreage of either fall-seeded or spring-seeded forage in the county on the date of seeding:

(1) In which you have a 100 percent share: or

(2) Which is owned and operated by another entity on a share basis. Land rented for cash, a fixed commodity payment, or any other consideration other than a share in the forage crop on such land will be considered as owned by the lessee. Units will be determined when the acreage is reported but may be adjusted to reflect the actual unit structure when adjusting a loss except that no further unit division will be allowed at loss adjustment time. We may consider any acreage and share thereof reported by or for your spouse or child or any member of your household to be your bona fide share or the bona fide share of any other person having an interest therein.

b. Forage seeding acreage that would otherwise be one unit, as defined in section 6.a. above, may be divided into more than one unit if you agree to pay additional premium if provided for by the actuarial table and either;

(1) Acreage planted to the insured forage seeding crop is located in separate, legally identifiable sections or, in the absence of section descriptions the land is identified by separate ASCS Farm Serial Numbers, provided:

(a) The boundaries of the section or ASCS Farm Serial Numbers are clearly identified, and the insured acreage can be easily determined; and

(b) The forage seeding crop is planted in such a manner that the planting pattern does not continue into an adjacent section or ASCS Farm Serial Number; or

(2) The acreage planted to the insured forage crop hereunder is located in a single section or ASCS Farm Serial Number and consists of acreage on which both irrigation and non-irrigation practices are carried out, provided:

(a) Forage seeded on the irrigated acreage does not continue into nonirrigated acreage in the same rows or planting pattern (Nonirrigated corners of a center pivot irrigation system planted to insurable forage are part of the irrigated unit); and

(b) Planting, fertilizing, and harvesting are carried out in accordance with recognized good irrigation and non-irrigation farming practices as applicable for the area.

7. Claim for Indemnity

a. In accordance with the provisions in section 9.c. of the general crop insurance policy, the indemnity will be determined on each unit by:

(1) Subtracting from 90% of the insured acreage the total amount of insured acreage with an established stand;

(2) If this amount is greater than zero, multiplying this amount by the amount of insurance per acre; and

(3) Multiplying this result by your share.

b. The acres with an established stand will include:

(1) Acreage which has at least 75 percent of a normal stand as defined by the actuarial table;

(2) Acreage abandoned or put to another use without our prior written consent;

(3) Acreage damaged solely by an uninsured cause; or

(4) Acreage which is harvested and not reseeded.

c. The amount of indemnity on any spring-seeded acreage determined in accordance with section 7.a. will be reduced 50 percent if we determine that your forage stand is less than 75 percent but more than 55 percent of a normal stand.

d. A reseeding payment will be made on any insured fall-seeded acreage with less than a 75 percent normal stand, on which we have given written consent to reseed and which is reseeded in the next succeeding spring by the final spring-seeding date. The amount of the reseeding payment will be the actual cost of reseeding but may not exceed 50 percent of the amount of indemnity determined in accordance with section 7.a.

8. Cancellation and Termination

The cancellation and termination dates are:

State	Cancellation and termination dates
New Hampshire, New York, Pennsylvania, Vermont.	July 31
All other states	April 15

9. Contract Changes

The date by which contract changes will be available in your service office is December 31 for counties with an April 15 cancellation date and April 30 for all other counties.

10. Production Reporting

The production reporting provision contained in section 4 of the general crop insurance policy will not be applicable to this endorsement.

11. Meaning of Terms

a. "*Crop year*" means the period within which the seeding is or normally would become established and will be designated by the calendar year in which the seeding is made for spring-seeded acreage and the next succeeding calendar year for fall-seeded acreage.

b. "*Forage*" means grasses, legumes, or other vegetation grown singly or in combination, as specified on the actuarial table, for the purpose of producing livestock feed.

c. "*Harvest*" means the first severance of the forage plant from the land for the intended use as livestock feed.

d. "*Normal stand*" is defined in the actuarial table.

e. "*Reseed*" means the mechanical incorporation of seed into the soil at not less than 50 percent of the original seeding rate.

Done in Washington, DC, on January 11, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1430 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 401

[Amendment No. 19; Doc. No. 6420S]

General Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1989 and succeeding crop years, by: (1) Deleting a subsection which provides that insurance is not available on land located between any body of water and a primary flood control structure; (2) amending another subsection to clarify that acreage on which a crop has not been planted and harvested in at least one of the three previous crop years is insurable if that land has been in a soil conserving legume or is considered "cropland" by the Agricultural Stabilization and Conservation Service (ASCS); and (3) providing a definition for "cropland." The intended effect of this rule is to equalize the insurance offer on land described in (1) above since flood risk is many times included in the rating formula and establishing a specific cause of loss on such land is often difficult, and to clarify that land planted in a soil conserving legume as being the same land ASCS recognizes as cropland.

Comment Date: Written comments, data, and opinions on this proposed rule must be submitted by not later than March 24, 1988, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Secretary, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1989 and succeeding crop years, to make the insurance offer available on land described as being between a body of water and a primary flood control

structure, since flood risk is many times included in the rating formula, and establishing a specific cause of loss on such land is often difficult and to clarify that, for insurance purposes, land planted in a soil conserving legume is considered the same land ASCS recognizes as cropland.

On Thursday, July 30, 1987, FCIC published a final rule in the **Federal Register** at 52 FR 28443, to provide the provisions of crop insurance protection in a General Crop Insurance Policy (7 CFR Part 401).

In order to provide all insureds with the same degree of insurance protection, FCIC herein proposes to (1) delete subsection 1.b.(5)(52 FR 28448), which provides that insurance is not available on land located between any body of water and a primary flood control structure, because establishing a specific cause of loss on such land is often difficult; (2) amend subsection 2.e.(11)(52 FR 28448), to clarify that acreage on which a crop has not been planted and harvested in at least one of the three previous crop years is insurable if that land has been in a soil conserving legume or is considered "cropland" by the Agricultural Stabilization and Conservation Service (ASCS) because ASCS uses cropland acres as a basis for program payments and it is inappropriate for FCIC to deny insurance on land recognized by ASCS for program payment purposes; and (3) to provide a definition for "cropland" in subsection 17 of the policy.

The public is invited to submit written comments on this proposed rule for 60 days after its publication in the **Federal Register.** Written comments should be sent to Peter F. Cole, Secretary, Federal Crop Insurance Corporation, Office of the Manager, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC.

All written comments received pursuant to this notice of proposed rulemaking will be available for public inspection and copying at the above address during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

General crop insurance regulations.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), proposed to be effective for the 1989 and succeeding crop years, as follows:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

§ 401.8 [Amended]

2. 7 CFR 401. 8(d), subsection 1.b., is amended by deleting clause (5) and re-numbering clauses (6) through (9) as (5) through (8), respectively.

3. 7 CFR 401.8(d), subsection 2.e., clause (11), is amended to read as follows:

2. Crop, acreage, and share insured.

* * * * *

(e) * * *

(11) On which a crop has not been planted and harvested in at least one of the three previous crop years unless it is determined the acreage has been in a soil conserving legume or the acreage meets the definition of Agricultural Stabilization and Conservation Service (ASCS) "cropland" acreage; or

4. 7 CFR 401.8(d), subsection 17 is amended by re-numbering present paragraphs f. through s. as g. through t. respectively and by inserting a new paragraph f. to read as follows:

17. Meaning of Terms.

* * * * *

f. "Cropland" means any acreage considered by ASCS for program payment purposes.

Done in Washington, DC, on January 11, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1317 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 401

[Amt. No. 38 Docket No. 5997S]

General Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Notice of additional proposed rulemaking and extended comment period.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) herewith gives notice of additional proposed rulemaking and extension of comment period with respect to a proposed amendment to the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1989 and succeeding crop years, to include provisions for a Late Planting Agreement Option (7 CFR 401.107) applicable to certain crops under the provisions of the Late Planting Agreement Option Regulations. The intended effect of this rule is to include additional crops among those listed in the Late Planting Agreement Option as being eligible for that option, and to clarify the availability of the option.

DATE: Written comments, data, and opinions on this additional proposed rulemaking must be submitted not later than February 22, 1989, to be sure of consideration.

ADDRESS: Written comments on this additional proposed rulemaking should be sent to Peter F. Cole, Secretary, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of

the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

On Thursday, July 30, 1987, FCIC published a final rule in the **Federal Register** at 52FR 28443, issuing a new Part 401 to 7 CFR, Title IV. Included in this rule is 7 CFR 401.107, titled the Late Planting Agreement Option, published at 52 FR 28457.

The Late Planting Agreement Option becomes effective when elected by producers on the crop insurance endoresements listed under 7 CFR 401.107 which are eligible for that option in the option regulations.

FCIC studies indicated that the crops listed below would benefit from the option. The use of the option benefits the insured by allowing coverage to be obtained after the normal crop planting period.

On Thursday, August 4, 1988, FCIC published a notice of proposed rulemaking in the **Federal Register** at 53 FR 29340, proposing to include provisions for a Late Planting Agreement Option (7 CFR 401.107) on the following additional crop insurance endorsements in the Late Planting Agreement Option Regulations:

7 CFR

401.116 Flaxseed Endorsement
401.123 Safflower Endorsement
401.124 Sunflower Endorsement
401.109 Hybrid Sorghum Endorsement
401.118 Canning and Processing Bean Endorsement

Upon further review of the rule, FCIC has determined that certain crops eligible for Late Planting Agreement under the provisions of 7 CFR Part 400, Subpart A, which have been recently converted to endorsements under the General Crop Insurance Policy, were inadvertently omitted from the rule published at 53 FR 29340.

These crop insurance endorsements should be included in the rule and are as follows:

7 CFR

401.111 Corn (Grain) Endorsement
401.113 Grain Sorghum Endorsement
401.114 Canning and Processing Tomato Endorsement
401.117 Soybean Endorsement
401.118 Canning and Processing Tomato Endorsement
401.119 Cotton Endorsement
401.120 Rice Endorsement

In addition, the statement of availability of the Late Planting Agreement Option, found at Paragraph (e) of 7 CFR 401.107 in the proposed rule (53 FR 29340) should be clarified to more clearly define the limitations on the availability of the option. Presently, the paragraph states that the option will be available in all counties in which the Corporation offers insurance on these crops unless prohibited by the actuarial table in certain counties on fall-planted crops.

Other instruments which may also indicate limitations include the crop endorsement any option to the endorsement. Therefore, FCIC proposes to clarify the availability of the Late Planting Agreement Option by amending § 401.107(e) for this purpose.

FCIC is soliciting public comment on these proposed additional rulemaking changes for 30 days. All written comments received pursuant to this rule will be available for public inspection and copying in Room 4090, South Building, U.S. Department of Agriculture, Washington, DC, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

General crop insurance regulations.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to further amend the General Crop Insurance Regulations (7 CFR Part 401), proposed to be effective for the 1989 and succeeding crop years, in the following instances:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR 401.107—Late Planting Agreement Option, paragraph (e) is revised to read as follows:

§ 401.107 Late Planting Agreement Option.

* * * * *

(e) *Applicability to crops insured.* The provisions of this section will be applicable to the provisions for insuring crops under the following FCIC endorsements:

401.101 Wheat Endorsement.
401.103 Barley Endorsement.
401.105 Oat Endorsement.
401.106 Rye Endorsement.
401.109 Hybrid Sorghum Seed Endorsement.
401.111 Corn Endorsement.
401.113 Grain Sorghum Endorsement.
401.114 Canning and Processing Tomato Endorsement.
401.116 Flaxseed Endorsement.
401.117 Soybean Endorsement.
401.118 Canning and Processing Bean Endorsement.
401.119 Cotton Endorsement.
401.120 Rice Endorsement.
401.123 Safflower Endorsement.
401.124 Sunflower Endorsement.
401.126 Onion Endorsement.

The Late Planting Agreement Option will be available in all counties in which the Corporation offers insurance on these crops unless limited by the actuarial table, crop endorsement, or crop endorsement option.

* * * * *

Done in Washington, DC, on January 11, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-1426 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-08-M

Federal Grain Inspection Service

7 CFR Part 800

Shiplot Inspection Plan (Cu-Sum)

AGENCY: Federal Grain Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Grain Inspection Service (FGIS) proposes to revise the current shiplot inspection plan (Cu-Sum) and proposes to revise §§ 800.86, 800.129, and 800.139 of the regulations under the United States Grain Standards Act to include regulations concerning the inspection of shiplot, unit train, and lash barge grain in single lots and to organize the sections into a more logical order, clarify and remove unnecessary language, and remove provisions that are no longer needed. FGIS uses a statistically based sampling and inspection plan to determine the quality of grain exported from the United States. A study was initiated in 1986 to evaluate the relationship between the use of the Cu-Sum Plan and its effect on determining the quality of export grain. Based on the results of this study, FGIS is proposing to revise the Cu-Sum Plan and invites comments on the changes.

DATE: Comments must be submitted on or before March 24, 1989.

ADDRESS: Comments must be submitted in writing to Lewis Lebakken Jr., Resources Management Division, USDA, FGIS, Room 0628 South Building, P.O. Box 96454, Washington, DC, 20090-6454. Telemail users may respond to [IRSTAFF/FGIS/USDA] telemail; telex users may respond to Lewis Lebakken Jr., TLX: 7607351, ANS: FGIS UC; and telecopy users may send responses to the automatic telecopier at (202) 447-4628.

All comments received will be made available for public inspection at Room

0628 South Building, 1400 Independence Avenue SW., Washington, DC 20250, during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken Jr., address as above, telephone (202) 475-3428.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

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

Regulatory Flexibility Act Certification

W. Kirk Miller, Administrator, FGIS, has determined that this proposed 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.

Background

Since 1916, the United States Department of Agriculture (USDA) has established Official U.S. Standards for Grain. The standards and the inspection system serve the needs of the grain market by providing both the buyer and seller with a common language to describe grain quality through an impartial inspection process.

Determining the quality of large export grain shipments represents a difficult challenge for an inspection system. During the early years of U.S. grain exports, the quality of export shipments was determined after loading based on a single composite sample. As the size of export shipments increased, a need developed to determine grain quality during loading. In response, inspectors initially graded samples representing sublots (a portion of the entire shipment) but continued to determine the average quality for the export shipment on a single composite sample. Later, the average quality of the shipment was based on the average of the sublot results.

At first, no restrictions were placed on individual; sublot results. Quality could vary between sublots provided the average quality of the entire lot met contract requirements. By 1961, a process was developed to control quality fluctuations within export shipments. The process became known as the 10 Percent Plan because it allowed, based on sublot results, no more than 10 percent of the export shipment to be inferior by one grade in quality in comparison to the certificated grade.

With any inspection plan, inspection results are subject to variability caused by sampling limitations, equipment capabilities, and inspector performance. To minimze these variabilities and maintain an impartial inspection process, USDA developed a statistically based acceptance inspection plan in 1969 which later became known as Plan A. This plan compared individual factor results to contract and grade limits through the use of: (1) Absolute limits, (2) progressive loading limits, and (3) block limits. These limits allowed some fluctuation in quality results to compensate for the inherent variability associated with grain inspection. The absolute limit established an allowance beyond the grade factor limit. A sublot was considered inferior quality and designated a material portion if a sublot factor resulted exceeded the absolute limit. The progressive loading limit restricted the total number of inferior quality sublots for the entire vessel. The block limit restricted the number of consecutive sublots inferior in quality for the same factor. A "block" consisted of three or more consecutive sublots that exceed the same grade factor limit but did not exceed the absolute limit. All sublots in the block were considered a material portion when a block limit violation occurred. In addition, whenever a material portion was caused by exceeding the progressive loading limits or block limits, the next five sublots loaded after the material portion designated had to be within grade on the factor that caused the material portion designation.

Plan A also incorporated "second pick" procedure. When a sublot factor result exceeded the grade factor limit or the absolute limit, a second portion was analyzed. The average of the two analyses was used as the sublot factor result to determine if any loading limits were exceeded. Review inspections (reinspection, appeal inspection, and Board appeal inspection) were available for an entire lot or individual material portion sublots. To obtain a review inspection before a vessel was completed loaded, shippers could call a "cutoff" which designated the end of a lot. All sublots making up the lot could then be reviewed and the results certificated. Grain loaded after the "cutoff" represented another lot and was inspected and certificated separately. Material portion sublots were separately certificated even if the subsequent review inspection results were within the grade limit.

After several years of development and field testing, Plan A was implemented as an FGIS instruction on September 25, 1974, for use at shipping bin elevators. Shipping bin elevators have grain bins in which grain may be temporarily held after official sampling until the official inspection results are available. Elevators without shipping bins are commonly referred to as direct loading elevators because they do not have the capability of holding grain after official sampling while the inspector determines the quality. The 10 Percent Plan was implemented as a FGIS instruction on October 29, 1974, as an interim procedure for use at direct loading elevators which chose not to use Plan A. The 10 Percent Plan was scheduled to expire on November 1, 1975; however, the plan was extended at the grain industry's request. Both the 10 Percent Plan and Plan A were used for export grain shipments between 1974 and 1980.

A 1977 report prepared by the USDA Office of the Inspector General cited many problems associated with shiploading and recommended that FGIS develop one plan that was applicable to all elevators. A review was conducted to evaluate the 10 Percent Plan, Plan A, and alternate inspection plans. FGIS developed a Cumulative Sum (Cu-Sum) Plan in 1979 to replace both inspection plans. The Cu-Sum Plan was designed to simplify the process of inspecting, provide the shipper with final sublot quality results, and to be applicable at all export facilities. After a year of field tests, the Cu-Sum Plan was implemented as an FGIS instruction in Book III of the Grain Inspection Handbook on May 1, 1980.

The Cu-Sum Plan is an online acceptance sampling plan that provides continuous quality information. The plan establishes statistically based fctor tolerances (breakpoints) for accepting occasional portions of a lot when, due to known sampling, equipment, and inspection variations, inspection results exceed the grade limit. The individual sublot factor results are compared to the grade limit and the cumulative sum of the differences is monitored and applied to the acceptance tolerance. For example, if the grade limit for foreign material is 2.0 percent and the sublot foreign material result is 2.2 percent, the difference for the sublot is +0.2. The difference for each sublot by factor is added together during loading to derive what is known as the Cu-Sum. If the next sublot had a +0.1 difference, the Cu-Sum would be +0.3 (the sum of

0.2+0.1). Negative values are also added to the Cu-Sum but the overall Cu-Sum value cannot go below zero. If a factor's Cu-Sum value exceeds the breakpoint, the grain represented by the sublot is considered inferior quality and designated a material portion. If in the above example the breakpoint for foreign material was +0.4 and the next sublot had 2.3 percent foreign material, the Cu-Sum would be +0.6 thus exceeding the breakpoint and causing a material portion which is rejected by the plan. The certificated quality of the lot is the combined average of all sublots accepted under the plan. A material portion is certificated separately from sublots accepted under the plan.

The Cu-Sum Plan allows review inspections of material portion sublots as well as lots. One sublot within a material portion sequence (a series of sublots that lead to a sublot exceeding the breakpoint) may be reviewed under the plan. The reviewed sublot is certificated as part of the entire lot if the review inspection results are within the acceptable tolerance.

After nearly 6 years of use, FGIS contracted with an independent, third-party statistician, Dr. William H. Woodall, Department of Statistics, University of Southwestern Louisiana, to evaluate the Cu-Sum Plan. The statistician was selected because of the individual's expertise in the field of quality control and familiarity with Cu-Sum inspection techniques.

The study was designated to evaluate the relationship between the use of the Cu-Sum Plan, its effect on determining the quality of exported grain, and to identify possible improvements to the plan. To accomplish this, the statistician reviewed the present shiploading plan; reviewed sampling and equipment variability and its relationship to the inspection tolerance; reviewed the original statistical assumptions of the Cu-Sum Plan and determined if these assumptions are still valid; determined if the inspection plan statistically measures grain quality during loading; reviewed the effect of reinspections and appeal inspections on the plan's statistical performance; reviewed and compared grain quality between shipping bin and direct loading facilities; evaluated maximum size limitations of sublots, components, and subsamples; evaluated the use of Cu-Sum enhancement schemes as discussed in current industrial statistics literature; and reviewed the effect on the statistical performance when various changes are made in the design of the Cu-Sum procedure.

Four reports were prepared by the statistician: (1) A preliminary report, (2) a Grain Inspection Monitoring System (GIMS) data report, (3) a sublot data report, and (4) a final report. The preliminary report briefly described the Cu-Sum Plan and how the plan operates. It also explained the statistical background of the plan and discussed how the presence of sampling variability is a basic justification for inspection plans that allow some inspection results slightly over the grade limit to be accepted by the plan. The report also included a discussion on the over all performance of the inspection plan and contained tentative recommendations which were further addressed as part of the final report.

The second report entitled "GIMS Data Report: Standard Deviations of Factor Results" provided an estimation of factor standard deviations for corn, wheat, and soybeans. The estimates were based on 2 years (1984 and 1985) of Grain Inspection Monitoring System data for grain which was exported and sampled with a diverter-type mechanical sampler. The GIMS data for each factor was grouped by grade before calculating the factor standard deviation. The standard deviations for individual factors are an important part of the Cu-Sum Plan because these estimates are used to calculate the factor breakpoints which appear in Tables 1 through 3 in the section discussing breakpoints. The factor breakpoint is derived by multiplying the factor standard deviation by 1.645.

The third report entitled "Analysis of Sublot Data for Exported Soybeans (1984–85)" provided information regarding the current use of the Cu-Sum Plan. The review involved 1,066 export lots of soybeans having 21,610 sublots. The report identified the number of sublots, the number of sublots with at least one factor result below grade, the number of material portion sublots caused by sublots exceeding a breakpoint, the actual effects of the reinspection and appeal inspection process, and the number of sublots returned from shipping bins at the request of the elevator (house returns). Additionally, the review compared shipping bin elevators to direct loading elevators. The report concluded: (1) The proportion of sublots below grade is higher for shipping bin elevators (30.9 percent) than for direct loading elevators (19.7 percent), (2) the proportion of material portion sublots is higher for shipping bin elevators (8.8 percent) than for direct loading elevators (1.2 percent, (3) the proportion of material portion designations removed through the review inspection process (reinspection, appeal and Board appeal inspection) is higher for direct loading elevators (74.8 percent) than for shipping bin elevators (47.3 percent), and (4) the overall percentage of house returns is higher for shipping bin elevators (1.5 percent) than for direct loading elevators (0.0 percent). Several other points were also noted in this report. They were: (1) Foreign material was the factor most often below grade, (2) there was no evidence of any Board appeals on the shiplogs for grading factors, (3) of the 202 house returns, 16 were apparently for high foreign material even though the sublots were not designated as material portions while the remainder of the house returns appear to have been due to low foreign material, and (4) 77 percent of all soybean sublots were exported through elevators in the gulf region.

The final report included recommendations to improve the effectiveness of the Cu-Sum Plan. The specific recommendations are: (1) Retain the basic Cu-Sum procedure but average review inspection results unless a material error is present and use a reference value smaller than the grade limit to regain the effectiveness of the original Cu-Sum Plan; (2) use an absolute limit equal to the breakpoint less the starting value; (3) revise the Cu-Sum breakpoints based on new estimates of factor result variability; and (4) improve the accuracy of the USDA rounding procedure.

FGIS already addressed the fourth recommendation by implementing revised rounding procedures on June 30, 1987, which are more generally accepted mathematical rounding procedures. The rounding procedures appear in § 810.104. of the Official U.S. Standards for Grain (7 CFR 810.104).

Based on these recommendations and all other available information, FGIS proposes several changes to improve the Cu-Sum Plan, which include: (1) Revising and updating the breakpoints for grading factors based on new estimates of standard deviation, (2) revising the review inspection procedures under the plan, (3) redefining material portions, (4) including protein determinations as part of the Cu-Sum Plan, and (5) offering optional component sample inspections.

Breakpoints

The tolerances used in the Cu-Sum Plan are based on a factor's standard deviation measurement. Standard deviation is a statistical measurement which indicates variability. In the case of the inspection plan, it is a measurement of inspection variability caused by sampling limitations, equipment capabilities, and inspector

performance. The original Cu-Sum Plan breakpoints were based on factor standard deviations derived from the Plan A absolute limits. Additional inspection information has been collected since the Cu-Sum Plan was implemented. This data is an excellent source of information for estimating standard deviations because original inspection results are directly compared to monitoring results.

FGIS reviewed GIMS inspection results to determine the standard deviations for factors expressed numerically. The sample data represented export samples obtained by diverter-type mechanical samplers during fiscal years 1985, 1986, and 1987. The review was limited to wheat, corn, and soybeans because these grains represent approximately 92 percent of the total exported grain. Revised breakpoints have been calculated from these new estimates of standard deviation and are included in Tables 1–3. FGIS also proposes to periodically review inspection information collected by GIMS and revise breakpoints accordingly.

TABLE 1.—CURRENT AND PROPOSED WHEAT BREAKPOINTS

[Wheat Grading Factors]

U.S. Grade	Test weight per bushel		Heat damaged kernels		Damaged kernels (total)		Foreign material		Shrunken and brokern kernels		Defects		Contrasting classes		Wheat of other classes	
	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed
No. 1	0.3	0.3	0.1	0.2	0.9	1.0	0.3	0.2	0.6	0.3	1.3	0.7	0.5	0.7	1.9	1.6
No. 2	0.3	0.3	0.1	0.2	0.9	1.5	0.3	0.3	0.6	0.4	1.3	0.9	0.7	1.0	1.9	2.1
No. 3	0.3	0.3	0.3	0.3	1.0	1.9	0.3	0.5	0.6	0.5	1.3	1.2	0.9	1.3	3.2	2.9
No. 4	0.3	0.3	0.4	0.4	1.3	2.3	0.4	0.6	1.3	0.6	1.9	1.4	1.5	2.3	3.2	2.9
No. 5	0.3	0.3	0.6	0.7	1.9	2.7	0.6	0.7	1.9	0.7	1.9	1.5	1.5	2.3	3.2	2.9

[1] Moisture: Current—0.3; Proposed—0.3.

TABLE 2.—CURRENT AND PROPOSED CORN BREAKPOINTS

[Corn grading factors]

U.S. grade	Test weight per bushel		Heat damaged kernels		Damaged kernels (total)		Broken corn and foreign material	
	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed
No. 1	0.3	0.4	0.1	0.1	0.9	1.0	0.5	0.2
No. 2	0.3	0.4	0.3	0.2	1.0	1.3	0.5	0.3
No. 3	0.3	0.4	0.4	0.3	1.3	1.5	0.6	0.3
No. 4	0.3	0.4	0.5	0.5	1.4	1.8	0.8	0.4
No. 5	0.3	0.4	0.9	0.9	1.8	2.1	0.8	0.4

Moisture: Current—0.5; Proposed—0.4.

TABLE 3.—CURRENT AND PROPOSED SOYBEAN BREAKPOINTS

[Soybean grading factors]

U.S. Grade	Test weight per bushel		Heat damaged kernels		Damaged kernels (total)		Foreign material		Splits		Soybeans of other colors	
	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current	Proposed
No. 1	0.3	0.4	0.3	0.2	0.8	0.8	0.5	0.2	2.8	1.6	0.5	0.7
No 2	0.3	0.4	0.4	0.3	0.9	0.9	0.5	0.3	3.2	2.2	0.8	1.0
No. 3	0.3	0.4	0.5	0.5	1.1	1.2	0.8	0.4	3.6	2.5	1.1	1.6
No. 4	0.3	0.4	0.9	0.9	1.4	1.5	0.8	0.5	3.7	2.7	1.5	2.3

Moisture: Current—0.5; Proposed—0.2.

Review Inspections

Three review inspections (reinspection, appeal inspection, and Board appeal inspection) are options an applicant for inspection may use under the current procedures if the original and subsequent review inspection results are not accepted by the Cu-Sum Plan. The review inspection result, under current procedures, replaces the previous inspection result.

A 1983 FGIS reinspection and appeal program study concluded that while the practice of replacing previous inspection results implies greater confidence in the review inspection measurements, the practice also biases the results because most changes are small and merely reflect natural and unavoidable sampling differences. The review inspection process allows the applicant to request a reinspection, an appeal inspection, and a Board appeal inspection. Thus, if an applicant only questions unfavorable results, the review process can create biased factor measurements. This differs from correcting definite grading errors caused by arithmetic mistakes, failure to interpret the standards correctly, or equipment malfunctions. The statistician evaluating the Cu-Sum Plan agreed with this conclusion and added that the current review inspection process is not statistically sound and provides for a less effective Cu-Sum Plan.

As discussed previously, Plan A employed a "second pick" procedure for sublot results exceeding the grade limit. The "second pick" procedure may create a biased factor measurement if it were requested only for unfavorable results.

However, the effect would be minimized because the second analysis was averaged with the initial analysis. The current Cu-Sum Plan permits multiple reviews and no averaging which may magnify the bias. FGIS considered eliminating the review inspection option for sublot inspections to correct any adverse influence review inspections may have on the plan. FGIS concluded that a modified review inspection process for sublots that would minimize any adverse influences would be in the best interest of the grain industry. Therefore, FGIS proposes to: (1) Average review inspection results with the original results unless a material error is detected, (2) limit the number of field review inspections (reinspection or appeal inspection) to one, and (3) limit review inspection requests to sublots designated as a material portion or the entire lot.

The effectiveness of the Cu-Sum Plan would improve when original and review inspection results for sublots are averaged because the average sublot result more accurately identifies the true quality of the grain. This improvement in performance may be attributed to reduced variability due to an increase in the sample size to make the determination. FGIS further proposes to replace original inspection results with review inspection results if a material error is detected. A material error is defined as a two standard deviation change in inspection results when review inspection results are compared to original inspection results.

The procedure for implementing the averaging proposal is based on the factor breakpoint value for the quality intended to be loaded. The breakpoint value, as noted earlier, is derived from the standard deviation of the test. Therefore, the use of breakpoints in determining when sample results are averaged is statistically sound. Table 4 identifies the two standard deviation measurement range for averaging review inspections with the inspection being reviewed.

TABLE 4.—TWO STANDARD DEVIATION RANGE FOR AVERAGING REVIEW INSPECTION RESULTS

Sample breakpoint	Two standard deviation range
0.1	±0.1
0.2	±0.2
0.3	±0.4
0.4	±0.5
0.5	±0.7
0.6	±0.8
0.7	±0.9

TABLE 4.—TWO STANDARD DEVIATION RANGE FOR AVERAGING REVIEW INSPECTION RESULTS—Continued

Sample breakpoint	Two standard deviation range
0.8	±1.1
0.9	±1.2
1.0	±1.4
1.1	±1.5
1.2	±1.6
1.3	±1.8
1.4	±1.9
1.5	±2.1
1.6	±2.2
1.7	±2.4
1.8	±2.5
1.9	±2.6
2.0	±2.8
2.1	±2.9
2.2	±3.1
2.3	±3.2
2.4	±3.3
2.5	±3.5
2.6	±3.6
2.7	±3.8
2.8	±3.9
2.9	±4.1
3.0	±4.2

The following is an example of how the averaging rule would be applied. A contract specifies U.S. No. 2 Yellow soybeans. The foreign material grade limit for U.S. No. 2 Yellow soybeans is 2.0 percent. The breakpoint for the U.S. No. 2 grade limit is 0.3 (Table 3). If a sublot is designated as a material portion due to 2.5 percent foreign material on the original inspection, Table 4 indicates a review inspection of this sublot is averaged with the original result if the review inspection result is 2.1 percent to 2.9 percent (plus or minus 0.4 percent from 2.5 percent). A review inspection result of 2.0 percent or less foreign material or 3.0 percent or more foreign material is not averaged with the original inspection result but replaces the original inspection result. The reviewed sublot result, whether it is an average result or a replacement result, is entered on the inspection log and a new Cu-Sum value is calculated to determine acceptance.

FGIS proposes to limit the number of field review inspections for sublots to improve the effectiveness of the inspection plan. Each additional review inspection may increase the probability of accepting inferior quality grain. Therefore, limiting the applicant to one field review inspection will either detect a material error or confirm the original inspection. Board appeal inspections will continue to be available. It is proposed that in the absence of a material error, Board appeal inspection results would be averaged with the average of the original and field review results to obtain a final inspection result for the sample. Board appeal results would replace the average of the previous two results if there is a material error detected during the inspection. This will be determined by comparing the Board appeal result to the average of the original/field review result provided a material error was not detected by the field review. If the original inspection result is replaced by a review inspection result because of a material error, then the Board appeal result is compared to the field review result. Factors which are not expressed numerically, e.g., odor, will be replaced by the determination made during the last review inspection.

FGIS also proposes to limit review inspections to only those sublots designated as material portions. This allows the shipper to confirm the quality or determine if a material error exists. Material portions are discussed in the next section.

Applicants may request a reinspection, an appeal inspection or Board appeal inspection of the entire lot. When a reinspection, appeal inspection or a Board appeal inspection of the entire lot is requested, results will not be averaged with the previous inspection results because the entire lot (sublots within and outside of Cu-Sum allowances) is reviewed.

Material Portions

The current inspection plan designates the sublot causing the Cu-Sum to exceed a breakpoint or a single sublot in the material portion sequence as a material portion (unacceptable quality). A material portion sequence under the current plan is a series of consecutive sublots having positive Cu-Sum values. The sequence begins when the breakpoint value is exceeded and extends back to where the last Cu-Sum value was zero or to the last sublot Cu-Sum value exceeding the breakpoint limit for that factor.

The following example illustrates the current material portion sequence definition. A vessel is loaded to meet a U.S. No. 2 Yellow soybean contract specification. The foreign material grade limit is 2.0 percent with a 0.5 breakpoint value and a 0.2 starting value. The sublot foreign material results and Cu-Sum values are:

Sublot No.	Foreign material	
	Grade limit	Cu-Sum value
	2.0	0.5/0.2
1	2.1	0.3
2	1.9	0.2

Sublot No.	Foreign material	
	Grade limit	Cu-Sum value
3	1.7	0.0
4	2.2	0.2
5	2.0	0.2
6	2.1	0.3
7	2.3	0.6

In the above example, sublot numbers 4, 5, 6, and 7 make up the material portion sequence under the current definition because they have Cu-Sum values greater than zero. Under the current plan, any one sublot in this material portion sequence may be designated as the material portion.

According to the Cu-Sum concept, whenever the Cu-Sum value begins to exceed zero, it is a warning that quality may be drifting from an acceptable level. Those responsible for product quality have the opportunity to check operations for any problems and take corrective measures before quality deficiencies occur. If quality remains constant and is of an acceptable quality, the Cu-Sum value should move back to zero. However, if the Cu-Sum value exceeds the breakpoint, then there was a quality problem causing the positive Cu-Sum; and all of the product back to the start of the material portion sequence should be considered inferior or unacceptable.

As currently defined, a material portion sequence may have one or more sublots within the contracted grade limit having a Cu-Sum value greater than zero. FGIS proposes to redefine the material portion to include the sublot exceeding the breakpoint plus all previously consecutive sublots exceeding the same contracted grade factor limit. The material portion will extend back to, but will not include, the last sublot loaded within the contracted grade factor limit. The proposed change will reject the entire material portion, requiring separate certification or removal from the lot. In the earlier example, sublot numbers 6 and 7 would be considered a material portion under the proposed changes because both sublots exceeded the contracted grade limit for foreign material and they were loaded consecutively when sublot number 7 exceeded the breakpoint. Sublot number 5 is not considered part of the material portion because the foreign material inspection result is within contract specifications.

Applicants may request a review inspection of the entire material portion as part of the review inspection process within the plan or review the entire lot.

Protein

Protein testing results for wheat are currently evaluated and certificated for quality and uniformity using the Protein Uniformity Inspection Plan (PUIP) which appears in the FGIS instructions as part of Book V of the Grain Inspection Handbook. PUIP is an inspection plan applied independently from the Cu-Sum Plan. There are two requirements for uniformity under PUIP: (1) Sublot results cannot exceed the absolute limit (0.5 percent inferior to the contract specifications) and (2) the difference between the highest and lowest sublot results must not exceed 1.0 percent protein. A material portion exists if either requirements is exceeded.

When shiplot grain is inspected for both grade and protein, the two plans (Cu-Sum and PUIP) are applied concurrently; and grade and protein results are issued on the same certificate. When either grade or protein is inferior to the contract specifications, the material portion designation encompasses both grade and protein results, regardless of whether grade or protein or both are the cause of the material portion.

FGIS proposes to discontinue the PUIP and include protein testing under the Cu-Sum Plan. This would provide for a single inspection plan for all factors. A review of protein data indicates the applicable protein breakpoint would be 0.5 with a starting value of 0.2.

Sales contracts identify protein specifications as either a mimimum or maximum protein limit or an average (or ordinary) protein. The Cu-Sum Plan will be applied differently depending on which contract specification is used. When a minimum or maximum protein limit is specified, FGIS proposes the Cu-Sum Plan be applied to determine Cu-Sum values and compare these values to the breakpoint. If a contract specifies both a minimum and a maximum protein limit (specific range), FGIS proposes the Cu-Sum Plan be applied to both the minimum and maximum limits. Cu-Sum Plan tolerances are not applied when an average protein is specified in the sales contract.

Due to the unique protein requirements or many processed products, protein uniformity is considered important inspection information. FGIS, therefore, proposes range limits be applied whenever protein testing services are required. These limits are to be applies concurrently with the breakpoint limit. FGIS proposes a 1.0 percentage point range limit for protein unless a specific range is established by the contract.

When a minimum or maximum protein limit is declared, Cu-Sum values are determined and compared to the breakpoint value during loading. All sublots accepted by the inspection plan are combined and certificated as one lot. Sublots designated as material portions are separately certificted. After accepted sublots are combined to form the single lot, official personnel will determine if the 1.0 percentage point range limit was exceeded during loading. This is determined by comparing the lowest and highest protein sublot results for the lot. If the range limit is exceeded, a special statement will be shown on the inspection certificate which indicates the actual range (lowest and highest protein results). This statement better describes the uniformity of the combined sublots in a single lot. Material portion sublots due to protein may be combined if the sublots are of like numerical grade and their protein results are within 1.0 percentage point range. Their combined quality will be the average of their factor results.

Cu-Sum tolerances are not applied if a specific protein limit is not declared in the contract. The certified quality of the shipment is the average of all sublot results. A special statement indicating the acutal protein range of the shipment will be shown on the inspection certificate if the difference between the lowest and highest protein results of the lot exceed the 1.0 percentage point range limit.

Optional Component Sample Inspections

During the loading of shiplots, samples are continuously drawn and portions of a sublot (component sample) are visually examined for insect infestation and to detect extreme variations in quality. Component samples represent a minimum of 10,000 bushels. Component samples are examined to determine whether any factor exceeds that contracted grade limit for the shiplot by more than one numerical grade. If all factors in the component sample are within the "one grade" limit, inspection personnel combine the samples and grade them sublot. If any factor in a component sample appears to be more than one grade inferior in quality, the component sample is analyzed for that factor. The gain represented by the component sample is declared a material portion when the factor result of the component sample exceeds the contracted limit by more than one numerical grade.

Upon request under the current plan, a special factor analysis may be provided on each component sample if inspection personnel are given sufficient advance notice. This analysis is currently limited to a single mechancially determined factor. The component sample results are entered on the inspection log then averaged to determine the sublot result for that factor.

FGIS reviewed this procedure and determined that the averaging of component sample results provides a better estimate of sublot quality because the sample size for the factor determination is increased due to the number of analyses made for that factor. In turn, inspection variability caused by sampling, inspection equipment, and inspector performance is reduced.

FGIS proposes to provide, upon request, component inspection analysis under the following conditions: (1) A minimum of three component samples must comprise the sublot, (2) sublots sizes may be increased to a maximum of 120,000 bushels based on the loading characteristic of the elevator and the size of the shiplot, (3) reduced factor breakpoints will be implemented based on the number of components in the sublot (Table 5), (4) component sample inspections will be limited to critical grading factors (factors which usually determine grade or contract compliance), and (5) component sample results will be required to be within the "one grade" limit.

TABLE 5.—BREAKPOINTS FOR COMPONENT SAMPLE ANALYSIS

Regular sublot breakpoint	Sublot breakpoints based on number of component samples—		
	Three components	Four components	Five components
0.1	0.1	0.1	0.0
0.2	0.1	0.1	0.1
0.3	0.2	0.2	0.1
0.4	0.2	0.2	0.2
0.5	0.3	0.3	0.2
0.6	0.3	0.3	0.3
0.7	0.4	0.4	0.3
0.8	0.5	0.4	0.4
0.9	0.5	0.5	0.4
1.0	0.6	0.5	0.4
1.1	0.6	0.6	0.5
1.2	0.7	0.6	0.5
1.3	0.8	0.7	0.6
1.4	0.8	0.7	0.6
1.5	0.9	0.8	0.7
1.6	0.9	0.8	0.7
1.7	1.0	0.9	0.8
1.8	1.0	0.9	0.8
1.9	1.1	1.0	0.9
2.0	1.2	1.0	0.9
2.1	1.2	1.1	0.9
2.2	1.3	1.1	1.0
2.3	1.3	1.2	1.0
2.4	1.4	1.2	1.1
2.5	1.4	1.3	1.1

TABLE 5.—BREAKPOINTS FOR COMPONENT SAMPLE ANALYSIS—Continued

Regular sublot breakpoint	Sublot breakpoints based on number of component samples—		
	Three components	Four components	Five components
2.6	1.5	1.3	1.2
2.7	1.6	1.4	1.2
2.8	1.6	1.4	1.3
2.9	1.7	1.5	1.3
3.0	1.7	1.5	1.3

Table 5 indicates how the breakpoints are reduced in size based on the number of component samples analyzed within a sublot. Table 3 identifies the proposed breakpoint for foreign material for U.S. No. 2 Yellow soybeans as 0.3. Under the component inspection system, the sublot breakpoint for foreign material is 0.2, 0.2, and 0.1 for sublots having three component samples, four component samples, and five component samples, respectively. The average sublot results for the component sample analysis is applied to the appropriate breakpoint to determine acceptance under the inspection plan.

Economic Impact Analysis

FGIS requested that the Economic Research Service, USDA, (ERS) conduct an economic impact analysis of the proposed changes to the shiplot inspection plan. A stratified, random sample of wheat, corn, and soybean export lots loaded during fiscal year 1987 was used to complete the analysis. The final report published by ERS estimates the proposed changes to the shiplot inspection plan could result in costs for the U.S. wheat, corn, and soybean industries from $15.5 million to $85.6 million, depending on how quickly the industries adapt to the proposed changes. Costs of improving grain quality, recycling, and unloading were estimated in selected scenarios with regard to the industries' response to the proposed changes.

The ERS report estimates the proposed changes could cost the industries approximately $15.5 million if the industries quickly improve their grain quality to maintain their current frequency of material portion occurrence (scenario No. 1). The ERS report further estimates the proposed changes could cost the industries approximately $24.4 million under a transition scenario (scenario No. 2) if the frequency of material portion occurrences doubled after improving grain quality and the rejected sublots were unloaded from ships or recycled from shipping bins. The ERS report also estimates, as the worst possible case (scenario No. 3), the proposed changes could cost industry approximately $85.6 million if the industries did not improve their grain quality over the current level. Additionally, the ERS study indicated higher quality U.S. export grain and oilseeds resulting from the proposed changes to the inspection plan could bring benefits which could offset or even outweigh the costs of improving grain quality. The benefit of improving wheat protein under the proposed plan is estimated at $5.2 million, compared to the estimated $4.1 million cost of improving the quality factor.

The specific economic impact for the three grains analyzed using the three different scenarios was estimated at $4.6, $4.9, and $19.7 million for wheat; $3.5, $10.1, and $31.1 million for corn; and $7.4, $9.5, and $34.8 million for soybeans.

Summary

The overriding concern with the current Cu-Sum Plan, as determined by the statistician and confirmed by USDA statisticians, is that there is a much higher prohability that interior quality grain will be accepted under the plan than good quality being rejected. Consequently, the plan provides the buyer with only limited protection against receiving inferior quality grain while assuring the shipper a limited amount of acceptable quality grain is rejected. The proposed changes are directed at balancing, and to the extent possible, minimizing the probabilities of acceptance and rejection around the grade limit between buyer and seller. FGIS believes that these revisions will improve the statistical performance of the plan and ensure that the plan is a more unbiased, neutral inspection process.

Copies of the ERS report, "Economic Impacts of Changes in the Shiplot Inspection Plan Proposed by the Federal Grain Inspection Service", are available from FGIS upon request.

Regulatory Revisions

FGIS proposes to revise the regulations regarding the inspection of shiplot grain. The proposed revisions include adding certain provisions concerning the inspection plan and establishing in the regulations procedures for review inspection services for sublots inspected as part of the inspection plan. The revisions would specify that the regulations apply to inspection of shiplot, unit train, and lash barge grain in single lots. FGIS further proposes to revise §§ 800.86, 800.129, and 800.139 to organize them into a more

logical order, clarify and remove unnecessary language, and remove provisions that are no longer needed.

Specifically, the following changes are proposed:

1. Renaming § 800.86 to include the terms "unit train" and "lash barge" because they are inspected, at times, using the statistical sampling and inspection plan.

2. Renaming § 800.86(c) *Inspection procedure; general,* to *Inspection procedures.* Paragraph (c) is further subdivided into (1) *General information,* (2) *Tolerances,* (3) *Grain accepted by the inspection plan,* (4) *Grain rejected by the inspection plan,* and (5) *Reinspection service and appeal inspection service.* Tolerances would be placed in the tables in a format that would include information from the Official United States Standards for Grain (7 CFR Part 810). This format would enhance the understanding, clarity, and use of the regulations. The general information paragraph contains the same provisions. The grain accepted by the inspection plan paragraph is similar to the current provisions outlined in § 800.86(f), *Grain uniform in quality.* The information is being moved to the inspection procedures paragraph because it follows a more logical order. Following the same reasoning, the grain rejected by the inspection plan paragraph is similar to the current provisions outlined in § 800.86(g), *Grain not uniform in quality.* The proposed paragraph regarding grain rejected by the inspection plan includes the applicant's options when sublots are designated material portions. The reinspection service and appeal inspection service paragraph establishes the provisions for limiting the review inspection to one field review and averaging review inspection results with original inspection results. The current paragraph (i), *Reinspection service and appeal inspection service on a shiplot* is deleted and replaced with the revised paragraph under paragraph (c).

3. Moving provisions of § 800.86(d), *Weighted or mathematical average,* to the new § 800.86(c)(3).

4. Revising §§ 800.129(a)(1), *Results of sublots,* and 800.139(b), *Result of sublots,* to include provisions for averaging review inspection results with original inspection results.

List of Subjects in 7 CFR Part 800

Administrative practice and procedure, Export, Grain.

For the reasons set out in the preamble, 7 CFR Part 800 is proposed to be amended as follows:

PART 800—(AMENDED)

1. The authority citation for Part 800 continues to read as follows:

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

2. Section 800.86 is revised to read as follows:

§ 800.86 Inspection of shiplot, unit train, and lash barge grain in single lots.

(a) *General.* Official inspection for grade of bulk or sacked grain aboard, or being loaded aboard, or being unloaded from a ship, unit train, or lash barges as a single lot shall be performed according to the provisions of this section and procedures prescribed in the instructions.

(b) *Application procedure.* Applications for the official inspection of shiplot, unit train, and lash barges as a single lot shall:

(1) Be filed in advance of loading or unloading;

(2) Show the estimated quantity of grain to be certificated;

(3) Show the contract grade and official criteria if applicable; and

(4) Identify the carrier and stowage area into which the grain is being loaded, or from which the grain is being unloaded, or in which the grain is at rest.

(c) *Inspection procedures*—(1) *General information.* Shiplot, unit train, and lash barge grain officially inspected as a single lot shall be sampled in a reasonably continuous operation. Representative samples shall be obtained from the grain offered for inspection and inspected and graded in accordance with a statistical acceptance sampling and inspection plan according to the provisions of this section and procedures prescribed in the instructions.

(2) *Tolerances.* The probability of accepting or rejecting portions of the lot during loading or unloading is dependent on inspection results obtained from preceding portions and the applied breakpoints and procedures. Breakpoints shall be periodically reviewed and revised based on new estimates of inspection variability. Tables 1 through 24 list the breakpoint for all grains.

TABLE 1.—GRADE LIMITS AND BREAKPOINTS FOR SIX-ROWED MALTING BARLEY AND SIX-ROWED BLUE MALTING BARLEY

Grade	Minimum limits of—						Maximum limits of—									
	Test weight per bushel (pounds)		Suitable malting type (percent)		Sound barley [1] (percent)		Damaged kernels [1] (percent)		Foreign material (percent)		Other grains (percent)		Skinned and broken kernels (percent)		Thin barley (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	47.0	−0.5	95.0	−1.3	97.0	−1.0	2.0	0.8	1.0	0.4	2.0	0.8	4.0	1.1	7.0	0.6
U.S. No. 2	45.0	−0.5	95.0	−1.3	94.0	−1.4	3.0	0.9	2.0	0.4	3.0	0.9	6.0	1.4	10.0	0.9
U.S. No. 3	43.0	−0.5	95.0	−1.3	90.0	−1.6	4.0	1.1	3.0	0.4	5.0	1.3	8.0	1.5	15.0	0.9

[1] Injured-by-frost kernels and injured-by-mold kernels are not considered damaged kernels or scored against sound barley.

Note: Six-rowed barley that meets the requirements of U.S. No. 1 to U.S. No. 3, inclusive, for the subclasses Six-rowed Malting Barley and Six-rowed Blue Malting Barley is classified and graded according to the requirements in this section. Otherwise, it will be graded according to the requirements in § 810.206.

TABLE 2.—GRADE LIMITS AND BREAKPOINTS FOR TWO-ROWED MALTING BARLEY

Grade	Minimum limits of—						Maximum limits of—							
	Test weight per bushel (pounds)		Suitable malting types (percent)		Sound barley [1] (percent)		Wild oats (percent)		Foreign material (percent)		Skinned and broken kernels (percent)		Thin barley (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1 Choice	50.0	−0.5	97.0	1.0	98.0	0.8	1.0	0.6	0.5	0.1	5.0	1.3	5.0	0.4
U.S. No. 1	48.0	−0.5	97.0	1.0	98.0	0.8	1.0	0.6	0.5	0.1	7.0	1.3	7.0	0.5
U.S. No. 2	48.0	−0.5	95.0	1.3	96.0	1.1	2.0	0.8	1.0	0.4	10.0	1.8	10.0	0.9
U.S. No. 3	48.0	−0.5	95.0	1.3	93.0	1.1	3.0	0.9	2.0	0.4	10.0	1.8	10.0	0.9

[1] Injured-by-frost kernels and injured-by-mold kernels are not considered damaged kernels or scored against sound barley.

Note: Two-rowed barley that meets the requirements of U.S. No. 1 Choice to U.S. No. 3, inclusive, for the subclass Two-rowed Malting Barley is classified and graded according to the requirements in this section. Otherwise, it will be graded according to the requirements in § 810.206.

TABLE 3.—GRADE LIMITS AND BREAKPOINTS FOR SIX-ROWED BARLEY, TWO-ROWED BARLEY, AND BARLEY

Grade	Minimum limits of—				Maximum limits of—									
	Test weight per bushel (pounds)		Sound barley (percent)		Damaged kernels [1] (percent)		Heat-damaged kernels (percent)		Foreign material (percent)		Broken kernels (percent)		Thin barley (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	47.0	−0.5	97.0	−1.1	2.0	0.8	0.2	0.1	1.0	0.4	4.0	1.0	10.0	0.9
U.S. No. 2	45.0	−0.5	94.0	−1.4	4.0	1.0	0.3	0.1	2.0	0.4	8.0	1.5	15.0	0.9
U.S. No. 3	43.0	−0.5	90.0	−1.6	6.0	1.4	0.5	0.2	3.0	0.5	12.0	1.8	25.0	1.3
U.S. No. 4 [2]	40.0	−0.5	85.0	−2.2	8.0	1.5	1.0	0.5	4.0	0.5	18.0	1.8	35.0	1.9
U.S. No. 5	36.0	−0.5	75.0	−2.2	10.0	1.8	3.0	0.6	5.0	0.6	28.0	2.4	75.0	2.3

[1] Includes heat-damaged kernels. Injured-by-frost kernels and injured-by-mold kernels are not considered damaged kernels.
[2] Barley that is badly stained or materially weathered shall be graded not higher than U.S. No. 4.

TABLE 4.—BREAKPOINTS FOR BARLEY SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Dockage	0.99 or above	0.47
Two-rowed barley	Not more than 10% of Six-rowed in Two-rowed.	1.8
Six-rowed barley	Not more than 10% of Two-rowed in Six-rowed.	1.8
Malting (Blue Aleurone Layers).	Not less than 90%	−1.3
Malting (White Aleurone Layers).	Not less than 90%	−1.3
Smutty	More than 0.2%	0.06

TABLE 4.—BREAKPOINTS FOR BARLEY SPECIAL GRADES AND FACTORS—Continued

Special grade or factor	Grade limit	Breakpoint
Garlicky	3 or more in 500 grams.	2⅓
Ergoty	More than 0.10%	0.13
Infested	Same as instruction	0
Blighted	More than 4.0%	1.1
Injured-by-frost kernels.	More than 1.9%	0.1
Injured-by-heat kernels.	More than 0.2%	0.04

TABLE 4.—BREAKPOINTS FOR BARLEY SPECIAL GRADES AND FACTORS—Continued

Special grade or factor	Grade limit	Breakpoint
Frost-damaged kernels.	More than 0.4%	0.05
Heat-damaged kernels.	More than 0.1%	0.1
Other grains	Not more than 25.0%.	2.4
Moisture	As specified by contract or load order grade.	0.5

TABLE 5.—GRADE LIMITS AND BREAKPOINTS FOR CORN

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—					
			Heat-damaged kernels (percent) [1]		Total (percent) [1]		Broken corn and foreign material (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	56.0	−0.4	0.1	0.1	3.0	1.0	2.0	0.2
U.S. No. 2	54.0	−0.4	0.2	0.2	5.0	1.3	3.0	0.3
U.S. No. 3	52.0	−0.4	0.5	0.3	7.0	1.5	4.0	0.3
U.S. No. 4	49.0	−0.4	1.0	0.5	10.0	1.8	5.0	0.4
U.S. No. 5	46.0	−0.4	3.0	0.9	15.0	2.1	7.0	0.4

[1] Damaged kernels.

TABLE 6.—BREAKPOINTS FOR CORN SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Flint	95% or more of flint corn.	1.0.
Flint and Dent	More than 5%, but less than 95% if flint corn.	1.0 or 1.0.
Infested	Same as instruction.	0.
Corn of other colors:		
White	2.0%	0.8.
Yellow	5.0%	1.0.
Waxy	95.0%	3.0.
High BCFM	As specified by contract or load order grade.	10% of the load order grade.
Moisture	As specified by contract or load order grade.	0.4

TABLE 7.—GRADE LIMITS AND BREAKPOINTS FOR FLAXSEED

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—			
			Heat-damaged flaxseed (percent)		Total (percent)	
	GL	BP	GL	BP	GL	BP
U S. No. 1	49.0	−0.1	0.2	0.1	10.0	0.9

TABLE 7.—GRADE LIMITS AND BREAKPOINTS FOR FLAXSEED—Continued

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—			
			Heat-damaged flaxseed (percent)		Total (percent)	
	GL	BP	GL	BP	GL	BP
U.S. No. 2	47.0	−0.1	0.5	0.1	15.0	1.1

TABLE 8.—BREAKPOINTS FOR FLAXSEED SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Moisture	As specified by load order or contract grade.	0.4
Dockage	0.99% or above	0.32

TABLE 9.—GRADE LIMITS AND BREAKPOINTS FOR MIXED GRAIN

Grade	Maximum limits of—				
	Moisture (percent)	Damaged kernels			
		Total (percent)		Heat-damaged (percent)	
		GL	BP	GL	BP
U.S. mixed grain	16.0	15.0	0.6	3.0	0.4

NOTE: There is no tolerance for U.S. Sample grade Mixed Grain.

TABLE 10.—BREAKPOINTS FOR MIXED GRAIN SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Smutty	More than 14 in 250 grams (wheat, rye, or triticale predominates).	0.6
	More than 0.2% (all other mixtures).	0.05
Ergoty	More than 0.10%	0.13
Garlicky	2 or more per 1,000 grams (wheat, rye, or triticale predominates).	1
	4 or more per 500 grams (all other mixtures).	2
Infested	Same as instruction.	0
Blighted	More than 4.0% (barley predominates).	1.1
Treated	Same as instruction.	0
Moisture	As specified by contract or load order grade.	0.5

TABLE 11.—GRADE LIMITS AND BREAKPOINTS FOR OATS

Grade	Minimum limits of—				Maximum limits of—					
	Test weight per bushel (pounds)		Sound Oats (Percent)		Heat-damaged kernels (Percent)		Foreign material (Percent)		Wild Oats (Percent)	
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	36.0	−0.5	97.0	−0.8	0.1	0.1	2.0	0.4	2.0	0.6
U.S. No. 2	33.0	−0.5	94.0	−1.2	0.3	0.4	3.0	0.4	3.0	0.8
U.S. No. 3 [1]	30.0	−0.5	90.0	−1.4	1.0	0.5	4.0	0.5	5.0	1.1
U.S. No. 4 [2]	27.0	−0.5	80.0	−1.9	3.0	0.8	5.0	0.5	10.0	1.4

[1] Oats that are Slightly Weathered shall be graded not higher than U.S. No. 3.
[2] Oats that are Badly Stained or Materially Weathered shall be graded not higher than U.S. No. 4

TABLE 12.—BREAKPOINTS FOR OATS SPECIAL GRADES AND FACTORS

Special grade or factors	Grade limit	Breakpoint
Heavy	38.0 pounds or more.	0.5
Extra Heavy	40.0 pounds or more.	0.5
Moisture	As specified by contract or load order grade.	0.5

TABLE 12.—BREAKPOINTS FOR OATS SPECIAL GRADES AND FACTORS—Continued

Special grade or factors	Grade limit	Breakpoint
Thin	More than 20.0 percent.	0.5
Smutty	More than 0.2 percent.	0.05
Ergoty	More than 0.10 percent.	0.10

TABLE 12.—BREAKPOINTS FOR OATS SPECIAL GRADES AND FACTORS—Continued

Special grade or factors	Grade limit	Breakpoint
Garlicky	4 or more in 500 grams.	2⅓
Infested	Same as instruction	0
Bleached	Same as instruction	0

TABLE 13.—GRADE LIMITS AND BREAKPOINTS FOR RYE

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—									
			Foreign material				Damaged kernels				Thin Rye (percent)	
			Foreign matter other than wheat (percent)		Total (percent)		Heat-damaged (percent)		Total (percent)			
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	56.0	-0.5	1.0	0.4	3.0	0.8	0.2	0.1	2.0	-0.8	10.0	0.6
U.S. No. 2	54.0	-0.5	2.0	0.5	6.0	1.1	0.2	0.1	4.0	-1.1	15.0	0.8
U.S. No. 3	52.0	-0.5	4.0	0.8	10.0	1.4	0.5	0.4	7.0	-1.4	25.0	0.9
U.S. No. 4	49.0	-0.5	6.0	0.8	10.0	1.4	3.0	0.8	15.0	-2.0		

TABLE 14.—BREAKPOINTS FOR RYE SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Break-point
Moisture	As specified by contract or load order grade.	0.3
Light Garlicky	2 or more per 1,000 grams.	1⅓
Garlicky	More than 6 per 1,000 grams.	7⅓
Ergoty	More than 0.30%	0.1
Plump	Not more than 5.0% through 0.064 × ⅜ sieve.	0.5
Light Smutty	More than 14 per 250 grams.	6
Smutty	More than 30 per 250 grams.	10
Infested	Same as instruction	0
Dockage	0.99% or above	0.32

TABLE 15.—GRADE LIMITS AND BREAKPOINTS FOR SORGHUM

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—					
			Heat-damaged (percent)		Total (percent)		Broken kernels, foreign material, and other grains (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	57.0	-0.4	0.2	0.1	2.0	1.1	4.0	0.8
U.S. No. 2	55.0	-0.4	0.5	0.4	5.0	1.8	8.0	0.9
U.S. No. 3 [2]	53.0	-0.4	1.0	0.5	10.0	2.3	12.0	1.3
U.S. No. 4	51.0	-0.4	3.0	0.8	15.0	2.8	15.0	1.5

[1] Damaged kernels.
[2] Sorghum which is distinctly discolored shall be graded not higher than U.S. No. 3.

TABLE 16.—BREAKPOINTS FOR SORGHUM SPECIAL GRADES AND FACTORS

Special grade or factors	Grade limit	Break-point
Class:		
Brown	Not less than 90 percent	1.9
Yellow	Not less than 90 percent	-1.9
White	Not less than 98.0 percent	-0.9
Smutty	20 or more in 100 grams	8
Infested	Same as instruction	0
Dockage	0.99 percent and above	.32
Moisture	As specified by contract or load order grade	0.5

TABLE 17.—GRADE LIMITS AND BREAKPOINTS FOR SOYBEANS

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—									
			Damaged kernels				Foreign material (percent)		Splits (percent)		Soybeans of other colors (percent)	
			Heat damaged (percent)		Total (percent)							
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	56.0	0.4	0.2	0.2	2.0	0.8	1.0	0.2	10.0	1.6	1.0	0.7
U.S. No. 2	54.0	0.4	0.5	0.3	3.0	0.9	2.0	0.3	20.0	2.2	2.0	1.0
U.S. No. 3 [1]	52.0	-0.4	1.0	0.5	5.0	1.2	3.0	0.4	30.0	2.5	5.0	1.6
U.S. No. 4 [2]	49.0	0.4	3.0	0.9	8.0	1.5	5.0	0.5	40.0	2.7	10.0	2.3

[1] Soybeans which are purple mottled or stained shall be graded not higher than U.S. No. 3.
[2] Soybeans which are materially weathered shall be graded not higher than U.S. 4.

TABLE 18.—BREAKPOINTS FOR SOYBEAN SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Garlicky	5 or more per 1,000 grams	2
Infested	Same as instruction	0
Soybeans of other colors	10.0%	2.3
Moisture	As specified by contract or load order grade	0.2

TABLE 19.—GRADE LIMITS AND BREAKPOINTS FOR SUNFLOWER SEED

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—					
			Heat-damaged (percent)		Total (percent)		Dehulled seed (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	25.0	−0.5	0.5	0.4	5.0	1.3	5.0	1.3
U.S. No. 2	25.0	−0.5	1.0	0.6	10.0	1.8	5.0	1.3

TABLE 20.—BREAKPOINTS FOR SUNFLOWER SEED SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Moisture	As specified by contract or load order grade	0.5
Foreign Material	Less than 1.25	0.27
	1.26 and above	0.39
Admixture	As specified by contract or load order grade	0.6

TABLE 21—GRADE LIMITS AND BREAKPOINTS FOR TRITICALE

Grade	Minimum test weight per bushel (pounds)		Maximum limits of—											
			Heat-damaged (percent)		Total [1] (percent)		Material other than wheat or rye (percent)		Total [2] (percent)		Shrunken and broken kernels (percent)		Defects [3] (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	48.0	−0.5	0.2	0.1	2.0	0.8	1.0	0.4	2.0	0.6	5.0	0.8	5.0	1.3
U.S. No. 2	45.0	−0.5	0.2	0.1	4.0	1.1	2.0	0.5	4.0	0.9	8.0	0.8	8.0	1.3
U.S. No. 3	43.0	−0.5	0.5	0.4	8.0	1.5	3.0	0.6	7.0	1.2	12.0	1.6	12.0	2.3
U.S. No. 4	41.0	−0.5	3.0	0.8	15.0	2.0	4.0	0.8	10.0	1.4	20.0	2.3	20.0	2.3

[1] Includes heat-damaged kernels.
[2] Includes material other than wheat or rye.
[3] Defects include damaged kernels (total), foreign material (total), and shrunken and broken kernels. The sum of these three factors may not exceed the limit for defects for each numerical grade.

TABLE 22.—BREAKPOINTS FOR TRITICALE SPECIAL GRADES AND FACTORS

Special grade or factor	Grade limit	Breakpoint
Garlicky	2 or more per 1,000 grams.	1⅓
Ergoty	More than 0.1 percent.	0.1
Smutty	More than 14 per 250 grams.	6

TABLE 22.—BREAKPOINTS FOR TRITICALE SPECIAL GRADES AND FACTORS—Continued

Special grade or factor	Grade limit	Breakpoint
Infested	Same as instruction	0
Dockage	0.99 percent or above.	0.32

TABLE 22.—BREAKPOINTS FOR TRITICALE SPECIAL GRADES AND FACTORS—Continued

Special grade or factor	Grade limit	Breakpoint
Moisture	As specified by contract or load order grade.	0.5

TABLE 23.—GRADE LIMITS AND BREAKPOINTS FOR WHEAT

Grade	Minimum limits of (test weight per bushel)—				Maximum limits of—													
	Hard Red Spring wheat or White Club wheat [1] (pounds)		All other classes and subclasses (pounds)		Damaged kernels				Foreign material (percent)		Shrunken and broken kernels (percent)		Defects [3] (percent)		Wheat of other classes [4]			
					Heat-damaged kernels (percent)		Total [2] (percent)								Contrasting classes (percent)		Total [5] (percent)	
	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	58.0	-0.3	60.0	-0.3	0.2	0.2	2.0	1.0	0.5	0.2	3.0	0.3	3.0	0.7	1.0	0.7	3.0	1.6
U.S. No. 2	57.0	-0.3	58.0	-0.3	0.2	0.2	4.0	1.5	1.0	0.3	5.0	0.4	5.0	0.9	2.0	1.0	5.0	2.1
U.S. No. 3	55.0	-0.3	56.0	-0.3	0.5	0.3	7.0	1.9	2.0	0.5	8.0	0.5	8.0	1.2	3.0	1.3	10.0	2.9
U.S. No. 4	53.0	-0.3	54.0	-0.3	1.0	0.4	10.0	2.3	3.0	0.6	12.0	0.6	12.0	1.4	10.0	2.3	10.0	2.9
U.S. No. 5	50.0	-0.3	51.0	-0.3	3.0	0.7	15.0	2.7	5.0	0.7	20.0	0.7	20.0	1.5	10.0	2.3	10.0	2.9

[1] These requirements also apply when Hard Red Spring or White Club wheat predominate in a sample of Mixed wheat.
[2] Includes heat-damaged kernels.
[3] Defects include damaged kernels (total), foreign material, and shrunken and broken kernels. The sum of these three factors may not exceed the limit for defects for each numerical grade.
[4] Unclassed wheat of any grade may contain not more than 10.0 percent of wheat of other classes.
[5] Includes contrasting classes.

TABLE 24.—BREAKPOINTS FOR WHEAT SPECIAL GRADES AND FACTORS

Other factors	Grade limit	Breakpoint
Moisture	As specified by contract or load order grade.	0.3
Garlicky	More than 2 per 1,000 grams.	1⅓
Light Smutty	More than 14 smut balls per 250 grams.	6
Smutty	More than 30 smut balls per 250 grams.	10
Weevily	Same as instruction	0
Ergoty	More than 0.30 percent.	0.19
Treated	Same as instruction	0
Dockage	As specified by contract or load order grade.	0.20
Protein	As specified by contract or load order grade.	0.5
Class—subclass:		
Hard Red—DNS	75 percent or more DHV.	-5.0
Spring—NS	25 percent or more DHV but less than 75 percent DHV.	-5.0
Durum:		
HADU	75 percent or more HVAC.	-5.0
ADU	60 percent or more HVAC but less than 75 percent of HVAC.	5.0
White:		
HDWH	75 percent or more hard kernels and not more than 10 percent WHCB.	5.0 2.0
SWH	Not more than 10 percent WHCB and less than 75 percent hard kernels.	2.0 5.0
WHCB	Not more than 10 percent OWH.	2.0
WWH	More than 10 percent WHCB and more than 10 percent OWH.	-3.0 -3.0

(3) *Grain accepted by the inspection plan.* Grain which is offered for inspection as part of a single lot and accepted by a statistical acceptance sampling and inspection plan according to the provisions of this section and procedures prescribed in the instructions shall be certificated as a single lot provided it was sampled in a reasonably continuous operation. Official factor and official criteria information shown on the certificate shall be based on the weighted or mathematical averages of the analysis of sublots.

(4) *Grain rejected by the inspection plan.* When grain which is offered for inspection as part of a single lot is rejected by the plan or is not sampled in a reasonably continuous operation, the grain in each portion shall be certificated separately. If any portion of grain is not accepted by the plan and designated a material portion, the applicant shall be promptly notified and have the option of:

(i) Removing the material portion from the carrier; or

(ii) Requesting the material portion be separately certificated; or

(iii) Requesting either a reinspection or an appeal inspection of the material portion; or

(iv) Requesting a reinspection service and/or an appeal inspection service on the entire lot.

(5) *Reinspection service and appeal inspection service.* A reinspection or an appeal inspection may be requested on a material portion. A Board appeal inspection may also be requested on a material portion after the reinspection or appeal inspection. A reinspection, an appeal inspection, and a Board appeal inspection may be requested on the total sublots in the lot.

(i) *Material portions.* A material portion designated by the plan may be reinspected or appeal inspected once in the field, but not both, and once at the Board of Appeals and Review. The reinspection or appeal inspection result shall, unless a material error is found, be averaged with the original inspection determination. The Board appeal inspection result shall, unless a material error is found, be averaged with the previous inspection result. The inspection plan tolerances shall be reapplied to the material portion grain to determine acceptance or rejection. If a material error is found, the reinspection or appeal inspection result shall replace the original inspection result or the Board appeal result shall replace the previous inspection result. For purposes of this section, a material error is defined as results differing by more than two standard deviations. Acceptance or rejection of that portion of grain shall be based on the reinspection or appeal inspection and on the Board appeal inspection result alone when a material error is found.

(ii) *Entire lot.* The applicant may request a reinspection service, an appeal inspection service, and a Board appeal inspection service on the entire lot. Inspection results for these services shall replace the previous inspection results. The tolerances shall be reapplied to all portions of the entire lot to determine acceptance or rejection.

(d) *Infested grain*—(1) *Available options.* If grain or any portion of grain in a single shiplot, unit train, or lash barge lot is found to be infested, according to the provisions of the Official U.S. Standards for Grain, the applicant shall be promptly notified and have the option of:

(i) Unloading the portion of infested grain from the lot and an additional

amount of other grain in common stowage with the infested grain; or

(ii) When applicable, completing the loading and treating all infested grain in the lot; or

(iii) When applicable, treating the infested grain for the purpose of destroying the insects, subject to subsequent examination by official personnel; or

(iv) Continue loading without treating the infested grain, in which case all of the infested grain in the lot and all grain in common stowage areas with the infested grain will be officially certificated as infested according to the provisions of the Official U.S. Standards for Grain.

(2) *Exception.* If infested grain is loaded into common stowage with a lot, or a portion of a lot, which has not been officially certificated as being infested, the applicant loading the infested grain may not use the option in paragraph (d)(1)(i) of this section.

(3) *With treatment.* If infested grain is treated with a fumigant in accordance with the instructions and the treatment is witnessed by official personnel, the official sampling, inspection, grading, and certification of the lot shall continue as though the infested condition did not exist.

(e) *Special certification procedures*—(1) *Rejected grain.* When grain is rejected by the inspection plan under paragraph (c)(4) of this section, the official inspection certificate for each different portion of different quality shall show:

(i) A statement that the grain has been loaded with grain of other quality;

(ii) The grade, location, or other identification and approximate quantity of grain in the portions; and

(iii) Other information required by the regulations and the instructions.

The requirement of paragraph (e)(1)(i) of this section does not apply to grain that is inspected as it is unloaded from the carrier or to portions loaded in separate carriers or stowage space.

(2) *Common stowage.*—(i) *Without separation.* When bulk grain is offered for official inspection as it is loaded aboard a ship and is loaded without separation in a stowage area with other grain or another commodity, the official inspection certficate for the grain in each lot shall show the kind, the grade, if known, and the location of the other grain, or the kind and location of the other commodity in the adjacent lots.

(ii) *With separation.* When separations are laid between lots, the official inspection certificates shall show the kind of material used in the separations and the locations of the separations in relation to each lot.

(iii) *Exception.* The common stowage requirements of this paragraph are not applicable to the first lot in a stowage area unless a second lot is loaded, in whole or in part, in the stowage area prior to issuing the official inspection certificate for the first lot.

(3) *Protein.* A special statement indicating the actual protein range of a lot shall be shown on the official inspection certificate if the difference between the lowest and highest protein determinations for the lot exceeds 1.0 percent when protein is officially determined and a specific range limit is not established by the contract grade.

(4) *Part lot.* If part of a lot of grain in an inbound carrier is unloaded and part is left in the carrier, the unloaded grain shall be officially inspected and certificated in accordance with the provisions of § 800.84(g).

(5) *Official mark.* If the grain in a single lot is officially inspected for grade as it is being loaded, upon request, the following official mark shall be shown on the inspection certificate: "Loaded under continuous official inspection."

3. Section 800.129(a)(1) is revised to read as follows:

§ 800.129 Certificating reinspection and review of weighing results.

(a) * * *

(1) *Results of material portion subslots.* When results of a reinspection on a material portion do not detect a material error, they shall be averaged with the original inspection results. For purposes of this section, a material error is defined as results differing by more than two standard deviations. The averaged inspection results shall replace the original inspection results recorded on the official inspection log. Reinspection results shall replace the original inspection results recorded on the official inspection log if a material error is detected. No certificates will be issued unless requested by the applicant or deemed necessary by official personnel.

* * * * *

4. Section 800.135(a) is revised to read as follows

§ 800.135 Who may request appeal inspection services.

(a) *General.* Any interested person may request appeal inspection or Board appeal inspection services, except as provided for in § 800.86(c)(5). When more than one interested person requests an appeal inspection or Board appeal inspection service, the first person to file is the applicant of record. Only one appeal inspection may be obtained from any original inspection or reinspection service. Only one Board appeal inspection may be obtained from an appeal inspection. Board appeal inspections will be performed on the basis of the official file sample. Board appeal inspections are not available on stowage examination services.

* * * * *

5. Section 800.139(b) is revised to read as follows:

§ 800.139 Certificating appeal inspections.

* * * * *

(b) *Results of material portion sublots.* When results of an appeal inspection performed by a field office or the Board of Appeals and Review on a material portion do not detect a material error, they shall be averaged with the previous inspection results recorded on the official inspection log for the identified sample. For purposes of this section, a material error is defined as results differing by more than two standard deviations. The appeal or Board appeal inspection result shall replace the previous inspection results recorded on the offficial inspection log for the identified sample if a material error is detected. No certificate will be issued unless requested by the applicant or deemed necessary by inspection personnel.

* * * * *

Dated: December 28, 1988.

W. Kirk Miller,

Administrator.

[FR Doc. 89-1194 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-EN-M

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Reg. Z: Docket No. R-0655]

Truth in Lending; Home Equity Disclosure and Substantive Rules

AGENCY: Board of Governor of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board is publishing for comment a proposal to amend Regulation Z (Truth in Lending). The proposal implements provisions of the Home Equity Loan Consumer Protection Act of 1988, which requires creditors to provide consumers with more information for open-end credit plans secured by the consumer's dwelling, and imposes substantive limitations on these plans. Creditors would have to provide information at the time an application is provided to the consumer, including information about the payment terms,

fees imposed under the plan, and, for variable-rate plans, information about the index and a fifteen-year history of changes in the index values. Creditors would be required to provide consumers with a brochure prepared by the Board (or one substantially similar) describing home equity plans. The proposal also imposes duties on third parties who provide applications to consumers and modifies the rules relating to advertisements for home equity plans.

In addition to these disclosure requirements, the proposal would amend Regulation Z to implement new substantive limitations imposed by the statute. The regulation would limit a creditor's right to terminate a plan and accelerate any outstanding balance, or to change the terms of a plan after it has been opened, as well as limit the type of index that can be used for variable-rate plans.

DATES: Comments must be received on or before March 21, 1989.

ADDRESSES: Comments should refer to Docket No. R-0655 and be mailed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551. They may be delivered to Room B-2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays or to the guard station in the Eccles Building Courtyard on 20th Street NW. (between Constitution Avenue and C Street NW.) any time. Comments will be available for inspection in the Freedom of Information Office, Room B-1122 of the Eccles Building between 9:00 a.m. and 5:00 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Sharon Bowman, Leonard Chanin or Thomas Noto, Staff Attorneys, or Mike Bylsma, Senior Attorney, Division of Consumer and Community Affairs, at (202) 452-3667 or 452-2412; for the hearing impaired only, contact Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf, at (202) 452-3544, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

(1) Background

In December 1987 the Board proposed amendments to Regulation Z to change the existing disclosure requirements for home equity lines of credit secured by the consumer's principal dwelling (52 FR 48702). The proposal would have (1) required disclosures to be given at the time an application form is provided to the consumer (or before the consumer pays a nonrefundable fee, if that occurs earlier); (2) required that the disclosures be segregated from other information; and (3) increased the number of required disclosures. Subsequently, the Home Equity Loan Consumer Protection Act was enacted on November 23, 1988 (Pub. L. No. 100-709). The law superseded the Board's proposal. While both the Board's 1987 proposal and the statute address many of the same disclosure and advertising issues, the statute also places substantive limitations on how home equity plans operate.

The statute, which requires the Board to issue regulations, provides that the statutory provisions and rules adopted by the Board shall apply to open-end credit plans entered into five months after the promulgation of final regulations. The Board is proposing amendments for comment, and expects to adopt final regulations in May 1989. Compliance with the law would be mandatory around October 1989.

Under Truth in Lending and Regulation Z, creditors offering open-end credit are currently required to provide consumers with a limited amount of information prior to the first transaction under the plan. The disclosures must reflect the features of the specific plan. Creditors must disclose the information clearly and conspicuously, but are permitted to integrate the disclosures into the contractual agreement.

The statute and proposed amendments to the regulation leave in place the existing disclosure requirements. They would add, however, two requirements to this framework. First, as is the case for closed-end adjustable-rate mortgages that are secured by the consumer's principal dwelling and have a term over one year (see § 226.19(b) of Regulation Z), creditors generally would be required to provide detailed disclosures about their home equity plans when an application is provided to the consumer. Second, creditors would be required to provide the information again, along with the current disclosures, prior to the first transaction under the plan.

The Board is publishing proposed sample disclosure forms to assist creditors in preparing their plan disclosures. The Board expects to publish along with the final regulation tables of values for commonly used indices for home equity plans.

(2) Proposed Amendments to Regulation Z

The Home Equity Loan Consumer Protection Act is quite detailed and, for the most part, the proposed amendments mirror the statutory requirements. The proposed amendments to Regulation Z would incorporate the disclosure provisions into a new § 226.5b of the regulation and into existing § 226.6. (A new § 226.5a has been proposed recently by the Board to implement the Fair Credit and Charge Card Disclosure Act. See 53 FR 51785, December 23, 1988.) Modifications would be made to the advertising rules contained in § 226.16, and technical amendments would be made to §§ 226.1 and 226.5.

(i) Coverage

The proposed amendments to Regulation Z would apply to all open-end credit plans secured by the consumer's dwelling, as set forth in § 226.5b. Thus, the rules apply not only to plans secured by the consumer's principal dwelling, but also to those secured by second or vacation homes.

(ii) Format of Disclosures

Unlike existing Truth in Lending requirements for closed-end and other types of open-end credit, the proposed amendments would not require that the disclosures provided at the time of application be in a form the consumer can keep. (See footnote 8 accompanying § 226.5(a).) Thus, under the proposal, although the disclosures would have to be in writing, creditors would be permitted to place the first set of disclosures on the application form the consumer returns to the creditor to apply for the plan.

Section 226.5b(a) of the proposal would require most of the disclosures to be grouped together and "segregated" from unrelated information provided to the consumer in connection with the application. The brochure and the variable rate information could be provided either separately from or with the other disclosures. Under the proposal, greater flexibility would be permitted in complying with the segregation standard than currently exists for closed-end credit. Disclosures for home equity plans tend to be less concise and more narrative in form than those for closed-end credit. Therefore, the Board proposes to apply a more liberal standard that would permit information that explains or expands on the required disclosures to be included. Information on other aspects of the plan that is not related to the required disclosures, such as underwriting criteria, however, would not be permitted to be interspersed with the disclosures. Such information, of course, could be provided as long as it is separated from the required disclosures.

The segregation standard would not apply to the second set of disclosures provided by the creditor prior to the first transaction under the plan. The additional disclosures would be given

with the information currently required under Regulation Z, which is not required to be segregated from other information. These disclosures could be combined and could be integrated into the contract. Like the disclosures currently required, the additional disclosures would have to be in a form the consumer can keep.

In the first set of disclosures, § 226.5 (a)(2) of the proposal provides that certain items would be further highlighted by requiring them to precede the other disclosures. Consumers would be notified that (1) they should keep a copy of the disclosures; (2) they have a right to obtain a refund of fees if any terms change and they decide not to enter into the contract as a result; (3) they risk the loss of the dwelling in the event of default; and (4) a creditor may terminate a plan or suspend future advances under certain circumstances.

Creditors would state all aspects of their plans in the first set of disclosures. For example, if a creditor offers several payment options, all options would have to be set forth. Furthermore, if any aspects of a plan are linked together—for example, if the consumer can obtain only certain payment options in conjunction with plans of certain lengths—the creditor must clearly disclose the relation among those plan features. As an alternative to the combined disclosure method, the Board proposes to permit creditors to create separate disclosure documents where features may vary. Creditors pursuing this latter alternative would have to include a statement in the early disclosures that the consumer should "ask about" the creditor's other home equity programs. Creditors would have to provide disclosures in response to any such request.

(iii) Timing of Disclosures

Section 226.5b(b) would require the disclosures and a brochure to be given to consumers at the time an application is provided. In the case of applications contained in magazines or taken by telephone or through third parties, footnote 10a would allow the creditor to mail or deliver the disclosures and brochure to the consumer within three business days of receipt of the application.

In addition to providing these disclosures early in the application process, the statute and § 226.6(e) would require creditors to provide all of the disclosures again along with the disclosures currently required for open-end credit, to the extent they are not duplicative. Creditors also would disclose a list of the conditions that permit the creditor to terminate the plan, freeze or reduce the credit limit, and implement modifications to the original terms. (This requirement could be met by providing a separate list or by identifying the provisions in the contract which contain such conditions.) The disclosures would be provided prior to the first transaction under the plan, in accordance with the existing rule in § 226.5(b). (See the discussion below concerning the specific requirements for this second set of disclosures.)

(iv) Duties of Third Parties

In addition to requiring creditors to provide disclosures to consumers at an earlier time, § 226.5b(c) of the proposed amendments also would impose a duty on third parties who provide applications to consumers. The statute requires that a third party, such as a loan broker, that provides a consumer with an application also must give a brochure and disclosures. The statute recognizes, however, that in some circumstances third parties may not be able to provide disclosures since specific information about the plan terms may be unavailable.

The Board believes that requiring both a third party and a creditor to provide the consumer with identical information about the same plan may result in unnecessary duplication. Under § 226.5b(c) of the proposal, therefore, a third party would be required to provide disclosures only if that party has the disclosures for a creditor's particular home equity plan in its possession. Third parties would not have an affirmative duty to obtain such disclosures about a creditor's programs, or to create a set of disclosures based on what the third party knows about a creditor's program. If, however, a creditor supplies disclosures to a third party along with its application form, the third party would have to give the consumer the disclosures. In all cases, consumers will be provided disclosures by the creditor within three days after the creditor receives the application. While consumer shopping might be enhanced if third parties provided the disclosures at the earlier time, consumers will still be able to shop for credit since neither a creditor nor any other party is permitted to collect a nonrefundable fee until three days after disclosures have been received by the consumer.

Although the duty of third parties to provide the disclosures may arise infrequently, the proposal would require third parties to give the home equity brochure at the time an application is given to the consumer. Because providing the brochure is not linked to the availability of information from a creditor about its specific plan, the Board believes third parties would have access to the brochure, and, thus, be able to provide it with the application. (See the discussion below concerning the responsibility of the creditor if the third party has already given the consumer a brochure.)

(v) Content of Disclosures

Section 226.5b(d) of the proposal lists the information that would be given to consumers when they apply for home equity plans. As is the case with existing Truth in Lending disclosure rules, the information would be provided only to the extent applicable; thus, for example, if negative amortization cannot occur in a program, no mention of it need be made. Because the disclosures need not be in a form the consumer can keep, the consumer would be advised to retain a copy of the disclosures. Creditors would include a statement of any time by which an application must be submitted to obtain specific terms disclosed. If creditors choose not to "guarantee" all or some of the terms, they would provide a statement of the terms that may change prior to opening the plan. Creditors also would have to notify the consumer of the right to refund of all fees paid in connection with the application if any disclosed terms (other than a variable rate) change prior to opening the plan, and as a result the consumer chooses not to enter into the plan. Creditors would have to disclose the fact that a security interest is being taken in the consumer's dwelling and that the consumer may lose the home in the event of default.

(A) Possible Actions by Creditor

Under § 226.5b(d)(4) of the proposal, a statement must be provided that, under certain circumstances, a creditor may terminate the plan and accelerate any outstanding balance, prohibit additional advances or reduce the credit limit or, as set forth in the initial agreement, implement modifications to the original terms. In light of § 226.5b(f)(3)(i) of the proposal, which would permit such modifications if they are explicitly provided for in the contract, the Board is proposing to add this last condition to the disclosure. A creditor would be required to state if fees may be imposed if the account is terminated. Consumers would be notified that they can receive, upon request, a list of the conditions that permit the creditor to terminate the plan, prohibit additional advances or reduce the credit limit, and implement modifications during the term of the plan. Upon receiving a request from a consumer, creditors would be required

to provide this information in writing in a form the consumer can keep. (See § 226.5b(g) of the proposal.)

Although the statute calls only for a disclosure of the right to receive upon request the list of conditions, the Board proposes in § 226.5b(d)(4)(iii) to permit creditors to provide the actual list with the early disclosures in lieu of that statement. The Board believes this flexibility may help consumers compare home equity lines, and may assist creditors by reducing the circumstances in which consumers will request that this information be provided. Creditors would be permitted to provide this list with the segregated disclosures or apart from those disclosures. Section 226.6(e) would provide that the list of these conditions also would have to be given with the disclosures currently required for open-end credit. (This requirement could be met by identifying the provisions in the contract which contain such conditions.)

(B) Payment Terms

Under § 226.5b(d)(5) of the proposal, creditors would be required to describe the payment terms of the plan, including the length of the draw period and any repayment period. (The combined length of the draw period and any repayment period would not have to be stated.) If the terms are indefinite, creditors would state that fact. All payment options under the plan would be stated, including any different payment terms that may exist during the draw period or during any repayment period, as well as any differences that may apply within either period. If the plan permits the consumer to convert any of the loan balance to a fixed term loan, this information would be provided in the disclosures. How the minimum periodic payment is determined, the frequency of payments, and whether making only the minimum payments would not repay any or all of the principal balance during the draw and repayment periods would be set forth. The proposed regulation also calls for a disclosure if a balloon payment is required under the plan—to give consumers an accurate picture of their payment obligations. An explanation of the balance computation method would not have to be provided.

Creditors would disclose an example, based on an assumed $10,000 outstanding balance and a recent annual percentage rate (APR), showing the minimum periodic payment and any balloon payment, and the time it would take to pay off the balance if the consumer made only those payments. Footnote 10c of the proposal would provide that, for fixed rate plans, a recent APR is one that has been in effect under the plan within the twelve months prior to the date the disclosures are provided to the consumer. For variable rate plans, a recent APR would be the most recent rate provided in the historical table, or a more recent rate.

(C) Annual Percentage Rate

Section 226.5b(d)(6) of the proposal provides that, for fixed-rate plans, a recent APR would have to be provided. Consumers would be told that the APR does not include costs other than interest.

(D) Fees Imposed By the Creditor and By Third Parties

Under § 226.5b(d)(7) of the proposal, creditors would have to provide a description and the amount of charges required to open and use the account and a statement of when the consumer must pay the charges. These charges could be stated as an estimated dollar amount for each fee, or as a percentage of a hypothetical amount of credit. These fees include application fees, points, annual fees, and transaction fees. Under § 226.5b(d)(8) of the proposal, an estimate of fees imposed by third parties stated as a single dollar amount or a range (and a statement that the consumer may request more specific information about such fees from the creditor) also would be provided.

(E) Other Provisions

Under § 226.5b(d)(9), a statement if the plan has a negative amortization—which will reduce the consumer's equity in the dwelling—most be provided. Section 226.5b(d)(10) would require creditors to state any limitations on the number of extensions or amount of credit that can be obtained during any time period and any minimum draw or minimum outstanding balance requirement stated as dollar amount or as a percentage. Section 226.5(d)(11) would require that consumers be told to consult a tax advisor regarding the deductibility of interest and charges under the plan.

(vi) Variable-Rate Disclosures

Section 226.5b(d)(12) of the proposal would require creditors to provide information about the variable-rate feature contained in a plan. Many of these disclosures closely parallel the disclosures currently required for closed-end variable-rate transactions secured by a consumer's principal dwelling. The Board is proposing to add a few additional variable-rate disclosures to those required by the statute. These minor additions would help make the home equity rules and the rules for closed-end ARMs more uniform, and thus make compliance easier for creditors. Furthermore, these additional disclosures would provide consumers with more complete information about the variable-rate feature of home equity lines.

(A) Index and APR

Creditors would be required to state that the APR may change and that the payment or term may change due to the fact that the APR is variable. The frequency of changes in the APR would be provided. Creditors would have to identify the index used to determine rate adjustments and a source of information about the index. Creditors would have to describe how the corresponding APR will be determined (for example, by stating that a margin is added to the index value). If the initial rate is discounted, a disclosure of that fact as well as the disclosure forms could be preprinted and rate information may not be accurate, consumers would be told to "ask about" the current index value, margin, and APR. Rules relating to changes in the index value and resulting changes in the APR would be set forth. This provision would require an explanation, for example, of a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as an employee leaving the creditor's employ. Similarly, an explanation would have to be given if the plan permits the consumer to convert from a variable rate plan to a fixed rate.

(B) Rate and Payment Limitations

Any annual rate caps must be stated and, if there are no such limits, that fact must be stated. The maximum rate that may be imposed under each payment option under the plan also would be provided. This rate could be stated as a specific rate (for example, 18%), or as a percentage above an initial rate (for example, 5% above the initial rate). In either circumstance creditors could use a range in expressing the maximum rate in the early disclosures. In addition, creditors would have to show, if the maximum rate were in effect, the minimum periodic payment based on a $10,000 outstanding balance. (If a range is used, the highest rate in the range should be used for this disclosure.) Finally, any payment limitations would be provided.

(C) Historical Table

A 15-year historical table, based on an assumed $10,000 extension of credit and showing how the APRs and payments would have been affected by the index value changes under the plan, would be

provided. If the values for an index have not been available for 15 years, creditors would need only go back as far as the values have been available in giving the history and may start the example at the year for which values are first available. The history would reflect the method of choosing values for each plan. For instance, if an average of index values is used, averages would be used in the history, but if a single index value is used, a single index value would be shown. The creditor would assume one date within a year (or one period, if an average is used) on which to base the history of index values for each loan plan. The creditor could choose to use index values as of any date or period as long as the index value as of this date or period is used for each year in the index history. Only one index value per year need be shown, even if the plan provides for adjustments to the APR or payment more than once a year. In such cases, the creditor would assume that the index rate remained constant for the full year for the purpose of calculating the annual percentage rate and payment. Updating will be necessary only once each year to reflect the most recent year's index value. To assist creditors in constructing histories of certain common indices, the Board expects to include tables of index values when the final rule is published. In its final regulation, the Board expects to publish rate information for the prime rate published in the Wall Street Journal, the average prime rate published in the Federal Reserve Bulletin, and United States Treasury securities adjusted to constant maturities of 90 days and 6 months. The Board requests that commenters provide the names of any other indices for which it would be useful to have rate histories.

The payment figures in the example must reflect all significant loan program terms. For example, features such as rate and payment caps, a discounted APR, negative amortization, and interest carryover would be taken into account by creditors in calculating the payment figures. One payment per year would be shown in the table, even though payments may vary during a year. (The calculations, however, should be based on the actual payment computation formula.) Balloon payments need not be reflected in the table.

Because disclosures will be given early, creditors would need to assume a value for the margin in order to do the calculations for the example. Creditors would select a margin that they used during the preceding six months and disclose on the form that the margin is one that they have used recently. The margin selected may be used until a creditor updates the disclosure form to reflect the most recent 15 years of index values. Similarly, if the home equity plan has a discounted initial rate, creditors also will be permitted to assume an amount by which the initial rate will be discounted—which is representative of the amount of a discount used by the creditor during the preceding six months—and disclose on the form that the initial rate has been discounted.

In setting forth payment information, both the draw and any repayment period would be illustrated in the table. In providing this information, creditors would assume that the $10,000 balance is reduced according to the terms of the plan. To minimize compliance costs, the Board proposes to permit the use of a representative term within a range of a five-year period in setting forth the draw and repayment information in the table. For example, if a creditor offers plans with a five-year draw period, and repayment periods ranging from six to fifteen years, the creditor would use the actual length of the draw period. In figuring the repayment period for the table, the creditor could use any term from six to ten years (for example, eight years), and any term from eleven to fifteen years (for example, thirteen years). If different payment options are available during either period, payments under each option would have to be shown.

(D) Other Information

Consumers would be informed that rate information will be provided with the periodic statement.

Sample home equity disclosure forms that show how the proposed requirements might be met are provided in proposed Appendix G.

(vii) Later Disclosures

As discussed earlier, § 226.6(e) would require creditors to provide the disclosures set forth in § 226.5b(d) a second time along with the disclosures would be provided prior to the first transaction under the plan, in accordance with the existing rule in § 226.5(b), and could be integrated into the contract.

(A) Duplicative Information

Information that duplicates the current disclosures need not be provided. For example, because § 226.6(a)(4) and (b) require the disclosure of any finance and "other" charges, respectively, creditors would not have to disclose fees imposed by the creditor (see proposed § 226.(d)(7)) or fees imposed by third parties (see proposed § 226.5b(d)(8)).

(B) Inapplicable Information

Creditors need not provide information that is inapplicable. For example, because § 226.5(a)(1) requires that the disclosures be in a form the consumer may keep, creditors would not make the statement in proposed § 226.5b(d)(1) that consumers should make a copy of the disclosures. Similarly, because proposed § 226.6(e)(2) would require creditors to disclose the conditions under which the creditor may, for example, terminate the plan and require payment of the outstanding balance in full in a single payment upon termination, creditors need not disclose that the consumer may receive, upon request, this information, as required by proposed § 226.5b(d)(4).

(C) Current Information

Creditors would be required to provide current information about aspects of the plan that may vary among consumers. For example, if the creditor offers a variety of payment options and the consumer chooses one option (and the others are unavailable), the specific payment terms selected would have to be disclosed. Similarly, if the first set of disclosures stated the maximum APR that could be imposed (for variable-rate plans) as a range, the later disclosures would have to reflect the specific rate cap.

(D) Historical Information

Creditors could provide the same historical information about the program that was given in the first set of disclosures. For example, the historical table provided in the earlier disclosures would not have to be modified for the later disclosures to reflect more recent margins or discounts, since the table is intended to show historical rate fluctuations and their effects on payments (and need only be updated once a year).

(viii) Consumer Brochure

Section 226.5b(e) would require creditors and third parties providing applications to furnish consumers with a brochure prepared by the Board describing home equity plans, or a brochure that provides substantially similar information. As required by the statute, the brochure will describe home equity plans, including the potential advantages and disadvantages. The brochure also will provide guidance on how to compare home equity plans with closed-end credit. The Board envisions that any substitutes must be, at a

minimum, comparable in substance and comprehensiveness, recognizing that some lenders' brochures may contain more detailed descriptions of their particular home equity programs than contained in the Board's brochure. The Board is currently preparing a brochure and will have it available when the regulation is issued in final form.

The proposal would mirror the statute in requiring third parties to provide consumers with the brochure if an application is given to the consumer. The Board believes, however, that requiring a second brochure to be given by the creditor in such circumstances is unnecessary. Therefore, the Board believes that the creditor's duty to provide the brochure would be met if the third party provides the brochure to the consumer. This will avoid duplication. The creditor would have a duty, however, to ensure that the third party has provided the brochure if the creditor chooses not to give the consumer the brochure.

(ix) Right of Rescission—Material Disclosures

The Board is soliciting comment on whether it should amend footnote 36, accompanying § 226.15(a)(3) of the regulation, to provide that the payment information required under proposed § 226.5b(d)(5) (i) and (ii) that is given at the time an account is opened be treated as "material disclosures" for purposes of the right of rescission (§ 226.15). Section 226.15(a)(3) states that the consumer may exercise the right of rescission until midnight of the third business day following the opening of the plan, delivery of the notice of the right to rescind, or delivery of all "material disclosures," whichever occurs last. Footnote 36 of the regulation currently defines material disclosures to include the method of determining the finance charge and the balance upon which a finance charge will be imposed, the annual percentage rate, and the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan. Including such payment information in the definition of "material disclosures" would be consistent with the material disclosure definition in the closed-end credit rescission provisions.

(x) Advertising Requirements

Under the open-end advertising rules in § 226.16, any reference to an item required to be disclosed under § 226.6 requires the disclosure of cost information such as the APR, any membership or participation fee, and any minimum, fixed, transaction, or activity charge. Under current rules, a creditor may refer to a payment term in an advertisement for open-end credit without having to make additional disclosures about other material terms. Furthermore, only items stated affirmatively require further information. Under § 226.16(d)(1) of the proposed regulation, any reference to a payment term in a home equity advertisement would "trigger" further disclosures, including loan fees, estimates of other fees that may be imposed, and, for variable-rate plans, the maximum rate that may be imposed under the plan. Proposed § 226.16(d)(3) provides that, if such an advertisement states a payment amount, it would have to state, if applicable, that the plan contains a balloon payment. Furthermore, if any of the "triggers" is stated affirmatively *or* negatively, further disclosures must be given. For example, if a creditor states "no annual fee" in an advertisement, additional information must be provided.

In addition, § 226.16(d)(2) of the proposal provides that if an advertisement states a "discounted" APR it must state in equal prominence the APR derived by use of the fully-indexed value. Creditors would be prohibited by § 226.16(d)(5) from referring to home equity plans as "free money" or using similarly misleading terms. Finally, if an advertisement states that any interest under the plan may be tax deductible, the advertisement must not be misleading about such deductibility. (See § 226.16(d)(4).) For example, an advertisement referring to deductibility might include a statement that the consumer should consult a tax advisor regarding the deductibility of interest.

(xi) Substantive Limitations

The act imposes three substantive limitations on the way home equity plans can be structured. In some provisions the statute speaks in terms of creditor actions. In other provisions the statute speaks in terms of what may be contained in the credit contract. Under § 226.5b(f) of the Board's proposal, the substantive limitations would apply to both actions creditors may take and the provisions that may be contained in contracts. These limitations also would apply to assignees and holders.

(A) Index For Variable-Rate Plans

Under § 226.5b(f)(1) of the proposal, a creditor may change the APR after the plan is opened only if the change is based on an index outside the creditor's control and the index value is available to the public. This provision would prohibit a creditor from using its own prime rate or simply retaining the right to change rates at its discretion. A creditor would be permitted to use the Wall Street Journal prime rate, for example, or any other index not within the creditor's control.

(B) Termination

Under the statute and proposed § 226.5b(f)(2), creditors are prohibited from terminating an account and accelerating payment of the outstanding balance prior to the scheduled expiration of the plan. The act, however, provides three exceptions to the rule. First, a creditor may terminate the plan if there has been fraud or material misrepresentation by the consumer in connection with the plan. Second, a creditor may terminate the plan if the consumer has failed to meet the repayment terms of the agreement. This provision would permit termination only if the consumer fails to actually make payments. A creditor could not terminate a plan if, for example, the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. Finally, a creditor is permitted to terminate the plan if the consumer acts or fails to act in a way that adversely affects the creditor's security interest. This provision would permit termination, for example, if the consumer transferred title to the property without the permission of the creditor or if the consumer failed to maintain required insurance on the dwelling.

If any of these three events occurs, a creditor may also be able to take action short of terminating an account and accelarating payment of the outstanding balance. These three events would likely constitute circumstances that would permit a creditor to prohibit additional extensions of creditor or reduce the credit limit. (See the later discussion of the ability of a creditor to change the terms due to default and other events.)

Creditors would not be permitted to specify in their contracts other events that would permit terminating an account and accelerating payment of the outstanding balance. Thus, for example, a contract could not provide that the account will be terminated and the balance accelerated if a judgment is filed against the consumer.

(C) Change of Terms

Section 226.5b(f)(3), which implements the third substantive limitation, provides that a creditor may not unilaterally change the terms under the plan after the account has been opened. There are, however, several exceptions to this rule.

(1) Events provided for in the contract. The legislative history makes clear that a creditor was not meant to be prohibited from implementing specific changes set forth in the contract that are contemplated on the occurrence of a specific event; this exception has been incorporated in proposed § 226.5b(f)(3)(i). Both the triggering event and the resulting modification must be stated with specificity. For example, in an employee loan program, the contract could provide that a specified higher rate will apply if the borrower's employment ends. Similarly, a creditor would be permitted to suspend additional extensions of credit if the maximum APR is reached, as long as this is expressly provided for in the agreement. A creditor using this provision could only suspend advances for the period the APR would exceed the rate cap, and would have to permit further advances if the applicable rate drops to or below the cap, if that occurs during the draw period set forth in the initial agreement. The Board solicits comment on whether other examples should be provided such as permitting contracts to provide for a replacement index in the event the original index in a variable-rate plan becomes unavailable.

While the Board proposes to permit creditors to specify in the initial agreement specific changes that are contemplated on the occurrence of specific events, there are two limitations on the provisions that could be set forth in the contract. First, under the regulation, creditors would not be permitted to include a general provision in the agreement permitting them to change any or all of the terms of the plan. For example, creditors could not include "boilerplate" language in the agreement stating that they reserve the right to change the payment obligations under the plan. Second, creditors would not be permitted to include in the initial agreement any events which the regulation expressly addresses. For example, the statute and § 226.5b(f)(3)(iii) of the regulation provide that a creditor may prohibit additional extensions of credit or reduce the credit limit during any period in which the value of the dwelling that secures the plan declines significantly below the property's appraised value. Because the statute expressly provides for this situation, and specifically sets forth what action the creditor may take if it arises, the contract may not authorize the creditor to take more sweeping action. For example, a creditor could not permanently refuse to make further advances if the value of the property declines significantly below the property's appraised value, since the statute provides that further advances can be prohibited only during the period in which the value of the property remains significantly below the appraised value. Similarly, a contract may not authorize the creditor to take any additional action beyond prohibiting further advances or reducing the credit limit when the creditor reasonably believes that the consumer will be unable to fulfill the repayment obligations due to a material change in the consumer's financial circumstances—since this condition also is set forth in the statute. The Board believes permitting creditors to expand on the exceptions set forth in the statute would be inconsistent with the intent of the legislation.

(2) Changes made by mutual written agreement. The statute and the proposed amendments to the regulation prohibit *unilateral* changes. The Board proposes to permit creditors to change the terms after a plan is opened provided the consumer expressly agrees in writing to the change. Thus, for example, under footnote 10d to § 226.5b(f)(3), a consumer and a creditor could agree to extend the period during which advances can be obtained, or could agree to change the repayment terms from, for example, interest-only payments to payments that reduce the principal balance. Under the proposal, creditors would not be permitted to assume consent because the consumer uses an account (even if that implies acceptance under state law). The Board believes this will carry out the Congressional intent to limit changes after a plan is opened, yet accommodate the need for adjustments agreed to by both parties to the contract.

(3) Insignificant changes. The statute and § 226.5b(f)(3) of the proposal provide another exception to the general prohibition against changing terms, for changes to "insignificant terms." This is intended to address operational problems, such as changing the address of the creditor for purposes of sending payments. This exception would not permit a creditor to unilaterally change a term such as a fee charged for late payments.

(4) Substitution of index. Section 226.5b(f)(3)(ii) of the proposal also provides that the creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the two indices were substantially similar, and as long as the new index and margin would have resulted in a rate similar to the rate that was in effect at the time the original index became unavailable.

(5) Beneficial changes. Creditors also would be permitted under proposed § 226.5b(f)(3)(iv) to make any changes that "unequivocally benefit" the consumer as long as the change is beneficial for the entire term of the agreement. A creditor would not be able to change the payment obligations of the plan in reliance on this exception. For example, reducing the amount of the minimum payment may not be unequivocally beneficial since it may result in less principal being repaid over the term of the plan and may result in a higher total amount of finance charges. While this exception is narrow, as noted above, a consumer and creditor would be permitted to change the terms of the plan by mutual written agreement.

(6) Changes due to default and other events. Section 226.5b(f)(3)(iii) of the proposal incorporates the statutory provisions that provide that a creditor may prohibit additional extensions of credit or reduce the credit limit in four circumstances. First, a creditor may take such action if the value of the dwelling that secures the plan declines significantly below the property's appraised value for purposes of the plan. Second, a creditor may prohibit additional extensions of credit or reduce the credit line if the creditor reasonably believes the consumer will be unable to fulfill the repayment obligations under the plan due to a material change in the consumer's financial circumstances. Two conditions must be met for a creditor to use this exception. First, there must be a "material change" in the consumer's financial circumstances. For example, a significant decrease in the consumer's income would meet this part of the requirement. Second, as a result of this change, the creditor must have a reasonable belief, based on some evidence (such as failure to pay other debts), that the consumer will be unable to fulfill the payment obligations of the plan.

The third exception permits a creditor to prohibit additional extensions of credit or reduce the credit line if the consumer is in default of any material obligations under the agreement. (Sections 226.5b(d)(4) and 226.6(e)(2) require that the creditor provide or make available a list of the conditions that would permit prohibiting additional extensions of credit or reducing the credit line.) The final exception permits a creditor to prohibit additional advances or reduce the credit line because action by a governmental body either (a) precludes the creditor from imposing the agreed-upon APR (for

example, enactment of a lower state rate ceiling after the plan has been entered into), or (b) adversely affects the priority of the creditor's security interest to the extent that the value of the security is less than 120 percent of the amount of the credit line (for example, through imposition of a tax lien).

Under the proposed regulation, creditors are permitted to prohibit additional extensions of credit or reduce the credit limit only as long as any of these four circumstances exist. Thus, for example, if the creditor limits the ability of the consumer to obtain further advances due to a significant decline in the value of the dwelling, and during the length of the draw period the value of the property subsequently increases, the creditor would have to reinstate credit drawing privileges. Similarly, a creditor may reduce the credit limit only during the period any of the circumstances exists.

(D) Refund of Fees

Section 226.5b(g) of the proposal imposes a duty on a creditor to refund all fees paid by the consumer in connection with an application if any term disclosed (other than a variable rate) changes between the time disclosures are provided to the consumer and the plan is opened, and if, as a result of the change, the consumer decides to not enter into the plan. This rule applies to any fees paid in connection with the plan, such as credit report fees and appraisal fees, whether paid directly to the creditor or to third parties. This right is distinct from the existing right of rescission under § 226.15, which begins only when a plan secured by the consumer's principal dwelling is actually opened.

(E) Imposition of Fees

Finally, under § 226.5b(h) of the proposal, neither the creditor nor any other party may impose a nonrefundable fee in conjunction with an application until three business days after the disclosures and brochure have been provided to the consumer. If disclosures are mailed to the consumer, footnote 10e of the regulation provides that a fee cannot be collected until six business days after the mailing. If a refundable fee is collected prior to the consumer receiving the disclosures, the fee would have to be refunded to the consumer if the consumer decides not to enter into the agreement.

(xii) Effective Date

The statute provides that the act and regulations shall apply to: (1) Any agreement to open a plan which is entered into five months after the regulations become final; and (2) any application to open a plan which is distributed by or received by a creditor five months after regulations become final. Under this requirement, creditors would have to provide the first set of disclosures to consumers if an application is received after the effective date of the regulations, even if the application was provided to the consumer prior to the effective date of the rule. The Board plans to provide a rule in the supplemental information to the final amendments allowing creditors to provide the first set of disclosures to consumers within three days of receipt of the application in such cases.

(xiii) Disclosure Samples and Model Clauses

In connection with the other revisions, the Board is proposing to revise Appendix G of the regulation to incorporate disclosure samples (G–17A and G–17B), and model clauses (G–18) to assist creditors in preparing disclosures.

(A) Disclosure Samples

Form G–17A illustrates a variable-rate plan with 10-year draw period followed by a 5-year repayment period. The payments are based on a percentage of the outstanding balance so that, independent of rate changes, payments will vary each month during the plan. Consequently, payments are stated as a range in the minimum payment example. In the historical table, which illustrates both the draw and the repayment periods, only one payment per year is reflected and the fact that payments would have varied during each year is stated. All calculations, however, are conducted using the actual payment computation formula. The Board specifically solicits comment on whether this treatment is appropriate for such payment arrangements.

Form G–17B illustrates a variable-rate plan with interest-only payments during the draw period followed by a repayment period, the length of which depends on the size of the outstanding balance. The consumer is permitted to select between two payment arrangements—monthly or quarterly payments—during the draw period. Accordingly, the payment disclosures and examples illustrate such payment option. In addition, by including two payment columns, the form illustrates how one historical table can be used to disclose multiple payment options.

(B) Model Clauses

Appendix G–18 contains a number of model clauses that may be used in preparing disclosures. Information that must be inserted is indicated by italicized language within parentheses. Alternative language is set forth in brackets and separated by a slash. Disclosures that may not be applicable to a given plan are set forth in brackets.

(3) Economic Impact Statement

The Board's Division of Research and Statistics has prepared an economic impact statement on the proposed revisions to Regulation Z. A copy of the analysis may be obtained from Publications Services, Board of Governors of the Federal Reserve System, Washington, DC, 20551, at (202) 452–3245.

List of Subjects in 12 CFR Part 226

Advertising, Banks, banking, Consumer protection, Credit, Federal Reserve System, Finance, Penalties, Rate limitations, Truth in Lending.

(4) Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside arrows. Pursuant to authority granted in section 105 of the Truth in Lending Act (15 U.S.C. 1604 as amended), the Board proposes to amend Regulation Z (12 CFR Part 226).

1. The authority citation for Part 226 continues to read:

Authority: Sec. 105, Truth in Lending Act, as amended by sec. 605, Pub. L. No. 96–221, 94 Stat 170 (15 U.S.C. 1604 et seq.); section 1204(c), Competitive Banking Equality Act, Pub. L. No. 100–86, 101 Stat. 552.

2. Regulation Z (12 CFR Part 226) is proposed to be amended by adding a sentence to the end of paragraph (b) of § 226.1 (the first sentence is republished), by adding paragraph (3), § 226.1(c), by revising the second sentence of paragraph (2) to § 226.1(d, (the first sentence is republished), by revising footnote 8, by adding paragraph (4) to § 226.5(a) (a) introductory text is republished) by adding paragraph (4) to § 226.5(b), by adding § 226.5b, by adding paragraph (e) to § 226.6, and by adding paragraph (d) to § 226.16.

Subpart A—General

§ 226.1 Authority, purpose, coverage, organization, enforcement and liability.

(b) *Purpose.* The purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. * * * ►In addition, the regulation requires a maximum interest rate to be stated in variable-rate contracts secured by the consumer's dwelling, and imposes limitations on home equity

plans that are subject to the requirements of § 226.5b.◄

(c) *Coverage.* * * *

►(3) In addition, certain requirements of § 226.5b apply to persons who are not creditors but who provide applications for home equity plans to consumers.◄

(d) *Organization.* * * *

(2) Subpart B contains the rules for open-end credit. It requires that initial disclosures and periodic statements be provided►, as well as additional disclosures for home equity plans subject to the requirements of § 226.5b◄. * * *

* * * * *

Subpart B—Open-End Credit

§ 226.5—General disclosure requirements.

(a) *Form of disclosures.* (1) The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing,[7] in a form that the consumer may keep.[8]

* * * * *

►(4) For rules governing the form of disclosures for home equity plans, see § 226.5b(a).◄

(b) *Time of disclosures.* * * *

►(4) *Home equity plans.* Disclosures for home equity plans shall be made in accordance with § 226.5b(b).◄

►§ 226.5b Requirements for home equity plans.

The requirements of this section apply to open-end credit plans secured by the consumer's dwelling.

(a) *Form of disclosures*—(1) *General.* The disclosures required by § 226.5b(d) shall be made clearly and conspicuously and shall be grouped together and segregated from all other unrelated information. The disclosures may be provided on the application form or on a separate form. The variable-rate information required in paragraph (d)(12) of this section, as well as the disclosure provided for under paragraph (d)(4)(iii) of this section, may be provided separately from the other required disclosures.

(2) *Precedence of certain disclosures.* The disclosures required by paragraphs (d)(1) through (4)(ii) of this section shall precede the other required disclosures.

(b) *Time of disclosures.* The disclosures and brochure required by paragraphs (d) and (e) of this section shall be provided at the time an application is provided to the consumer.[10a] (See § 226.6(a) for additional disclosures to be provided later.)

(c) *Duties of third parties.* Persons other than the creditor who provide applications to consumers for home equity plans must provide the brochure required under paragraph (e) of this section at the time an application is provided. If such persons have the disclosures for a creditor's home equity plan, they also shall provide the disclosures at such time.

(d) *Content of disclosures.* The creditor shall provide the following disclosures, as applicable:

(1) *Retention of information.* A statement that the consumer should make or otherwise retain a copy of the disclosures.

(2) *Conditions for disclosed terms.* (i) A statement of the time by which the consumer must submit an application to obtain specific terms disclosed and an identification of any disclosed term that is subject to change prior to opening the plan.

(ii) A statement that, if a disclosed term changes (other than a change due to a variable-rate feature) prior to opening the plan and the consumer therefore elects not to open the plan, the consumer may receive a refund of all fees paid in connection with the application.

(3) *Security interest and risk to home.* A statement that the creditor will acquire a security interest in the consumer's dwelling and that loss of the dwelling may occur in the event of default.

(4) *Possible actions by creditor.* (i) A statement that the creditor, under certain conditions, may terminate the plan and require payment of the outstanding balance in full in a single payment upon termination, and that fees may be imposed upon termination; that the creditor may prohibit additional extensions of credit or reduce the credit limit under certain conditions; and that the creditor, as specified in the initial agreement, may modify certain terms of the plan.

(ii) A statement that the consumer may receive, upon request, information about the conditions under which such actions may occur.

(iii) In lieu of the disclosure required under paragraph (d)(4)(ii) of this section, a statement of such conditions.

(5) *Payment terms.* The payment terms of the plan, including:

(i) The length of the plan.

(ii) An explanation of how the minimum periodic payment will be determined and the timing of the payments. If paying only the minimum periodic payments will not repay any of the principal or will repay less than the outstanding balance, a statement of this fact, as well as a statement of any balloon payment that will result.[10b]

(iii) An example, based on a $10,000 outstanding balance and a recent annual percentage rate,[10c] showing the minimum periodic payment, any balloon payment, and the time it would take to repay the $10,000 outstanding balance if the consumer made only those payments and obtained no additional extensions of credit.

If different payment terms may apply to the period during which the consumer may obtain additional extensions of credit and the period during which the consumer must repay the outstanding balance without obtaining additional extensions of credit, or if different payment terms may apply within either period, the disclosures shall reflect the different payment terms.

(6) *Annual percentage rate.* For fixed rate plans, a recent annual percentage rate [10c] imposed under the plan and a statement that the rate does not include costs other than interest.

(7) *Fees imposed by creditor.* An itemization of any fees imposed by the creditor to open, use, or maintain the plan, stated as a dollar amount or percentage, and when such fees are payable.

(8) *Fees imposed by third parties.* An estimate, stated as a single dollar amount or range, of any fees that may be imposed by persons other than the creditor, as well as a statement that the consumer may request from the creditor a good faith itemization of such fees.

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[7] The disclosure required by § 226.9(d) when a Finance charge is imposed at the time of a transaction need not be written.

[8] The ►home equity disclosures required under § 226.5b(d), the◄ alternative summary billing rights statement provided for in § 226.9(a)(2), and the disclosures made under § 226.10(b) about payment requirements need not be in a form that the consumer can keep.

[10a] The disclosures and the brochure may be delivered or placed in the mail not later than three business days following receipt of a consumer's application in the case of applications contained in magazines or other publications, or when the application reaches the creditor by telephone or through an intermediary agent or broker.

[10b] A balloon payment results if paying the minimum periodic payments will not fully amortize the outstanding balance by a specified date, and the consumer will be required to repay the entire outstanding balance at such time.

[10c] For purposes of this section, an annual percentage rate is the annual percentage rate as determined under § 226.14(b). For fixed rate plans, a recent annual percentage rate is a rate that has been in effect under the plan within the twelve months preceding the date the disclosures are provided to the consumer. For variable rate plans, a recent annual percentage rate is the most recent rate provided in the historical table or a rate that has been in effect under the plan since the date of the most recent rate in the table.

(9) *Negative amortization.* A statement that negative amortization may occur and that negative amortization increases the principal balance and reduces the consumer's equity in the dwelling.

(10) *Transaction requirements.* Any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw requirements, stated as dollar amounts or percentages.

(11) *Tax implications.* A statement that the consumer should consult a tax advisor regarding the deductibility of interest and charges under the plan.

(12) *Disclosures for variable-rate plans.* In a variable-rate plan, the following disclosures:

(i) The fact that the annual percentage rate, payment, or term may change due to the variable-rate feature.

(ii) A statement that the annual percentage rate does not include costs other than interest.

(iii) The index used in making rate adjustments and a source of information about the index.

(iv) An explanation of how the annual percentage rate will be determined, including an explanation of how the index is adjusted, such as by the addition of a margin.

(v) A statement that the consumer should ask about the current index value, margin, and annual percentage rate.

(vi) A statement that the initial annual percentage rate is not based on the index and margin used to make later rate adjustments, and the period of time such initial rate will be in effect.

(vii) The frequency of changes in the annual percentage rate.

(viii) Any rules relating to changes in the index value and resulting changes in the annual percentage rate and payment amount, including, for example, an explanation of payment limitations and interest rate carryover.

(ix) A statement of the maximum amount that the annual percentage rate may change in any one-year period (or a statement that no such limitation exists), as well as a statement of the maximum annual percentage rate that may be imposed under each payment option.

(x) The minimum periodic payment required when the maximum annual percentage rate for each payment option is in effect for a $10,000 outstanding balance, and a statement of the earliest date the maximum rate may be imposed.

(xi) An historical table, based on a $10,000 extension of credit, illustrating how annual percentage rates and payments would have been affected by index value changes implemented according to the terms of the plan. The historical table shall be based on the most recent 15 years of index values (selected for the same time period each year) and shall reflect all significant plan terms, such as rate discounts, rate and payment limitations, rate carryover, and negative amortization, that would have been affected by the index movement during the period.

(xii) A statement that rate information will be provided on or with each periodic statement.

(e) *Brochure.* The home equity brochure published by the Board or any brochure that provides substantially similar information shall be provided.

(f) *Limitations on home equity plans.* No creditor may, by contract or otherwise:

(1) Change the annual percentage rate unless:

(i) Such change is based on an index that is not under the creditor's control; and

(ii) Such index is available to the general public.

(2) Terminate a plan and demand repayment of the entire outstanding balance in advance of the original term unless:

(i) There has been fraud or material misrepresentation by the consumer in connection with the plan;

(ii) The consumer has failed to meet the repayment terms of the agreement for any outstanding balance; or

(iii) Any action or inaction by the consumer has adversely affected the creditor's security for the plan.

(3) Change any term [10d] (other than an insignificant term), except that a creditor may:

(i) Provide in the initial agreement that specified changes will occur if a specific event takes place (for example, that the annual percentage rate will increase a certain amount if the consumer leaves the creditor's employment or that further extensions of credit will not be made if the maximum annual percentage rate is reached).

(ii) Change the index and margin used under the plan if the original index is no longer available, the new index has an historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an interest rate substantially similar to the rate in effect at the time the original index became unavailable.

(iii) Prohibit additional extensions of credit or reduce the credit limit applicable to an agreement during any period in which:

(A) The value of the dwelling that secures the plan declines significantly below the property's appraised value for purposes of the plan;

(B) The creditor reasonably believes that the consumer will be unable to fulfill the repayment obligations under the plan because of a material change in the consumer's financial circumstances;

(C) The consumer is in default of any material obligation under the agreement;

(D) The creditor is precluded by government action from imposing the annual percentage rate provided for in the agreement; or

(E) The priority of the creditor's security interest is adversely affected by government action to the extent that the value of the security interest is less than 120 percent of the credit line.

(iv) Make any change that will unequivocally benefit the consumer throughout the remainder of the plan.

(g) *Disclosure required upon request.* A creditor shall provide, at the consumer's request, a statement of the conditions under which the creditor may take the actions described in paragraph (d)(4)(i) of this section.

(h) *Refund to consumer.* A creditor shall refund all fees paid by the consumer to anyone in connection with an application if any term required to be disclosed under paragraph (d) of this section changes (other than a change due to a variable-rate feature) before the plan is opened and, as a result, the consumer elects not to open the plan.

(i) *Imposition of nonrefundable fees.* Neither a creditor nor any other person may impose a nonrefundable fee in connection with an application until three business days after the consumer receives the disclosures and brochure required under this section.[10e]

§ 226.6 Initial disclosure statement.

* * * * *

►(e) *Home equity plan information.* (1) The disclosures required under § 226.5b(d), to the extent they are not duplicative.

(2) A statement of the conditions under which the creditor may take the actions described in § 226.5b(d)(4)(i).◄

* * * * *

§ 226.26 Advertising.

* * * * *

►(d) *Additional requirements for home equity plans.*—(1) *Advertisement*

[10d] The creditor may implement changes during the plan if a specific written agreement is made with the consumer at that time.

[10e] If the disclosures and brochure are mailed to the consumer, the consumer is considered to have received them three business days after they have been mailed.◄

of terms that require additional disclosures. If any of the terms required to be disclosed under § 226.6(a) or (b) or the payment terms of the plan are set forth, affirmatively or negatively, in an advertisement for a home equity plan subject to the requirements of § 226.5b, the advertisement shall also clearly and conspicuously set forth the following:

(i) Any loan fee that is a percentage of the credit limit under the plan and an estimate of any other fees imposed for opening the plan, stated as a single dollar amount or a reasonable range.

(ii) Any periodic rate used to compute the finance charge, expressed as an annual percentage rate as determined under § 226.14(b).

(iii) The maximum annual percentage rate that may be imposed in a variable-rate plan.

(2) *Discounted and premium rates.* If an advertisement states an initial annual percentage rate that is not based on the index and margin used to make later rate adjustments in a variable-rate plan, the advertisement also shall state the period of time such rate will be in effect, and, with equal prominence to the initial rate, a reasonably current annual percentage rate that would have been in effect using the index and margin.

(3) *Balloon payment.* If an advertisement contains a statement about any minimum periodic payment, the advertisement also shall state, if applicable, that a balloon payment[10b] will result.

(4) *Tax implications.* An advertisement that states that any interest expense incurred under the home equity plan is or may be tax deductible may not be misleading in this regard.

(5) *Misleading terms.* An advertisement may not refer to a home equity plan as "free money" or contain a similarly misleading term.◄

* * * * *

3. Appendix G is amended by adding G–17A, G–17B, and G–18.

Appendix G—Open-End Model Forms And Clauses

* * * * *

►G–17A Home Equity Sample.
G–17B Home Equity Sample.
G–18 Home Equity Model Clauses.◄

* * * * *

►*G—17A Home Equity Sample*

IMPORTANT TERMS OF OUR HOME EQUITY LINE OF CREDIT

This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

Availability of Terms: To obtain the terms described below, you must submit your application before April 1, 1989.

If any of these terms changes (other than the annual percentage rate) and you decide, as a result, to not enter into an agreement with us, you are entitled to a refund of any fees that you paid in connection with your application.

Security Interest: We will take a mortage in your home. You could lose your home if you don't meet the obligations in your agreement with us.

Possible Actions: Under certain circumstances, we can (1) terminate your account and require you to pay us the entire outstanding balance in one payment and also charge you certain fees, (2) refuse to make additional extensions of credit, and (3) reduce your credit limit.

Upon request, we will provide you with more specific information about when we can take these actions.

Minimum Payment Requirements: You can obtain credit advances for 10 years (the "draw period"). During the draw period, payments will be due monthly. Your minimum monthly payment will equal the greater of 1/360th of the outstanding balance plus the finance charges that have accrued on the outstanding balance, or $100.

After the draw period ends, you will no longer be able to obtain credit advances and must pay the outstanding balance on your account over 5 years (the "repayment period"). During the repayment period, payments will be due monthly. Your minimum monthly payment will equal all payments past due, plus 1/60th of the balance that was outstanding at the end of the draw period plus the finance charges that have accrued on the remaining balance.

Minimum Payment Example: If you made only the minimum monthly payment and took no other credit advances, it would take 15 years to pay off a credit advance of $10,000 at an ANNUAL PERCENTAGE RATE of 12.00%. During that period, you would make 120 monthly payments varying between $127.78 and $100.00 followed by 60 monthly payments varying between $187.06 and $118.08.

Fees and Charges: In order to open and maintain an account, you must pay certain fees and charges. The following fees must be paid to us:

Application fee: $150 (due at application)
Points: 1% of credit limit (due when account opened)
Annual maintenance fee: $75 (due each year)

You also must pay certain fees to third parties such as appraisers, credit reporting firms, and government agencies. These fees generally total between $500 and $900. Upon request, we will provide you with an itemization of the fees you will have to pay to third parties.

Minimum Draw and Balance Requirements: The minimum credit advance that you can receive is $500. You must maintain an account balance of at least $100.

Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges under the plan.

Variable-Rate Feature: The plan has a variable-rate feature, and the annual percentage rate and the minimum monthly payment can change as a result. The annual percentage rate does not include costs other than interest.

The annual percentage rate is based on the value of an index. The index is the monthly average prime rate charged by banks and is published in the *Federal Reserve Bulletin.* To determine the annual percentage rate that will apply to your account, we add a margin to the value of the index.

Ask us for the current index value, margin and annual percentage rate. After you open an account, rate information will be provided on periodic statements that we send you.

Rate Changes: The annual percentage rate can change monthly. There is no limit on the amount by which the rate can change during any one-year period. The maximum ANNUAL PERCENTAGE RATE that can apply during the plan is 18%.

Maximum Rate and Payment Examples: If you had an outstanding balance of $10,000 at the beginning of the draw period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $177.78. This annual percentage rate could be reached during the first month of the draw period.

If you had an outstanding balance of $10,000 at the beginning of the repayment period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $316.67. This annual percentage rate could be reached during the first month of the repayment period.

Variable-Rate Example: The following table shows how the annual percentage rate and the minimum monthly payments for a single $10,000 credit advance would have changed based on changes in the index over the last 15 years. The index values are from September of each year. While only one payment amount per year is shown, payments would have varied slightly during each year.

The table assumes that no additional credit advances were taken and that only the minimum payment was made each month. It does not necessarily indicate how the index or your payments would change in the future.

Year	Percentatge—			Minimum monthly payment
	Index	Margin	Annual rate	
1974	12.00	2	14.00	$144.44
1975	7.88	2	9.88	$106.50
1976	7.00	2	9.00	$100.00

Year	Percentatge—			Minimum monthly payment
	Index	Margin	Annual rate	
1977	7.13	2	9.13	$100.00
1978	9.41	2	11.41	$105.47
1979	12.90	2	14.90	$126.16
1980	12.23	2	14.23	$117.53
1981	20.08	2	[1] 18.00	$138.07
1982	13.50	2	15.50	$117.89
1983	11.00	2	13.00	$100.00
1984	12.97	2	14.97	$203.81
1985	9.50	2	11.50	$170.18
1986	7.50	2	9.50	$149.78
1987	8.70	2	10.70	$141.50
1988	10.00	2	12.00	$130.55

[1] This rate reflects the 18 percent maximum rate limitation.

G-17B Home Equity Sample

IMPORTANT TERMS OF OUR HOME EQUITY LINE OF CREDIT

This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

Availability of Terms: All of the terms described below are subject to change.

If any of these terms changes (other than the annual percentage rate) and you decide, as a result, to not enter into an agreement with us, you are entitled to a refund of any fees that you paid in connection with your application.

Security Interest: We will take a mortgage in your home. You could lose your home if you don't meet the obligations in your agreement with us.

Possible Actions: Under certain circumstances, we can (1) terminate your account and require you to pay us the entire outstanding balance in one payment and also charge you certain fees, (2) refuse to make additional extensions of creidt, (3) reduce your credit limit, and (4) make specific changes that are set forth in your agreement with us.

Upon request, we will provide you with more specific information about when we can take these actions.

Minimum Payment Requirements: You can obtain credit advances for 15 years (the "draw period"). When you open your account, you can choose to make either monthly or quarterly payments during the draw period. If you choose the monthly payment option, your monthly payment will equal the finance charges that accrued during the preceding month. If you choose the quarterly payment option, your quarterly payment will equal the finance charges that accrued during the preceding quarter. Under either option, if the accrued finance charges are less than $50, the minimum payment will equal $50 or the account balance, whichever is less. Balances of less than $50 must be paid in full.

Under either the monthly or quarterly payment option, the minimum payment during the draw period will not reduce the principal that is outstanding on your account.

After the draw period ends, you will no longer be able to obtain credit advances and must repay the outstanding balance on your account (the "repayment period"). The length of the repayment period will depend on the balance outstanding on your account at the beginning of it. During the repayment period, payments will be due monthly and will equal 3% of the then outstanding balance (including finance charges) on your account or $100, whichever is greater.

Minimum Payment Examples: If you made only the minimum payment and took no other credit advances, it would take 22 years and 11 months to pay off a credit advance of $10,000 at an ANNUAL PERCENTAGE RATE of 12.00%. Under the monthly payment option, you would make 180 monthly payments of $100.00 followed by 94 monthly payments varying between $303.00 and $100.00 and a final payment of $30.27. Under the quarterly payment option, you would make 60 quarterly payments of $303.01 followed by 94 monthly payments varying between $303.00 and $100.00 and a final payment of $30.27.

Fees and Charges: In order to open and maintain an account, you must pay certain fees and charges. The following fees must be paid to us:

Application fee: $100 (due at application)
Points: 1% of credit limit (due when account opened)
Annual maintenance fee: $75 (due each year)

You also must pay certain fees to third parties such as appraisers, credit reporting firms, and government agencies. These fees generally total between $500 and $900. Upon request, we will provide you with an itemization of the fees you will have to pay to third parties.

Minimum Draw Requirement: The minimum credit advance that you can receive is $200.

Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges under the plan.

Variable-Rate Feature: The plan has a variable-rate features, and the annual percentage rate and the minimum monthly payment can change as a result. The annual percentage rate does not include costs other than interest.

The annual percentage rate is based on the value of an index. The index is the monthly average prime rate charged by banks and is published in the *Federal Reserve Bulletin*. To determine the annual percentage rate that will apply to your account, we add a margin to the value of the index.

Ask us for the current index value, margin and annual percentage rate. After you open an account, rate information will be provided on periodic statements that we send you.

Rate Changes: The annual percentage rate can change monthly. There is no limit on the amount by which the rate can change during any one-year period. The maximum ANNUAL PERCENTAGE RATE that can apply during the plan is 18%.

Maximum Rate and Payment Examples: Under the monthly payment option, if you had an outstanding balance of $10,000 at the beginning of the draw period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $150.00. Under the quarterly payment option, the minimum quarterly payment would be $456.78. This annual percentage rate could be reached during the first month of the draw period.

If you had an outstanding balance of $10,000 at the beginning of the repayment period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $304.50. This annual percentage rate could be reached during the first month of the repayment period.

Variable-Rate Example: The following table shows how the annual percentage rate and payments for a single $10,000 credit advance would have changed based on changes in the index over the last 15 years. The index values are from September of each year.

The table assumes that no additional credit advances were taken and that only the minimum payment was made. It does not necessarily indicate how the index or your payments would change in the future.

Year	Percentage—			Minimum payment—	
	Index	Margin	Annual rate	Monthly	Quarterly
1974	12.00	2	14.00	$116.67	$354.10
1975	7.88	2	9.88	$82.33	$249.04
1976	7.00	2	9.00	$75.00	$226.69
1977	7.13	2	9.13	$76.08	$229.99
1978	9.41	2	11.41	$95.08	$287.97
1979	12.90	2	14.90	$124.17	$377.14
1980	12.23	2	14.23	$118.58	$359.99
1981	20.08	2	[1] 18.00	$150.00	$456.78
1982	13.50	2	15.50	$129.17	$392.53
1983	11.00	2	13.00	$108.33	$328.53
1984	12.97	2	14.97	$124.75	$378.94
1985	9.50	2	11.50	$95.83	$290.26
1986	7.50	2	9.50	$79.17	$239.39
1987	8.70	2	10.70	$89.17	$269.89
1988	10.00	2	12.00	$100.00	$303.01

[1] This rate reflects the 18-percent maximum rate limitation.

G–18 Home Equity Model Clauses

Retention of Information: This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

Availability of Terms: To obtain the terms described below, you must submit your application before (*date*). However the (*description of terms*) are subject to change.

If any of these terms changes [(other than the annual percentage rate)] and you therefore decide to not enter into an agreement with us, you need not do so. You will then be entitled to a refund of any fees that you paid in connection with your application.

Security Interest: We will take a [security interest in/mortgage on] your home. You could lose your home if you don't meet the obligations in your agreement with us.

Possible Actions: Under certain circumstances, we can (1) terminate your account and require you to pay us the entire outstanding balance in one payment [, and also charge you certain fees], (2) refuse to make additional extensions of credit, (3) reduce your credit limit [, and (4) make specific changes that are set forth in your agreement with us].

[Upon request, we will provide you with more specific information about when we can take these actions./We can take these actions under the following circumstances: (*when actions may be taken*).]

Minimum Payment Requirements: The length of the [draw period/repayment period] is (*length*). Payments will be due (*frequency*). Your minimum payment will equal (*how payment determined*).

The minimum payment will not repay the balance that is outstanding on your account by (*time*). You will then be required to pay the entire balance in a single payment.

Minimum Payment Example: If you made only the minimum monthly payment and took no other credit advances, it would take (*length of time*) to pay off a credit advance of $10,000 at an ANNUAL PERCENTAGE RATE of (*recent rate*). During that period, you would make (*number*) (*frequency*) payments of $___.

Fees and Charges: To open and maintain an account, you must pay certain fees and charges. The following fees must be paid to us:

(*Description of fee*) [$___/___% of _____]
(*When payable*)
(*Description of fee*) [$___/___% of _____]
(*When payable*)

You also must pay certain fees to third parties such as appraisers, credit reporting firms, and government agencies. These fees generally total [$___/___% of _____]. Upon request, we will provide you with an itemization of the fees you will have to pay to third parties.

Minimum Draw and Balance Requirements: The minimum credit advance that you can receive is $___. You must maintain an account balance of at least $___.

Negative Amortization: Under some circumstances, negative amortization may occur. Negative amortization will increase the amount that you owe us and reduce your equity in your home.

Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges for the plan.

Variable-Rate Feature: The plan has a variable-rate feature and the annual percentage rate and the [minimum payment/term of the plan] can change as a result. The annual percentage rate does not include costs other than interest.

The annual percentage rate is based on the value of an index. The index is the (*identification of index*) and is published in (*source of information*). To determine the annual percentage rate that will apply to your account, we add a margin to the value of the index.

Ask us for the current index value, margin and annual percentage rate. After you open an account, rate information will be provided on periodic statements that we send you.

[The initial annual percentage rate is not based on the index and margin used for later rate adjustments. The initial rate will be in effect for (*period*).]

Rate Changes: The annual percentage rate can change (*frequency*). [The rate cannot increase by more than ___ percentage points in any one year period./There is no limit on the amount by which the rate can change in any one year period.] [The maximum ANNUAL PERCENTAGE RATE that can apply during the plan is ___%./The ANNUAL PERCENTAGE RATE cannot increase by more than ___ percentage points above the initial rate during the plan.]

Maximum Rate and Payment Examples: If you had an outstanding balance of $10,000, the minimum payment at the maximum ANNUAL PERCENTAGE RATE of ___% would be $___. This annual percentage rate could be reached (*when maximum rate could be reached*).

Variable-Rate Example: The following table shows how the annual percentage rate and the minimum payments for a single $10,000 credit advance would have changed based on changes in the index over the last 15 years. The index values are from (*when values are measured*).

The table assumes that no additional credit advances were taken and that only the minimum payment was made. It does not necessarily indicate how the index or your payments would change in the future.

Year	Percentage—			Minimum payment
	Index	Margin	Annual rate	
1974				
1975				
1976				
1977				
1978				
1979				

Year	Percentage—			Minimum payment
	Index	Margin	Annual rate	
1980				
1981				
1982				
1983				
1984				
1985				
1986				
1987				
1988				

By order of the Board of Governors of the Federal Reserve System, January 11, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-1080 Filed 1-19-89; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88-AGL-28]

Proposed Control Zone Alterations—Ann Arbor, MI, and Detroit Willow Run Airport, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to alter the Detroit Willow Run Airport, MI, and Ann Arbor, MI, control zones to accommodate existing Standard Instrument Approach Procedures (SIAPs) to Willow Run Airport, Detroit, MI, and Ann Arbor Municipal Airport, Ann Arbor, MI, respectively. It will also eliminate all references to the Willow Run Very High Frequency Omnidirectional Range Station (VOR) in the legal descriptions.

DATE: Comments must be received on or before February 28, 1989.

ADDRESSES: Send Comments on the proposal in tripilicate to: Federal Aviation Administration, Regional Counsel, AGL-7, Attn: Rules Docket No. 88-AGL-28, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Regional Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois

An informal docket may also be examined during normal business hours at the Air Traffic Division, Airspace Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Harold G. Hale, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in tripilicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AGL-28." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice maybe changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2, which describes the application procedure.

The Proposal

The FAA is considering an amendment to § 71.171 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to modify the control zone airspace for Detroit Willow Run Airport, MI, and Ann Arbor, MI.

The legal descriptions for both control zones are being modified to exclude references to the Willow Run VOR and to accommodate existing approaches to Willow Run Airport, Detroit, MI, and Ann Arbor Municipal Airport, Ann Arbor, MI, respectively. The modification to the Detroit Willow Run Airport control zone eliminates a portion of the southwest control zone extension which overlies the Ann Arbor, MI control zone. That portion of airspace will be returned to a noncontrolled status and the Ann Arbor, MI, control zone will be redescribed without the words "excluding that portion which overlies the Detroit Willow Run Airport, MI, Control Zone."

The decommissioning of the Detroit Willow Run VOR made it necessary to modify these two control zones. The facility decommissioning was circularized to the aviation public under Airspace Case Number 87-AGL-71-NR.

Aeronautical maps and charts will reflect the defined areas which will enable other aircraft to circumnavigate the area in order to comply with applicable visual flight rule requirements.

Section 71.171 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

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, Control zones.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1345(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 71.171 [Amended]

2. Section 71.171 is amended as follows:

Detroit Willow Run Airport, MI [Revised]

Within a 5-mile radius of Willow Run Airport (lat. 42°14'16"N., long. 83°31'50"W.), within 2 miles each side of the Willow Run Airport ILS localizer SW course, extending from the 5-mile radius zone to the OM, excluding the portion subtended by a chord drawn between the points of the INT of the 5-mile radius zone with the Detroit Metropolitan Wayne County Airport, MI, control zone.

Ann Arbor, MI [Revised]

Within a 5-mile radius of the Ann Arbor Municipal Airport (lat. 42°13'22"N., long. 83°44'40"W.) This control zone is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Issued in Des Plaines, Illinois, on January 9, 1989.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 89–1301 Filed 1–19–89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 88-AGL-30]

Proposed Transition Area Establishment—Hawley, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish the Hawley, MN, transition area to accommodate a new VOR/DME-A Standard Instrument Approach Procedure (SIAP) to Hawley Municipal Airport, Hawley, MN. The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions in controlled airspace.

DATE: Comments must be received on or before February 24, 1989.

ADDRESS: Send comments on the proposal in triplicate to: Federal Aviation Administration, Regional Counsel, AGL-7, Attn: Rules Docket No. 88-AGL-30, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Regional Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

An informal docket may also be examined during normal business hours at the Air Traffic Division, Airspace Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Harold G. Hale, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AGL-30". The postcard will be date/time stamped and returned to the commenter. All communications received before the specifed closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2, which describes the applications procedure.

The Proposal

The FAA is considering an amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish a transition area airspace near Hawley, MN.

The development of a new VOR/DME-A SIAP requires that the FAA designate airspace to insure that the procedure will be contained within controlled airspace. The minimum descent altitude for this procedure may be established below the floor of the 700-foot controlled airspace.

Aeronautical maps and charts will reflect the defined areas which will enable other aircraft to circumnavigate the area in order to comply with applicable visual flight rule requirements.

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated Januany 4, 1988.

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, Transition areas.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Hawley, MN [New]

That airspace extending upward from 700 feet above the surface within a 5 mile radius of the Hawley Municipal Airport (lat. 46°53'02"N., long. 96°21'02"W.) within 3.5 miles each side of the 246° bearing from the airport extending from the 5 mile radius to 6 miles southwest of the airport, excluding that portion which overlies the Fargo, ND, transition area.

Issued in Des Plaines, Illinois, on January 5, 1989.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 89-1302 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 88-AGL-29]

Proposed Transition Area Establishment—Spearfish, SD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish the Spearfish, SD, transition area to accommodate a new NDB-A Standard Instrument Procedure (SIAP) to Black Hills-Clyde Ice Field Airport, Spearfish, SD. The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions in controlled airspace.

DATE: Comments must be received on or before February 28, 1989.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Regional Counsel, AGL-7, Attn: Rules Docket No. 88-AGL-29, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Regional Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

An informal docket may also be examined during normal business hours at the Air Traffic Division, Airspace Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Harold G. Hale, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AGL-29". The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2, which describes the application procedure.

The Proposal

The FAA is considering an amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CER Part 71) to establish a transition area airspace near Spearfish, SD.

The development of a new NDB-A SIAP requires that the FAA designate airspace to insure that the procedure will be contained within controlled airspace. The minimum descent altitude for this procedure may be established below the floor of the 700-foot controlled airspace.

Aeronautical maps and charts will reflect the defined areas which will enable other aircraft to circumnavigate the area in order to comply with applicable visual flight rule requirements.

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

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, Transition areas.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Spearfish, SD [New]

That airspace extending upward from 700 feet above the surface within a 9.5-mile radius of the Black Hills-Cyde Ice Field Airport (lat. 44°29'00"N., long. 103°47'00"W.).

Issued in Des Plaines, Illinois, on January 9, 1989.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 89-1304 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 93

[Docket No. 25758; Notice No. 88-18]

High Density Traffic Airports; Slot Allocation and Transfer Methods; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking; Correction.

SUMMARY: FAA is correcting an error in the Notice number and errors in "For Further Information Contact." In FR Doc. 89-410, published Tuesday, January 10, 1989, on page 831, please change NPRM 88-17 to read Notice No. 88-18 and "For Further Information Contact" should read as follows, David L. Bennett, Office of Chief Council, AGC-230, (202) 267-3491.

FOR FURTHER INFORMATION CONTACT: Mr. David L. Bennett, (202) 267-3491.

Michael D. Triplett,

Legal Technician, Program Management Staff AGC-10.

[FR Doc. 89-1298 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-13-M

INTERNATIONAL TRADE COMMISSION

19 CFR Part 201

Procedures Relating to Assessment of Fees and Waiving of Fees Under the Freedom of Information Act and Requests for Information in Cases to Which Commission Is Not a Party

AGENCY: International Trade Commission.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: This notice sets forth proposed rules which the U.S. International Trade Commission is considering adopting relating to: (1) Assessment of fees and waiving of fees under the Freedom of Information Act (5 U.S.C. 552), and (2) requests for information in cases or matters in which the Commission is not a party. The proposed rules, if adopted, would amend 201.20 (relating to fees) and 201.21 (relating to availability of specific records). These proposed fee waiver rules supersede proposed rules published on June 5, 1987 (52 FR 21317).

The proposed rules with respect to fees under the Freedom of Information Act (5 U.S.C. 552) reflect the new fee provisions of the Freedom of Information Reform Act of 1986 (Pub. L. No 99-570, section 1803) and conform to the Uniform Freedom of Information Act Fee Schedule and Guidelines promulgated by the Office of Management and Budget (52 FR 10011, March 27, 1987). These proposed rules also contain procedures and guidelines for determining when such fees should be waived or reduced. The proposed rules parallel rules on fees and waivers of fees promulgated by the U.S. Department of Justice (*see* 28 CFR Part 16). The recommended charges in proposed rule 201.20(b)(1)(ii) for document searches follow such guidelines. They reflect distinctions between lower grade clerical/professional and higher grade professional/managerial staff costs. They are based on projected January 1989 salary levels for GS-8, step 1, and GS-12, step 1, respectively, as calculated by the Commission's Finance Division, which the Commission estimates are the average staff grades in each of these two categories of personnel likely to be doing such searches. The fees for computer searches (§ 201.20(b)(1)(iii)) and review (§ 201.20(b)(3)) are also based on salary level GS-12, step 1, which the Commission estimates is the average staff grade of personnel likely to be doing such computer searches or review.

The proposed rules governing requests for information in cases or matters to which the Commission is not a party specify the Commission's procedures with respect to such requests. The proposed rules are intended to prevent the harm that may result from inappropriate disclosure of nonpublic information or inappropriate allocation of Commission resources.

DATES: Comments must be received not later than thirty (30) days from the date that this notice appears in the **Federal Register.**

ADDRESS: Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: William W. Gearhart, Esq., Assistant General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202-252-1091.

SUPPLEMENTARY INFORMATION: None of the proposed amendments constitutes a "major rule" within the meaning of Executive Order No. 12291 (Improving Government Regulations). The requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), do not apply.

List of Subjects in 19 CFR Part 210

Administrative practice and procedure, Freedom of information, Investigations.

PART 201—[AMENDED]

1. The authority citation for Part 201 is revised to read as follows:

Authority: 5 U.S.C. 552, 552a, 552b(g), 553; 19 U.S.C. 1335; 31 U.S.C. 9701.

2. Section 201.20 is revised to read as follows:

§ 201.20 Fees.

(a) *In general.* Fees pursuant to 5 U.S.C. 552 shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by agency personnel in responding to and processing requests for records under this subpart. All fees so assessed shall be charged to the requester, except where the charging of fees is limited under paragraph (c) of this section or where a waiver or reduction of fees is granted under paragraph (d) of this section. The Secretary will collect all applicable fees. Requesters shall pay fees by check or money order made payable to the Treasury of the United States.

(b) *Charges.* In responding to requests under this subpart, the following fees shall be assessed, unless a waiver or

reduction of fees has been granted pursuant to paragraph (d) of this section:

(1) *Search.* (i) No search fee shall be assessed with respect to requests by educational institutions, noncommercial scientific institutions, and representatives of the news media as defined in paragraphs (j) (6), (7), and (8) of this section, respectively. Search fees shall be assessed with respect to all other requests, subject to the limitations of paragraph (c) of this section. The Secretary may assess fees for time spent searching even if agency personnel fail to locate any respective record or where records located are subsequently determined to be entirely exempt from disclosure.

(ii) For each quarter hour spent by agency personnel in salary grades GS-2 through GS-10 in searching for and retrieving a requested record, the fee shall be $3.00. When the time of agency personnel in salary grades GS-11 and above is required, the fee shall be $5.00 for each quarter hour of search and retrieval time spent by such personnel.

(iii) For computer searches of records, which may be undertaken through the use of existing programming, requester shall be charged the actual direct costs of conducting the search, although certain requesters (as defined in paragraph (c)(2) of this section) shall be entitled to the cost equivalent of two hours on manual search time without charge. These direct costs shall include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a request, as well as the costs of operator/programmer salary apportionable to the search (at no more than $5.00 per quarter hour of time so spent). Agency personnel are not required to alter or develop programming to conduct a search.

(2) *Duplication.* Duplication fees shall be assessed with respect to all requesters, subject to the limitations of paragraph (c) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be $0.10 per page. For copies produced by computer, such as tapes or printouts, the Secretary shall charge the actual direct costs, including operator time, of producing the copy. For other methods of duplication, the Secretary shall charge the actual direct costs of duplicating a record.

(3) *Review.* (i) Review fees shall be assessed with respect to only those requesters who seek records for a commercial use, as defined in paragraph (j) (5) of this section. For each quarter hour spent by agency personnel in reviewing a requested record for possible disclosure, the fee shall be $5.00.

(ii) Review fees shall be assessed only for the initial record review, i.e., all of the review undertaken when a component analyzes the applicability of a particular exemption to a particular record or record portion at the initial request level. No charge shall be assessed for review at the administrative appeal level of an exemption already applied. However, records or record portions withheld pursuant to an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs of such a subsequent review are properly assessable, particularly where that review is made necessary by a change of circumstances.

(c) *Limitations on charging fees.* (1) No search or review fee shall be charged for a quarter-hour period unless more than half of that period is required for search or review.

(2) Except for requesters seeking records for a commerical use (as defined in paragraph (j)(5) of this section), the Secretary shall provide without charge—

(i) The first 100 pages of duplication (or its cost equivalent), and

(ii) The first two hours of search (or its cost equivalent).

(3) Whenever a total fee calculated under paragraph (b) of this section is $25.00 or less, no fee shall be charged.

(4) The provisions of paragraphs (c) (2) and (3) of this section work together. For requesters other than those seeking records for a commercial use, no fee shall be charged unless the cost of search is in excess of two hours plus the cost of duplication in excess of 100 pages exceeds $25.00.

(d) *Waiver or reduction of fees.* (1) Records responsive to a request under 5 U.S.C. 552 shall be furnished without charge or at a charge reduced below that established under paragraph (b) of this section where the Secretary determines, based upon information provided by a requester in support of a fee waiver request or otherwise made known to the Secretary that disclosure of the requested information is in the public interest, because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(2) In order to determine whether the first fee waiver requirement is met—i.e., that disclosure of the requested information is in the public interest because it is likely to contributed significantly to public understanding of the operations or activities of the government—the Secretary shall considered the following four factors in sequence:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject matter of the requested records, in the context of the request, must specifically concern identifiable operations or activities of the federal government—with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone will not satisfy this threshold consideration.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute; to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative on specific government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) *The contribution of an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications—e.g., expertise in the subject area and ability and intention to effectively convey information to the general public—shall be considered. It will be presumed that a representative of the news media (as defined in paragraph (j)(8) of this section who has access to the means of public dissemination readily will be able to satisfy this consideration. Requests from libraries or other record repositories (or requesters who intend merely to disseminate information to such institutions) shall be analyzed, like those of other requesters, to identify a particular person who represents that he

actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. The Secretary shall not make separate judgments as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the operations or activities of the government, is "important" enough to be made public.

(3) In order to determine whether the second fee waiver requirement is met—i.e., that disclosure of the requested information is not primarily in the commercial interest of the requester—the Secretary shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The Secretary shall consider all commercial interests of the requester (with reference to the definition of "commercial use" in paragraph (j)(5) of this section), or any person on whose behalf the requester may be acting, but shall consider only those interests which would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration shall be given to the role that such FOIA-disclosed information plays with respect to those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is warranted only where, once the "public interest" standard set out in paragraph (d)(2) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. The Secretary shall ordinarily presume that, where a news media requester has satisfied the "public interest" standard, that will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who compile and market government information for direct economic return shall not be presumed to primarily serve the "public interest."

(4) Where only a portion of the requested records satisfies both of the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(5) Requests for the waiver or reduction of fees shall address each of the factors listed in paragraphs (d)(2) and (3) of this section, as they apply to each record request.

(e) *Notice of anticipated fees in excess of $25.00.* Where the Secretary determines or estimates that the fees to be assessed under this section may amount to more than $25.00, he shall notify the requester as soon as practicable of the actual or estimated amount of the fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. (If only a portion of the fee can be estimated readily, the Secretary shall advise the requester that the estimated fee may be only a portion of the total fee.) In cases where a requester has been notified that actual or estimated fees may amount to more than $25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph shall offer him the opportunity to confer with agency personnel in order to reformulate his request to meet his needs at the lower cost.

(f) *Aggregating requests.* Where the Secretary reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, the Secretary may aggregate any such requests and charge accordingly. The Secretary may presume that multiple requests of such type made within a 30-day period have been made in order to evade fees. Where requests are separated by a longer period, the Secretary shall aggregate them only where there exists a reasonable basis for determining that said aggregation is warranted, e.g., where the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(g) *Advance payments.* (1) Where the Secretary estimates that a total fee to be assessed under this section is likely to exceed $250.00, the Secretary may require the requester to make an advance payment of an amount up to the entire estimated fee before beginning to process the request, except where the Secretary receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(2) Where a requester has previously failed to pay a records access fee within 30 days of the date of billing, the Secretary may require the requester to pay the full amount owed, plus any applicable interest (as provided for in paragraph (h) of this section), and to make an advance payment of the full amount of any estimated fee before he begins to process a new request or continues to process a pending request from that requester.

(3) For requests other than those described in paragraphs (g)(1) and (2) of this section, the Secretary shall not require the requester to make an advance payment, i.e., a payment made before work is commenced or continued on a request. Payment owed on work already completed is not an advance payment.

(4) Where the Secretary acts under paragraph (g)(1) or (2) of this section, the administrative time limits described in subsection (a)(6) of the FOIA for the processing of an initial request or an appeal, plus permissible extensions of these time limits, shall be deemed not to begin to run until the Secretary has received payment of the assessed fee.

(h) *Charging interest.* The Secretary may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent to the requester. Once a fee payment has been received by the Secretary, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in section 3717 of title 31 U.S.C. and shall accrue from the date of the billing. The Secretary shall follow the provisions of the Debt Collection Act of 1982, Pub. L. 97-265 (Oct. 25, 1982), and its implementing procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Other statutes specifically providing for fees.* (1) The fee schedule of this section does not apply with respect to the charging of fees under a statute specifically providing for setting the level of fees for particular types of records—i.e., any statute that specifically requires a government entity such as the Government Printing Office or the National Technical Information Service, to set and collect fees for particular types of records—in order to:

(i) Serve both the general public and private sector organizations by conveniently making available government information;

(ii) Ensure that groups and individuals pay the cost of publications and other services that are for their special use so that these costs are not borne by the general taxpaying public;

(iii) Operate an information-dissemination activity on a self-sustaining basis to the maximum extent possible; or

(iv) Return revenue to the Treasury for defraying, wholly or in part, appropriate funds used to pay the costs of disseminating government information.

(3) Where records responsive to requests are maintained for distribution for agencies operating statutorily based fee schedule programs, the Secretary shall inform requesters of the steps necessary to obtain records from those sources.

(j) *Definitions.* For the purpose of this section:

(1) The term "direct costs" means those expenditures which the agency actually incurs in searching for the duplicating (and, in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include, for example the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space and heating or lighting of the facility in which the records are stored.

(2) The term "search" includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The Secretary shall ensure, however, that searches are undertaken in the most efficient and least expensive manner reasonably possible; thus, for example, the Secretary shall not engage in line-by-line search where merely duplicating an entire document would be quicker and less expensive.

(3) The term "duplication refers to the process of making a copy of a record necessary to respond to a FOIA request. Such copies can take the form of payer copy, microform, audio-visual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others. The copy provided shall be in a form that is reasonably usable by requesters.

(4) The term "review" refers to the process of examining a record located in response to a request in order to determine whether any portion of it is permitted to be withheld. It also includes processing any record for disclosure, e.g., doing all that is necessary to excise it and otherwise prepare it for release, although review costs shall be recoverable even where there ultimately is no disclosure of a record. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term "commercial use" in the context of a request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The Secretary shall determine, as well as reasonably possible, the use to which a requester will put the records requested. Where the circumstances of a request suggest that the requester will put the records sought to a commercial use, either because of the nature of the request itself or because the Secretary otherwise has reasonable cause to doubt a requester's stated use, the Secretary shall provide the requester a reasonable opportunity to submit further clarification.

(6) The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought in furtherance of scholarly research.

(7) The term "noncommercial scientific institution" refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (j)(5) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought in furtherance of scientific research.

(8) The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news" who make their products available for purchases or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization; a publication contract would be the clearest proof, but the Secretary shall also look to the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester also must not be seeking the requested records for a commercial use. In this regard, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(k) *Charges for other services and materials.* Apart from the other provisions of this section, where the Secretary elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending them other than by ordinary mail, the actual direct costs of providing the service or materials shall be charged.

3. Section 201.21 is amended by adding paragraph (c) to read as follows:

§ 201.21 Availability of specific records.

* * * * *

(c) *Information requested in cases or matters to which the Commission is not a party.* (1) The procedure specified in this section will apply to all demands directed to Commission employees for the production of documents or for testimony that relates in any way to the employees' official duties. These procedures will also apply to demands directed to former employees if the demands seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (c)(2) of this section will also apply to demands directed to the agency. For purposes of this section, the term "demand" means any request, order or subpoena for testimony or production of documents; the term, "subpoena" means any compulsory process in a case or matter to which the Commission is not a party;

the term "nonpublic" includes any material or information which, under § 201.21(b), is exempt from availability for public inspection and copying; the term "employee" means any current or former officer or employee of the Commission; the term "documents" means all records, papers or official files, including without limitation, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, graphs, notes, charts, tabulations, data analysis, statistical or information accumulations, records of meetings and conversations, film impressions, magnetic tapes, and sound or mechanical reproductions; the term "case or matter" means any civil proceeding before a court of law, administrative board, hearing officer, or other body conducting a legal or administrative proceeding in which the Commission is not a named party.

(2) Prior to or simultaneously with a demand to a Commission employee for the production of documents or for testimony concerning matters relating to official duties, the party seeking such production or testimony must serve upon the General Counsel of the Commission an affidavit, or if that is not feasible, then a statement which sets forth the title of the case, the forum, the party's interest in the case, the reasons for the request, and a showing that the desired testimony or documents are not reasonably available from any other source. Where testimony is sought, the party must also provide a summary of the testimony desired, the intended use of the testimony, and show that Commission records could not be provided and used instead of the requested testimony. A subpoena for testimony from a Commission employee concerning official matters or for the production of documents shall be served in accordance with Rule 45 of the Federal Rules of Civil Procedure and a copy of the subpoena shall be sent to the General Counsel.

(3) Any employee or former employee who is served with a subpoena or other demand shall promptly advise the General Counsel of the service of the subpoena or other demand, the nature of the documents or information sought, and all relevant facts and circumstances.

(4) Absent written authorization from the Chairman of the Commission ("Chairman"), the employee shall respectfully decline to produce the requested documents, to testify, or to otherwise disclose requested information. If a court rules that the demand must be complied with despite the absence of such written authorization, the employe upon whom the demand is made shall respectfully refuse to comply based upon these regulations and *Touhy* v. *Ragan*, 340 U.S. 462 (1951).

(5) The Chairman will consider and act upon subpoena under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account such factors as the need to conserve employee's time for conducting official business, the need to prevent the expenditure of the United States government's time and money for private purposes, the need to maintain impartiality between private litigants in cases where no substantial governmental interest is involved, and the relevant legal standards for determining whether justification exits for the disclosure of nonpublic information and documents. If the Chairman determines that the subpoena documents or information are protected by a privilege or that the Commission has a duty in law or equity to protect such documents or information from disclosure, the General Counsel shall move the court to quash the subpoena or for other appropriate action.

(6) The General Counsel may consult or negotiate with counsel or the party seeking testimony or documents to refine and limit the demand so that compliance is less burdensome, or obtain information necessary to make the determination described in paragraph (c)(5) of this section. Failure of the counsel or party seeking the testimony or documents to cooperate in good faith to enable the General Counsel to make an informed recommendation to the Chairman under paragraph (c)(5) of this section may serve as the basis for a determination not to comply with the demand.

(7) Permission to testify will, in all cases, be limited to the information set forth in the affidavit as described in paragraph (c)(2) of this section, or to such portions thereof as the Chairman deems proper.

(8) If the Chairman authorizes the testimony of an employee, then the General Counsel shall arrange for the taking of the testimony by methods that are least disruptive of the official duties of the employee. Testimony may, for example, be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law. Costs of providing testimony, including transcripts, wil be borne by the party requesting the testimony. Such costs shall also include reimbursing the Commission for the usual and ordinary expenses attendant upon the employee's absence from his or her official duties in connection with the case or matter, including the employee's salary and applicable overhead charges and any necessary travel expenses.

(9) The Secretary in consultation with the General Counsel is further authorized to charge reasonable fees to parties demanding documents or information. Such fees, calculated to reimburse the government for the expense of responding to such demand, may include the costs of time expended by Commission employees to process and respond to the demand, attorney time for reviewing the demand and for related legal work in connection with the demand, and expenses generated by equipment used to search for, produce and copy the responsive information. In general, such fees will be assessed at the rates and in the manner specified in § 201.20 of this part.

(10) This section does not affect the rights and procedures governing the public access to official documents pursuant to the Freedom of Information Act or the Privacy Act.

(11) This section is intended to provide instructions to Commission employees and does not create any right or benefit, substantive or procedural, enforceable by any party against the Commission.

Issued: January 11, 1989.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 89-1253 Filed 1-19-89; 8:45 am]

BILLING CODE 7020-02-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[INTL-152-86]

Limitation of Foreign Tax Credit for Foreign Oil and Gas Taxes

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains proposed Income Tax Regulations relating to the amendments made to the Internal Revenue Code by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). The amendments require that foreign oil and gas extraction

income and losses from all foreign countries be aggregated before computing the limit on creditability of foreign taxes. The amendments also repeal the separate application of the foreign tax credit limitation to taxes on foreign oil related income. In the Rules and Regulations portion of this **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to these matters. The text of those temporary regulations also serves as the comment document for this proposed rulemaking.

DATES: Written comments and requests for a public hearing must be delivered or mailed by April 24, 1989. The amendments are proposed to be effective, generally, for taxable years beginning after December 31, 1982.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue (Attention: CC:CORP:T:R, INTL-152-86), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Richard L. Chewning of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington DC 20224 (Attention: CC:CORP:T:R (INTL-152-86)) (202-566-6384, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations published in the Rules and Regulations portion of this issue of the **Federal Register** and new §§ 1.907 (a)-0AT, 1.907 (c)-1AT, 1.907 (a)-0T through 1.907 (f)-1T. The final regulations that are proposed to be based on the temporary regulations would amend 26 CFR Part 1 to conform the regulations to changes made to section 907 by section 211 (96 Stat. 448) of TEFRA. For the text of the temporary regulations, see T.D. 8240 published in the Rules and Regulations portion of this issue of the **Federal Register**.

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. Although this document is a notice of proposed rulemaking that solicits public comments, the notice and public procedure requirements of 5 U.S.C. 553 do not apply because it has been determined that these proposed regulations are interpretative. Therefore, an initial Regulatory Flexibility Analysis is not required by the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed original and seven copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request by any person who has submitted written comments on the proposed rules. Notice of the time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Richard L. Chewning of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service. Other personnel from offices of the Internal Revenue Service and Treasury Department participated in developing these regulations.

List of Subjects in 26 CFR 1.861 through 1.997-1

Income taxes, Corporate deductions, Aliens, Exports, DISC, Foreign investment in U.S., Foreign tax credit, FSC, Sources of income, United States investments abroad.

Proposed Amendments to the Regulations

The temporary regulations T.D. 8240, published in the Rules and Regulations portion of this issue of the **Federal Register** are hereby also proposed as final regulations under section 907 of the Internal Revenue Code of 1986.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 89-450 Filed 1-19-89; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Parts 1, 501, 504, 505, 506, 507, 511, 512, 518, 519, and 602

[INTL-952-86]

Allocation and Apportionment of Interest Expense and Certain Other Expenses; Public Hearing on Proposed Regulations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing on proposed regulations relating to allocation of apportionment of interest expense and certain other expenses for purposes of the foreign tax credit rules and certain other international tax provisions.

DATES: The public hearing will be held on Tuesday, February 21, 1989, beginning at 10:00 a.m. Outlines of oral comments must be delivered on or mailed by Tuesday, February 7, 1989.

ADDRESS: The public hearing will be held in the I.R.S. Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. The requests to speak and outlines of oral comments should be submitted to the Commissioner of Internal Revenue, Attn: CC:CORP:T:R (IL-952-86), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Angela D. Wilburn of the Regulations Unit, Assistant Chief Counsel (Corporate), Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, telephone 202-566-3935, (not a toll-free call).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under sections 861(b), 863(a), 863(b) and 864(e) of the Internal Revenue Code of 1986. The proposed regulations appeared in the **Federal Register** for Wednesday, September 14, 1988, at page 35525 (53 FR 35525).

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR Part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Tuesday, February 7, 1989, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker will be limited to 10 minutes for an oral presentation exclusive of the time consumed by questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the speakers. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue.

Cynthia E. Grigsby,

Acting Chief, Regulations Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 89-1337 Filed 1-19-89; 8:45 am]

BILLING CODE 4830-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3507-3]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Notice of proposed rulemaking; extension of the public comment period.

SUMMARY: On November 3, 1988 (53 FR 44491), USEPA proposed rulemaking on a revision to the Illinois State Implementation Plan (SIP) for Ozone. The revision pertains to an alternative control strategy (or bubble) for the General Electric Major Appliance Business Group (GE) plant located in Cook County, Illinois. USEPA's action is based upon a revision request which was submitted by the State. USEPA proposed to disapprove the bubble because it failed to satisfy the baseline and progress requirements of the December 4, 1986, Emissions Trading Policy Statement (51 FR 43814). Further, the bubble is not consistent with USEPA policy on transfer efficiency credit.

At the request of the State of Illinois, the public comment period was extended until January 2, 1989, to allow the State additional time to develop comments on the complex issues presented in the proposed rulemaking.

DATE: Comments were accepted if received on or before January 2, 1989.

ADDRESSES: Comments were submitted to: Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch, Region V, U.S. Environmental Protection Agency (5AR-26), 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, (312) 886-6036.

Dated: January 11, 1989.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 89-1358 Filed 1-19-89; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 52

[FRL-3507-7]

Proposed Disapproval of Air Quality Implementation Plan Revision, Louisiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to disapprove a State Implementation Plan (SIP) revision request submitted by the State of Louisiana on September 3, 1987. The revision, as requested, consists of an order by the Louisiana Department of Environmental Quality approving a compliance demonstration submitted by General Motors Corporation (GM). That demonstration purports to show that the topcoat operation of a light duty truck assembly facility in Shreveport, Louisiana complies with Louisiana Air Quality Regulation (LAQR) 22.9.2(f) through "equivalency," primarily on the basis of improved transfer efficiency. The emission rate which GM claims to have achieved is not, however, equivalent to the requirements of the regulation as applied to GM's facility. Indeed, the transfer efficiency GM now claims is far lower than it indicated in obtaining a 1977 determination of lowest achievable emission rate (LAER) for the topcoat operation. GM's demonstration is also deficient in using yearly averaging to show compliance with an instantaneous standard and estimates instead of actual values determined from performance testing.

DATE: Comments must be received on or before February 22, 1989.

ADDRESS: Written comments should be addressed to Mr. Thomas Diggs, Chief (6T-AN), SIP/NSR Section, Air Programs Branch, EPA Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733. Documents relevant to this action are available for public inspection during normal business hours at the same address and at the offices of the Louisiana Department of Environmental Quality, 625 North 4th Street, Baton Rouge, Louisiana 70804. Anyone wishing to examine those documents should make an appointment with the appropriate office at least 24 hours before the examination.

FOR FURTHER INFORMATION CONTACT: Mr. Gregg Guthrie, SIP/NSR Section (6T-AN), Air Programs Branch, EPA Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733; Telephone (214) 655-7214 or FTS 255-7214. Reference File SIP 1-2-2-25.

SUPPLEMENTARY INFORMATION: In May 1977, EPA issued a control technique guideline (CTG) entitled "Control of Volatile Organic Emissions from Existing Stationary Sources—Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light Duty Trucks," (EPA-450/2-77-008). That guideline discussed various types of industrial coatings processes, identified reasonably available control technologies (RACT) for reducing volatile organic compound (VOC) emissions from existing sources and provided sample regulatory language for states to use in imposing emission limitations based on those technologies.

Generally, the CTG for automobiles and light duty trucks recommended the use of low solvent coatings for reducing VOC emissions from existing coatings lines. In relevant part, it found that a waterborne topcoat process, in which solids (resins and pigments) were mixed with a limited amount of organic solvents and a larger amount of water, resulted in reduced topcoat VOC emissions when compared to conventional solvent-borne coatings. The CTG thus recommended that states base VOC RACT level emission limits on the waterborne topcoat process, which was then used in GM auto assembly plants in Southgate and Van Nuys, California. The CTG concluded that automobile topcoat operations could generally be required to use coatings containing no more than 2.8 pounds of VOC per gallon of coating (less water) or obtain equivalent VOC reductions by other means, e.g., capture and destruction of VOC through incineration.

After EPA issued the 1977 CTG and a number of states had adopted RACT level control requirements based on its recommendations, topcoat technology development took a new direction in the American auto industry. Instead of reducing VOC emissions through conversion to waterborne topcoats, the industry focused its attention on trying to achieve equivalent emission reductions by developing "higher solids" solvent-borne topcoats. Higher solids solvent-borne topcoats contain more solids and less VOC than conventional solvent-borne topcoats, but more VOC than waterborne topcoats. Because solvent-borne coatings could be more efficiently applied than waterborne coatings, much industry interest was centered on the degree to which improved transfer efficiency (TE)[1] could

[1] TE is the ratio between consumed solids, i.e., solids passing through the application equipment, and applied solids, i.e., solids that remain on the coated object. The difference between applied and consumed solids is known as "overspray." At 60%

Continued

offset or eliminate emissions which would otherwise occur from using solvent-borne topcoats. Auto manufacturers maintained that they would emit no more VOC to the atmosphere using high solids solvent-borne topcoats applied at higher TE than they would using the waterborne topcoats forming the basis for typical RACT regulations.

Responding to this issue, Richard G. Rhoads, Director of EPA's Control Program Development Division, issued memoranda on October 6, 1978, May 24, 1979, July 3, 1979, and May 5, 1980. In essence, those memoranda set forth methods for mathematically converting a typical RACT standard expressed in pounds of VOC per gallon of coating (less water), to a RACT "solids consumed" standard under which the effects of add-on controls could be evaluated, and to a "solids applied" standard with which the effect of improved TE could also be evaluated. Although the methods recommended by the Rhoads memoranda were based on sound technical reasoning, their application required a higher degree of sophistication than the basic RACT regulations recommended by the CTG. Protracted negotiations between industry and EPA representatives eventually resulted in the development of mutually satisfactory regulatory formats and methods for determining the variables required for calculating VOC emissions of specific sources.[2]

While these national policies on controlling emissions from existing auto and truck assembly plants were evolving, the somewhat convoluted chain of events leading to today's proposal began. In 1977, the same year EPA issued the CTG, GM submitted a permit application to the State of Louisiana, seeking approval of its plans to construct and operate a new light duty truck assembly plant in Shreveport, Louisiana. Because monitoring data indicated Shreveport a nonattainment area for ozone, EPA's Emissions Offset Interpretive Ruling, published at 41 FR 55524 (December 21, 1976), required that GM obtain offsetting VOC reductions from existing facilities in the area and comply with the lowest achievable emission rate (LAER) for VOC.

At the time, GM maintained that the topcoat operation of its proposed plant would achieve LAER because it would use the same type of waterborne coatings recommended by the CTG. Using emissions data from a truck assembly plant in Fremont, California (which used conventional solvent-borne coatings) and adjusting it for the reduced VOC content of the waterborne coatings it intended to use in Shreveport and operational differences between the facilities, GM calculated its hourly and yearly VOC emissions from the proposed topcoat operation (as well as other plant processes), thus quantifying the required offsets. After review of those calculations and after GM obtained offsetting emission reductions totalling 3,726 tons per year, EPA approved Louisiana's issuance of GM's preconstruction permit. See 43 FR 36114 (August 15, 1978); 44 FR 15704 (March 15, 1979).

Subsequently, the State adopted Louisiana Air Quality Regulation (LAQR) 22.9.2, which EPA approved as part of the SIP at 47 FR 53412 (October 29, 1981). Although LAQR 22.9.2 purported to limit VOC emissions from all "new and existing" automobile and light duty truck assembly surface coating operations, GM's plant was the only such source in Louisiana and thus the only one to which the regulation applied. The part of the regulation here relevant, LAQR 22.9.2(f), required that GM use coatings containing less than 2.8 pounds of VOC per gallon of coating (less water) in its topcoat application area, flashoff area, and oven. Because GM had already committed to using such coatings to obtain its preconstruction approval, the regulation imposed no significant new requirements on its topcoat operation, but provided a supplementary means of enforcing EPA's LAER determination.

By the time it completed constructing the Shreveport facility, GM had abandoned its plans to use waterborne topcoats therein. On June 10, 1981, GM requested that the State determine the solvent-borne coatings it now wished to use in the plant's topcoat operation equivalent (with respect to VOC emissions) to the waterborne coatings on which its LAER permit and LAQR 22.9.2(f) were based because they would be applied at greater TE. On July 17, 1981, Louisiana initially denied GM's request because "the documentation provided is insufficient to properly understand your proposal." Later meetings and correspondence apparently clarified the issue for the State, however, because it granted GM's request to use solvent-borne coatings on March 5, 1982. Louisiana did not, however, amend GM's permit, revise LAQR 22.9.2(f), or otherwise seek EPA approval of its action.

On January 16, 1986, EPA issued a notice to GM, in relevant part identifying a violation of LAQR 22.9.2(f) in the major spray booths of the Shreveport facility's topcoat area. In response, GM submitted a new equivalency demonstration to the Louisiana Department of Environmental Quality (LDEQ) on June 25, 1986, requesting that it be approved and submitted to EPA as a SIP revision request. In the course of Louisiana's administrative proceedings, EPA reviewed GM's demonstration and submitted adverse comments on its sufficiency, along with Agency guidance on issues for consideration, to LDEQ. LDEQ issued a final order in the matter on August 26, 1987, which the Governor of Louisiana submitted to EPA as a requested SIP revision on September 3, 1987.

The order LDEQ adopted is not a regulation, variance, or compliance order, and is probably considered an interpretive order by the State. The singular nature of the order renders discussion of its deficiencies difficult, but the remainder of today's notice sets forth EPA's primary concerns.

LDEQ's order recites findings of fact, then "orders" that:

> Compliance with Section 22.9.2(f) of the Louisiana Air Quality Regulations has been and is allowed through equivalency with 15.1 pounds of VOC per gallon of solids applied which is the equivalent emission rate of 2.8 pounds of VOC per gallon standard.

In arriving at this conclusion, LDEQ performed the conversion calculations suggested by the Rhoads memoranda, using a baseline TE of 30%. The Rhoads memoranda provide guidance for converting RACT limitations which were adopted for application to existing but previously unregulated facilities. In suggesting that an assumed 30% baseline TE be used in conversions, the Rhoads memoranda reflect EPA's 1979 decision that such existing facilities would achieve about 30% TE if they began using waterborne coatings. The basis for that estimate was performance testing of GM's Van Nuys and Southgate, California auto assembly plants.

In converting a standard applicable to GM's Shreveport facility, the use of the generally applicable 30% RACT baseline TE is inappropriate, however, GM's topcoat facility was not an existing unregulated facility when Louisiana adopted LAQR 22.9.2(f). It was already

TE, for example, 60% of all solids consumed are applied and 40% are overspray. The higher the TE, the less coating it takes to cover an object of a given surface area at a given film thickness.

[2] Those methods are now embodied in a June 10, 1988 document entitled "Protocol for Determining the Daily VOC Emission Rate of Automobile and Light-Duty Truck Topcoat Operations." Although that protocol, which was issued after the Louisiana actions under review occurred, is not relevant to today's proposal, it may prove helpful in the ultimate resolution of compliance problems GM now faces

required to use waterborne coatings by its LAER permit and had presumably designed its topcoat operation to use them. Under such circumstances, it makes little sense to assume the facility would have achieved no better TE than older facilities which were retrofitted for using waterborne coatings. Indeed, a GM topcoat operation designed for waterborne coatings in Oklahoma City, Oklahoma achieved a TE of at least 37% using waterborne coatings from 1979 to 1985.[3]

Moreover, in 1977, GM successfully objected to EPA basing its LAER determination on data from its Van Nuys plant, explaining that fundamental differences between the configurations of trucks and autos and the processes used for coating them made comparison of the two plants inappropriate. Thus, use of the Van Nuys plant data was, at GM's behest, affirmatively excluded from consideration in determining LAER for its topcoat operation. Because LAQR 22.9.2(f) was apparently adopted as a method of enforcing that determination, it would be anomalous indeed for EPA to now approve the State's use of the Van Nuys data (albeit indirectly) as the presumptive basis for the regulation. Yet, at GM's behest, that is exactly what Louisiana has done in its conversion of LAQR 22.9.2(f), ignoring the regulatory history associated with GM's facility and emission limits.

Under the circumstances underlying GM's current emission limits, EPA believes the State should have examined GM's applications for preconstruction approval to determine an appropriate baseline TE for use in its conversion calculations. Although GM did not specifically identify TE in those applications, the performance it predicted for its topcoat operation is possible only at 77% TE. Using that figure as the TE baseline in the appropriate conversion calculations results in a finding that 2.8 pounds of VOC per gallon of coating consumed (less water) is equivalent to 5.9 pounds of VOC per gallon of solids applied. The alternate compliance target which LDEQ set through its order is thus far too lenient. This is not the only deficiency in the requested SIP revision.

Although it describes no method for demonstrating compliance with the defectively lenient "equivalent" limitation, LDEQ's order states as a finding of fact that:

> Respondent [GM] provided a demonstration that its paint usage results in an emission of 14.7 pounds of VOC per gallon of solids applied which is less than 15.1 equivalency level.

Apparently, the State intended to approve GM's demonstration without adopting independent criteria under which it could be judged. In essence, LDEQ has attempted to adopt GM's demonstration methods through incorporation by reference, a procedure failing to provide objective replicable standards for future compliance demonstrations. Under the Rhoads' memoranda, which the State purportedly used in developing its order, such ad hoc actions are unapprovable.

GM's methods do not, moreover, even demonstrate compliance with the standard of LDEQ's order, i.e., "15.1 pounds of VOC gallon of solids applied." According to the information provided in connection with its compliance demonstration, more than 15.1 pounds of VOC are emitted each time GM applies a gallon of the solids contained in the metallic coatings used in its topcoat operation. GM's demonstration obscures this fact by averaging VOC emissions from two fundamentally different types of coatings, i.e., solid colors and metallics, over a year to provide an "actual" value for their VOC emissions. LAQR 22.9.2(f), however, imposes an "instantaneous" limitation, i.e., it requires that GM never use coatings containing more than 2.8 pounds of VOC per gallon. Although averaging is per se inconsistent with instantaneous compliance, emission reductions obtained through TE increases can not be quantified or considered on an instantaneous basis. They must be calculated over some period of time. Through its order, however, LDEQ implies that averaging "has been and is allowed" to demonstrate compliance with the instantaneous standard of LAQR 22.9.2(f). Clearly, something has been added through "interpretation."

The stringency of any numerical emission limitation is affected by the length of time over which compliance is calculated. Increasing the length of an averaging period for demonstrating compliance renders any given numerical limitation less stringent. In recognition of this relationship between averaging time and stringency, applicable EPA policy limits compliance averaging time under VOC coatings standards to one day, thus protecting the short term National Ambient Air Quality Standard (NAAQS) for ozone.[4] Hence, even had Louisiana amended LAQR 22.9.2(f) instead of issuing an interpretive order, EPA would not have approved the use of yearly averaging in compliance demonstrations. The interpretation given the existing regulation by the State simply renders it incapable of protecting the ozone NAAQS.

Another technical deficiency of GM's demonstration is its use of estimated values in calculating the average TE of its topcoat operation. Although estimates based on actual experience at representative facilities may suffice for developing emission limitations, they have no place in demonstrating compliance with those limitations; performance testing is required. Simply put, compliance demonstrations must demonstrate actual, not estimated, compliance.

This is not to say that GM's estimates are of no interest. If accurate, they indicate GM's topcoat operation is achieving an average TE of only 46%, far lower than the 77% TE reflected by its applications for preconstruction approval. It appears that GM lacks a factual basis for its claim of compliance through improved TE. Indeed, if TE is considered a relevant factor in determining GM's compliance with LAQR 22.9.2(f), the record suggests that GM's topcoat operation is incapable of meeting its emisison limits at its current production rate using its current coating processes. In contrast to the conditions it indicated to obtain preconstruction approval, GM's topcoat operation uses coatings with higher VOC content applied in a thicker coat at the same production rate at much lower TE. The relatively modest emission reduction GM claims as an incineration credit is simply insufficient to offset the cumulative effect of those factors.

EPA believes the root of GM's current compliance problems lies in faulty assumptions contained in their application for preconstruction approvals for the Shreveport plant. When it prepared its permit application and supplied EPA with information for determining LAER, GM apparently assumed that waterborne and solvent-borne coatings could be applied at the same TE. Indeed, an attachment to the Rhoads memorandum of July 3, 1979, suggests GM made the same assumption in providing EPA with information in connection with the Agency's development of the 1977 CTG.

[3] Although the Oklahoma City plant exemplifies the difference between the performance of facilities initially designed for waterborne coatings and those retrofitted for such use, EPA is not suggesting that Louisiana should have used 37% as the baseline TE for its conversion calculations.

[4] If the production requirements of a specific industrial source render daily averaging infeasible, EPA may allow longer averaging periods. In such instances, however, EPA would require the imposition of other measures protecting the NAAQS, e.g., lower numerical limits or daily emission caps.

In the instant matter, correction of this decade old error may require reconsideration of the 1977 LAER determination and, if necessary, corresponding adjustments to permit, offsets, and LAQR 22.9.2(f). That would be a more realistic approach to the compliance problems GM faces than the demonstration LDEQ approved and submitted EPA as a requested SIP revision. EPA now proposes to disapprove the State's request.

Regulatory Flexibility

The SIP revision requested by Louisiana involves a single large entity, i.e., General Motors Corporation. Moreover, EPA's proposed disapproval of the requested revision does not impose any new regulatory requirements on General Motors. I thus certify that EPA's proposed disapproval will not have a significant economic impact on a substantial number of small entities.

Executive Order 12291

Under Executive Order 12291, this action is not "Major." It has been submitted to the Office of Management and Budget for review.

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7642.

Date: June 2, 1988.

Robert E. Layton, Jr.,

Regional Administrator.

Note: This document was received by the Office of the Federal Register January 17, 1989.

[FR Doc. 89–1359 Filed 1–19–89; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

42 CFR Part 1001

Medicare and Medicaid Programs; Fraud and Abuse OIG Anti-Kickback Provisions

AGENCY: Office of the Secretary, HHS, Office of Inspector General (OIG).

ACTION: Proposed rule.

SUMMARY: These proposed regulations are designed to implement section 14 of Pub. L. 100–93, the Medicare and Medicaid Patient and Program Protection Act of 1987, by specifying various payment practices which, although potentially capable of inducing referrals of business under Medicare, would not be considered kickbacks for purposes of criminal prosecution or civil remedies.

DATE: To assure consideration, public comments must be mailed and delivered to the address provided below by March 24, 1989.

ADDRESSES: Address comments in writing to: Office of Inspector General, Department of Health and Human Services, Attention: LRR–17–P, Room 5246, 330 Independence Avenue, SW., Washington, DC 20201.

If you prefer, you may deliver your comments to Room 5551, 330 Independence Avenue, SW., Washington, DC. In commenting, please refer to file code LRR–17–P.

Comments will be available for public inspection beginning approximately two weeks after publication in Room 5551, 330 Independence Avenue, SW., Washington, DC on Monday through Friday of each week from 9:00 a.m. to 5:00 p.m., (202) 472–5270.

FOR FURTHER INFORMATION CONTACT:

Harvey Yampolsky, Office of the General Counsel, (202) 472–5335

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For paperwork reduction and information collection requirements: Allison Herron, Office of Management and Budget, (202) 395–7316.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1128B(b) of the Social Security Act, previously codified at sections 1877 and 1909, provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit or receive remuneration in order to induce business reimbursed under the Medicare or State health care programs. The offense is classified as a felony, and is punishable by fines of up to $25,000 and imprisonment for up to 5 years.

This provision is extremely broad. The types of remuneration covered specifically include kickbacks, bribes, and rebates made directly or indirectly, overtly or covertly, or in cash or in kind. In addition, prohibited conduct includes not only remuneration intended to induce referrals of patients, but remuneration also intended to induce the purchasing, leasing, ordering, or arranging for any good, facility, service, or item paid by Medicare or State health care programs.

The leading case regarding this statute illustrates its broad scope. In *United States* v. *Greber*, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 988, 106 S.Ct. 396 (1985), the Third Circuit Court of Appeals was asked to examine the nature of payments between a medical diagnostic company, providing holter monitor services, and physicians. The company billed Medicare for the monitoring service it performed, and forwarded 40 percent of those payments (up to $65 per patient) to the referring physician.

The defendant in this case alleged that these payments were merely "interpretation fees" paid to the referring physicians for their initial consultation and for explaining the test results to the patients. *Id.* at 70. The court, however, declined to examine whether there might have been a legitimate purpose behind those payments, concluding: "if one purpose of the payment is to induce future referrals, the medicare statute has been violated." *Id.* at 69.

Since the statute on its face is so broad, and the court has recognized its full breadth, concern has arisen among a number of health care providers that many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and are, therefore, subject to criminal prosecution.

Public Law 100–93

Public Law 100–93, the Medicare and Medicaid Patient and Program Protection Act of 1987, added two new provisions addressing the anti-kickback statute. Section 2 specifically provided new authority to the Office of Inspector General (OIG) to exclude a person or entity from participation in the Medicare and State health care programs if it is determined that the party is engaged in a prohibited remuneration scheme. This new sanction authority is intended to provide an alternative civil remedy, short of criminal prosecution, that will be a more effective way of regulating abusive business practices than is the case under criminal law.

In addition, section 14 of Pub.L. 100–93 requires the promulgation of regulations specifying those payment practices that will not be subject to criminal prosecution under section 1128B of the Act and that will not provide a basis for exclusion from the Medicare program or from the State health care programs under section 1128(b)(7). This section reflects the generally accepted view that the language proscribing remuneration that induces referrals is so broadly written as to encompass many harmless or efficient arrangements as well.

In accordance with the stipulation of Pub.L. 100–93, these proposed regulations have been developed in

consultation with the Department of Justice.

Notice of Intent

The legislative history of section 14 of Pub.L. 100–93 indicates that Congress expected the Department of Health and Human Services to consult with affected provider, practitioner, supplier and beneficiary representatives before promulgating regulations. In order to most effectively address issues related to this provision, we published a notice of intent to develop regulations (52 FR 38794, October 21, 1987) soliciting comments from interested parties prior to developing proposed regulations. As a result of that notice, the OIG received a total of 137 timely comments, recommendations and suggestions on generic criteria that can be applied to particular types of business arrangements in order to determine if such arrangements are inappropriate for civil or criminal sanctions.

II. Provisions of the Proposed Rule

We are proposing to amend 42 CFR Part 1001 by adding a new § 1001.952 to set forth those specific payment practices that would not be treated as a criminal offense under section 1128B of the Act and would not serve as the basis for an exclusion from the Medicare and State health care programs. Before we discuss the various payment practices that we are proposing to exempt, we will clarify the effect of not having a particular business arrangement exempted, and we invite public comments on the issues of continuing guidance, notice to beneficiaries, and preferred provider organizations.

Business Arrangements Not Exempt

We are aware that it is the unique position physicians occupy in the medical marketplace that has led to the examination of their relationship with varying business arrangements. It is the physician who controls access to a large array of medical items and services in order for third party reimbursement to be available. This is a highly competitive market that is constantly expanding with new drugs, medical devices and tests. While this competitive marketplace is important, it is necessary for the fiscal integrity of the Medicare and Medicaid programs to assure that physicians exercise sound, objective medical judgment when controlling admittance to this market. We have attempted in these proposed regulations to permit physicians to freely engage in business practices and arrangements that encourage competition, innovation and economy. However, we have added criteria to each "safe harbor" in order to reduce the potential for abuse.

In order for a business arrangement to comply with one of the exemptions set forth below, each provision of that exemption must be met. If, however, the business arrangement involves several payments, for example, rental of both space and equipment, then each payment will be analyzed to determine if all the provisions of each applicable exemption have been fulfilled. Thus, fully complying with one exemption may not grant that individual or entity complete immunity under the statute.

Several commenters responding to our notice of intent have asked that we clarify what it means if a particular business arrangement does not fully comply with each element of a particular exemption. In many instances, the failure to comply fully with one of the exemptions will be of no consequence because the arrangement does not fall within the proscriptions of the statute at all. However, where individuals and entities have entered into arrangements that are covered by the statute, where they have chosen not to fully comply with one of the exemptions proposed in these regulations, they would risk scrutiny by the OIG and may be subject to civil or criminal enforcement action.

Continuing Guidance

Congress intended that the regulations set forth on "safe harbors" be an evolving rule that would be periodically updated to reflect changing business practices and technologies. In the House Committee Report accompanying Pub.L. 100–93, the Committee stated that it "believes that a mechanism for periodic public input is necessary to ensure that the regulations remain relevant in light of changes in health care delivery and payment and to ensure that published interpretations of the law are not impeding legitimate and beneficial activities. Accordingly, the Committee expects that the Secretary will formally reevaluate the anti-kickback regulations on a periodic basis and, in doing so, will solicit public comments at the outset of the review process."

We, therefore, invite public comments on how we can best achieve the twin goals of keeping the industry aware of our views of particular business practices, and assuring that our regulations remain current with new developments. Comments should address how affected parties can make their questions or views known on a continuing or regular basis, and how the Department can best respond to such concerns.

Notice to Beneficiaries

We considered including in several of the proposed "safe harbors" a requirement that a person notify each Medicare beneficiary or Medicaid State health care program of the financial relationship that exists and any person to whom he or she refers the beneficiary for items or services. This requirement may serve to provide an additional safeguard against the abuse for which there is always some potential when such financial relationships exist. Furthermore, it reiterates the ethical responsibility of physicians as reflected in the Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association, and it is a duty imposed by some State statutes as well.

However, such notice requirements may be unduly burdensome compared with the potential benefits to health care consumers. We therefore have not included the requirement in the ownership and financial relationship safe harbors at this time. However, we invite public comments on this issue.

Preferred Provider Organizations

We are aware that there are an increasing variety of arrangements among providers grouped under the generic headings "preferred provider organizations" (PPOs) or "managed care." Unlike HMOs, PPOs and managed care arrangements do not have a single unique identifying structure or concept. In addition, unlike HMOs, there is no single entity that is recognized as the "provider." For these reasons, there is no safe harbor specifically delineated for these arrangements. Rather, we believe that the safe harbors we have designated would cover many relationships in preferred provider and managed care networks. Furthermore, the anti-kickback statute would not apply to participants in PPOs where the discounts and financial relationships are obviously not designed to improperly induce referrals. However, we invite comments from the public regarding additional safe harbors that would provide further assurance to PPOs.

Relationship to Other Laws

The safe harbors being proposed in these regulations are only for purposes of the Federal Medicare and Medicaid anti-kickback statute. They would not provide immunity from civil or criminal

prosecution or other sanctions under any other Federal or State laws. For example, a particular arrangement permissible under a safe harbor may violate a law administered by the Federal Trade Commission or the Securities and Exchange Commission (SEC), or may run afoul of a State law that is applied by the State in a stricter fashion than the Federal law.

Proposed Safe Harbors

Set forth below is a description of the various payment practices that we are proposing to exempt and the rationale for their inclusion in this proposed rulemaking.

A. Investment Interests

As written, the anti-kickback provision applicable to the Medicare and State health care programs is so broad that it could be interpreted literally, for example, to prohibit a physician from receiving dividend payments from a large publicly traded pharmaceutical company if he or she prescribed one of the company's products for a Medicaid patient, knowing that ordering that product would increase his or her dividend payment.

We do not believe that Congress intended to bar all forms of investment or ownership by referral sources in health providers. This conclusion is based on the fact that there are other provisions of Medicare law that pertain specifically to physician-owned home health agencies. Obviously, these provisions would make little sense if the kickback provision prohibited, *per se*, referrals by physicians to entities in which they had any investment interest.

To reflect this view that Congress did not intend to absolutely bar any investment by physicians in other health care entities, we have included a "safe harbor" for investment interests in large public corporations. We have done this to assure that the companies are sufficiently large enough so that the return on investment is, at most, tangentially related to any referrals of items or services made by a shareholder, for example, the prescribing of a drug by an investing physician. This "safe harbor" describes a minimum number of shareholders and a minimun amount of assets the company must have in order to qualify under this exempiton. We have adopted the same bright line employed by the SEC. The SEC applies these same standards to determine which companies are required to register with it, regardless of whether they are traded on a national securities exchange (15 U.S.C. 78*l*(g) and 17 CFR 240.12g–1). We believe this bright line will be useful to health care providers as it sets forth a standard for permissible investments under this "safe harbor" that can be easily determined.

On the other hand, many commenters have described to us situations where health care entities sell limited partnership interests at nominal cost solely to investors who are in a position to make referrals to the entity, and where the profit distribution in the first year, and each year thereafter, is substantially in excess of the original investment. Competitors of these entities complain of losing a significant share of the market to an entity that establishes a limited partnership with physicians in the service area. We have been urged not to include a "safe harbor" for such practices.

Therefore, under the proposed rule, referrals by physicians to entities in which they have any kind of investment interest (other than in large corporations available to the general public), such as limited partnerships, would be subject to prosecution under the same circumstances as they have been until now under section 1128B of the Social Security Act.

However, we are considering crafting an additional exemption to the anti-kickback statute for certain limited partnerships and managing partnership interests that operate according to standards we would prescribe to assure minimum risk of abuse. Accordingly, we are interested in receiving comments suggesting what those standards should be. This "safe harbor" might include: (1) Investment in an entity such as a limited partnership where a bona fide opportunity to invest is made on an equal basis to people in a position to make referrals as well as others, where there are no requirements to make referrals, where there has been disclosure to a referred patient, and where payments are not related to referrals; and (2) managing partnership interests where there is a disclosure to a referred patient, and where payments are not related to referrals.

B. Space Rental

The anti-kickback statute is so broadly written that it could be interpreted to cover rental payments where one party is in a position to make referrals to the other party, even if there is no explicit or implicit understanding regarding referrals. While many rental arrangements are legitimate, we have been informed of many situations where rental payments were simply a device used to mask the real nature of the payments, that is, to induce referrals.

Some examples of these kinds of arrangements are where: (1) A health care entity rents space at a rate above market value from a physician by the hour—with the space being used solely to provide care or services to patients referred by the physician—and the hours per week, and thus the payments, varying in direct relationship to the number of referrals; (2) a physician rents space to a health care entity at a rate above what the market would ordinarily bear, but the entity agrees to the high rent because of an understanding that the physician will refer his or her patients to that entity; or (3) a physician rents space to a health care entity on a month-to-month lease, with the rent varying each month based on the number of referrals from the physician in the preceding month. These arrangements obviously fall within the scope of the anti-kickback law, and provide the potential to abuse the Medicare and State health care programs.

Typically, the abusive arrangements involve rental payments either substantially in excess or below the fair market value of the rental space. The Ninth Circuit Court of Appeals, in *United States v. Lipkis*, 770 F.2d 1447 (9th Cir. 1985), emphasized the importance of determining fair market value when assessing the legitimacy of payments between parties who are in a position to make referrals. In *Lipkis*, a medical management company providing services to a physician group entered into an arrangement with a laboratory where the laboratory returned 20 percent of its revenues obtained from the physician group's referrals back to the management company. The defendant alleged that these payments were fair compensation for "specimen collection and handling services." *Id.* at 1449. The court rejected this defense, concluding: "The fair market value of these services was substantially less than the [amount paid], and there is no question that [the laboratory] was paying for referrals as well as the described services." *Ibid.* Accordingly, one fundamental principle is whether the payment is based on fair market value, regardless of whether the payment is for space rental, equipment rental, personal services, or management contracts.

We have, therefore, crafted an exemption to the anti-kickback law in these proposed regulations for rental arrangements that would require certain standards and safeguards in order to limit the opportunity for abusive relationships that are intended to induce referrals. Proposed § 1001.952(b), Rent,

specifically would establish "safe harbors" in cases of rental agreements where: (1) In instances when access is for periodic intervals, those intervals are set in advance in the lease, rather than allowed to vary week-to-week on the basis of the number of referred patients to be served at the premises; (2) the lease is for at least one year so it cannot be readjusted every month based on the number of referrals; and (3) the charges reflect fair market value.

C. Equipment Rental

Diagnostic and other items of medical equipment are sometimes rented rather than purchased. Obviously, there is no *per se* violation of the anti-kickback statute solely because the owner of the equipment refers a patient to the entity who is paying the individual rent for the equipment. However, we have had situations brought to our attention where payment for the use of the equipment, just like rent for space, is simply a vehicle to provide reimbursement for referrals.

For example, we have had described to us arrangements where a provider rents equipment from a hospital and reimburses the hospital on an hourly basis each time he or she uses the equipment. Under this type of arrangement, the hosptial knows it will be paid a fee by the provider each time it refers a patient to the provider for services requiring the use of the equipment. In another case, an ophthalmologist may rent diagnostic equipment to an optometrist at a rate significantly below the usual market rate. In this instance, there is an understanding between the parties that the rate will be adjusted periodically depending on the referral rate of patients from the optometrist to the ophthalmologist. The reduction in the rental charge, which becomes larger as the number of referrals increase, could obviously be construed as the offer of remuneration in order to induce referrals.

We have, therefore, provided in § 1001.952(c), a "safe harbor" for equipment rentals similar to those applied to real estate rental discussed above, along with the appropriate conditions and safeguards to limit the potential for abuse.

D. Personal Services/Management Contracts

Medical practitioners and providers often have agreements to perform services for each other on a mutually beneficial basis.

Sometimes these agreements call for the party requiring the service to pay a fixed amount or hourly rate to the party performing the service. In other instances, both parties may be allegedly contributing some service or benefit to a so-called "joint venture," and taking compensation in the form of a share of the profits generated by the venture. In still other situations, a party may perform a service acting in the capacity of agent for a company. For example, the agent may perform management services for the company, or handle certain billing and collection services.

None of these arrangements is *per se* illegal solely because referrals between the parties, or to the joint venture, occur. However, if the nature of the agreement is such that payments are intended to induce referrals, or there is an implicit or explicit arrangement where the amount of the payment varies with the volume of referral, the anti-kickback law would apply.

Examples of abusive arrangements that would fall into this category are where: (1) An orthopedist is under contract with a physical therapist to provide billing services for patients he or she refers for the service, thereby receiving compensation in an amount that varies directly with the volume of the referrals; (2) a hospital-employed respiratory therapist is paid by a supplier for servicing home oxygen equipment, but only in cases where the therapist is the source of the patient referral; and (3) a hospital stores and delivers medical equipment to discharged patients on behalf of a supplier and is compensated through a disproportionate share of the net profits of the supplier, although the hospital's only other "service" to the joint venture is the referral of the discharged patients. The variations on these examples are virtually limitless.

We have established in § 1001.952(d) a "safe harbor" for joint ventures and other arrangements involving payments for personal services or management contracts, but only if certain standards are met and safeguards are present to limit the opportunity to provide financial incentives in exchange for referrals. This exemption includes the determination of whether services are paid at fair market value, and is predicated on the same type of standards and qualifications as set forth in the exemption for space and equipment rental.

E. Sale of Practice

It has been brought to our attention that another approach sometimes employed by hospitals to assure a referral of business is to buy, or appear to buy, a physician's practice. Unlike the traditional sale of a practice by a retiring physician to another physician, in these cases the physician continues to practice on the staff of the hospital. Thus, the hospital is able to assure that it will be the provider of both physician services and any hospital services required by any of the physician's patients. The physician's patients, in most cases, may be totally unaware that the physician has "sold" his or her practice to the hospital. Further, such sales often involve much higher rates of compensation that would be the case if a retiring physician sold a comparable practice to another physician. The additional compensation in these instances reflects the value of the referrals.

Another approach in the sale of a practice is for the hospital to pay a practicing physician a monthly fee to keep alive its so-called "option" to purchase his or her practice. We have been advised that in these situations neither party intends for the hospital to ever exercise its option, but that the payments are for referrals and will continue only so long as the physician meets his or her monthly quota of referrals.

We are also aware of practices between practitioners such as optometrists and ophthalmologists whereby the ophthalomologist "buys" the optometrist's practice, but the optometrist keeps practicing, only now substantially salaried by the ophthalmologist. The only purpose of this sale was to lock up referrals.

The "safe harbor" we are proposing in § 1001.952(f) would exist for the sale of physician practices when occurring as the result of retirement or some other event that removes the physician from the practice of medicine or from the service area in whch he or she was practicing, but not when the sale is for the purpose of obtaining an ongoing source of patient referrals.

F. Referral Services

Professional societies and other consumer-oriented groups often operate referral services, with a fee sometimes paid to cover the costs of such a service. Because such a service fee could be construed as a payment in order to obtain a referral, we have concluded that it is appropriate to establish a specific "safe harbor" for this type of practice. The proposed regulations at §1001.952(g), Referral services, provides standards and safeguards to assure that the "safe harbor" is not abused by persons who would attempt to operate exclusive or selective referral services for which they would impose high participation fees.

G. Warranties

We believe that it is in the public interest to have companies offer warranties as an inducement to the consumer to purchase a product. Section 1001.952(h) reflects this belief and provides a "safe harbor" for such purposes. We are aware, however, that some companies, such as some pacemaker manufacturers, offer so-called "warranties" on *other* manufacturers' products. The reason this occurs is that the Medicare program will reimburse the full costs of a replacement product. As a result, if a patient has no out-of-pocket expenses, he or she can easily be persuaded to make use of another manufacturer's product, and the manufacturer can, in turn, look to the Medicare program for reimbursement. These so-called warranties do not meet the Federal Trade Commission definition of warranty, and these regulations would not provide a "safe harbor" for such warranties.

H. Waiver of Deductibles for Inpatient Hospital Care

With the advent of the prospective payment system in 1984 for reimbursing hospitals for inpatient care, some hospitals have advertised the routine waiver of Medicare coinsurance and deductible amounts as a means of attracting patients to their facilities. Because the Federal anti-kickback statute does not distinguish between categories of individuals who are prohibited from receiving something of value as an inducement to arrange for care from a particular provider, as a technical matter, the statute prohibits hospitals from engaging in this kind of practice.

This discrepancy between the technical prohibition on waivers of deducibles and the practices of some hospitals resulted in many comments. Commenters requested policies ranging from complete prohibition to permitting widespread use of waivers.

At this time, we have not included a "safe harbor" for waiving deductibles for inpatient hospital care in this proposed rule. However, we solicit comments on defining a waiver of deductible "safe harbor" that would be limited to inpatient hospital care, include only the deductible amount, be available to all Medicare beneficiaries without regard to diagnosis or length of stay, and assure that any costs to the hospital of waiving the deductible would not be passed on to any Federal program as a bad debt or in any other way. With respect to other situations where deductibles or copayments are routinely waived (such as Part B deductibles and copayments), we believe the anti-kickback statute is clearly violated.

I. Discounts, Employees and Group Purchasing Organizations

The "safe harbors" relating to discounts, employees and group purchasing organizations are specifically required under section 1128B of the Act. The proposed regulations, at § 1001.952(i), (j), and (k), respectively, set forth guidance on the scope of these exemptions.

1. *Discounts.* The proposed discount exemption we are proposing is intended to meet the legislative intent of encouraging price competition that benefits the Medicare and Medicaid programs.

The exemption applies to individuals and entities, including providers, who solicit or receive price reductions, and to individuals and entities who offer or pay them. However, while the exemption places certain requirements on individuals or entities who solicit or receive the discount, we are not proposing any requirements on the individuals or entities offering or paying it in order for them to qualify for the exemption. In addition, the exemption also applies regardless whether the discount is offered for bulk purchases, prompt payment or other purposes, and whether the buyer buys directly from the seller or through a group purchasing organization.

This proposed discount exemption closely follows the statutory language, limiting its application to reductions in the amount a seller charges in a specific transaction for a good or service to a buyer. We are specifically requiring that the discount be itemized and appear clearly on the invoice or statement. This discount may take the form of a direct and explicit reduction in price, or of an indirect reduction that results from the offer of an extra quantity of the item purchased "at no extra charge." This exemption specifically does not apply to remuneration in the form of other things of value, such as rebates of cash, other free goods or services, redeemable coupons, or credit towards the future purchases of other goods or services. It also does not apply to any reductions in price offered to beneficiaries, such as routine reductions or waiver of coinsurance and deductible amounts owed by program beneficiaries, unless permitted under these regulations for inpatient hospital care.

We have proposed to limit the scope of this exemption because we have become aware of numerous practices whereby practitioners and providers have been offered a variety of things of value, which are not legitimate "discounts," in return for referrals of Medicare or State health care program business. Such forms of remuneration include, among other things, trips, computers or computer terminals, coupons, cash rebates, or in kind offers, such as the inclusion of one free item when one hundred are purchased. We believe that these practices should not qualify for the discount exemption because many of them are subject to abuse and because their benefits cannot be realized by the Medicare and Medicaid programs.

In addition, we believe that it would not be feasible to enforce the requirements of the exemption if remuneration other than price discounts were permitted here. Such an enforcement effort would require the Department to know the precise amount and value of these other goods or services and then be able to apportion that value to each claim or request for payment. It would be very easy for providers seeking to evade enforcement to conceal or undervalue some part of these goods or services. However, we are interested in receiving comments on the prevalence of such arrangements and mechanisms that could be used to recognize other cash or inkind discounts where the benefits can be realized by the Medicare and Medicaid programs.

For the purposes of qualifying for this discount exemption, we have divided providers, practitioners, and suppliers into three categories, depending on how they are reimbused under the programs: (1) Payments based on reasonable cost, acquisition cost, and prospectively determined payment amounts, such PPS payments to hospitals, the composite rate paid to providers of maintenance renal dialysis services, or payments made *exclusively* on a fee schedule; (2) payments based in whole or in part on charges; and (3) payments based on a capitated risk sharing basis under section 1876 of the Act or on a similar basis.

With respect to the first category, cost-based or PPS paid providers, the exemption merely requires the individual or entity to report the discount. Of course, we expect that the *full* amount of the discount to be reported. For the most part, this would be accomplished through the cost report.

For example, the reasonable cost rules at 42 CFR 413.98 specify how to report discounts. In other cases, such as with payments based on acquisition costs, the discount could alternatively be reported on the claim or request for payment.

With respect to the second category, those paid in whole or in part on the basis of charges, the exemption applies only if the discount is reported, and the actual charge is reduced by *the full amount* of the discount.

This second discount exemption applies to all individuals or entities that are reimbursed based on the lesser of actual charges or fee schedule amounts. We are aware of many situations, particularly in the case of laboratory-to-laboratory discounts offered by one clinical diagnostic laboratory to another, where fee schedule amounts are being paid by Medicare but if the discount were properly reported and fully reflected, the actual charge would be reduced to below the fee schedule amount.

With respect to the third category, we are proposing not to impose any requirements or risk sharing health maintenance organizations or competitive medical plans paid on a capitated basis under section 1876 of the Act or on a similar basis. Since we do not perceive any circumstance where the Medicare or State health care programs will benefit from any price reductions obtained by these entities, we see no purpose in imposing any requirements on them to comply with this exemption.

2. Employees.

This statutory exemption permits an employer to pay an employee in whatever manner he or she chooses for having that employee assist in the solicitation of Medicare or State health care program business. The proposed exemption follows the statute in that it applies only to bona fide employee-employer relationships. We have decided to adopt the definition of employee from the Internal Revenue Service set forth in 26 U.S.C. 3121(d)(2).

In response to the October 21, 1987 request for comments, many commenters suggested that we broaden the exemption to apply to independent contractors paid on a commission basis. We have declined to adopt this approach because we are aware of many examples of abusive practices by sales personnel who are paid as independent contractors and who are not under appropriate supervision. We believe that if individuals and entities desire to pay a salesperson on the basis of the amount of business they generate, then to be exempt from civil or criminal prosecution, they should make these salespersons employees where they can and should exert appropriate supervision for the individual's acts.

3. Group purchasing organizations.

This exemption applies to payments made by a vendor of goods or services to a person authorized to act as a group purchasing organization (GPO) for a number of individuals or entities who are furnishing Medicare or State health care program services. The exemption closely follows the statute, and requires a written agreement between the GPO and the individual or entity that specifies the amount the GPO will be paid. Where the entity is a provider, the exemption requires the GPO to disclose in writing to the provider at least annually the amounts received from each vendor with respect to purchases made on behalf of that provider. Providers must make such disclosures available to the Department upon request, but we are not proposing at this time to require that these disclosures be submitted on a routine basis. In addition, we are not proposing more specific requirements as to the content of the disclosure. At this time, we have concluded that the purposes of this statutory exemption are fulfilled with these limited disclosure requirements. Of course, providers and GPOs remain free to supplement these requirements as they see fit.

III. Regulatory Impact Statement

A. Introduction

Executive Order 12291 requires us to prepare and publish an initial regulatory impact analysis for any proposed regulation that meets one of the Executive Order criteria for a "major rule," that is, that would be likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individuals, industries, Federal, State, or local government agencies or geographic regions; or, (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. In addition, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (5 U.S.C. 601 through 6712), unless the Secretary certifies that a proposed regulation would not have a significant economic impact on a substantial number of small entities.

B. Impact on Providers and Practitioners

The provision providing new authority to the OIG to exclude a person or entity from Medicare and State health care programs if engaged in a prohibited remuneration scheme would ensure that the Department could seek action against those practicing in such prohibited schemes short of criminal prosecution. This provision, is a result of the statute and not this proposed rule. In addition, this proposed rule attempts to specify various business and payment practices that would not be considered a kickback for purposes of criminal or civil remedies. The regulations serve to clarify departmental policy as to the legality of various commercial arrangements. We believe that the great majority of providers and practitioners do not engage in illegal remuneration schemes, and that the aggregate economic impact of this provision should, in effect, be minimal, affecting only those who have chosen to interpret the kickback statute broadly and who have engaged in prohibited payment schemes in violation of the statutory intent.

C. Conclusion

For these reasons, we have determined that a regulatory impact analysis is not required. Further we have determined, and the Secretary certifies, that this proposed rule would not have a significant economic impact on a number of small business entities. Therefore, we have not prepared a regulatory flexibility analysis.

IV. Paperwork Reduction Act

Section 1001.952 of this proposed rule contains information collection requirements. As required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3504), we have submitted a copy of this proposed rule to the Executive Office of Management and Budget (EOMB) for its review of these requirements. Other organizations and individuals desiring to submit comments on the information collection requirements should follow the instructions in the ADDRESS section of this preamble.

V. Response to Comments

Because of the large number of comments we normally receive on proposed regulations, we cannot acknowledge or respond to them individually. However, in preparing the final rule, we will consider all comments received timely and respond to the major issues in the preamble to that rule.

List of Subjects in 42 CFR Part 1001

Administrative practice and procedure, Fraud, Health facilities, Health professions, Medicare.

42 CFR Chapter V, Part 1001 would be amended as set forth below:

PART 1001—PROGRAM INTEGRITY: MEDICARE

1. The authority citation for Part 1001 would be revised to read as follows:

Authority: Secs. 1102, 1128, 1128B, 1842(j), 1842(k), 1862(d), 1862(e), 1866(b)(2) (D), (E), and (F), and 1871 of the Social Security Act (42 U.S.C. 1302, 1320a-7, 1320a-7b, 1395u(j), 1395u(k), 1395y(d), 1395y(e), 1395cc(b)(2) (D), (E), and (F), and 1395hh), unless otherwise noted.

2. A new Subpart E is added to Part 1001 to read as follows:

Subpart E—Permissive Exclusions

Sec.
1001.951 Fraud, kickbacks and other prohibited activities.
1001.952 Exceptions.

Subpart E—Permissive Exclusions

§ 1001.951 Fraud, kickbacks and other prohibited activities.

The OIG may exclude any individual or entity that it determines has committed an act described in section 1128B of the Social Security Act, subject to the exceptions set forth in § 1001.952.

§ 1001.952 Exceptions.

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion.

(a) *Investment interests.* As used in section 1128B of the Act, "remuneration" does not include any payment that is a return, such as a dividend, capital gains distribution, or interest income, from an investment obtained for fair market value in the investment securities (including shares in a corporation, bonds, debentures, notes, or other debt instruments) of a corporation that, at the end of the corporation's fiscal year preceding the purchase of the securities, had—

(1) Total assets exceeding $5,000,000, and

(2) A class of equity security held of record by at least 500 persons.

(b) *Space rental.* As used in section 1128B of the Act, "remuneration" does not including payments made by a lessee to a lessor for the use of premises, as long as—

(1) The lease agreement is set out in writing and signed by the parties;

(2) The lease specifies the premises covered by the lease;

(3) If the lease is intended to provide the lessee with access to the premises for periodic intervals of time, rather than on a full-time basis for the term of the lease, the lease specifies exactly the schedule of such intervals their precise length, their periodicity, and the exact rent for such intervals;

(4) The term of the lease is for not less than one year; and

(5) The rental charge is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals of business between the parties reimbursed under Medicare or Medicaid.

For purposes of this section, the term "fair market value" means the value of the rental property for general commercial purposes (not taking account of its intended use), but shall not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the property as a result of its proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee.

(c) *Equipment rental.* As used in section 1128B of the Act, "remuneration" does not include payments made by a lessee of equipment to the owner ("lessor") of the equipment for the use of the equipment, as long as—

(1) The lease agreement is set out in writing and signed by the parties;

(2) The lease specifies the equipment covered by the lease;

(3) If the lease is intended to provide the lessee with use of the equipment for periodic intervals of time rather than on a full-time basis for the term of the lease, the lease specifies exactly the schedule of such intervals, their precise length, their periodicity, and the exact rent for such intervals;

(4) The term of the lease is for not less than one year; and

(5) The rental charge is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals of business between the parties reimbursed under Medicare or Medicaid.

For purposes of this section, the term "fair market value" means the value of the equipment when obtained from a manufacturer or professional distributor, but shall not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the equipment as a result of its proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee.

(d) *Personal services and management contracts.* As used in section 1128B of the Act, "remuneration" does not include payments made by a principal to an agent as compensation for the services of the agent, as long as—

(1) The agency agreement is set out in writing and signed by the parties;

(2) The agency agreement specifies the services to be provided by the agent;

(3) If the agency agreement is intended to provide for the services of the agent on a periodic, sporadic or part-time basis, rather than on a full-time basis for the term of the agreement, the agreement specifies exactly the schedule of such intervals, their precise length, their periodicity, and the exact charge for such intervals;

(4) The term of the agreement is for not less than one year; and

(5) The aggregate compensation paid to the agent over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner than takes into account the volume or value of any referrals of business between the parties that is reimbursed under Medicare or any State health care program.

For purposes of this section, an agent of a principal is any person, other than a bona fide employee, who has an agreement to perform services for, or on behalf of, the principal.

(e) *Sale of practice.* As used in section 1128B of the Act, "remuneration" does not include payments made to a practitioner by another practitioner where one practitioner is selling his or her practice to another practitioner, as long as—

(1) The period from the date of any agreement pertaining to the sale to the completion of the sale is not more than one year; and

(2) The practitioner who is selling his or her practice will not be in a professional position to make referrals to the purchasing practitioner after one year from the date of the agreement.

(f) *Referral services.* As used in section 1128B of the Act, "remuneration" does not include payments by a physician to an entity which offers to the public that it will refer a person to a physician for medical services, as long as—

(1) The entity does not exclude any qualified physician from participation in the referral service;

(2) Any fee for participation in the referral service is charged equally to all physicians and is reasonably related to the cost of operating the referral service;

(3) The entity imposes no requirements on the manner in which the physician provides services to a referred person, except that the entity may require that these services be furnished free of charge or at reduced charge to the patient; and

(4) The entity makes a disclosure to each person referred as to—

(i) The manner in which it selects a physician for the person.

(ii) The nature of the relationship between the entity and the physicians to whom it makes referrals, and

(iii) The nature of any restrictions that would exclude a physician from the pool of physicians to whom referrals are made.

(g) *Warranties.* As used in section 1128B of the Act, "remuneration" does not include payments by a manufacturer or supplier of an item to the purchaser of the item as compensation for any loss sustained by the purchaser due to the failure of the item to operate as intended, as long as the payment—

(1) Is made in accordance with a written affirmation made in connection with the original sale of the item by the supplier to the purchaser, with such affirmation relating to the nature of the material or workmanship and affirming or promising that such material or workmanship is defect-free or will meet a specified level of performance over a specified period of time; and,

(2) Is reasonably related to the economic loss that would otherwise be sustained by the purchaser, including, but not limited to—

(i) either a refund of the purchase price or the repair or replacement of the defective item, and

(ii) reimbursement of any costs associated with replacing the product.

(h) *Discounts.* (1) As used in section 1128B of the Act, a discount is a reduction in the amount a seller charges for a good or service to a buyer (who buys either directly or through a contract with a group purchasing organization) that appears on the invoice or statement. Discounts do not include rebates of cash, other kinds of free goods or services, redeemable coupons, credit towards the future purchase of any goods or services, routine reductions or waivers of any coinsurance or deductible amount owed by program beneficiaries for other than inpatient hospital services, or other remuneration in cash or in kind.

(2) A reduction in a seller's charge is considered a discount as long as an individual or entity that solicits or receives such discount—

(i) On an item or service for which payment is made on the basis of a reasonable cost, acquisition cost, or prospectively determined payment amounts (such as prospective payments system payments to hospitals, or the composite rate paid to providers of maintenance renal dialysis services), fully and accurately reports the discount in the applicable cost reporting mechanism or claim for payment filed with the Department, a State agency or one of their agents;

(ii) On an item or service for which payment is made in whole or in part on the basis of charges—

(A) Fully and accurately reports the discount in the applicable claim for payment filed with the Department, a State agency, or one of their agents, and

(B) Reduces the charge to the program or the beneficiary by the full amount of the discount; or

(iii) Is a health maintenance organization or competitive medical plan paid for by Medicare as a risk contractor under the Tax Equity and Fiscal Responsibility Act of 1982, as authorized under section 1876 of the Act, or by a Medicaid State agency on a similar basis.

(i) *Employees.* As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the provision of covered items or services. For purposes of this section, the term "employee" has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

(j) *Group purchasing organizations.* As used in section 1128B of the Act, "remuneration" does not include payments by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed by Medicare or Medicaid, as long as—

(1) The purchasing agent has a written agreement with each individual or entity in the group that specifies the amount the agent will be paid by each vendor (where such amount may be a fixed sum or a fixed percentage of the value of purchases made from the vendor by the members of the group under the contract between the vendor and the purchasing agent); and

(2) In the case of an entity that is a provider of services, the agent discloses in writing to the entity at least annually, and to the Secretary upon request, the amount received from each vendor with respect to purchases made by or on behalf of the entity.

Dated: January 12, 1989.

R.P. Kusserow,

Inspector General, Department of Health and Human Services.

Approved: January 13, 1989.

Otis R. Bowen,

Secretary.

[FR Doc. 89-1275 Filed 1-17-89; 10:59 am]

BILLING CODE 4150-04-M

DEPARTMENT OF THE INTERIOR

43 CFR Part 11

Natural Resource Damage Assessments

AGENCY: Department of the Interior.

ACTION: Notice of response to comments.

SUMMARY: This Notice responds to the comments received by the Department of the Interior (the Department) on the Advance Notice of Proposed Rulemaking (ANPRM) published on May 3, 1988 (53 FR 15714), concerning the statutory two-year review of the natural resource damage assessment regulations. Section 301(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, requires that regulations promulgated under section 301(c) be reviewed and revised, as appropriate, every two years. The final rule establishing the general assessment process and the type B procedures was published on August 1, 1986 (51 FR 21674). Therefore, the Department published the ANPRM of May 3, 1988, requesting information based specifically on experience with application of the general administrative process and the type B assessment procedures. The Department also requested information drawn from any new technology not available when the regulations were developed. Only four comments were received in response to the ANPRM. Based on its review of the comments received, the Department has determined that it would not be appropriate to revise these regulations at this time. This Notice presents the Department's response to those comments.

ADDRESS: Office of Environmental Project Review, Room 4239, ATTN: NRDA Regulations; Department of the Interior, 1801 C Street, NW., Washington, DC 20240 (Regular business hours 7:45 a.m. to 4:15 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: David Rosenberger or Linda Burlington (202) 343-1301.

SUPPLEMENTARY INFORMATION:

I. Background

Section 301(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601 et seq., requires the promulgation of regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a

discharge of oil or a release of a hazardous substance for the purposes of CERCLA and section 311(f) (4) and (5) of the Clean Water Act (CWA), 33 U.S.C. 1251 et seq. (also known as the Federal Water Pollution Control Act). Section 301(c)(3) states that the regulations shall be reviewed and revised as appropriate every two years

On August 1, 1986 (51 FR 27674), the Department published a final rule that provides the general process for conducting natural resource damage assessments, and the alternative methodologies for conducting assessments in individual cases otherwise known as the "type B" procedures. A notice was issued on November 16, 1987 (52 FR 43763), announcing the availability of five final type B technical information documents that were prepared in conjunction with the development of the type B assessment procedures. On March 20, 1987 (52 FR 9042), the Department published a final rule that contains standard procedures for simplified assessments, known as the "type A" procedures. On February 22, 1988 (53 FR 5166), the Department published a final rule to amend 43 CFR Part 11 to conform with amendments to CERCLA brought about by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Finally, on March 25, 1988, the Department published technical corrections to the NRDAM/CME (53 FR 9769). These rules together, codified at 43 CFR Part 11, comprise the natural resource damage assessment regulations called for by section 301(c) of CERCLA. Natural resource damage assessments performed by Federal or State trustees in accordance with these regulations are provided the legal evidentiary states of a rebuttable presumption in an administrative or judicial proceeding, as provided by section 107(f)(2)(C) of CERCLA.

In order to carry out the statutory requirement that the natural resource damage assessment regulations be reviewed and revised as appropriate every two years, the Department published an Advance Notice of Proposed Rulemaking (ANPRM) to begin the biennial review of the general assessment process and the type B procedures on May 3, 1988 (53 FR 15714). The ANPRM sought public comment reflecting experience with the general assessment process and the type B procedures contained in the August 1, 1986, regulations. The type A procedures were developed later and the Department will begin the review of the type A procedures at a later date.

In the ANPRM of May 3, 1988, the Department asked for information based specifically on experience with application of the general administrative process and the type B assessment procedures. Since section 301(c) of CERCLA states that the regulations shall identify the "best available" procedures, the Department also requested information drawn from any new technology not available when the regulations were developed. Comments were asked to focus on all Subparts of 43 CFR Part 11 except Subpart D and §§ 11.31 and 11.33 of Subpart C, which pertain to the type A procedures.

Suggestions were solicited for possible revision of the regulations where experience has shown a different approach that may be adopted or where procedures not incorporated in the regulations have since been sufficiently developed to be included. Comments were asked to address the following questions: (1) Where and how have the assessment process and the type B procedures been applied, for example, geographical location, environmental setting, etc.?; (2) How effective was the assessment process in these applications?; (3) In what type of situation has the assessment process been used, for example, in settlement negotiations, court actions, etc.?; (4) What are recommendations for modification of the assessment process and the type B procedures based on the applications mentioned above?; and (5) How effective has the process been pertaining to restorations and the ability to apply funds recovered towards planned restoration activities?

The Department also asked for any relevant information not available at the time the type B procedures were developed. Section 301(c) of CERCLA states that such regulations shall identify the "best available" procedures to determine damages to natural resources. In order to ensure that the type B procedures are the "best available" procedures, the Department wanted to know of any new methodologies or protocols that might be incorporated into the type B procedures. For example, new methodologies or technical information might exist in such areas as defining injuries to the resources and determining the extent of and compensation for the injury.

The Department stated in the ANPRM that it would, upon review of the comments received, determine the need for revisions to the general assessment process or to the type B procedures. The comment period for that ANPRM closed July 5, 1988.

II. Response to Comments

Only four comments to the ANPRM were received by the Department. Not only was the ANPRM published in the **Federal Register,** but copies were sent to over 900 names on the Department's mailing list compiled since the first ANPRM concerning the regulations, in January of 1983. A general view expressed in the comments was that there has been, as yet, no experience with the regulations. Two of the commenters recommended that the Department not make significant revisions to the rule at this time. They stated that there has been little practical experience with rule and there is, as yet, no new information to be considered. One of these two commenters suggested that, instead of significantly revising the regulations, the Department should: (1) initiate an educational effort for the existing rule; (2) require prompt identification of trustees to expedite trustee action; (3) amend the regulations to call for earlier notification and involvement of potentially responsible parties (PRPs); and (4) identify specific coordination points within the National Contingency Plan (NCP) response actions. The other comment stated that the Department should eliminate the use of contingent valuation methodology from the regulations, or to incorporate into the rule procedural safeguards for its use.

The Department agrees with the general suggestion that the Department initiate education of natural resource trustees and the general public as to the natural resource damage assessment regulations. The Department is proceeding at this time with the development of an outreach program. The effort will assist in facilitating consistent understanding and application of the regulations among all parties; and help to improve coordination and expedited actions with other aspects of response and cleanup measures.

The Department does not agree with the specific comment that the regulations should be amended at this time to make procedural changes to the administrative process contained within the rule. As was noted by this and other commenters, there has been little practical experience to date with the application of the rule. Making procedural changes based solely on a few isolated experiences should not be considered as representative of a general trend or reflective of widespread difficulties in proceeding through the assessment process.

The Department notes that section 104(b)(2) of CERCLA requires that Federal and State natural resource trustees be given prompt notification and requires coordination of assessments, investigations and planning that may be occurring under section 104 of CERCLA. The proposed changes to the NCP would highlight this requirement. The Department is also aware that the respective state governors are now designating their natural resource trustees to the Environmental Protection Agency (EPA), as required by section 107(f)(2)(B) of CERCLA, which will further understanding of the preassessment process. The Department has been working with the EPA on the issue of timely notification of trustees. Section 11.20(c) of the Department's rule already provides instructions to the natural resource trustees to assist, as needed, in identifying other natural resource trustees whose resources may be affected as a result of shared responsibility for the resource and who should be notified. Further, § 11.32(a)(1) of the rule requires coordination of natural resource trustees prior to the development of the Assessment Plan. Guidance is also provided within that section on the selection of a lead authorized official from among the respective trustees participating in the assessment. The Department considers that these provisions of the rule, in conjunction with the requirements of CERCLA, are sufficient until wider experience indicates changes are needed.

The rule at § 11.32(a)(2) requires formal identification and involvement of the potentially responsible party in the development of a natural resource damage assessment plan. The Department recognizes that in many instances the potentially responsible party may be known to the natural resource trustee prior to the development of an Assessment Plan. As was stated in the preamble to the final rule (51 FR 27700), however, prior to the formulation of the assessment plan, decisions on proceeding with an assessment are generally based on questions of jurisdiction, statutory authority and internal agency authority, and on the severity of the potential for natural resource injury. It is, therefore, inappropriate to require specific identification and involvement of the PRP during the time that these internal issues are being resolved.

The Department has not defined, in the natural resource damage assessment rule, specific coordination points within the EPA's NCP response actions. The Department considers that the provisions of the natural resource damage assessment process, as appropriate, with that of the NCP.

The second commenter stated that the Department should eliminate the use of contingent valuation methodology from the regulations, or should incorporate into the rule procedural safeguards for its use. The Department's response is that there are procedural safeguards present in the rule pertaining not just to the use of contingent valuation techniques, but to the entire damage assessment process. The guidance found in § 11.84, the provisions for public (and PRP) review and input to the process and the relevant technical information document all provide guidance for applying the contingent valuation methodologies. Since all these safeguards are already present in the rule, and lacking wider experience with the use of these provisions, there is no need to revise the rule.

The third commenter stated that the regulations are unworkable because they fail to adequately value natural resource damages. The commenter recommended that the regulations be significantly modified to conform with the revisions suggested in the commenter's legal brief filed in *State of Ohio* v. *Department of the Interior.*

The Department's reply is that the issues raised are currently before the U.S. Court of Appeals for the District of Columbia Circuit, as provided for in section 113 of CERCLA, and will be resolved by that court. The legal review of the rules is currently on-going. Since the issues raised by the commenter pertain to legal interpretations of CERCLA, it is appropriate that the resolution of these differing interpretations be resolved by the court. The regulations are valid, final regulations that are in effect for natural resource damage assessments.

The fourth commenter stated that he had not had any experience to date with the rules and, thus, had no comments to offer at this time. The commenter indicated that should he gain experience with the rules, he would be pleased to share his insights with the Department.

III. Conclusion

Based on review of the comments received on the ANPRM of May 3, 1988, the Department has determined that it is not appropriate to revise the general assessment process and the type B procedures at this time. Information received through these comments shows that there has been too little experience to warrant revisions to either the general damage assessment process or the type B procedures. Also, no new information or new technologies in this area have been brought to the attention of the Department to justify revising the regulations.

Dated: January 13, 1989.

Bruce Blanchard,

Director, Office of Environmental Project Review.

[FR Doc. 89-1291 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-RG-M

Notices

Federal Register
Vol. 54, No. 13
Monday, January 23, 1989

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

Commodity Credit Corporation

Counties Designated as Suitable for Growing Extra Long Staple Cotton

AGENCY: Commodity Credit Corporation.

ACTION: Notice of Counties Designated as Suitable for Growing Extra Long Staple Cotton During Marketing Year 1989.

SUMMARY: In accordance with 7 CFR 1413.3(n), the following counties have been designated as suitable for growing extra long staple cotton during marketing year 1989:

Arizona: Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pima, Pinal, Santa Cruz, Yavapai, and Yuma. (La Paz County was created from Yuma County as a result of an action of the Arizona State legislature and is approved for ELS.)

California: Imperial and Riverside.

Florida: Alachua, Hamilton, Jefferson, Madison, Marion, Suwannee, and Union.

Georgia: Berrien and Cook.

New Mexico: Chaves, Dona Ana, Eddy, Hildalgo, Luna, Otero, and Sierra.

Texas: Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Loving, Pecos, Presidio, Reeves and Uvalde.

Before March 31, 1989, as deemed appropriate by the Commodity Credit Corporation, additional counties may be designated as suitable for growing extra long staple cotton during marketing year 1989.

Authority: Sec. 103(h) of the Agricultural Act of 1949, as amended, 97 Stat. 494, as amended, (7 U.S.C. 1444(h)).

FOR FURTHER INFORMATION CONTACT: Charles V. Cunningham, Leader, Fibers Group, Commodity Analysis Division, USDA-ASCS, Room 3758 South Building, P.O. Box 2415, Washington, DC 20013 or call (202) 447-7954.

Signed at Washington, DC, January 6, 1989.

Milton Hertz,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 89-1326 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-05-M

Forest Service

Last Chance Compartment Timber Sale(s); Plumas National Forest, Plumas County, CA; Intent To Prepare an Environmental Impact Statement

The Department of Agriculture, Forest Service will prepare an environmental impact statement for a proposed timber sale(s) within the Last Chance Compartment, Ward Management Area No. 30 of the Greenville Ranger District.

The Plumas National Forest Land and Resource Management Plan has been prepared. This Plan directs that timber be managed on a regulated basis on lands classified as capable, available and suitable for scheduled timber production. The proposed timber sale project is included in The Plumas Timber Harvest Schedule for Fiscal Year 1991. The harvest objective for the project(s) is 12 million board feet.

Some initial scoping and analysis have been completed on this project. Comments received during the original scoping will be retained and considered in the analysis.

Federal, State and local agencies; potential purchasers; and other individuals or organizations who may be interested in or affected by the decision will be invited to participate in the scoping process. This scoping process will include:

1. Identification of potential issues.
2. Identification of issues to be analyzed in depth.
3. Elimination of insignificant issues or those which have been covered by a previous environmental review.
4. Determination of potential cooperating agencies and assignment of responsibilities.

The Fish and Wildlife Service, Department of Interior, will be invited to participate as a cooperating agency to evaluate potential impacts on threatened and endangered species habitat if any such species are found to exist in the potential timber sale(s) area.

The District Ranger will hold a public meeting at the Town Hall, Greenville, CA at 1 p.m., Saturday, February 18, 1989. Mary J. Coulombe, Forest Supervisor, Plumas National Forest, Quincy, California is the responsible official.

The analysis is expected to take about 1-2 months to complete. The Draft Environmental Impact Statement should be available for public review by May 1989. The Final Environmental Impact Statement should be available for public review by November 1989.

Written comments and suggestions concerning the scoping or analysis should be sent to Michael R. Williams, District Ranger, Greenville Ranger District, P.O. Box 329, Greenville, CA 95947.

Questions about the proposed action and Environmental Impact Statement should be directed to Conrad P. Nussbaumer, Sale Planning Forester, Greenville Ranger District, phone (916) 284-7126 extension 250.

Dated: January 12, 1989.

Mary J. Coulombe,

Forest Supervisor.

[FR Doc. 89-1343 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census
Title: Survey of Income and Program Participation, 1988 Panel Wave 5
Form Number: SIPP-8500 Wave 5 Questionnaire, SIPP-85/7803 Reminder Card, and SIPP 85-7805(L) Introductory Letter
Agency Approval Number: 0607-0595
Type of Request: Revision
Burden: 12,180 hours
Number of Respondents: 24,360
Avg Hours Per Response: 30 minutes
Needs and Uses: This survey provides statistics not previously available for the Executive and Legislative Branches, such as multiple recipiency of benefits of major government programs and monthly program participation to support policy analyses. The data requirements

include income, employment and household composition, taxes, assets, in-kind income, and related subjects to estimate the effects of Executive and Legislative decisions.

Affected Public: Individuals or households

Frequency: One time only

Respondent's Obligation: Voluntary

OMB Desk Officer: Francine Picoult, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: January 13, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89-1296 Filed 1-19-89; 8:45 am]

BILLING CODE 3510-07-M

International Trade Administration

[A-588-028]

Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Review and Intent To Revoke In Part

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review and intent to revoke in part.

SUMMARY: On November 1, 1988, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on roller chain, other than bicycle, from Japan. The review covers Tsubakimoto, a manufacturer/exporter of this merchandise to the United States, and the period April 1, 1986 through March 31, 1987.

We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received and the correction of certain clerical errors, we have changed the margin from that presented in our preliminary results of review to a *de minimis* amount. We intend to revoke the antidumping finding with respect to Tsubakimoto.

EFFECTIVE DATE: January 23, 1989.

FOR FURTHER INFORMATION CONTACT: Edward F. Haley or Robert J. Marenick, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5255.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 1988, the Department of Commerce ("the Department") published in the **Federal Register** (53 FR 44057) the preliminary results of its administrative review of the antidumping finding on roller chain, other than bicycle, from Japan (38 FR 9226, April 12, 1973). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by this review are shipments of roller chain, other than bicycle, from Japan. The term "roller chain, other than bicycle," as used in this review includes chain, with or without attachments, whether or not plated or coated, and whether or not manufactured to American or British standards, which is used for power transmission and/or conveyance. Such chain consists of a series of alternately-assembled roller links and pin links in which the pins articulate inside the bushings and the rollers are free to turn on the bushings. Pins and bushings are press fit in their respective link plates. Chain may be single strand, having one row of roller links, or multiple strand, having more than one row of roller links. The center plates are located between the strands of roller links. Such chain may be either single or double pitch and may be used as power transmission or conveyor chain.

This review also covers leaf chain, which consists of a series of link plates alternately assembled with pins in such a way that the joint is free to articulate between adjoining pitches. This review further covers chain model numbers 25 and 35. Roller chain, other than bicycle, is currently classifiable under various Harmonized Tariff Schedule item numbers from 7315.11.00 through 7616.90.00. HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers Tsubakimoto Chain Co. ("Tsubakimoto"), a manufacturer/exporter of Japanese roller chain, other than bicycle, to the United States, and the period April 1, 1986 through March 31, 1987.

Analysis of Comments Received

We invited interested parties to comment on the preliminary results. We received comments from the petitioner, the American Chain Association ("the ACA"), and Tsubakimoto. We have made adjustments for certain clerical errors. Other claimed clerical errors are discussed below.

Comment 1: Tsubakimoto argues that the Department erroneously excluded from the review approximately 500 exporter's sales price ("ESP") sales where merchandise was shipped by U.S. Tsubaki, Inc. ("UST") prior to the review period but invoiced to the customer during the period of review. ESP sales were reported on the basis of invoice date, usually only a day or two after shipment date. The invoice date is the date on which all terms of sale are reduced to a single document and booked on UST's financial records. Also, the Department did not notify the respondent that it would be using sales based on shipping date rather than invoice date until October 1988, when it was too late to supply data based on date of shipment.

Department's Position: We consider the date of sale to be the date on which the terms of sale are fixed. In this case, we view the shipping date as more indicative of this date than the invoice date, which was usually later than the date of shipment, occasionally by more than a week. We accepted the date of invoice as the date of sale until verification. At that time, we learned that the date of purchase was not recorded because most orders were taken by phone and shipping documents were prepared the same or next day, noting the merchandise, price, quantity, and payment terms. At verification the Department informed UST that we would likely use the date of shipment as the date of sale, but UST presented no new data based on date of shipment prior to the preliminary results of review. It is the Department's practice not to accept new information after the preliminary determination.

Comment 2: Tsubakimoto, citing *Timken Co.* v. *United States*, 673 F. Supp. 495 (CIT 1987), contends that the Department incorrectly deducted credit expense, a direct selling expense, from ESP. Respondent maintains that the Department's practice of deducting direct selling expenses from U.S. price as a means of making a circumstance of sale adjustment pursuant to section 772 of the Tariff Act is contrary to the holding in *Timken*, which requires the Department to make adjustments for

direct selling expenses to the foreign market value.

Department's Position: Deducting these expenses from the U.S. selling price is consistent with section 772(e) of the Tariff Act which requires the Department to reduce ESP for "expenses generally incurred by and for the account of the exporter in selling identical or substantially identical merchandise * * *" Furthermore, *Timken* has been remanded to the Department and is not yet final. The Department will continue to deduct direct selling expenses from both the U.S. and home market prices in ESP situations, pending a final determination of this issue in the courts.

Comment 3: Tsubakimoto contends that the Department erred in failing to make any adjustments to accommodate the rapid appreciation of the Japanese yen. Respondent states that in fair value investigations the Department may depart from its practice of using exchange rates in effect on the date of sale, citing 19 CFR 353.56(b), and claims that the same principle of fairness should apply in this review.

Department's Position: We disagree. 19 CFR 353.56(b) is a special rule for *fair value* investigations which allows us to compensate for price differences resulting from sustained changes or temporary fluctuations in prevailing exchange rates. No provision is made for this adjustment in section 751 . administrative reviews. *See Potassium Permanganate from Spain* (53 FR 21504, June 8, 1988).

Comment 4: Tsubakimoto requests that the Department issue a final revocation should the final results of this administrative review result in no or *de minimis* margins.

Department's Position: The Department has been ordered by the CIT not to revoke the finding with respect to Tsubakimoto until the matter has been decided by the Court (*UST Inc. and Tsubakimoto Chain Company* v. *United States,* Court No. 86-08-00993, Order dated February 4, 1988). We are not issuing a final revocation by this notice. This notice only contains an intent to revoke.

Comment 5: The ACA argues that sales to related parties were included in the calculation of foreign market value, contrary to 19 CFR 353.22(b). Tsubakimoto had not demonstrated that related-party transactions were made at prices comparable to those charged to unrelated customers. Although the ACA formally raised this issue with the Department on May 4, 1988, the matter was not addressed during the subsequent Tsubakimoto verification. Furthermore, even if the Department uses related party sales, it should not allow deductions for discounts and rebates in calculating foreign market value because these adjustments are intracorporate transfers of funds.

Department's Position: At verification we determined that sales to related parties were made on the same basis and at comparable gross prices as sales to unrelated parties. In addition, we verified that discounts and rebates were granted equally to related and unrelated distributors. In this and previous reviews of Tsubakimoto the Department found no price discrimination based on relationship. We have supplemented our verification report to cover this area more thoroughly.

Comment 6: The ACA claims that the Department should have made a level-of-trade adjustment to U.S. price because all home market sales were to distributors, while substantial numbers of U.S. sales, particularly purchase price sales, were made to end-users. The petitioner argues that end-user sales would have to be made at higher prices than prices to distributors in the home market, and that an adjustment, in compliance with 19 CFR 353.19, is necessary. The ACA further argues that the Department should make the adjustment by reducing prices to end-users in the U.S. in the amount of "Discount C." This discount is granted to certain home market distributors who perform sales office functions for Tsubakimoto in areas where Tsubakimoto has no sales office. The petitioner claims that Discount C is representative of selling expenses Tsubakimoto would have incurred in Japan in selling directly to end-users rather than through distributors.

Department's Position: We disagree. A level-of-trade adjustment is an amount added to or subtracted from home market prices (19 CFR 353.13 and 353.19), not an adjustment to U.S. prices as suggested by the petitioner. The purpose of the adjustment is to create an "apples-to-apples" comparison of the United States price to foreign market value by adjusting the home market price at one level of trade to represent what the price would have been in the home market at a different level of trade.

Assuming that Discount C represents additional expense Tsubakimoto would have incurred in selling to end-users in Japan, and an adjustment for level of trade is warranted, it would have to be made by increasing the prices to the distributors by the amount of Discount C. This argument however, was not made by the ACA. Moreover, we have no basis to assume that Discount C represents expenses Tsubakimoto would have incurred in selling to end-users because Discount C was granted to distributors in the home market selling to other distributors. Thus, the discount is not relevant to any sales which might have been made to end-users. Lacking relevance, it cannot be used to quantify a level-of-trade adjustment.

The ACA presents no cogent argument that sales to end-users would differ from those to distributors. In light of the absence of any evidence that a difference in level of trade affects the prices, and the absence of any relevant information quantifying the cost differences in selling to different levels of trade in the same market, no adjustment is justified.

Comment 7: The petitioner claims the Department made no adjustment for technical service on U.S. sales and that technical service was not included as a cost in calculating constructed value.

Department's Position: We disagree. On U.S. sales, the Department included technical service as part of UST's selling and administrative expenses. Technical service was also included in constructed value.

Comment 8: The ACA objects to the allocation of foreign inland freight on the basis of sales value rather than on weight and/or volume. They claim this overstates home market freight costs, which are much higher than foreign inland freight costs for shipments to the United States.

DOC Position: We have accepted Tsubakimoto's allocation of foreign inland freight expenses by value rather than by weight, consistent with our practice in previous administrative reviews of Tsubakimoto, because freight costs were incurred in ways not related to weight and/or volume. Most domestic deliveries are made by chartered trucks or contract trucks. Chartered truck fees are based on distance and the number of trips a truck makes. Contract truck fees are per day, whether a truck is used or not.

Both chartered and contract trucks carry a mixture of Tsubakimoto products, including those not of the same class or kind as covered roller chain. U.S. foreign inland freight costs were less than home-market freight costs because the U.S. product was shipped in containers over a short distance to the port, compared to non-containerized longer distance domestic shipments.

Comment 9: The petitioner states that the constructed values of chain purchased from companies related to Tsubakimoto represent only the cost of acquiring chain and do not reflect

Tsubakimoto's SG&A expenses, profit, and packing costs. The ACA also claims an unexplained discrepancy in the reported number of related firms producing chain for Tsubakimoto, saying Tsubakimoto reported three in its questionnaire response but only two were noted at verification.

DOC Position: We disagree. The verification report and calculations provided to the ACA show that in calculating constructed value we used Tsubakimoto's actual SG&A expenses, the statutory minimum profit of eight percent, and added back Tsubakimoto's U.S. packing costs. There was no discrepancy in the number of related firms selling to Tsubakimoto. Three related firms sold made-to-order roller chain to Tsubakimoto, but we selected only two for verification.

Comment 10: The Petitioner is concerned that the reported figure for inventory carrying costs does not reflect imputed interest costs between the date of shipment from Japan and the date of receipt by UST and claims that ESP inventory carrying costs should be increased accordingly.

DOC Position: Inventory carrying costs used were verified and do reflect interest expense from date of shipment to date of receipt. We have supplemented our verification report to reflect this fact.

Comment 11: The ACA objects to the correction of "clerical errors" made by Tsubakimoto based on Tsubakimoto's submission of documentation after verification and the preliminary results of this review.

DOC Position: We consider new information submitted by Tsubakimoto subsequent to verification and the preliminary results to be untimely. Therefore, we have not allowed the recalculation of certain constructed values based on new documents showing mathematical errors made by Tsubakimoto in its questionnaire response. We will not allow respondents to selectively amend their responses to their advantage after verification unless the errors are so obvious they can be corrected without additional information. Tsubakimoto had ample time between the submission of their response on February 22, 1988 and the verification in May 1988 to correct any errors.

Comment 12: The petitioner objects to the Department's adjusting constructed value for packing and inland freight costs because constructed value should already include U.S. packing and should not include inland freight.

DOC Position: In their response, Tsubakimoto presented constructed values that included inland freight and home market packing. Constructed value should include U.S. packing but not inland freight. Therefore, we deducted inland freight and home market packing and added U.S. packing which was not included in the original submission. Failure to do so would have resulted in an erroneous constructed value.

Final Results of Review and Intent to Revoke in Part: Based on our analysis of the comments received and the corrrection of certain clerical errors, we determine that a weighted-average dumping margin of 0.47 percent *ad valorem* exists for Tsubakimoto during the period April 1, 1986 through March 31, 1987. The Department considers any rate less than 0.5 percent *ad valorem* to be *de minimis*.

For the reasons set forth in the tentative determination to revoke in part (48 FR 39673, September 1, 1983), and because *de minimis* margins were found in this review, we are satisfied that there is no likelihood of resumption of sales at less than fair value by Tsubakimoto. Accordingly, we intend to revoke in part the antidumping finding on roller chain, other than bicycle, from Japan. If this partial revocation becomes final it will apply to all unliquidated entries of this merchandise manufactured and exported by Tsubakmoto and entered, or withdrawn from warehouse, for consumption on or after September 1, 1983, the date of our tentative determination to revoke with respect to this firm, pending further order of the CIT.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences beween United States price and foreign market value may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, since the margin for Tsubakimoto is *de minimis*, the Department will not require a cash deposit for this firm, in accordance with section 751(a)(1) of the Tariff Act. For any shipments from the remaining known manufacturers and/or exporters not covered by this review, a cash deposit shall be required at the rates published in the final results of the last administrative review for each of those firms. For any shipments from a new exporter, whose first shipments occurred after March 31, 1987 and who is unrelated to Tsubakimoto or any previously reviewed firm, no cash deposit shall be required. These deposit requirements are effective for all shipments of Japanese roller chain, other than bicycle, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review, intent to review, intent to revoke in part, and notice are in accordance with section 751(a)(1) and (c) of the Tariff Act (19 U.S.C. 1675(a)(1) and (c)) and 19 CFR 353.53a and 353.54.

Jan W. Mares,

Assistant Secretary for Import Administration.

Date: January 17, 1989.

[FR Doc. 89-1392 Filed 1-18-89; 9:56 am]

BILLING CODE 3510-DS-M

COMMISSION OF FINE ARTS

Meeting

The Commission of Fine Arts' next scheduled meeting is Thursday, 23rd February 1989 at 10:00 a.m. at the Commission's offices at 708 Jackson Place NW., Washington, DC 20006 to discuss various projects affecting the appearance of Washington, DC, including buildings, memorials, parks, etc.; also matters of design referred by other agencies of the government. Handicapped persons should call the offices (566-1066) for details concerning access to meetings.

Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Mr. Charles H. Atherton, Secretary, Commission of Fine Arts, at the above address or call the above number.

Dated in Washington, DC, 13th January 1989.

Charles H. Atherton,

Secretary.

[FR Doc. 89-131 Filed 1-19-89; 8:45 am]

BILLING CODE 6330-01-M

CONSUMER PRODUCT SAFETY COMMISSION

Request for Extension of Approval of Information Collection Requirements; Requirements for Electrically Operated Toys

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Consumer Product Safety Commission has submitted a request to the Office of Management and Budget for an extension of approval

through December 31, 1991, of its approval of information collection requirements in 16 CFR Part 1505. That rule requires manufacturers and importers of certain electrical toys and other children's products to provide warning and identification labeling and to establish and maintain a quality assurance program. In addition, manufacturers and importers must make, keep, and maintain for three years records of sales and distribution, material and production specifications, a description of the quality assurance program, and the results of all inspections and tests conducted.

The purposes of these reporting requirements are to reduce risks to children of electrocution, electric shock, electrical burns, and thermal burns associated with electrical toys and children's products, and to help determine the extent to which manufacturers and importers are complying with requirements of 16 CFR Part 1505.

Additional Information About the Requested Extension of Approval of Requirements for Collection of Information

Agency Address: Consumer Product Safety Commission, Washington, DC 20207.

Title of Information Collection: Requirements for Electrically Operated Toys or Other Electrically Operated Articles Intended for Use by Children, 16 CFR 1505.4(a)(3).

Type of Request: Extension of approval.

Frequency of Collection: Recordkeeping, plus occasional reporting at the request of the Commission's compliance staff.

General Description of Respondents: Manufacturers and importers of electrically operated toys and children's articles.

Estimated Number of Respondents: 40.

Estimated Average Number of Hours per Respondent per Year: 200—160 hours testing; 40 hours recordkeeping.

Estimated Number of Hours for All Respondents per Year: 8,000.

Comments: Comments about this request for extension of approval of information collection requirements should be addressed to Pamela Barr, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; telephone (202) 395-7340. Copies of the request for extension of approval of information collection requirements are available from Francine Shacter, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 492-6416.

This is not a proposal to which 44 U.S.C. 3504(h) is applicable.

Dated: January 13, 1989.

Sadye E. Dunn,

Consumer Product Safety Commission.

[FR Doc. 89-1349 Filed 1-19-89; 8:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an information collection requirement concerning Drug-Free Workplace. Because of the statutory deadline for implementation of the Drug-Free Workplace Act of 1988, and the fact that the information collection being requested follows statutory language, we have requested that OMB/OIRA take action to permit publication of a rule on January 31, 1989.

ADDRESS: Send comments to Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Office of Federal Acquisition and Regulatory Policy, (202) 523-3847.

SUPPLEMENTARY INFORMATION:

a. Purpose

Pub. L. 100-690, the Drug-Free Workplace Act of 1988, mandates that: (1) Government contract employees notify their employer of any criminal drug statute conviction for a violation occurring in the workplace; and (2) Government contractors after receiving notice of such conviction, must notify the Government contracting officer. These requirements are effective as of March 18, 1989.

The information provided to the Government will be used to determine contractor compliance with the statutory requirements to maintain a drug-free workplace.

b. Annual Reporting Burden

The annual reporting burden is estimated as follows: Respondents, *600*; responses per respondent, *1*; total annual responses, *600*; hours per response, *.17*; and total response burden hours, *102*.

c. Annual Recordkeeping Burden

The annual recordkeeping burden is estimated as follows: Recordkeepers, *600*; hours per recordkeeper, *.5*; and total recordkeeping burden hours, *300*.

Obtaining Copies of Proposals: Requester may obtain copies from General Services Administration, FAR Secretariat (VRS), Room 4041, Washington, DC 20405, telephone (202) 523-4755. Please cite OMB Control No. 9000-00XX, Drug-Free Workplace.

Dated: January 12, 1989.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 89-1305 Filed 1-19-89; 8:45 am]

BILLING CODE 6820-61-M

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision of a currently approved information collection concerning termination settlement proposal forms (Standard Forms 1435-1440).

ADDRESS: Send comments to Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein, Office of Federal Acquisition and Regulatory Policy, (202) 523-3775.

SUPPLEMENTARY INFORMATION:

a. Purpose

The termination settlement proposal forms (Standard Forms 1435 through 1440) provide a standardized format for listing essential cost and inventory information needed to support the terminated contractor's negotiation position. Submission of the information assures that a contractor will be fairly reimbursed upon settlement of the terminated contract.

b. Annual reporting burden

The annual reporting burden is estimated as follows: Respondents, *600*; responses per respondent, *1*; total annual responses, *600*; preparation hours per response, *2.5*; and total reporting burden hours, *1,500*.

Obtaining Copies of Proposal

Requester may obtain copies from General Services Administration, FAR Secretariat (VRS), Room 4041, Washington, DC 20405, telephone (202) 523–4755. Please cite OMB Control No. 9000–0012, Termination settlement proposal forms.

Dated: January 11, 1989.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 89–1308 Filed 1–19–89; 8:45 am]

BILLING CODE 6820–61–M

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to approve an information collection requirement concerning Prompt Payment.

ADDRESS: Send comments to Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson, Office of Federal Acquisition and Regulatory Policy, (202) 523–3781.

SUPPLEMENTARY INFORMATION:

a. *Purpose.* Part 32 of the Federal Acquisition Regulation (FAR) and the clause at FAR 52.232–5, Payments Under Fixed-Price Construction Contracts, require that contractors under fixed-price construction contracts certify, for every progress payment request, that payments to subcontractors/suppliers have been made from previous payments received under the contract and timely payments will be made from the proceeds of the payment covered by the certification, and that this payment request does not include any amount which the contractor intends to withhold from a subcontractor/supplier. Part 32 of the FAR and the clause at 52.232–27, Prompt Payment for Construction Contracts, further require that contractors on construction contracts:

(a) Notify subcontractors/suppliers of any amounts to be withheld, and furnish a copy of the notification to the contracting officer;

(b) Pay interest to subcontractors/suppliers if payment is not made by 7 days after receipt of payment from the Government, or within 7 days after correction of previously identified deficiencies;

(c) Pay interest to the Government if amounts are withheld from subcontractors/suppliers after the Government has paid the contractor the amounts subsequently withheld, or if the Government has inadvertently paid the contractor for nonconforming performance; and

(d) Include a payment clause in each subcontract which obligates the contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days after such amounts are paid to the contractor, include an interest penalty clause which obligates the contractor to pay the subcontractor an interest penalty if payments are not made in a timely manner, and include a clause requiring each subcontractor to include these clauses in each of its subcontracts and to require each of its subcontractors to include similar clauses in their subcontracts.

These requirements are imposed by Pub. L. 100–496, the Prompt Payment Act Amendments of 1988.

Contracting officers will be notified if the contractor withholds amounts from subcontractors/suppliers after the Government has already paid the contractor the amounts withheld. The contracting officer must then charge the contractor interest on the amounts withheld from subcontractors/suppliers. Federal agencies could not comply with the requirements of the law if this information were not collected.

b. *Annual reporting burden:* The annual reporting burden is estimated as follows: Respondents, *4,000*; responses per respondent, *3*; total annual responses, *12,000*; hours per response, *.33*; and total response burden hours, *4,000*.

c. *Annual recordkeeping burden:* The annual recordkeeping burden is estimated as follows: Recordkeepers, *20,000*; hours per recordkeeper, *18*; and total recordkeeping burden hours, *360,000*.

Obtaining Copies of Proposals: Requester may obtain copies from General Services Administration, FAR Secretariat (VRS), Room 4041, Washington, DC 20405, telephone (202) 523–4755. Please cite OMB Control No. 9000–00XX, Prompt Payment.

Dated: January 13, 1989.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 89–1342 Filed 1–19–89; 8:45 am]

BILLING CODE 6820–61–M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Individual MCJROTC Instructor Evaluation Summary Report, NAVMC 10942, and OMB Control Number: 0703–0016.

Type of Request: Extension.

Average Burden Hours/Minutes per Response: .30 minutes.

Frequency of Response: Annually.

Number of Respondents: 178.

Annual Burden Hours: 89.

Annual Responses: 178.

Needs and Uses: The purpose of the report is to commit to writing and evaluation of the overall performance of duty of the Senior Marine Instructors who are charged with the responsibility of implementing the Marine Corps Junior Reserve Officer's Training Corps (MCJROTC).

Affected Public: Individuals.

Frequency: Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Dr. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. Timothy Sprehe at the Office of Mangement and Budget, Desk Officer,

Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposed may be obtained from Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, telephone (202) 746-0933.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

January 13, 1989.

[FR Doc. 89-1327 Filed 1-19-89; 8:45 am]

BILLING CODE 3810-01-M

Office of the Secretary

Defense Science Board Task Force on Competitive Strategies; Advisory Committee Meeting

AGENCY: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Competitive Strategies will meet in closed session on February 7, 1989 at the Pentagon, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will periodically review the application of competitive strategies to the selection of technologies, weapons, and support systems, including C3 for emphasis by the Department of Defense.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Pub. L. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that this DSB Task Force meeting, concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

January 13, 1989.

[FR Doc. 89-1328 Filed 1-19-89; 8:45 am]

BILLING CODE 3810-01-M

Office of the Secretary of Defense

Defense Science Board Task Force on Follow-on Forces Attack (FOFA); Cancellation of Meeting

ACTION: Cancellation of meeting.

SUMMARY: The meeting notice for the Defense Science Board Task Force on Follow-on Forces Attack (FOFA) scheduled for January 11, 1989 as published in the **Federal Register** (Vol. 53, No. 238, Page 49907, Monday, December 12, 1988, FR Doc. 88-28509) has been cancelled.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

January 13, 1989.

Defense Wage Committee; Closed Meetings

Pursuant to the provisions of section 10 of Pub. L. 92-463, the Federal Advisory Committee Act, notice is hereby given that a meeting of the Department of Defense Wage Committee will be held on Tuesday, February 7, 1989; Tuesday, February 14, 1989; Tuesday, February 21, 1989; and Tuesday, February 28, 1989 at 10:00 a.m. in Room 1E801, The Pentagon, Washington, DC.

The Committee's primary responsibility is to consider and submit recommendations to the Assistant Secretary of Defense (Force Management and Personnel) concerning all matters involved in the development and authorization of wage schedules for federal prevailing rate employees pursuant to Pub. L. 92-392. At this meeting, the Committee will consider wage survey specifications, wage survey data, local wage survey committee reports and recommendations, and wage schedules derived therefrom.

Under the provisions of section 10(d) of Pub. L. 92-463, meetings may be closed to the public when they are "concerned with matters listed in 5 U.S.C. 552b." Two of the matters so listed are those "related solely to the internal personnel rules and practices of an agency," (5 U.S.C. 552b.(c)(2)), and those involving "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552b.(c)(4)).

Accordingly, the Deputy Assistant Secretary of Defense (Civilian Personnel Policy) hereby determines that all portions of the meeting will be closed to the public because the matters considered are related to the internal rules and practices of the Department of Defense (5 U.S.C. 552b.(c)(2)), and the detailed wage data considered by the Committee during its meetings have been obtained from officials of private establishments with a guarantee that the data will be held in confidence (5 U.S.C. 552b(c)(4)).

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Additional information concerning this meeting may be obtained by writing the Chairman, Department of Defense Wage Committee, Room 3D264, The Pentagon, Washington, DC 20301.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

January 13, 1989.

[FR Doc. 89-1330 Filed 1-19-89; 8:45 am]

BILLING CODE 3810-01-M

Department of The Air Force

Air Force Institute of Technology Board of Visitors, a Subcommittee of the Air University Board of Visitors; Meeting

The Air Force Institute of Technology Board of Visitors, a Subcommittee of the Air University Board of Visitors, will hold an open meeting on March 31, 1989 at 10:00 a.m., in the Commandant's Conference Room (ten seats available), Building 125, Room 2020, Wright-Patterson Air Force Base, Ohio.

The purpose of the meeting is to give the Subcommittee the opportunity to present to the Commandant, Air Force Institute of Technology, a report of findings and recommendations concerning the Institute's educational programs. The findings of the Subcommittee will also be reported to the Commander, Air University, at the next regularly scheduled meeting of the Air University Board of Visitors.

For further information on this meeting, contact Major Ann Lisa Piercy-Pont, Chief, Evaluation and Technology Branch, Directorate of Operations and Plans, Air Force Institute of Technology, (513) 255-5760 or 5480.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 89-1391 Filed 1-19-89; 8:45 am]

BILLING CODE 3910-01-M

Department of the Air Force

USAF Scientific Advisory Board; Meeting

January 17, 1989.

The USAF Scientific Advisory Board Ad Hoc Committee on Munitions Effectiveness will meet on February 7-8, 1989, from 8:00 a.m. to 5:00 p.m. at the Picatinny Arsenal, NJ, 07806-5000.

The purposes of this meeting are to assess the changes in the threat over the past ten years and to study how to take full advantage of potential technology

improvements in the development and manufacturing of munitions. This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 89-1388 Filed 1-19-89; 8:45 am]

BILLING CODE 3910-01-M

USAF Scientific Advisory Board; Meeting

January 13, 1989.

The USAF Scientific Advisory Board Ad Hoc Committee on Conventional Munitions will meet on February 22-24, 1989 at the Armament Division, Eglin AFB Florida and at AFSOC Hulburt Field Florida.

The purpose of this meeting is to gather information on requirements and technological advances in conventional munitions. This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information contact the Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 89-1389 Filed 1-19-89 8:45 am]

BILLING CODE 3910-01-M

USAF Scientific Advisory Board; Meeting

January 13, 1989.

The USAF Scientific Advisory Board Ad Hoc Committee on Hypersonic Test Facilities will meet on February 16-17, 1989, from 8:00 a.m. to 5:00 p.m., at ANSER, Washington DC.

The purpose of this meeting is to review the status of the study's final report. This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 89-1390 Filed 1-19-89; 8:45 am]

BILLING CODE 3910-01-M

Department of the Army

Army Science Board Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB).

Dates of Meeting: February 8-9, 1989.

Time: 0800-1700 hours each day.

Place: Arlington, Virginia.

Agenda: The Army Science Board Ad Hoc Subgroup on Human Dimensions in Army Safety will conduct its fifth meeting at Arlington, VA. The panel will receive briefings and hold discussions with personnel from OSHA, the Army Materiel Command, and a civilian industrial/manufacturing firm. A review of past actions of the panel as well as current and planned issues and meetings will be discussed. These meetings will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039/7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 89-1421 Filed 1-19-89; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF ENERGY

Proposed Finding of No Significant Impact; SP-100 GES Test Site; Hanford Site, Richland, WA; Extension of Review Period

AGENCY: Department of Energy.

ACTION: Proposed finding of no significant impact; extension of review period.

SUMMARY: On December 15, 1988, the Department of Energy published in the **Federal Register** (53 FR 50444) a proposed finding of no significant impact (FONSI) for the proposed ground test of a prototype SP-100 nuclear reactor. The **Federal Register** publication marked the beginning of a 30-day period, during which the proposed FONSI and supporting environmental assessment are made available for public review. DOE has decided to extend the public review period until February 3, 1989. Comments received after February 3, 1989, will be considered to the extent possible.

Written comments and questions should be directed to Earl Wahlquist, Director, Office of Defense Energy Projects, U.S. Department of Energy, 1990 Germantown Road, Germantown, MD 20545, (301) 353-3321.

Issued at Washington, DC, January 12, 1989.

Ernest C. Baynard III,

Assistant Secretary, Environment, Safety and Health.

[FR Doc. 89-1413 Filed 1-19-89; 8:45 am]

BILLING CODE 6450-01-M

Morgantown Energy Technology Center; Financial Assistance Award (Grant)

AGENCY: U.S. Department of Energy (DOE), Morgantown Energy Technology Center.

ACTION: Notice of noncompetitive financial assistance application for a grant.

SUMMARY: Based upon a determination pursuant to 10 CFR 600.7(b)(2)(i)(D), the DOE, Morgantown Energy Technology Center (METC), publishes notice of its plans to award a 60 month Grant to the National Academy of Sciences (NAS) National Research Council of 2101 Constitution Avenue, Washington, DC 20418. The total federal assistance for the first budget period is expected to be $279,938. The pending award is based on acceptance of an application for a research program, whose purpose is the initation of the National Research Council (NRC)/Morgantown Energy Technology Center (METC) Resident Research Associateship Program. The DOE is charged to conduct R&D on energy and to enhance the reservoir of talent in the U.S. which is trained to deal with energy problems. The specific mission of METC is to develop new fossil energy technology and to increase the availability of people who can help solve fossil energy problems. The proposed program will address both the R&D and the educational components of these goals. The NAS will establish and administer a Research Associateship Program at METC through which postdoctoral and senior research associates will be selected for participation in METC research programs. This program will enhance the ability of METC staff by association with such highly qualified individuals and it will enhance technology transfer and education in fossil energy problems when the Associates relocate into industrial and university assignments following their associateship experience.

FOR FURTHER INFORMATION CONTACT: Mark L. Estel, U.S. Department of Energy, Morgantown Energy Technology

Center, P.O. Box 880, Morgantown, WV 26507-0880, 304/291-4085.

Louie L. Calaway,

Director, Acquisition and Assistance Division.

Date: January 11, 1989.

[FR Doc. 89-1412 Filed 1-19-89; 8:45 am]

BILLING CODE 6450-01-M

Office of Nuclear Energy; Low-Level Radioactive Waste; DOE Policies and Procedures Regarding The January 1, 1990, Milestone, and Eligibility of States and Compacts for Surcharge Rebates

AGENCY: Office of Nuclear Energy, DOE.

ACTION: Notice of DOE policies and procedures regarding the January 1, 1990, milestone and eligibility of States and compacts for surcharge rebates.

SUMMARY: The Low-Level Radioactive Waste Policy Amendments Act of 1985 establishes milestones for the development of new disposal facilities in compact regions and States that do not currently have operating disposal facilities. These non-sited regions and nonmember States must meet the milestones in order to receive rebates of a portion of disposal surcharges paid by their low-level waste generators to the three States with operating disposal sites. Twenty-five percent of the applicable surcharges are transferred by the States with disposal sites to the Department of Energy (DOE) and held in an escrow account. Following each milestone, DOE disburses the funds to non-sited compacts and nonmember States that have met the milestone.

This Notice discusses issues which may affect DOE's determinations of eligibility for surcharge rebates following the third milestone in the Act, which occurs January 1, 1990, and the procedures by which surcharge rebates will be administered.

The information collections contained in these procedures are covered under the Paperwork Reduction Act of 1980, as amended, and are approved by the Office of Management and Budget (OMB) under OMB control number 1910-0900.

EFFECTIVE DATE: January 23, 1988.

FOR FURTHER INFORMATION CONTACT: William F. Newberry, Low-Level Waste Program Manager, Division of Waste Treatment Projects (NE-24), Office of Nuclear Energy, Washington, DC 20545.

SUPPLEMENTARY INFORMATION:

Background

The Low-Level Radioactive Waste Policy Amendments Act of 1985 (Pub. L. 99-240) (the Act) sets forth milestones at section 5(e)(1) for the development of new low-level radioactive waste disposal facilities in non-sited compact regions and nonmember States. Non-sited compact regions and nonmember States that are in compliance with a milestone receive a rebate of 25 percent of surcharges paid by generators in their compact regions or States for disposal of waste at the three commercially operated disposal facilities in Nevada, South Carolina and Washington. Non-sited compacts and nonmember States that are not in compliance with a milestone forfeit their potential rebate to the sited State(s) in which the waste was disposed. As trustee for the escrow account in which the surcharges are deposited, DOE is required to determine whether each State and compact is eligible to receive a rebate of surcharge funds that have accrued in the account.

Non-sited compact regions and nonmember States must meet the requirements of section 5(e)(1)(C) of the Act in order to be found in compliance with the January 1, 1990, milestone. Section 5(e)(1)(C) of the Act states:

"By January 1, 1990—

(i) a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State; or

(ii) the Governor * * * of any state that is not a member of a compact region in compliance with clause (i), or has not complied with such clause by its own actions, shall provide a written certification to the Nuclear Regulatory Commission, that such State will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level radioactive waste generated within such State and requiring disposal after December 31, 1992, and include a description of the actions that will be taken to ensure that such capacity exists."

This notice discusses issues in several areas which may affect DOE's determinations of eligibility for surcharge rebates following the third milestone in the Act, which occurs January 1, 1990, and the procedures by which surcharge rebates will be administered. The Act also assigns the Nuclear Regulatory Commission (NRC) responsibilities under the January 1, 1990, milestone. The NRC plans to announce its policies and procedures in a forthcoming **Federal Register** notice. Additional information about the NRC's policies, procedures and guidance with respect to the milestone can be obtained from Mr. George Pangburn, Project Manager, Operations Branch, Division of Low-Level Waste Management and Decommissioning, Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Commission, Mail Stop 5-E-4, Washington, DC 20555.

Complete License Applications

The Act assigns the NRC (or applicable agreement State agencies) the responsibility for determining whether license applications are "complete," for purposes of milestone compliance evaluations. DOE will accept as documentation of a compact or nonmember State's compliance with the milestone a statement to that effect signed by the NRC or agreement State agency official authorized to issue disposal site operating licenses on behalf of the agency. The statements should verify that the license application was filed with the agency by January 1, 1990, and that the application has been determined by the agency to be complete. In the event that the disposal facility for which the application is submitted will not provide for the disposal of all the low-level waste for which the State or compact is responsible under section (3)(a) of the Act, then the statement should identify the waste that will be excluded. The State or compact should describe its plans for the disposal, storage or management of such waste by means of a Governor's certification, as discussed below. The statements may be sent to the name and address indicated in the Contact section of this Notice, or may be delivered by another means agreeable to DOE and the agency.

Governor's Certifications

The Act requires that Governors' certifications be provided to the NRC by January 1, 1990. The NRC, in turn, is required to (1) transmit the certifications to Congress, and (2) publish the certifications in the **Federal Register**.

The Act does not describe elements that must be included in Governors' certifications, as it did for the January 1, 1988, milestone. However, the Report of the Committee on Interior and Insular Affairs of the House of Representatives emphasizes that Congress expected such certifications to "show with reasonable certainty that the State will be capable of providing for disposal or some alternative means of managing the waste after January 1, 1993." (House Report 99-314, Part I, p. 31). The Report also provides some examples of the types of actions that may be described in the plans that accompany the Governors' certifications. The Report states, "The Governor might show that some alternate to disposal technology will be provided by the state, such as

interim storage facilities, or that disposal will be provided through an arrangement with another compact or state that has operating disposal capacity or which has provided acceptable assurance that disposal or other facilities will be available in a timely manner. The intent of the committee is not to require states and compacts each to have demonstrated by this date they will have provided for disposal of the waste generated in the state or region but to assure the committee and the Congress that when interim access is terminated low-level waste generated within each state will not constitute an involuntary burden either on the other states or on the Federal government or any Federal agency." (p. 31)

The NRC has elaborated upon this guidance by suggesting specific information that should be contained in Governors' certifications. This guidance will be provided in the NRC's **Federal Register** Notice on the milestone.

DOE will accept as documentation of a State's compliance with the milestone a statement signed by an NRC official authorized to verify NRC's official receipt of such correspondence. The statement should verify that a certification, as described in the Act, signed by the Governor of the State, was filed with the NRC by January 1, 1990. The statement should indicate that the Governors' certification provides for the storage, disposal or management of any low-level radioactive waste for which the State is responsible under section 3(a) of the Act. In the event that a license application is filed in accordance with the procedures described above for a facility for disposal of part of the waste for which the State or compact is responsible, then the Governors' certification need only describe plans for storage, disposal or management of the portion of waste that will be excluded from the disposal site. The statement may be sent to the address indicated in the Contact section of this Notice or may be delivered by another means agreeable to DOE and NRC.

Timely Surcharge Payments

The Act requires that DOE issue surcharge rebates to eligible non-sited States and compacts within 30 days of each milestone. DOE will encourage the NRC and applicable agreement State agencies to officially notify DOE as soon as possible after they receive the documentation called for in the Act. However, because DOE does not have administrative control over the processes by which these agencies formally notify DOE of receipt of the applicable documentation, DOE cannot ensure that such notifications will be made in time to permit surcharge rebates within 30 days of the milestone.

DOE will continue to work with the sited States to effect timely and regular transmittal of surcharge funds into the escrow account, and will contact the appropriate sited State officials to encourage expeditious or accelerated transmittal to the escrow account of the last monthly surcharge payment for the milestone period. However, because each of the sited States uses its own specific procedures for collecting and transmitting surcharge funds to the escrow account, DOE cannot ensure that all surcharge funds applicable to the January 1, 1990, milestone, will be deposited in time to permit DOE to issue rebates within 30 days of the milestone.

Compact Eligibility for Surcharges

The Governors' certification option calls for actions to be taken by each State, even where the State is a member of a compact. However, section 5(e)(1) of the Act designates each compact as the entity responsible for complying with the milestone, and section 5(d)(2)(D)(ii) directs DOE to issue surcharge rebates to the compact authority. DOE will determine that a compact is eligible for a surcharge rebate if a complete license application has been submitted for a facility in its host State for disposal of all waste for which the compact is responsible under section 3(a) of the Act, or if all of the member States of the compact have submitted Governors' certifications in accordance with the Act. In the event that a license application is submitted for a facility for disposal of part of the waste for which the compact States are responsible under section 3(a) of the Act, then each of the member States should submit Governors' certifications describing plans for the storage, disposal or management of the portion of waste that will be excluded from the disposal site.

Disposal Agreements as an Alternative Method of Milestone Compliance

The Act provides that under certain conditions a non-sited State that has entered into an agreement with a sited compact for disposal of its waste may be considered to be in compliance with the milestones. Section 5(e)(1)(F) states:

"Any State may, subject to all applicable provisions, if any, of any applicable compact, enter into an agreement with the compact commission of a region in which a regional disposal facility is located to provide for the disposal of all low-level radioactive waste generated within such State, and, by virtue of such agreement, may, with the approval of the State in which the regional disposal facility is located, be deemed to be in compliance with subparagraphs (A), (B), (C), and (D)." (Subparagraphs (A), (B), (C), and (D) refer to the July 1, 1986; January 1, 1988; January 1, 1990; and January 1, 1992, milestones, respectively.)

The provision indicates that a State that enters into such an agreement "may" be deemed to be in compliance with the milestones. DOE agrees with the Report of the Senate Committee on Energy and Natural Resources that "the appropriateness of any such agreement is a matter to be settled by the parties to the agreements themselves." (Senate Report 9–199, p. 13). Therefore, a valid disposal agreement, as described in the Act, in effect on January 1, 1990, may be submitted to DOE as the basis for compliance with the milestone.

The Act does not set a time period during which disposal access must be provided under such agreements. Agreements may provide for disposal of waste from a State during the interim access period, January 1, 1986 through December 31, 1992, or may provide for disposal of the State's waste after the end of interim access. While the goal of the Act is to ensure access to disposal capacity after 1992, the Report of the Senate Committee on Energy and Natural Resources suggests that a disposal access agreement could be used as a "safety valve" to provide access to disposal capacity "for a nonsited State that is concerned that it may not, for whatever reason, be in compliance with one or more of the milestones." (Senate Report 99–199, p. 14) DOE will not set a time period during which disposal must be provided under such agreements as a condition for eligibility for surcharge rebates.

Copies of disposal agreements as described in section 5(e)(1)(F) as evidence of compliance with the milestone should be sent to the address in the Contact section of this Notice, or transmitted by another means agreeable to the submitting State and DOE. Agreements should contain or be accompanied by a statement by the Governor of the State in which the disposal facility is located, or Governor's designee, indicating the State's approval of the agreement.

Federalism

Executive Order 12612, 52 FR 41685 (October 30, 1987) requires that regulations, rules, legislation, and any other policy action be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or on the

distribution of powers and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action.

Today's notice deals with interpretation of statutory language DOE will apply in order to determine State eligibility for rebates of surcharges that have been paid by waste generators pursuant to Federal law as a prerequisite for access to existing waste disposal facilities. The notice also deals with the administrative procedures that DOE will use in making the surcharge rebates. While today's notice will have direct effects on States, the rebate amounts are not significant in comparison with the State budgets, and the interpretations and procedures do not infringe on the institutional interests or traditional functions of States in our Federal system. Rather than coercing compliance with a Federally dictated plan, the rebates promote State and regional initiatives in developing new low-level radioactive waste disposal facilities.

John E. Baublitz,

Acting Director, Office of Remedial Action and Waste Technology, Office of Nuclear Energy.

[FR Doc. 89-1419 Filed 1-19-89; 8:45 am]

BILLING CODE 6450-01-M

Economic Regulatory Administration

Final Consent Order With Tesoro Petroleum Corp.

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Final action on proposed consent order.

SUMMARY: The Department of Energy (DOE) has determined that a proposed Consent Order with Tesoro Petroleum Corporation (Tesoro), which was published for comment in 53 FR 48710 (December 2, 1988), shall be made final. The Consent Order resolves matters relating to Tesoro's compliance with the federal petroleum price regulations for the period January 1, 1973, through January 27, 1981. To resolve these matters, Tesoro will pay a total of $48,500,000, plus interest on any unpaid balances over a period of six years.

FOR FURTHER INFORMATION CONTACT: Dorothy Hamid, Office of Enforcement Litigation, Economic Regulatory Administration, RG-32, U.S. Department of Energy, Washington, DC 20585, (202) 586-4167

SUPPLEMENTARY INFORMATION:

I. Introduction
II. Comments
III. Analysis of Comments
IV. Decision

I. Introduction

On December 2, 1988, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) published Notice in the **Federal Register**, Vol. 53 at page 48710 ("Notice"), announcing the execution of a proposed Consent Order between DOE and Tesoro which would resolve matters relating to Tesoro's compliance with federal petroleum price regulations for the period January 1, 1973, through January 27, 1981. 53 FR 48710 (December 2, 1988). The Consent Order requires Tesoro to pay a total of $48,500,000, plus interest on any unpaid balances, over a period of six years. Under the terms of the Consent Order, Tesoro will pay $25 million ($25,000,000) to DOE within thirty (30) days after the effective date of the Consent Order. Beginning one year after the date the initial payment becomes due and payable, Tesoro shall make six equal annual installments to the DOE of five million one hundred seventy-seven thousand eight hundred fifty dollars and ninety-five cents ($5,177,850.95), constituting an additional principal sum of twenty-three million five hundred thousand dollars ($23,500,000), plus interest calculated at the rate of 8.61 percent per annum. After the initial payment is made, ERA will petition the DOE's Office of Hearings and Appeals (OHA) pursuant to 10 CFR Part 205, Subpart V ("Subpart V"), for appropriate distribution of the monies paid.

The December 2, 1988 Notice provided in detail the bases for ERA's preliminary veiw that the settlement is favorable to the government and in the public interest. The Notice solicited written comments from the public relating to the terms and conditions of the settlement and whether the settlement should be made final. The Notice also announced a public hearing for the purpose of receiving oral presentations on the settlement. The hearing was held on January 4, 1989, at the headquarters of DOE in Washington, DC.

II. Comments

ERA received two written comments, and oral presentations were made at the January 4, 1989, public hearing by the two individuals who had submitted the written comments. All of the written and oral comments were considered in making the decision as to whether the proposed Consent Order should be made final.

The written and oral comments addressed two principal subject categories. Written and oral comments on behalf of certain unspecified utilities, transporters and manufacturers (hereinafter collectively referred to as "end users") addressed both the adequacy of the settlement amount and ERA's view regarding attribution of $2 million of the settlement amount to the refined product issues with the remainder attributed to the crude oil issues. The written and oral comments on behalf of the Petroleum Marketers Association of America, an unspecified several dozen resellers and retailers, and F. O. Fletcher, Inc., dba Fletcher Oil Company (hereinafter collectively referred to as "PMAA"), principally addressed ERA's view regarding attribution of the settlement proceeds.

III. Analysis of Comments

A. Adequacy of Settlement Amount

The representative of certain utilities, transporters and manufacturers argued that there was no apparent justification for the settlement amount, implicitly suggesting that the settlement amount of $48.5 million was too low. The commenter mentioned one of ERA's considerations in settlement, the fact that Tesoro, by specific contractual provisions, had passed through $10.8 million of its post-entitlements costs to a large utility. The end users claimed that the disposition of Tesoro's alleged overcharges should not excuse its alleged violations, citing to a recent determination by OHA in a formal Remedial Order issued to Cities Service Oil and Gas Corporation, (OHA Case No. HRO-0285, September 30, 1988).

Although ERA agrees that contractual passthrough provisions which are directly related to a refiner's post-entitlements costs should not constitute a legal defense to alleged violations, the Agency has historically treated such factors as relevant offsets and the extent of potential harm to others as appropriate considerations in the course of determining a fair measure of restitution to be effected through settlement.[1] Demonstrable, direct passthrough or non-retention of benefit is an equally valid consideration in the context of settlement. Moreover, notwithstanding any initial litigation success, one should nevertheless take into account the litigation risks associated with such arguments in other *fora, i.e.*, the Federal Energy Regulatory Commission ("FERC"), and the federal

[1] See, *e.g.*, Notice of Proposed Consent Order with Texaco Inc., 53 FR 15106 (April 27, 1988).

courts.[2] The end users do not address or assess such other considerations as the early litigation stage of ERA's principal entitlements claim against Tesoro, the uncertainties associated with protracted litigation, or the time and expense required to fully litigate every issue in order to obtain a recovery. As stated in the notice, ERA viewed all of these matters worthy of consideration and concluded that they do affect the appropriate and reasonable settlement amount. Nothing has been proffered by the end users which would reasonably support a change in that view.

The representative for the end users also dismissed as vague ERA's references to the inherent litigation risks in the cases, but failed to articulate any rationale for assuming there are no risks. No other commenters expressed any objections to the reasonableness of the overall settlement amount.

B. Distribution of Refunds

The December 2, 1988, Notice indicated ERA's preliminary view that approximately $2 million of the $48.5 million principal amount of the proposed Consent Order were attributable to alleged refined product pricing violations, and the remainder to crude oil issues. If ERA's view were accepted by OHA, funds attributed to crude oil issues would be distributed by OHA in accordance with the provisions of the Final Settlement Agreement in the Stripper Well case, *In re: The Department of Energy Stripper Well Exemption Litigation,* M.D.L. 378 (D. Kan.) (*Stripper Well Agreement*) and the Petroleum Overcharge Distribution and Restitution Act of 1986. Amounts attributed to refined product issues would be distributed to purchasers of Tesoro's refined petroleum products who may have been harmed by the alleged regulatory violations.

The end users argued that although a minor matter, ERA's "evident intent" to allocate $2 million of the $48.5 million settlement amount to refined product issues is not justified, and any such allocation would be excessive. The PMAA argued that ERA's assessment was not appropriate, and any such allocation was too low because Fletcher Oil Company ("Fletcher") believed Tesoro has used an excessive May 15, 1973, price in its product sales to Fletcher during the period of price controls. According to PMAA, the sum of the differentials for the volumes Fletcher purchased from Tesoro during the price control period amounted to $565,000; consequently, PMAA argues, with interest value, Fletcher should be entitled to $1.5 million of the $2 million ERA estimated to be product-related, and that the $2 million is therefore insufficient. PMAA's arguments are misplaced.

PMAA fails to recognize several factors relevant to a settlement of compliance issues identified by ERA. Most fundamentally, any settlement is by definition a compromise and, therefore, will seldom result in recovery of the full amount sought in litigation.

Second, several decisions by the FERC involving similar issues would indicate that even if it is found that a seller used an erroneous May 15, 1973 sale price, the amount of the error is not the appropriate measure of remedy; [3] instead, an entire recalculation of permissible prices would be required, taking into account allowable banks or underrecoveries, cost allocations and permissible reallocations for the various product groups, to determine the amount, if any, of overcharges caused by the May 15, 1973 price error. Numerous new questions or issues, including offset arguments, may arise in the process of litigating such a wholesale recalculation, and the Agency's governmental interest in enforcing regulatory compliance with an eye toward reasonable administrative economy would militate against a course of expending more resources than the amounts reasonably thought to be at stake.[4] Such considerations are entirely consistent with the provisions of the Economic Stabilization Act of 1970 in this area; ERA's enforcement authority is largely derived from section 209 of that Act, whereas the Act establishes in section 210 the coordinate right of private action.

Finally, while ERA had various reasons for not initiating an enforcement action related to the particular transactions between Tesoro and Fletcher, and accordingly could not plausibly bargain for additional consideration in settlement of Tesoro's potential section 209 liability, the settlement, as explained in the Notice and as stated in the Consent Order itself, resolves all of ERA's compliance disputes with Tesoro. Therefore, all purchasers of Tesoro's covered products would ordinarily be entitled to claim a refund in proceedings conducted by OHA pursuant to Subpart V. However, the amount of any award (based on proof of harm suffered), as well as the total amount available for Tesoro's refined product purchasers, are ultimately subject to OHA's determinations.

In contrast to the PMAA's arguments that insufficient monies had been designated for refined product purchasers, the end users argued that a $2 million attribution already represents a greater percentage of the settlement than the proportion of Tesoro's potential liability resulting from issues related to refined product sales. Accordingly, argued the end users, on a proportionate basis, refined product issues should receive an attribution of $1.4 million rather than the $2 million proposed by ERA. In his oral arguments, counsel for the end users argued that any claim by Fletcher should be precluded entirely. He argued that the notice of the proposed Consent Order explained that ERA's preliminary determination of a reasonable settlement amount was based on $137 million of refund claims which did not include the specific issues asserted by Fletcher. That amount, as described in the December 2, 1988 Notice, comprised Tesoro's total potential liability for the cases initiated by ERA. However, as discussed above, that fact should not preclude Fletcher from claiming a refund.

ERA agrees, however, that this issue is a relatively minor matter inasmuch as attribution of the settlement proceeds has nothing to do with the reasonableness of the settlement amount, and whatever ERA's view, it is not a binding determination.

ERA's view regarding attribution of portions of the settlement monies to refined product and crude oil transactions was the result of consideration of the amounts recoverable in litigation, the various litigation risks associated with the different cases, and the linkage of certain refined product issues which would distinctly alter dollar liability amounts. In any event, the OHA will decide the proration of the distribution.

V. Decision

Upon considertaion of all of the comments, and based upon the reasons as set forth above and in the Notice of proposed Consent Order, ERA has determined to effect the Consent Order as proposed.

[2] The potential success or failure in litigation of passthrough arguments may be significantly affected when, as in the *Tesoro* entitlements case, the passthrough is direct and is a substantial portion of the remedial amount sought.

[3] See *Exxon Company, USA,* 12 DOE ¶ 83,026 (1985), *vacated and remanded,* 35 FERC ¶ 61,033 (1986); *Texaco Inc.,* 14 DOE ¶ 83,034 (1986), *affirmed, vacated, and remanded,* 39 FERC ¶ 61,339 (1987); *Texaco Inc.,* 14 DOE ¶ 83,047, *affirmed, vacated, and remanded,* 39 FERC ¶ 61,067 (1987).

[4] These considerations have influenced and are consistent with ERA's frequently used approach of conducting sample audits designed to identify relatively significant or broad issues of regulatory compliance.

By this notice, and pursuant to 10 CFR 205.199J, the proposed Consent Order between Tesoro and DOE executed on November 23, 1988, is made a final order of the Department of Energy, effective on the date of publication of this notice in the **Federal Register**.

Issued in Washington, DC, on January 13, 1989.

Milton C. Lorenz,

Chief Counsel, Office of Enforcement Litigation, Economic Regulatory Administration.

[FR Doc. 89-1414 Filed 1-19-89; 8:45 am]

BILLING CODE 6450-01-M

[ERA Docket No. 88-74-NG]

Nicholson & Associates, Inc.; Application To Import and Export Natural Gas From and to Canada

AGENCY: Department of Energy, Economic Regulatory Administration.

ACTION: Notice of Application for Blanket Authorization to Import and Export Natural Gas from and to Canada.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice of receipt on December 14, 1988, of an application filed by Nicholson & Associates, Inc. (Nicholson), for blanket authorization to import up to 146 Bcf of natural gas from Canada and to export up to 36.5 Bcf of natural gas from the United States to Canada over a two-year period beginning on the date of first delivery.

The company intends to utilize existing pipeline facilities for the transportation of the volumes to be imported or exported and to submit quarterly reports detailing each transaction.

The application is filed with the ERA pursuant to section 3 of the Natural Gas Act and DOE Delegation Order No. 0204-1111. Protests, motions to intervene, notices of intervention and written comments are invited.

DATE: Protests, motions to intervene, or notices of intervention, as applicable, requests for additional procedures and written comments are to be filed no later than February 22, 1989.

FOR FURTHER INFORMATION CONTACT:

John Boyd, Natural Gas Division, Economic Regulatory Administration, U.S. Department of Energy, Forrestal Building, Room 3F-070, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-4523.

Diana Stubbs, Natural Gas and Mining Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, Room 6E-042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6667.

SUPPLEMENTARY INFORMATION:

Nicholson, a Washington state corporation with its principal place of business in Kirkland, Washington, has a broad corporate charter which includes the authority to market natural gas. The company proposes to import natural gas from various suppliers and to resell such gas on a non-discriminatory basis to purchasers, including local distributors and end users. It proposes to export gas obtained from various domestic suppliers and resell such gas to local gas distributors and end users in Canada. Nicholson would act either on its own behalf or as a broker or agent on behalf of a supplier or purchaser.

All of the contracts for the import or export of natural gas would involve short-term or spot transactions. The terms of each contract including price, duration, volume, renegotiation, price adjustment provisions and take-or-pay, if any, will be freely negotiated. The short-term contracts will refect and be responsive to current conditions of the natural gas market.

In support of its application, Nicholson asserts that the blanket import authority requested would allow it to import natural gas for short-term sales under market responsive terms and conditions which will assure both the competitiveness of the import and the need for the gas imported. The short-term nature of the sales will minimize domestic reliance on imported gas. In addition, Nicholson tends to purchase gas from a number of sources and would have sufficient flexibility to substitute supplies should one source become unavailable. With regard to gas to be exported, Nicholson maintains that there is no current domestic need for the volumes proposed. Some of the gas to be exported may be Canadian gas, the importation of which is covered by said application. The short-term or spot nature of the export sales and the market-responsive gas sales contracts provide assurances that domestic purchasers of gas may bid and purchase the natural gas.

The decision on the application for import authority will be made consistent with the DOE's gas import policy guidelines, under which the competitiveness of an import arrangement in the markets served is the primary consideration in determining whether it is in the public interest (49 FR 6684, February 22, 1984). In reviewing natural gas export applications, the ERA considers the domestic need for the gas to be exported, and any other issue determined by the Administrator to be appropriate in a particular case. Parties that may oppose this application should comment in their responses on the issue of competitiveness as set forth in the policy guidelines for the requested import authority, and on the domestic need for gas the applicant proposes to export. As noted above, the applicant asserts that import and export arrangements transacted under the requested authority will be competitive, and that there is no current need for domestic gas that would be exported under the proposed short-term arrangements. Parties opposing the arrangement bear the burden of overcoming these assertions.

Nicholson requests that an authorization be granted on an expedited basis. An ERA decision on Nicholson's request for expedited treatment will not be made until all responses to this notice have been received and evaluated.

All parties should be aware that if the ERA approves this requested blanket import/export it will permit the import or export of the gas at any existing point of entry and through any existing transmission system.

NEPA Compliance

On August 9, 1988, the DOE published in the **Federal Register** (53 FR 29934) a notice of proposed amendments to its guidelines for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, effective on an interim basis upon publication. In the notice, the DOE proposed to amend the agency's NEPA guidelines to add to its list of categorical exclusions the approval or disapproval of an import/export authorization for natural gas in cases not involving new construction. Application of the categorical exclusion in any particular case raises a rebuttable presumption that the ERA's action is not a major Federal action under NEPA. Unless the ERA receives comments indicating the presumption does not or should not apply in this case, no further NEPA review will be conducted by the DOE.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make

the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate procedural action to be taken on the application. All protests, motions to intervene, notice of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR Part 590.

Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Natural Gas Division, Office of Fuels Programs, Economic Regulatory Administration, Room 3F-070 RG-23 Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585. They must be filed no later than 4:30 p.m. e.s.t., February 22, 1989.

The Administrator intends to develop a decisional record on the application through responses to this notice by parties, including the parties written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, the ERA will provide notice to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of Nicholson's application is available for inspection and copying in the Natural Gas Division Docket Room, 3F-056 at the above address. The docket room is open between the hours of 8:00 a.m., and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, January 4, 1989.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 89-1415 Filed 1-9-89; 8:45 am]

BILLING CODE 6450-01-M

[Docket No. ERA C&E 89-04; Certification Notice 29]

Notice of Filing of Certification of Compliance; Coal Capability of New Electric Powerplants; Power Resources Inc.

AGENCY: Economic Regulatory Administration, DOE.

ACTION: Notice of Filing.

SUMMARY: Title II of the Powerplant and Industrial Fuel Use Act of 1978, as amended ("FUA"or "the Act") (42 U.S.C. 8301 *et seq*), provides that no new electric powerplant may be constructed or operated as a base load powerplant without the capability to use coal or another alternate fuel as a primary energy source (section 201(a), 42 U.S.C. 8311 (a), Supp. V. 1987). In order to meet the requirement of coal capability, the owner or operator of any new electric powerplant to be operated as a base load powerplant proposing to use natural gas or petroleum as its primary energy source may certify, pursuant to section 201(d), to the Secretary of Energy prior to construction, or prior to operation as to base load powerplant, that such powerplant has the capability to use coal or another alternate fuel. Such certification establishes compliance with section 201(a) as of the date it is filed with the Secretary. The Secretary is required to publish in the **Federal Register** a notice reciting that the certification has been filed. One owner and operator of a proposed new electric base load powerplant has filed a self certification in accordance with section 201(d).

Further information is provided in the SUPPLEMENTARY INFORMATION section below.

SUPPLEMENTARY INFORMATION: .

The following company has filed a self certification:

Name	Date received	Type of facility	Megawatt capacity	Location
Power Resources, Inc., Houston, TX	12-30-88	Topping cycle	58.35	Big Spring, TX

Amendments to the FUA on May 21, 1987, (Public Law 100-42) altered the general prohibitions to include only new electric base load powerplants and to provide for the self certification procedure.

Issued in Washington, DC on January 11, 1989.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 89-1416 Filed 1-19-89; 8:45 am]

BILLING CODE 6450-01-M

[Docket No. ERA C&E 89-05; Certification Notice 30]

Notice of Filing of Certification of Compliance: Coal Capability of New Electric Powerplants; Indeck Energy Services

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of Filing.

SUMMARY: Title II of the Powerplant and Industrial Fuel Use Act of 1978, as amended ("FUA" or "the Act") (42 U.S.C. 8301 *et seq*), provides that no new electric powerplant may be constructed or operated as a base load powerplant without the capability to use coal or another alternate fuel as a primary energy source (section 201(a), 42 U.S.C. 8311 (a), Supp. V. 1987). In order to meet the requirement of coal capability, the owner or operator of any new electric powerplant to be operated as a base load powerplant proposing to use natural gas or petroleum as its primary energy source may certify, pursuant to section 201(d), to the Secretary of Energy prior to construction, or prior to operation as to base load powerplant, that such powerplant has the capability

to use coal or another alternate fuel. Such certification establishes compliance with section 201(a) as of the date it is filed with the Secretary. The Secretary is required to publish in the **Federal Register** a notice reciting that the certification has been filed. One owner and operator of two proposed new electric base load powerplants has filed a self certification in accordance with section 201(d).

Further information is provided in the SUPPLEMENTARY INFORMATION section below.

SUPPLEMENTARY INFORMATION:

The following company has filed two self certifications:

Name	Date received	Type of facility	Megawatt capacity	Location
Indeck Energy Services, Inc., Wheeling, IL	01-09-89	Combined cycle cogen	55	Silver Springs, NY
Indeck Energy Services, Inc., Wheeling, IL	01-09-89	Combined cycle cogen	53.4	Tonawanda, NY

Amendments to the FUA on May 21, 1987, (Public Law 100-42) altered the general prohibitions to include only new electric base load powerplants and to provide for the self certification procedure.

Issued in Washington, DC on January 12, 1989.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 89-1417 Filed 1-19-89; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. ER82-774-001, et al.]

Nantahala Power and Light Co., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Nantahala Power and Light Company

[Docket No. ER82-774-001, ER82-774-008]

January 12, 1989.

Take notice that on December 23, 1988, Nantahala Power and Light Company (Nantahala) tendered for filing its compliance filing in compliance with the Commission's order dated November 23, 1988.

Comment date: January 26, 1989, in accordance with Standard Paragraph E at the end of this notice.

2. Oroville Energy, Inc.

[Docket No. QF89-110-000]

January 12, 1989.

On December 30, 1988, Oroville Energy, Inc. (Applicant) of 305-111th Avenue, NE., Bellevue, Washington, 98004, submitted for filing an application for certification of a facility as a qualifying 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 at 2723 South Fifth Avenue, Oroville, California. The facility will consist of eight Waukesha Model 7042 GSI engine generators. Applicant states that, the thermal output of the facility, in the form of hot engine jacket water, will be used in a brine processing facility to evaporate, concentrate and crystalize salts out of oil and gas well production brine and to treat other aqueous waste streams produced in the area. The primary energy source for the facility will be natural gas. The electric power production capacity of the facility will be 7.5 MW. Construction of the facility is expected to begin in February 1989.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

3. Alpha Joshua, Inc.

[Docket No. QF88-365-001]

January 13, 1989.

On January 3, 1989, Beta Joshua, Inc. (Applicant), of 665 West Avenue J, Lancaster, California 93534 submitted for filing an application for recertification 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 small power production facility will be located in Kern County, California, to the west of the town of Mojave. The original application was filed on May 4, 1988 and was granted on September 30, 1988; 44 FERC ¶ 61,442 (1988). The recertification is requested due to change in ownership structure The 30 MW facility which includes 18.35% undivided interest in a 46 mile of 230 KV transmission line will now be jointly developed and constructed by SeaWest Industries Inc. (SeaWest) and Toyo Construction Company (TCC). TCC is a wholly-owned California subsidiary of Toyo Menka Kaisha, Ltd., a Japanese Trading Company.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

4. Beta Willow, Inc.

[Docket No. QF88-366-001]

January 13, 1989.

On January 3, 1989, Beta Joshua, Inc. (Applicant), of 665 West Avenue J, Lancaster, California 93534 submitted for filing an application for recertification 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 small power production facility will be located in Kern County, California, to the west of the town of Mojave. The original application was filed on May 4, 1988 and was granted on September 30, 1988; 44 FERC ¶ 61,442 (1988). The recertification is requested due to change in ownership structure to 30 MW. The facility which includes 13.76% undivided interest in a 46 mile of 230 KV transmission line will now be jointly developed and constructed by SeaWest Industries Inc. (SeaWest) and Toyo Construction Company (TCC). TCC is a wholly-owned California subsidiary of Toyo Menka Kaisha, Ltd., a Japanese Trading Company.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

5. Beta Joshua, Inc.

[Docket No. QF88-370-001]

January 13, 1989.

On January 3, 1989, Beta Jashua, Inc. (Applicant), of 665 West Avenue J, Lancaster, California 93534 submitted for filing an application for recertification 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 small power production facility will be located in Kern County, California, to the west of the town of Mojave. The original application was filed on May 4, 1988 and was granted on September 30, 1988; 44 FERC ¶ 61,442 (1988). The recertification is requested due to change in ownership structure and increase in electric power production capacity from 18 MW to 25 MW. The facility which includes 11.01% undivided interest in a 46 mile of 230 KV transmission line will now be jointly developed and constructed by SeaWest Industries Inc. (SeaWest) and Toyo Construction Company (TCC). TCC is a wholly-owned California subsidiary of Toyo Menka Kaishal, Ltd., a Japanese Trading Company.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

6. Southern California Edison Company

[Docket No. ER89-149-000]

January 13, 1989.

Take notice that on December 27, 1988, Southern California Edison Company (Edison) tendered for filing a notice of extension of rates for the purchase of Replacement Capacity by the Cities of Anaheim, Azusa, Banning, Colton, Riverside, and Vernon, California (Cities) from Edison under the provision of the following rate schedules:

Entity	Rate schedule FERC No.
1. City of Anaheim	95,208
2. City of Azusa	144,209
3. City of Banning	145,210
4. City of Colton	146,211
5. City of Riverside	94,212
6. City of Vernon	154

Copies of this filing were served upon the Public Utilities Commission of the State of California and the Cities of Anaheim, Azusa, Banning, Colton, Riverside, and Vernon, California.

Comment date: January 30, 1989, in accordance with Standard Paragraph E 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, DC 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.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1332 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Project Nos. 803-014, et al.]

Hydroelectric Applications; Pacific Gas & Electric Company, et al.; Applications Filed with the Commission

Take notice that the following hydroelectric applications have been filed with the Federal Energy Regulatory Commission and are available for public inspection:

1 a. *Type of Application:* Amendment of License.

b. *Project No.:* 803-014.

c. *Date Filed:* December 24, 1985.

d. *Applicant:* Pacific Gas and Electric Company.

e. *Name of Project:* DeSabla-Centerville Water Power Project.

f. *Location:* On Butte Creek and West Branch Feather River, in Butte County, California.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. R.J. Strub, Manager, Hydro Generation, Pacific Gas and Electric Company, One California Street, Room F-759, San Francisco, CA 94106, (415) 972-9320.

i. *FERC Contact:* Mr. William Roy-Harrison, (202) 376-9830.

j. *Comment Date:* February 17, 1989.

k. *Description of Project:* The amendment of license as originally proposed, and noticed on May 8, 1986, consisted of adding a penstock and a 4.2 MW generating unit at the existing DeSabla Powerhouse and replacing the penstock and the existing Centerville Powerhouse. However, now the applicant wants authorization only for replacing the existing Centerville Powerhouse and replacing the existing generating units with a new more efficient 8.5 MW generating unit.

l. This notice also consists of the following standard paragraphs: B, C, and D1.

2 a. *Type of Application:* Amendment of License.

b. *Project No.:* 2157-031.

c. *Date Filed:* October 14, 1988.

d. *Applicant:* Snohomish County PUD No. 1.

e. *Name of Project:* Henry M. Jackson Hydroelectric Project.

f. *Location:* Snohomish County, Washington.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* J.D. Maner, 2320 California Street, Everett, Washington, 98201, (206) 258-8211.

i. *FERC Contact:* Robert Crowley, (202) 376-9053.

j. *Comment Date:* February 14, 1989.

k. *Description of Project:* The licensee proposes to change the rule curve for the Spada Lake reservoir to provide additional flood control storage per article 57 of the license.

l. This notice also consists of the following standard paragraphs: B, C, and D2.

3 a. *Type of Application:* Minor License.

b. *Project No.:* 8263-004.

c. *Date Filed:* October 13, 1988.

d. *Applicant:* Summit Hydropower.

e. *Name of Project:* Falls Mill Dams Hydropower Project.

f. *Location:* On the Yantic River near Norwich, New London County, Connecticut.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Duncan Broatch, P.O. Box 122, Putnam, CT 06260, (203) 928-2002.

i. *FERC Contact:* Ed Lee, (202) 376-5786.

j. *Comment Date:* March 3, 1989.

k. *Description of Project:* The proposed run-of-river project would consist of: (a) Two existing dams and reservoirs, approximately 600 feet apart with a connecting 6-foot-diameter penstock, and consisting of an upper dam approximately 12-foot-high and 103-foot-long with a 4-acre upper reservoir as well as a lower by-pass dam approximately 12-foot-high and 140-foot-long with a 2-acre reservoir; (b) a new 25-foot-wide and 25-foot-long concrete powerhouse housing a single 1-MW generating unit located and connected by a 300-foot-long penstock downstream from the lower by-pass dam; (c) a new 50-foot-long underground conduit connecting the powerhouse switchgear to the transformer; and (d) appurtenant facilities. The project site is primarily owned by the City of Norwich, Connecticut. The applicant estimates that the average annual generation would be 4.3 kWh.

l. *Purpose of Project:* All project energy will be sold to a local utility company.

m. This notice also consists of the following standard paragraphs: A3, A9, B, C, and D1.

4 a. *Type of Application:* Transfer of License.

b. *Project No.:* 8361–005.

c. *Date Filed:* December 15, 1988.

d. *Applicant:* Olsen Power Project, Inc. (Licensee) and Olsen Power Partners (Transferee).

e. *Name of Project:* Olsen Water Power Project.

f. *Location:* On Old Crow Creek, a tributary of the Sacramento River partially on land administered by the Bureau of Land Management in Shasta County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Wayne L. Rogers, 410 Severn Avenue, Suite 313, Annapolis, MD 21403.

i. *FERC Contact:* Ms. Julie Bernt, (202) 376–1936.

j. *Comment Date:* February 27, 1989.

k. *Description of Project:* On April 7, 1987, a major license was issued to Olsen Power Project, Inc. for the construction, operation and maintenance of the Olsen Water Power Project No. 8361. It is proposed to transfer the license to Olsen Power Partners. The purpose of the proposed license transfer is to facilitate the financing of this project.

The licensee certifies that it has fully complied with the terms and conditions of its license and obligates itself to pay all annual charges accrued under the license to the date of the transfer. The transferee accepts all the terms and conditions of the license and agrees to be bound thereby to the same extent as though it were the original licensee.

l. The notice also consists of the following standard paragraphs: B and C.

5 a. *Type of Filing:* Preliminary Permit.

b. *Project No.:* 10665–000.

c. *Date Filed:* September 23, 1988.

d. *Applicant:* Pacific Water and Power, Inc.

e. *Name of Project:* Savage Dam.

f. *Location:* At the existing Savage Dam in San Diego County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Robert R. Doelle, P.O. Box 6022, Stanford, CA 94305, (408) 778–5608.

i. *FERC Contact:* Mr. William Roy-Harrison, (202) 376–9830.

j. *Comment Date:* March 20, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An existing 149-foot-high, 750-foot-long Savage Dam; (2) an existing reservoir with a gross storage capacity of 49,510 acre feet, and a surface area of 1,110 acres; (3) an existing 5- to 7-foot-diameter, 3,000- to 5,000-foot-long penstock, (4) one to three powerhouses containing generating units with a total rated capacity of 2,605 kW; and (5) a transmission line. The applicant estimates a 17,520 MWh average annual energy production.

l. *Purpose of Project:* Power would be sold to a local utility.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

6 a. *Type of Filing:* Preliminary Permit.

b. *Project No.:* 10666–000.

c. *Date Filed:* September 26, 1988.

d. *Applicant:* Pacific Water and Power, Inc.

e. *Name of Project:* San Vincente Reservoir/Dam.

f. *Location:* At the existing San Vincente Dam in San Diego County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Robert R. Doelle, P.O. Box 6022, Stanford, CA 94305, (408) 778–5608.

i. *FERC Contact:* Mr. William Roy-Harrison, (202) 376–9830.

j. *Comment Date:* March 20, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An existing 203-foot-high, 940-foot-long San Vincente Dam; (2) an existing reservoir with a gross storage capacity of 90,230 acre feet, and a surface area of 1,069 acres; (3) an existing 7- to 13-foot-diameter, 3,000- to 5,000-foot-long penstock, (4) two powerhouses, containing generating units, with a total rated capacity of 5,439 kW; and (5) a transmission line. The applicant estimates a 47,645 MWh average annual energy production.

l. *Purpose of Project:* Power would be sold to a local utility.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

7 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10692–000.

c. *Date Filed:* November 4, 1988.

d. *Applicant:* Robert A. Davis III.

e. *Name of Project:* Yellow Creek.

f. *Location:* On Yellow Creek near Dawsonville, Dawson County, Georgia.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Robert A. Davis III, 255 Ashley Circle North, Martinez, GA 30907, (404) 863–2171.

i. *FERC Contact:* Mary Nowak, (202) 376–9634.

j. *Comment Date:* March 3, 1989.

k. *Description of Project:* The project would consist of the following facilities: (1) A proposed reconstructed reinforced concrete dam 5 feet to 8 feet high at the center of a stream; (2) a proposed reservoir with a surface elevation of approximately 1,085 feet mean sea level and a surface area of ½ acre; (3) a proposed 2,500-foot-long by 18-inch-diameter penstock; (4) a proposed powerhouse with a turbine-generator unit having a total installed capacity of 275 kilowatts; (5) a proposed 2½-mile, 3-phase transmission line; and (6) appurtenant facilities. The applicant estimates that the average annual generation would be 2,146,320 kilowatthours. The dam would be owned by Robert A. Davis III. The applicant estimates that the cost of the studies under permit would be no more than $8,000.00.

l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

8 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10700–000.

c. *Date Filed:* December 1, 1988.

d. *Applicant:* City of Vernon, California.

e. *Name of Project:* Bear Butte Pumped Storage.

f. *Location:* On Big Creek and Huntington Lake, within Sierra National Forest in Fresno County, California, Township 8 South, Ranges 25 and 26 East.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* David B. Brearly, City Attorney, City of Vernon, Hacienda Professional Plaza, 2440 S. Hacienda Blvd. # 223, Hacienda, Heights, CA 91745, (818) 336–3408.

i. *FERC Contact:* Mr. James Hunter, (202) 376–1943.

j. *Comment Date:* March 3, 1989.

k. *Description of Project:* The proposed project would consist of: (1) A 290-foot-high concrete gravity type dam with an overall crest length of 2,620 feet; (2) a reservoir with a 26,000-acre-foot capacity at normal pool elevation 8,188 feet; (3) a 7,600-foot-long, 15-foot-diameter underground penstock; (4) an underground powerhouse/pumping facility containing a turbine/pumping unit with a capacity of 120 MW and an average annual output of 170 GWH; (5) a 14,300-foot-long tailrace tunnel; (6) an inlet/outlet at elevation 6,880, beneath the surface of Huntington Lake; (7) a 5,600-foot-long access tunnel; and (8) a 23,400-foot-long, 230-KV transmission line connecting to Southern California Edison's existing Big Creek No. 1 Swithyard. The estimated cost of permit activities is $1,000,000.

l. *Purpose of Project.* Project power would be used to serve the applicant's and other municipal electric utility service areas.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

9 a. *Type of Filing:* Preliminary Permit.

b. *Project No.:* 10703–000.

c. *Date Filed:* December 7, 1988.

d. *Applicant:* City of Centralia, Washington.

e. *Name of Project:* Yelm Hydroelectric Project.

f. *Location:* On the Nisqually River near the town of Yelm, in Thurston and Lewis Counties, Washington.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Robert E. Gatton, CH2M Hill Northwest, Inc., P.O. Box 91500, Seattle, WA 98009–2050, (206) 453–5000.

i. *FERC Contact:* Thomas Dean, (202) 376–9562.

j. *Comment Date:* March 20, 1989.

k. *Description of Application:* The existing project consists of: (1) A 20-foot-high concrete diversion dam with a crest elevation of 334.5 feet national geodetic vertical datum (NGVD); (2) a 7-acre diversion pool with a normal maximum water surface elevation of 336 feet NGVD; (3) a 105-foot-long, 8-foot-wide fishway; (4) a 9.1-mile-long earthen power canal; (5) two 84-inch-diameter, 416-foot-long penstocks leading to; (6) a powerhouse containing two 3-MW and one 6-MW generating units with a combined capacity of 12 MW; (7) a 160-foot-long tailrace discharging to the Nisqually River; and (8) a 26.1-mile-long, 69-kV transmission line.

The applicant states that the average annual energy production is 74.9 GWh. The approximate cost of the studies under the permit would be $300,000.

l. *Purpose of Project:* All of the power generated at this project is used in the applicant's power system.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

10 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10705–000

c. *Date Filed:* December 9, 1988.

d. *Applicant:* Alpyn Creek Development Corporation.

e. *Name of Project:* Huntersfield.

f. *Location:* Near Schoharie Creek in the Towns of Prattsville and Roxbury, Greene and Delaware Counties, New York.

g. *Filed Pursuant to :* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact: Mr. David Willett, 140 John James Audubon Parkway, Amherst, NY 14228–1180, (716) 689–3737.*

i. *FERC Contact:* Charles T. Raabe, (202) 376–9778.

j. *Comment Date:* March 10, 1989.

k. *Description of Project:*

The proposed "closed system" hydroelectric pumped storage project would consist of: (1) an 18,000-foot-long, 130-foot-high, earthfill upper dike enclosing; (2) a 14,000 acre-foot upper reservoir having a 400 acre surface area at maximum water surface elevation 2,000 feet MSL; (3) a series of underground concrete and steel lined shafts, tunnels, and manifolds connecting the upper reservoir, powerhouse, and lower reservoir; (4) an underground powerhouse containing four—250-MW reversible Francis—type pump/turbines operated at an 815-foot gross average head and connected to four motor/generators; (5) an access tunnel; (6) an 18,000-foot-long, 100-foot-high, earthfill lower dike enclosing; (7) an 14,000 acre-foot lower reservoir having a 200 acre surface area at maximum water surface elevation 1,220 feet MSL; (8) a switchyard and maintenance building; (9) a 345-kV transmission line to the existing Leeds Substation or a 230-kV transmission line to the existing Delhi Substation; and (10) appurtenant facilities.

The proposal would have an installed pumping/generating capacity of 1,000-MW and would provide up to 10-hours of daily generation at peak capacity. Power consumed/generated would be purchased/sold to utilities within the New York Power Pool. Applicant estimates that the cost of the studies under the permit and preparation of an FERC licenses application would be $1,500,000.

l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

11 a. *Type of Filing:* Major License (Less than 5-MW).

b. *Project No.:* 9656–002.

c. *Date Filed:* December 31, 1986.

d. *Applicant:* Marble Creek Hydro, Inc.

e. *Name of Project:* Marble Creek Project.

f. *Location:* On Marble Creek, in Shoshone County, Idaho occupying U.S. lands within the St. Joe National Forest and lands administered by the Bureau of Land Management. (Township 45 North Range 3 East Boise Meridian).

g. *Filed Pursuant to :* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* James R. Morris, Vice President, Marble Creek Hydro, Inc. P.O. Box 1016, Lewiston, ID 83501, (208) 799–1723.

i. *FERC Contact:* Thomas Dean, (202) 376–5962.

j. *Comment Date:* March 13, 1989.

k. *Description of Project.* The proposed project would consist of: (1) An 8-foot-high, 60-foot-long rock and concrete diversion structure at elevation 2,322 feet msl; (2) a 30-foot-long by 15-foot wide gate house with 36-inch-diameter pipe for sluicing sediment; (3) an 84-inch-diameter, 3,000-foot-long buried steel penstock leading to; (4) a 40-foot-wide by 150-foot-long powerhouse containing two generating units rated at 2,000 kilowatt (kW) and 1,200 kW with a combined installed capacity of 3,200 kW; (5) a tailrace; (6) a 2.2-mile-long, 24-kV transmission line; and (7) appurtenant facilities.

The applicant estimates the average annual energy production to be 10 GWh.

l. *Purpose of Project:* Applicant intends to sell the power generated from the proposed facility to the Washington Water Power Company.

m. This notice also consists of the following standard paragraphs: A3, A9, B, C, and D1.

Standard Paragraphs

A3. Development Application—Any qualified development applicant desiring to file a competing application must submit to the Commission, on or before the specified comment date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified comment date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

A5. Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

A7. Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or

before the specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

A9. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, include an unequivocal statement of intent to submit, if such an application may be filed, either (1) a preliminary permit application or (2) a development application (specify which type of application), and be served on the applicant(s) named in this public notice.

A10. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protests, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Dean Shumway, Director, Division of Project Review, Federal Energy Regulatory Commission, Room 203-RB, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D1. Agency Comments—States, agencies established pursuant to federal law that have the authority to prepare a comprehensive plan for improving, developing, and conserving a waterway affected by the project, federal and state agencies exercising administration over fish and wildlife, flood control, navigation, irrigation, recreation, cultural or other relevant resources of the state in which the project is located, and affected Indian tribes are requested to provide comments and recommendations for terms and conditions pursuant to the Federal Power Act as amended by the Electric Consumer Protection Act of 1986, the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Historic Preservation Act, the Historical and Archeological Preservantion Act, the National Environmental Policy Act, Pub. L. No. 88-29, and other applicable statutes. Recommended terms and conditions must be based on supporting technical data filed with the Commission along with the recommendations, in order to comply with the requirement in section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b), that Commission findings as to facts must be supported by substantial evidence.

All other federal, state, and local agencies that receive this notice through direct mailing from the Commission are requested to provide comments pursuant to the statutes listed above. No other formal requests will be made. Responses should be confined to substantive issues relevant to the issuance of a license. A copy of the application may be obtained directly from the applicant. If an agency does not respond to the Commission within the time set for filing, it will be presumed to have no comments. One copy of an agency's response must also be sent to the Applicant's representatives.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtain by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: January 13, 1989, Washington, DC.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1331 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-566-000, et al.]

Northwest Pipeline Co., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Northwest Pipeline Company

[Docket No. CP89-566-000]

January 12, 1989.

Take notice that on January 9, 1989, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84108, filed in Docket No. CP89-216-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP86-578-000 pursuant to section 7 of the Natural Gas Act for Harrah's Tahoe (Harrah), all as more fully set forth in the request on file with the Commission and open to public inspection.

Northwest proposes to transport natural gas for Harrah on an interruptible basis, pursuant to a transportation agreement dated October 28, 1988. Northwest explains that service commenced November 17, 1988, under § 284.223(a) of the Commission's Regulations, as reported on December 16, 1988, in Docket No. ST89-1318-000. Northwest further explains that the peak day quantity would be 720 NMBtu, the average daily quantity would be 450 MMBtu, and that the annual quantity would be 160,000 MMBtu. Northwest explains that it would receive natural gas from various sources in Wyoming, Colorado, Utah and Washington and would redeliver the gas for Harrah's account to Paiute Pipeline Company in Owyhee County, Idaho.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

2. United Gas Pipe Line Company

[Docket No. CP89-548-000]

January 12, 1989.

Take notice that on January 6, 1989, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas, 77251-1478, filed in Docket No. CP89-548-000 a request pursuant to § 157.205 of the

Regulations under the Natural Gas Act for permission and approval to abandon firm sales service to Westvaco Corporation (Westvaco), 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.

United proposes to abandon firm sales service on its system to Westvaco at the Tall Oil Plant near DeRidder, Beauregard Parish, Louisiana. United states that Westvaco has consented to the proposed abandonment. United further states that it would leave the facilities associated with the proposed abandonment in place to provide either transportation or sales service at some future time.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

3. Trunkline Gas Company

[Docket No. CP89-587-000]

January 12, 1989.

Take notice that on January 10, 1989, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas, 77251-1642, filed in Docket No. CP89-587-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation service on behalf of ANR Gathering Company (ANR), a shipper and marketer of natural gas, under its blanket certificate issued in Docket No. CP86-586-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Trunkline requests authorization to transport, on an interruptible basis, up to a maximum of 100,000 dt of natural gas per day for ANR from receipt points located in the states of Illinois, Louisiana, Tennessee and Texas. Trunkline will then transport and redeliver the gas to Columbia Gulf Company in St. Mary Parish, Louisiana. The ultimate end users are identified as Anchor Glass Corporation, City of Charlottesville, Virginia, City of Richmond, Consolidated Edison Company of New York Inc., Public Service Electric & Gas Company and Southern Gas Company. Trunkline anticipates transporting, on an average day 100,000 dt and an annual volume of 36,500,000 dt.

Trunkline states that the transportation of natural gas for ANR commenced December 1, 1988, as reported in Docket No. ST89-1479-000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

4. United Gas Pipe Line Company

[Docket No. CP89-537-000]

January 12, 1989.

Take notice that on January 5, 1989, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas, 77251-1478, filed in Docket No. CP89-537-000, a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP86-6-000, pursuant to section 7 of the Natural Gas Act for EnTrade Corporation (EnTrade), a marketer, all as more fully set forth in the request on file with the Commission and open to public inspection.

United proposes to transport up to a maximum of 77,250 MMBtu of natural gas per day for EnTrade from the existing interconnection between United and Sea Robin Pipeline Company near Erath, Vermilion Parish, Louisiana, to various delivery points also in the state of Louisiana. United anticipates transporting up to 77,250 MMBtu on a peak day and average day, 28,196,250 MMBtu annually for EnTrade. United explains that service commenced December 4, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket Nos. ST89-1301.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

5. Natural Gas Pipeline Company of America

[Docket No. CP89-563-000]

January 12, 1989.

Take notice that on January 9, 1989, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-563-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for EP Operating Company (EP), a producer, under the blanket certificate issued in Docket No. CP86-582-000, pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Natural states that pursuant to a transportation agreement dated November 2, 1988, under its Rate Schedule ITS, it proposes to transport for EP up to 10,000 MMBtu per day equivalent of natural gas (plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS). Natural states that it would receive the gas at existing receipt points in Oklahoma and that it would transport and deliver the gas for EP's account at an interconnection with Lone Star Gas Company in Wise County, Texas.

Natural advises that service under § 284.223(a) commenced November 8, 1988, as reported in Docket No. ST89-1641. Natural further advises that it would transport 6,500 MMBtu on an average day and 2,372,500 MMBtu annually.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

6. Natural Gas Pipeline Company of America

[Docket No. CP89-569-000]

January 12, 1989.

Take notice that on January 9, 1989, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-569-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Rangeline Corporation (Rangeline), a marketer, under the blanket certificate issued in Docket No. CP86-582-000, pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Natural states that pursuant to a transportation agreement dated October 13, 1988, as amended, under its Rate Schedule ITS, it proposes to transport for Rangeline up to 500,000 MMBtu per day equivalent of natural gas (plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS). Natural states that it would receive the gas at existing receipt points in Illinois, Texas, Oklahoma, Kansas, Arkansas, Iowa, Louisiana and offshore Louisiana, and that it would transport and deliver the gas in Michigan, Illinois, Kansas, Texas and Iowa.

Natural advises that service under § 284.223(a) commenced November 8, 1988, as reported in Docket No. ST89-1637. Natural further advises that it would transport 50,000 MMBtu on an average day and 18,250,000 MMBtu annually.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

7. Moraine Pipeline Company

[Docket No. CP89-545-000]

January 12, 1989.

Take notice that on January 6, 1989, Moraine Pipeline Company (Moraine) 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-545-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) and the Natural Gas Policy Act (18 CFR 284.223) for authorization to transport natural gas for National Energy Systems, Inc. (NES), a marketer of natural gas, under Moraine's blanket certificate issued in Docket No. CP86-492-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with Commission and open to public inspection.

Moraine proposes to transport on an interruptible basis up to 50,000 MMBtu of natural gas equivalent per day, plus additional quantities of overrun gas, on behalf of NES pursuant to a transportation agreement dated October 17, 1988, between Moraine and NES. Moraine would receive gas at an existing point of receipt in Lake County, Illinois and redeliver equivalent volumes at an existing delivery point in Kenosha County, Wisconsin.

Moraine further states that the estimated average daily and annual quantities would be 125 MMBtu and 45,625 MMBtu, respectively. Service under § 284.223(a) commenced on November 22, 1988, as reported in Docket No. ST89-1614-000, it is stated.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

8. Tennessee Gas Pipeline Company

[Docket No. CP89-584-000]

January 12, 1989.

Take notice that on January 10, 1989, Tennessee Gas Pipeline Company, (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP89-584-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide a transportation service for Cornerstone Production Corporation (Cornerstone), a marketer, under the blanket certificate issued in Docket No. CP87-115-000 on June 18, 1987, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Tennessee states that pursuant to a transportation agreement dated November 23, 1988, as amended on December 19, 1988, under its Rate Schedule IT, it proposes to transport up to 60,000 dekatherms (dt) per day equivalent of natural gas for Cornerstone. Tennesee states that it would transport the gas from receipt points located offshore Louisiana and in Louisiana and delivery such gas for Cornerstone's account to (1) Columbia Gulf Transmission Corporation at Egan B, Acadia Parish, Louisiana; (2) Florida Gas Company at (a) Carnes, Stone County, Mississippi, (b) Vinton, Calcasieu Parish, Louisiana; and (c) Southwest Jefferson Isle, Vermilion County, Louisiana; and (3) Zapata Gathering in Starr County, Texas.

Tennessee advises that service under § 284.223(a) commenced December 1, 1988, as reported in Docket No. ST89-1390 (filed December 20, 1988). Tennessee further advises that it would transport 60,000 dt on an average day and 21,900,000 dt annually.

Comment date: February 27, 1989, in accordance with standard Paragraph G at the end of this notice.

9. ANR Pipeline Company

[Docket No. CP89-579-000]

January 13, 1989.

Take notice that on January 10, 1989, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP89-579-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation service on behalf of Entrade Corporation (Entrade), a marketer of natural gas, under ANR's blanket certificate issued in Docket No. CP88-532-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

ANR requests authorization to transport, on an interruptible basis, up to a maximum of 20,000 dekatherms of natural gas per day for Entrade from receipt points located in Oklahoma, Texas, Offshore Texas, Kansas, Louisiana, Offshore Louisiana, Kentucky, Indiana, Ohio, Wisconsin, Michigan and Illinois, to a delivery point located in Allegan County, Michigan. ANR anticipates transporting an annual volume of 7,300,000 dekatherms.

ANR states that the transportation of natural gas for Entrade commenced October 18, 1988, as reported in Docket No. ST89-794-000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations and the blanket certificate issued to ANR in Docket No. CP88-532-000.

Comment date: February 27, 1989, in accordance with standard Paragraph G at the end of this notice.

10. Tennessee Gas Pipeline Company

[Docket No. CP89-582-000]

January 13, 1989.

Take notice that on January 10, 1989, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP89-582-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide transportation service for Ultramar Oil and Gas, Limited (Ultramar), a producer, under the blanket certificate issued in Docket No. CP87-115-000 on June 18, 1987, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Tennessee states that pursuant to a transportation agreement dated November 7, 1988, under its Rate Schedule IT, it proposes to transport up to 4,036 dekatherms (dt) per day equivalent of natural gas Ultramar for a point of receipt listed in Exhibit "A" of the agreement to a delivery point also listed in Exhibit "A". Tennessee states that it would receive the gas at an existing point on its system located in Cameron Parish, Louisiana, and that it would deliver the gas for Ultramar's account to Southern Natural Gas Company in St. Mary Parish, Louisiana. Tennessee further states that the ultimate delivery point is located in the state of Alabama.

Tennessee advises that service under §284.223(a) commenced November 22, 1988, as reported in Docket No. ST89-1204 (filed December 9, 1988). Tennessee further advises that it would transport 4,036 dt on an average day and 484,320 dt annually.

Comment date: February 27, 1989, in accordance with standard Paragraph G at the end of this notice.

11. Panhandle Eastern Pipe Line Company

[Docket No. CP89-590-000]

January 13, 1989.

Take notice that on January 10, 1989, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-590-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to

provide an interruptible transportation service for Amgas, Inc. (Amgas), a marketer, under the blanket certificate issued in Docket No. CP86-585-000 on November 20, 1987, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Panhandle states that pursuant to a transportation agreement dated November 2, 1988, under its Rate Schedule PT, it proposes to transport up to 1,600 dekatherms (dt) per day equivalent of natural gas Amgas from points of receipt listed in Exhibit "A" of the agreement to delivery points also listed in Exhibit "A", which transportation service may involve interconnections between Panhandle and various transporters. Panhandle states that it would receive the gas at various existing points on its system in Texas, Oklahoma, Kansas, Colorado, Wyoming, and Illinois, and that it would transport and redeliver the gas, less fuel used and unaccounted for line loss, for Amgas' account to Central Illinois Light Company in Sangamon County, Illinois.

Panhandle advises that service under §284.223(a) commenced December 1, 1988, as reported in Docket No. ST89-1512. Panhandle further advises that it would transport 800 dt on an average day and 292,000 dt annually.

Comment date: February 27, 1989, in accordance with standard Paragraph G at the end of this notice.

12. Panhandle Eastern Pipe Line Company

[Docket No. CP89-588-000]

January 13, 1989.

Take notice that on January 10, 1989, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-588-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Amgas, Inc. (Amgas), a marketer, under the blanket certificate issued in Docket No. CP86-585-000 on November 20, 1987, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Panhandle states that pursuant to a transportation agreement dated November 2, 1988, under its Rate Schedule PT, it proposes to transport up to 105 dekatherms (dt) per day equivalent of natural gas for Amgas from points of receipt listed in Exhibit "A" of the agreement to delivery points also listed in Exhibit "A", which transportation service may involve interconnections between Pandhandle and various transporters. Panhandle states that it would receive the gas at various existing points on its system in Texas, Oklahoma, Kansas, Colorado, Wyoming, and Illinois, and that it would transport and redeliver the gas, less fuel used and unaccounted for line loss, for Amgas' account to Central Illinois Light Company in Tazewell, Edgar, Moultrie, Douglas, Vermilion, Logan, Champaign, Sangamon, Peoria, and Knox Counties, Illinois.

Panhandle advises that service under § 284.223(a) commenced on December 1, 1988, as reported in Docket No. ST89-1515. Pandhandle further advises that it would transport 35 dt on an average day and 12,775 dt annually.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

13. Northwest Pipeline Corporation

[Docket No. CP89-568-000]

January 13, 1989.

Take notice that on January 9, 1989, Northwest Pipeline Corporation, (Northwest) 295 Chipeta Way, Salt Lake City, Utah 84108 filed in Docket No. CP89-568-000 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 High Sierra Casino Hotel (High Sierra), under its blanket authorization issued in Docket No. CP86-578-000 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.

Northwest would perform the proposed interruptible transportation service for High Sierra, an end user of natural gas, pursuant to a transportation agreement dated October 25, 1988, under its Rate Schedule TI-1. The term of the transportation agreement is from date of execution until October 25, 1989, and year to year thereafter, subject to termination upon 30 days written notice by either party. Northwest proposes to transport on a peak day up to 450 MMBtu; on an average day up to 250 MMBtu; and on an annual basis 90,000 MMBtu for High Sierra. Northwest proposes to receive the subject gas from various exiting points of receipt located in Washington, Oregon Colorado, Wyoming, and Utah for transportation to the Reno Lateral delivery point to Paiute Pipeline Company located in Owyhee County, Idaho. It is stated that the natural gas transported under the transportation agreement may be received on behalf of Northwest by any local distribution company or affiliate of Northwest which has an appropriate contractural arrangement with Northwest. Northwest alleges that High Sierra has entered into a service agreement with Southwest Gas Corporation, a local distribution company. Northwest avers that no new facilities nor expansion of existing facilities are required to provide the proposed service.

It is explained that the proposed service is currently being performed pursuant to the 120-day self implementing provisions of § 284.223(a)(1) of the Commission's Regulations. Northwest commenced such self-implementing service on November 22, 1988, as reported in Docket No. ST89-1319-000.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

14. Williams Natural Gas Company

[Docket Nos. CP89-527-000, CP89-550-000]

January 13, 1989.

Take notice that on January 3, 1989, and January 6, 1989, Williams Natural Gas Company (Williams), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket Nos. CP89-527-000 and CP89-550-000,[1] requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP86-631-000 pursuant to section 7 of the Natural Gas Act for Utilicorp United, Inc. d/b/a Missouri Public Service (Utilicorp), and Diamond Shamrock Natural Gas Marketing Company (Diamond Shamrock), all as more fully set forth in the requests on file with the Commission and open to public inspection.

Williams proposes to transport up to a maximum of 3,697 MMBtu of natural gas per day for Utilicorp and up to 63,200 MMBtu of natural gas per day for Diamond Shamrock, from various receipt points in Kansas, Missouri, Oklahoma, Texas and Wyoming to various delivery points on Williams' pipeline system located in Kansas and Missouri and Oklahoma. Williams anticipates transporting up to 3,697 MMBtu on a peak day and average day; 1,349,405 MMBtu annually for Utilicorp; and up to 63,200 MMBtu on a peak day, 50,000 MMBtu on an average day and 23,068,000 MMBtu annually for Diamond Shamrock. Williams explains that service commenced November 1, 1988,

[1] These dockets are not consolidated.

and November 16, 1988, respectively, under § 284.223(a) of the Commission's Regulations, as reported in Docket Nos. ST89-1153-000 and ST89-1377-000, respectively.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

15. Natural Gas Pipeline Company of America

[Docket No. CP89-564-000]

January 13, 1989.

Take notice that on January 9, 1989, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-564-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations (18 CFR 157.205 and 284.223) for authorization to transport, on an interruptible basis, for Mitchell Energy Corporation (Mitchell), a producer of natural gas, under Natural's blanket certificate issued in Docket No. CP86-582-000 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.

Natural states that, pursuant to the interruptible transportation service agreement dated September 20, 1988 (#IGP-1433), Natural is obligated to accept for transportation, on an interruptible basis, no more than 200 MMBtu per day of natural gas. Consistent with Natural's Rate Schedule ITS, however, it is stated that Mitchell may request, and Natural may agree to accept, additional quantities as overrun gas. Natural states that the quantity anticipated to be transported for Mitchell on an average day is 200 MMBtu, with the annual quantity expected to be 73,000 MMBtu. It is stated that the receipt point and the delivery point are located in Texas. It is further stated that Natural commenced the transportation of natural gas for Mitchell on November 4, 1988, for a 120-day period pursuant to § 284.223(a)(1), as reported in Docket No. ST89-1642. Natural states that no facilities are to be constructed by Natural regarding the transportation proposed and that it is not aware of any agency relationship under which a local distribution company or an affiliate of Mitchell is to receive natural gas on behalf of Mitchell.

Comment date: February 27, 1989, in accordance with Standard Paragraph G at the end of this notice.

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.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1407 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. G-4579-061, et al.]

OXY USA Inc., et al.; Applications for Certificates, Abandonment of Service and Amendment of Certificates [1]

January 17, 1989

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce, to abandon service or to amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before February 1, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). 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 in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

Docket No. and dated filed	Applicant	Purchaser and location	Description
G-4579-061, C, 12-23-88	OXY U.S.A. Inc., P.O. Box 300, Tulsa, OK 74102.	Colorado Interstate Gas Co., Greenwood Field, Morton County, KS.	New lease acquired for acreage previously dedicated by Texaco Inc. in Docket No. G-8087.
G-10546-001, B, 12-19-88	Tenneco Oil Co., P.O. Box 2511, Houston, TX 77252.	Colorado Interstate Gas Co., Mocane Field, Beaver County, OK.	Assigned certain interests to Spess Oil Co. 10-29-86, PNG Operating Co. 12-2-86, Donald C. Slawson Oil Producers 3-11-87, J-Brex Co. 4-27-88, Maple Properties Corp., Mesa Operating Limited Partnership and Cabot Petroleum Corp. 5-24-88.
CI63-459-004, D, 12-14-88	Chevron U.S.A. Inc., P.O. Box 3725, Houston, TX 77253-3725.	ANR Pipeline Co., Oakdale North Field, Woods County, OK.	Assigned certain interests 10-21-88, to Plains Resources Inc.
CI64-1075-000, E, 12-19-88	Fina Oil and Chemical Co., P.O. Box 2159, Dallas, TX 75221.	Tennessee Gas Pipeline Co., Heyser Field, Calhoun County, TX.	Acreage acquired 1-1-88 from Tenneco Oil Co.
CI66-310-001, D, 12-14-88	Chevron U.S.A. Inc.	Tennessee Gas Pipeline Co., Welsh Field, Jefferson Davis Parish, LA.	Assigned certain acreage 9-1-87, to Empire Land Corp.
CI68-621-005, E, 12-19-88	Fina Oil and Chemical Co.	Tennessee Gas Pipeline Co., Heyser Field, Calhoun County, TX.	Acreage acquired 1-1-88 from Tenneco Oil Co.

Docket No. and dated filed	Applicant	Purchaser and location	Description
CI80-206-003, D, 12-23-88	Tenneco Oil Co.	El Paso Natural Gas Co., Cheyenne NW Field, Roger Mills County, OK.	Assigned certain acreage 9-10-86 to Foran Oil Co.
CI89-180-000 (CI79-132), D, 12-15-88.	Tenneco Oil Co.	ANR Pipeline Co., NW Anthon Field, *et al.*, Custer and Roger Mills Counties, OK, and Roberts County, TX.	Assigned certain interests to Inexco Oil Co. 6-12-80, and Maple Properties Corp.5-2-88.
CI89-183-000 (CI68-80), D, 12-19-88.	ARCO Oil and Gas Co., Division of Atlantic Richfield Co., P.O. Box 2819, Dallas, TX 75221.	Northwest Pipeline Corp., Piceance Creek Field, Rio Blanco, CO.	Assigned 1-1-87, to Hondo Oil & Gas Co.
CI89-184-000 (CI68-672), D, 12-19-88.	ARCO Oil and Gas Co., Division of Atlantic Richfield Co.	Northwest Pipeline Corp., Piceance Creek Field, Rio Blanco, CO.	Assigned 1-1-87, to Hondo Oil & Gas Co.
CI89-185-000 (CI64-1067), B, 12-19-88.	Tenneco Oil Co.	Texas Eastern Transmission Corp., Bethany-Longstreet Field, DeSoto Parish, LA.	Ceased to produce in 1974.
CI89-188-000 (CI64-1027 and CI64-1030), B, 12-19-88.	Tenneco Oil Co.	Arkla Energy Resources, a division of Arkla, Inc., Haynesville Field, Claiborne Parish, LA.	Lease surrendered 10-85; other interests assigned to MacMillan Petroleum Co. 7-1-84, Equity Oil Co. 9-1-87, and B.R. Eubanks, M.D. 11-1-84.
CI89-189-000, A, 12-19-88	Union Oil Co. of CA, P.O. Box 7600, Los Angeles, CA 90051.	El Paso Natural Gas Co., Ignacio Blanco Field, La Plata County, CO.	Application for certificate to cover sale previously covered by the operator, Sohio Petroleum Co.
CI89-192-000 (CI67-270), F, 12-22-88.	Mesa Operating Limited Partnership, P.O. Box 2009, Amarillo, TX 78189.	ANR Pipeline Co., Laverne/Dobie Springs NW Field, Harper County, OK.	Acreage acquired 10-1-88 from Chevron U.S.A. Inc.
CI89-193-000 (G-16030), F, 12-22-88.	Mesa Operating Limited Partnership.	Panhandle Pipe Line Co., Forgan Field, Beaver County, OK.	Acreage acquired 10-1-88 from Chevron U.S.A. Inc.
CI89-195-000, A, 12-23-88	Union Oil Co. of CA	El Paso Natural Gas Co., Langlie Mattix Field, Lea County, NM.	Application for certificate to cover sale previously covered by the operator, Union Texas Petroleum Corp.
CI89-197-000, E, 12-27-88	Helmerich & Payne, Inc., 1579 East 21st St., Tulsa, OK 74114.	Arkla Energy Resources, a division of Arkla, Inc., South Ashland Field, Coal and Pittsburg Counties, OK.	Acreage acquired 2-1-87 from Anderman Oils Limited, *et al.*
CI89-198-000 (G-4328), F, 12-27-88.	Mesa Operating Limited Partnership.	Panhandle Eastern Pipe Line Co., Keyes Field, Cimarron County, OK.	Acreage acquired 12-1-87 from Tenneco Oil Co.
CI89-199-000 (CI79-436), F, 12-27-88.	Mesa Operating Limited Partnership.	Phillips Petroleum Co., Texas Hugoton Field, Sherman County, TX.	Acreage acquired 6-1-86 and 12-1-87 from Tenneco Oil Co.
CI89-200-000 (CI88-190-000), F, 12-27-88.	Amoco Production Co., P.O. Box 50879, New Orleans, LA 70150.	Northern Natural Gas Co., Division of Enron Corp., Ship Shoal Block 84, Offshore Louisiana.	Acreage acquired 7-1-88 from Enron Oil & Gas Co.
CI89-201-000, E, 12-27-88	ARCO Oil and Gas Co., Division of Atlantic Richfield Co..	Arkla Energy Resources, a division of Arkla, Inc., Wilburton Field, Latimer County, OK.	Acreage acquired 10-1-87 from BFO Energy, Inc.
CI89-202-000, E, 12-28-88	Kerr-McGee Corp., P.O. Box 25861, Oklahoma City, OK 73125.	El Paso Natural Gas Co., Spraberry Trend Field, Upton County, TX. Transcontinental Gas Pipe Line Corp., Cooke Field, LaSalle County, TX. Panhandle Eastern Pipe Line Co., Hugoton Field, Stephens County, KS. CNG Transmission Corp., Boone Mountain Field, Clearfield County, PA. Texas Eastern Transmission Corp., Delate Charco Field, Brooks County, TX.	Acreage acquired 1-1-88 from Benedum-Trees Oil Co.
CI89-203-000, F, 1-3-89	Samedan Oil Corp., P.O. Box 909, Ardmore, OK 73402.	Western Gas Processors, Ltd., Spotted Horse Field, Campbell County, WY.	Acreage acquired 12-1-86 from Texas Eastern Skyline Oil Co.
CI89-206-000 (CI65-56), B, 1-3-89.	Tenneco Oil Co.	Texas Gas Transmission Corp., Lisbon Field, Claiborne Parish, LA.	Wells plugged and abandoned and acreage released or held by production from non-dedicated sources.
CI89-207-000 (CI74-673), B, 1-3-89.	Tenneco Oil Co.	Tennessee Gas Pipeline Co., San Ramon Field, Hidalgo County, TX.	Well plugged and leases surrendered.
CI89-208-000 (G-10143), D, 1-3-89.	ARCO Oil and Gas Co., Division of Atlantic Richfield Co..	Tennessee Gas Pipeline Co., West Delta Block 84, Offshore Louisiana.	Acreage assigned 9-8-88 to S. Parish Oil Co., Inc.
CI89-215-000, F, 12-23-88	Mesa Operating Limited Partnership.	ANR Pipeline Co., Quinlan NW. Field, Woodward County, OK.	Acreage acquired 10-1-88 from Chevron U.S.A. Inc.

Filing Code: A—Initial Service, B—Abandonment, C—Amendment to add acreage, D—Amendment to delete acreage, E—Total Succession, F—Partial Succession.

[FR Doc. 89-1404 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-2-61-000]

Bayou Interstate Pipeline System; Proposed Change in Rates

January 12, 1989.

Take notice that on January 9, 1989, Bayou Interstate Pipeline System (Bayou) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, (Tariff) Ninth Revised Sheet No. 4 to be effective February 1, 1989.

Bayou states that the proposed tariff sheet is filed pursuant to the Purchased Gas Cost Adjustment provisions contained in Section 15 of Bayou's tariff. A copy of this filing is being mailed to Bayou's jurisdictional customers and interested state regulatory agencies.

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, DC 20426, in accordance with §§ 385.214 and 385.211. All such motions or protests must be filed on or before January 23, 1989. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1333 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP82-71-026 et al.]

Northern Natural Gas Co., et al.; Filing of Pipeline Refund Reports and Refund Plans

January 13, 1989.

Take notice that the pipelines listed in the Appendix hereto have submitted to the Commission for filing proposed refund reports. The date of filing and docket number are also shown on the Appendix.

Any person wishing to do so may submit comments in writing concerning the subject refund reports. All such comments should be filed with the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426, on or before February 6, 1989. Copies of the respective filings are on file with the Commission and available for public inspection.

Lois D. Cashell,

Secretary.

Appendix

Filing date	Company	Docket No.
11/8/88	Northern Natural Gas Co.	RP82-71-026
11/14/88	Transcontinental Gas Pipe Line Co.	RP87-7-043
11/15/88	Columbia Gas Transmission Corp.	RP73-65-026
11/23/88	Kentucky-West Virginia Gas Co.	RP86-52-012
12/13/88	Jupiter Energy Corp...	RP86-80-003
12/16/88	Trunkline Gas Pipe Line Co.	RP87-15-025
12/22/88	National Fuel Gas Supply Corp.	TA85-1-16-007
12/23/88	Northwest Pipeline Co.	RP82-56-022
12/30/88	El Paso Natural Gas Co.	RP85-58-027

[FR Doc. 89-1334 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM89-2-7-000]

Southern Natural Gas Co.; Proposed Changes in FERC Gas Tariff

January 12, 1989.

Take notice that on January 4, 1989, Southern Natural Gas Company (Southern) tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Sixth Revised Volume No. 1:

Third Revised Sheet No. 4B.1
Third Revised Sheet No. 4B.2
Third Revised Sheet No. 4B.3

The tariff sheets are proposed to be effective January 1, 1989.

Southern states that the proposed tariff sheets are being submitted in compliance with Ordering Paragraph (C) of the Commission's August 31, 1988 order in Docket No. RP88-229-000, in which Southern was authorized to flow through the take-or-pay buy-out and buy-down charges allocated to it by United Gas Pipeline Company to its firm sales customers. The aforesaid tariff sheets reflect the allocation of $555,220.00 in additional take-or-pay buy-out and buy-down charges assigned to Southern by United in its November 30, 1988 filing in Docket Nos. RP88-27-000 and RP88-264-000.

Southern states that copies of the filing were mailed to all of Southern's jurisdictional purchasers and interested state commissions as well as all parties to this proceeding.

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, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All motions or protests should be filed on or before January 23, 1989. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1335 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. EC88-2-000]

Utah Power & Light Co., PacifiCorp, and PC/UP&L Merging Corp.; Filing

January 13, 1989.

Take notice that on January 6, 1989 Utah Power & Light Company, PacifiCorp, and PC/UP&L Merging Corp., in accordance with the Commission's Opinion No. 318, dated October 26, 1988, filed their Announcement of Remaining Existing Capacity (Announcement) available to Qualifying Entities for firm transmission service as provided for in Opinion No. 318. On January 9, 1989 Utah Power & Light Company and PacifiCorp were merged with and into PC/UP&L Merging Corp. whose name was simultaneously changed to PacifiCorp (the Company).

Within 90 days of this notice, those seeking status as Qualifying Entities must file with the Company, as provided for in the Announcement, all executed contracts which they have negotiated for firm capacity and energy which would utilize the Remaining Existing Capacity.

Any person desiring to be heard or to protest said filing should file comments with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. All such comments should be filed on or before January 31, 1989. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1336 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-51-000]

United Gas Pipe Line Co.; Proposed Changes In FERC Gas Tariff

January 17, 1989.

Take notice that United Gas Pipe Line Company (United), on January 10, 1989, tendered for filing proposed changes in its FERC Gas Tariff, Volume No. 1. The proposed changes would revise United's Tariff to reflect revised Demand-1 and Damand-2 Billing Determinants for one of United's firm sales Rate Schedule PL Customers, Mississippi River Transmission Corporation (MRT). The filing of these tariff sheets is necessary to reflect a sales service agreement between United and MRT which has been implemented under the abandonment procedures of the Commission's Order No. 490 *et al.* United requests, subject to the limitations described below, that these tariff sheets be made effective as of December 1, 1988.

United states that under Order No. 490, *et al.*, United and MRT abandoned sales service obligations as necessary to implement a new sales service agreement. Specifically, the Commission certificated sales service by United to MRT with a maximum daily quantity (MDQ) of 524,000 Mcf per day in Docket Nos. G-232, CP70-278, and RP84-87. The sales service agreement for service of 524,000 Mcf per day contained an expiration date of November 1, 1988; however, United and MRT signed a new sales service agreement with an MDQ of 50,000 Mcf per day effective November 1, 1988. A copy of this new service agreement is attached to the filing. In addition, MRT has nominated each month Demand-2 Billing Determinants of 50,000 Mcf times the number of days in the month.

United states that while the revised service agreement with MRT will serve to inform the Commission of the contractual basis for United's current sales relationship with MRT, the billing determinant revisions requested in the instant filing have already been reflected in United's currently effective rates. United has pending in Docket No. RP88-92-000 a general rate increase filing which became effective, subject to refund, on October 1, 1988. On November 4, 1988, United filed an Interim Settlement Agreement (Interim Settlement) in that proceeding which provided for an immediate, limited term rate reduction for United's customers and which was subsequently approved by the Commission.[1] That Interim Settlement for MRT reflects, effective November 1, 1988, the same MDQ and Demand-1 and Demand-2 Billing Determinants as are reflected in the instant filing (*i.e.*, MDQ of 50,000 Mcf, Demand-1 of 50,000 Mcf per day, Demand-2 of 50,000 Mcf times the number of days in each month).

United states that on November 28, 1988, it filed a Base Stipulation and Agreement (Base Settlement) which will supersede the Interim Settlement if approved by the Commission and accepted by United. The Base Settlement, which is currently awaiting a decision on certification, reflects for MRT the same MDQ and Demand-1 and Demand-2 Billing Determinants as are reflected in both the instant filing and the Interim Settlement. Thus, both United's currently effective Interim Settlement rates, as well as its Base Settlement rates, already reflect the abandonment of MRT's 524,000 Mcf per day contract down to a level of 50,000 Mcf per day, and if the Base Settlement is approved, United's rates will continue to appropriately reflect this level of sales service to MRT.

United states that under the Interim Settlement, however, United has the right to recommence charging its motion rates in Docket No. RP88-92-000 if the Base Settlement is either not certified or is rejected or withdrawn. 45 FERC ¶ 61,259 at 61,811 (1988). The RP88-92-000 motion rates do *not* reflect MRT's revised sales service level but, rather, continue to reflect the now abandoned contract demand level of 524,000 Mcf per day. Consequently, in the event the RP88-92-000 Base Settlement is not certified or approved and United exercises its right to recommence charging and collecting its motion rates, then it is necessary that United's tariff sheets reflect the lower MDQ and Demand-2 Monthly Billing Determinants for MRT. Therefore, United Requests approval of Tariff Sheet Nos. 99-A and 99-B.6 effective December 1, 1988.[2] These tariff sheets revise MRT's MDQ and Demand-1 Billing Determinants to 50,000 Mcf per day and MRT's Demand-2 Monthly Billing Determinants to 50,000 Mcf times the number of days in each month, effective December 1, 1988. If the Commission does not permit the attached Tariff Sheet Nos. 99-A and 99-B.6 to become effective December 1, 1988 as requested, United requests the authority to waive the annual unauthorized penalty in Section 25 of its FERC Gas Tariff as it applies to MRT beginning December 1, 1988, and ending on the effective date of the tariff sheet that effects the immediate changes requested.

Copies of the filing were served upon the company's jurisdictional customers.

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, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before January 24, 1989. 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1405 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

[1] 45 FERC ¶ 61,259 (Nov. 22, 1988).

[2] An effective date of November 1, 1988 is not requested for herein because the tariff sheets made effective November 1, 1988 under the Interim Settlement already reflect MRT's MDQ and D-2 Monthly, Billing Determinants based on 50,000 Mcf per day. On November 23, 1988, United sought to effectuate these revisions in a compliance filing in Docket No. RP88-263. By letter order, the Director, Office of Pipeline and Producer Regulations rejected this portion of that filing without prejudice to United refiling its requests with the appropriate filing fee.

[Docket No. TQ89-1-23-001]

Eastern Shore Natural Gas Co.; Proposed Changes in FERC Gas Tariff

January 13, 1989

Take notice that Eastern Shore Natural Gas Company (ESNG) tendered for filing on January 9, 1989 certain substitute revised tariff sheets included in Appendix A attached to the filing. The purpose of this filing is to amend ESNG's Quarterly Purchased Gas Adjustment (PGA) filing in Docket No. TQ89-1-23-000, and filed on December 30, 1988, to (1) reflect the revised rates of its pipeline suppliers, Transcontinental Gas Pipe Line Corporation and Columbia Gas Transmission Corporation, as filed by the respective pipelines on December 30, 1988 and proposed to be effective on February 1, 1989 and (2) revise the costs associated with its conversion from Transco's Rate Schedule CD to Rate Schedule FT. The substitute tariff sheets are proposed to be effective February 1, 1989.

ESNG states that such tariff sheets are being filed pursuant to § 154.308 of the Commission's regulations and Sections

21.2 and 21.4 of the General Terms and Conditions of ESNG's FERC Gas Tariff to reflect changes in ESNG's jurisdictional rates. The sales rates set forth thereon reflect a decrease of $0.0733 per dt in the Commodity Charge; and increase of $0.4299 per dt in the Demand Charge 1; and a decrease of $0.0573 per dt in the Demand Charge 2 all as measured against ESNG's previously scheduled PGA filing in Docket No. TA89-1-23-000 as filed on September 2, 1988 and approved to be effective November 1, 1988. As measured against ESNG's currently effective sales rates as filed on November 30, 1988 in Docket No. TF89-2-23-000 and approved to be effective December 1, 1988 the sales rates filed hereon reflect a decrease of $0.0413 per dt in the Commodity Charge; and increase of $0.7885 per dt in the Demand Charge 1; and a decrease of $0.512 per dt in the Demand Charge 2.

ESNG states that copies of the filing have been served upon its jurisdictional customers and interested State Commissions.

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, DC 20426, in accordance with Rule 211 and Rule 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 January 24, 1989. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1406 Filed 1-19-89; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings and Appeals

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for disbursement of $20,407,551 (plus accrued interest) obtained as a result of a Consent Order which the DOE entered into with Shell Oil Company (Case No. KEF-0093). The fund will be available to customers who purchased refined petroleum products from Shell during the period March 6, 1973 through January 27, 1981.

DATE AND ADDRESS: Applications for Refund of a portion of the consent order fund must be filed in duplicate and postmarked no later than November 30, 1989. Applications should be addressed to: Shell Oil Company Refund Proceeding, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. All applications should conspicuously display a reference to Case No. RF315.

FOR FURTHER INFORMATION CONTACT: Jon Leyens, Staff Analyst, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-2383.

SUPPLEMENTARY INFORMATION: In accordance with the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The Decision and Order relates to a Consent Order entered into by the DOE and Shell Oil Company. The Consent Order settled possible violations of the Mandatory Petroleum Price and Allocation Regulations with respect to the firm's operations during the period January 1, 1973 through January 27, 1981. On December 10, 1987, the Office of Hearings and Appeals issued a Proposed Decision and Order which tentatively established refund procedures and solicited comments from interested parties concerning the proper disposition of the consent order fund. 52 FR 47967 (December 17, 1987).

As the Decision and Order indicates, Applications for Refund from the portion of the Shell consent order fund available for distribution to purchasers of Shell refined products may now be filed. All Applicants must be postmarked by November 30, 1989. Applications will be accepted from customers who purchased refined petroleum products from Shell during the period March 6, 1973 through January 27, 1981. The specific information required in an Application for Refund is set forth in the Decision and Order.

Date: January 13, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Order of the Department of Energy

January 13, 1989.

Name of Firm: Shell Oil Company
Date of Filing: April 29, 1987
Case Number: KEF-0093

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement procedures for the distribution of funds obtained by the DOE as a result of the agency's enforcement of the Mandatory Petroleum Price and Allocation Regulations. *See* 10 CFR Part 205, Subpart V. On April 29, 1987, the ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a Consent Order that it entered into with Shell Oil Company (Shell).

I. Background

Shell is a major integrated refiner which produced and sold crude oil and a full range of refined petroleum products during the period of federal price controls. The firm was therefore subject to the Mandatory Petroleum Price Regulations set forth at 6 CFR Part 150 and 10 CFR Parts 210, 211, and 212. During the period of federal controls, the ERA conducted an extensive audit of Shell's operations and, as a result of the audit, alleged that Shell had violated certain applicable DOE price and allocation regulations in its sales of crude oil and refined petroleum products. Settlement discussions were held, and on March 26, 1987, the ERA and Shell finalized a Consent Order (Consent Order No. RSHA00001Z) that resolved disputes regarding Shell's crude oil and refined petroleum product operations during the period January 1, 1973 through January 27, 1981 (consent order period). Pursuant to the terms of the Consent Order, Shell remitted a total of $183,667,955.78 (the consent order fund) [1] into an interest-bearing escrow

[1] This amount consists of the principal consent order amount of $180,000,000 plus $3,667,955.78 in interest which accrued prior to Shell's payment to the DOE. For accounting purposes, the interest remitted by Shell has been considered as additional principal and has been divided proportionately between the crude oil and refined product pools discussed below.

account, for ultimate distribution by the DOE through Subpart V.

On December 10, 1987, the OHA issued a Proposed Decision and Order (PD&O) setting forth a tentative plan for the distribution of the Shell consent order funds. Because the Consent Order resolves alleged violations involving both sales of crude oil and refined products, we proposed to divide the consent order fund into two pools. This Decision and Order establishes procedures for distributing the portion of those funds attributable to alleged refined product violations, consisting of $20,407,550.64 plus accrued interest.[2]

In order to give notice to all potentially affected parties, a copy of the PD&O was published in the **Federal Register** and comments regarding the proposed refund procedures were solicited. 52 FR 47967 (December 17, 1987). Two interested parties, the Petroleum Marketers Association of America (PMAA) and Energy Refunds, Inc., submitted comments concerning the proposed procedures for the distribution of the Shell consent order funds pertaining to alleged refined product violations. In this Decision and Order, we will address those comments and adopt final procedures for the distribution of the Shell refined product funds.

II. Final Refund Procedures

The procedural regulations of the DOE set forth general guidelines to be used by OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations in which the DOE is unable to identify readily those persons who may have been injured by the alleged regulatory violations or to determine the amount of such injuries. A more detailed discussion of Subpart V and the authority of OHA to fashion procedures to distribute refunds is set forth in the cases of *Office of Enforcement*, 9 DOE ¶ 82,508 (1981); and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981) (*Vickers*).

Pursuant to the goals of the Subpart V regulations, we will attempt to provide refunds to claimants who demonstrate that they were injured by Shell's alleged regulatory violations in its sales of refined petroleum products during the the January 1, 1973 through January 27, 1981 consent order period.[3] Residual funds in the Shell escrow account will be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), 15 U.S.C. 4500 *et seq.*, 1 Fed. Energy Guidelines ¶ 11,702.

A. Calculation of Refund Amounts

The first step in the refund process is the calcualtion of an applicant's potential refund. To accomplish this, we will presume that the alleged overcharges were spread evenly over all of Shell's sales of refined petroleum products during the consent order period. Under this volumetric presumption, a claimant's potential refund generally will be computed by multiplying the number of gallons of covered products that it purchased from Shell by a volumetric factor of $0.000226 per gallon.[4] we derived this figure by dividing the $20,407,550.64 received from Shell and allocated to the refined product pool by the 90,334,236,000 gallons of refined products subject to price and allocation controls that Shell sold during the consent order period. In addition, successful claimants will receive proportionate shares of the interest that has accrued on the Shell escrow account.[5]

We generally require claimants to submit monthly purchase schedules in order to establish their total purchase volumes from a consent order firm. In its comments, the PMAA suggests that, instead, we allow all refund applicants to submit yearly schedules of their purchase volumes of Shell covered products. We are not persuaded that this would be appropriate. An annual schedule can mask certain factors, such as seasonal purchase patterns, which help us to ascertain the accuracy of an applicant's submission. Therefore, we will accept annual purchase volume data only if it is accompanied by adequate supporting documentation, such as a computer printout of purchases from Shell provided by OHA.

As in previous cases, only claims for at least $15 in principal will be processed. This minimum has been adopted in refined product refund proceedings because the cost of processing claims for refunds of less than $15 outweighs the benefits of restitution in those instances. *See, e.g., Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985).

B. Determination of Injury

Once a claimant's potential refund has been calculated, we must determine whether the claimant was injured by its purchases from Shell, *i.e.*, whether it was forced to absorb the alleged overcharges. Based on our experience in numerous Subpart V proceedings, we will adopt certain presumptions concerning injury in this case. The use of presumptions in refund cases is specifically authorized by DOE procedural regulations. 10 CFR 205.282(e). An applicant that is not covered by one of these presumptions must demonstrate injury in accordance with the non-presumption procedures outlined in the latter part of this Decision.

1. *Presumptions Concerning Injury.* The presumptions we will adopt in this case are designed to allow claimants to participate in the refund process without incurring inordinate expense, and to enable OHA to consider the refund applications in the most efficient way possible. We will presume that end-users of Shell covered products, certain types of regulated firms, and cooperatives were injured by their purchases from Shell. In addition, we will adopt presumptions regarding small and mid-level claims submitted by

[2] The final procedures for disbursing the Shell crude oil refund pool, consisting of $163,260,405.14 plus accrued interest, were set forth in Shell Oil Company, 17 DOE ¶ 85,204 (1988).

[3] We recognize that we may receive claims based upon Shell's alleged violation of the DOE allocation regulations. *See* 10 CFR Part 211. We will evaluate such claims by referring to the standards set forth in Decisions such as Office of Special Counsel, 10 DOE ¶ 85,048 at 88,220 (1982) (Amoco), and OKC Corp./Town & Country Markets, Inc., 12 DOE ¶ 85,094 (1984). Under those standards an allocation claimant must: (1) demonstrate the existence of a supplier/purchaser relationship with the consent order firm and the likelihood that the consent order firm failed to furnish petroleum products that it was obliged to supply to the claimant under 10 CFR Part 211; (2) provide evidence that it had contemporaneously notified the DOE or otherwise sought redress for the alleged allocation violation; and (3) establish that it was injured and document the extent of the injury. The remainder of this Decision concerns only the filing of claims involving Shell's alleged pricing violations.

[4] Although the Shell consent order covers the period January 1, 1973 through January 27, 1981, applicants may file claims for volumes purchased only while the product in question was subject to federal price controls. Therefore, claimants may apply for refunds based on purchases made from Shell between March 6, 1973 and the date of decontrol for each particular product. Below is a list of regualted petroleum products and the dates on which they were decontrolled:

Product	Decontrol date
Motor Gasoline, Propane	Jan. 28, 1981.
Butane and Natural Gasoline	Jan. 1, 1980.
Aviation Gas and Jet fuel	Feb. 26, 1979.
Naphtha-Based Jet Fuel	Oct. 1, 1976.
Naphthas	Sept. 1, 1976.
Benzene, Toluene	Sept. 1, 1976.
Diesel Fuel, Kerosene	July 1, 1976.
No. 1 and No. 2 Heating Oil	July 1, 1976.
Residual Fuel	June 1, 1976.
Ethane and Asphalt	Apr. 1, 1974.

[5] Because we realize that the impact on an individual claimant may have been greater than its potential refund calculated using the volumetric methodology, a claimant may submit evidence detailing the specific alleged overcharge that it sustained in order to be eligible for a larger refund. *See* Standard Oil Co. (Indiana)/Army and Air Force Exchange Service, 12 DOE ¶ 85,015 (1984).

refiners, resellers and retailers. Finally, we will presume that refiners, resellers and retailers that made spot purchases of Shell products, as well as those who sold Shell products on consignment, were not injured by their purchases. Each of these presumptions is discussed below, along with the rationale underlying its use.

a. *End-Users.* First, in accordance with prior Subpart V proceedings, we will presume that end-users of Shell products were injured by the firm's alleged overcharges. Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the consent order period, and were not required to keep records which justified selling price increases by reference to cost increases. Consequently, analysis of the impact of the alleged overcharges on the final prices of goods and services produced by members of this group would be beyond the scope of a special refund proceeding. *See Marion Corporation,* 12 DOE ¶ 85,014 (1984) and cases cited therein. Therefore, end-users need only document their purchase volumes of Shell covered products to demonstrate that they were injured by the alleged overcharges.

b. *Regulated Firms and Cooperatives.* Second, public utilities, agricultural cooperatives, and other firms whose prices are regulated by government agencies or cooperative agreements do not have to submit detailed proof of injury. Such firms would have routinely passed through price increases, including overcharges, to their customers. Likewise, their customers would share the benefits of cost decreases resulting from refunds. *See, e.g., Office of Special Counsel,* 9 DOE ¶ 82,538 (1982) (*Tenneco*); *Office of Special Counsel,* 9 DOE ¶ 82,545 at 85,244 (1982) (*Pennzoil*). Such firms applying for refunds should certify that they will pass through any refund received to their customers and should explain how they will alert the appropriate regulatory body or membership group to monies received. Purchases that cooperatives subsequently resold to nonmembers will generally not be covered by this presumption.

c. *Refiner, Reseller and Retailer Small Claims.* Third, we will presume that a firm that resold Shell products and whose volumetric share of the consent order fund is $5,000 or less, excluding accrued interest, was injured by Shell's alleged overcharges. A refiner, reseller, or retailer seeking a refund under this small claims presumption will not be required to submit evidence of injury beyond documentation of its purchase volumes of covered products from Shell during the consent order period. *See Texas Oil & Gas Corp.,* 12 DOE ¶ 85,069 at 88,210 (1984). As we have noted in numerous prior proceedings, there may be considerable expense involved in gathering the types of data necessary to support a detailed claim of injury; in some cases, that expense might possibly exceed the expected refund. Consequently, failure to allow simplified application procedures for small claims could deprive injured parties of their opportunity to obtain a refund. Furthermore, use of the small claims presumption is desirable in that it allows OHA to process efficiently the large number of routine refund claims expected. Refiners, resellers and retailers of Shell products that are seeking full volumetric refunds in excess of $5,000 must follow the injury demonstration procedures that are outlined below in Section 2.[6]

d. *Refiner, Reseller and Retailer Mid-Level Claims.* Fourth, we will adopt a mid-level presumption of injury under which a refiner, reseller, or retailer whose volumetric share exceeds $5,000 may elect to receive as its refund the larger of $5,000 or 40% of its allocable share up to $50,000 in lieu of making a detailed showing of injury.[7] The use of this presumption is based on detailed marketing analyses that we conducted in prior special refund proceedings, which indicated that mid-level claimants likely absorbed 40 percent of any overcharges that they allegedly incurred. *See Gulf Oil Corp.,* 16 DOE ¶85,381 (1987) (*Gulf II*).[8] As with the small claims presumption, an applicant that chooses to rely on the mid-level presumption will be required only to document its purchase volumes of Shell covered products in order to demonstrate that it was injured by Shell's alleged overcharges.[9]

e. *Spot Purchasers.* We will also presume that refiners, resellers, and retailers that were spot purchasers of a Shell covered product, *i.e.,* made only sporadic, discretionary purchases, were not injured by their purchases. Consequently, they generally will be ineligible for refunds. The basis for this presumption is that a spot purchaser tended to have considerable discretion as to where and when to make a purchase, and therefore would not have made a purchase unless it was able to recover the full amount of its purchase price, including any alleged overcharges, from its customers. *See Vickers* at 85,396–97.

Citing *Tresler Oil Company/Swifty Oil Company,* 16 DOE ¶85,659 (1987) (*Swifty*), Energy Refunds suggests that we allow spot purchasers to receive 20% of their full volumetric shares without demonstrating injury. There is nothing in *Swifty,* however, to support such a suggestion,[10] and Energy Refunds has not provided any other reasoning that would support its position. Consequently, we will adopt the presumption of non-injury for spot purchasers outlined in the PD&O. In past proceedings, however, a spot purchaser has been able to rebut this presumption by demonstrating that its base period supply obligation limited its discretion in making the purchases and that it resold the product at a loss that was not subsequently recouped. *See, e.g., Saber, Energy, Inc./Mobil Oil Corp.,* 14 DOE ¶ 85,170 (1986).

f. *Consignees.* Finally, we will presume that consignees of Shell covered products were not injured by the firm's alleged pricing violations. *See, e.g., Jay Oil Co.,* 16 DOE ¶ 85,147 (1987). A consignee agent generally sold products pursuant to an agreement whereby its supplier established the prices to be charged by the consignee

[6] If an applicant with a claim greater than $5,000 attempts to make a detailed showing of injury in support of a full volumetric refund but, instead, demonstrates that it was injured by less than $5,000, it will receive a refund equal to the amount of demonstrated injury and not a refund at the $5,000 small claims threshold level. *See, e.g.,* Union Texas Petroleum Corp./Arrow Enterprises, Inc., 15 DOE ¶ DOE 85,087 (1986).

[7] A claimant with purchases of 55,304,203 gallons or less that wishes to rely on an injury presumption can receive a larger refund by limiting its claim to the $5,000 small claims threshold than by utilizing the mid-level presumption. If 40 percent of a claimant's volumetric share exceeds $50,000, *i.e.,* if the claimant purchased more than 553,102,877 gallons of Shell covered products, the claimant may choose to limit its claim to $50,000.

[8] The PMAA and Energy Refunds have suggested that we adopt higher presumptive levels of injury for middle distillates and natural gas liquids as we did in Getty Oil Co., 15 DOE ¶85,064 (1986) (Getty). The different absorption fractions that we adopted in Getty, however, were based strictly on Getty's pricing data. Getty at 88,117. They are not relevant to the present proceeding. Furthermore, the use of a single average absorption fraction simplifies the refund procedures for the benefits of both the claimants and the DOE. Therefore, we will not adopt the higher presumption levels suggested for these products. *See* Gulf II at 88,737.

[9] A mid-level claimant may elect not to receive a refund based upon this presumption and may instead attempt to show that it is eligible for a refund equal to its full volumetric share by making a detailed showing of injury using the criteria set forth later in this Decision. The 40 percent presumption, however, will not be available to claimants who submit a detailed injury showing which leads us to conclude that they are eligible for a refund of less than 40 percent of their volumetric share.

[10] In Swifty, the applicant was granted a refund on its purchases that were made under a long-term contract with the consent order firm, but was denied a refund on its spot purchases.

and compensated the consignee with a fixed commission based upon the volume of products that it sold. A consignee may rebut the presumption of non-injury by demonstrating that its sales volumes and corresponding commission revenues declined due to the alleged uncompetitiveness of Shell's pricing practices. *See Gulf Oil Corp./ C.F. Canter Oil Co.*, 13 DOE ¶85,388 at 88,962 (1986).

2. *Non-Presumption Demonstration of Injury.* A refiner, reseller or retailer whose allocable share is in excess of $5,000 that does not elect to receive a refund under either the small claims or 40 percent mid-level presumptions will be required to demonstrate its injury. There are two aspects to such a demonstration. First, a firm generally is required to provide a monthly schedule of its banks of unrecouped increased product costs for each covered product that it purchased from Shell during the consent order period.[11] Cost banks for a product should cover the period November 1, 1973 through the product's price decontrol date.[12] If a firm no longer has records of contemporaneously calculated cost banks for a particular product, it may approximate those banks by submitting the following information regarding its purchases of that product from all of its suppliers:

(1) The weighted average gross profit margin that the firm received for the product on May 15, 1973;

(2) a monthly schedule of the weighted average gross profit margins that it received for the product during the period, November 1, 1973 through the product's price decontrol date; and

(3) a monthly schedule of the firm's purchase or sales volumes of the product during the period November 1, 1973 through the product's price decontrol date.[13]

The existence of banks of unrecouped increased product costs that exceed an applicant's potential refund is only the first part of an injury demonstration. A firm must also show that market conditions forced it to absorb the alleged overcharges. We will infer this to be true if the prices the applicant paid Shell were higher than average market prices for the product concerned at the same level of distribution.[14] Accordingly, a claimant attempting to demonstrate injury should submit a monthly schedule of the weighted average prices that it paid Shell for each covered product that it purchased between March 6, 1973 and the product's decontrol date.

C. General Refund Application Requirements

Pursuant to 10 CFR 205.283, we will now accept Applications for Refund from individuals and firms that purchased refined petroleum products sold by Shell between March 6, 1973 and the date of decontrol for the products. No "class claims" on behalf of groups of applicants will be permitted. There is no specific application form that must be used. However, a suggested format for filing a Shell Refund Application is set forth in the Appendix to this Decision. All applicatons for Refund should include the following information:

(1) A conspicuous reference to Case Number RF315 and the name and address of the applicant during the period for which the claim is filed, as well as the name to whom the refund check should be made out and the address to which the check should be sent;

(2) The name, title, address and telephone number of a person who may be contacted by OHA for additional information concerning the Application;

(3) The manner in which the applicant used the Shell products, *i.e.*, whether it was a reseller, retailer, consignee, end-user, etc.;

(4) For each covered product, a monthly schedule of purchases from Shell during the period March 6, 1973 through the product's decontrol date. *See supra* note 4. If an applicant received a computer printout of its Shell purchases from OHA, it may submit that printout in lieu of monthly purchase volume schedules. If the applicant was an indirect purchaser it must also submit the name of its immediate supplier and indicate why it believes the covered product was originally sold by Shell;

(5) All relevant material necessary to support its claim in accordance with the injury presumptions and requirements outlined above;

(6) If the applicant was or is in any way affiliated with Shell, an explanation of the nature of the affiliation;

(7) A statement as to whether there has been a change in ownership of the entity that purchased the Shell refined petroleum products during or since the consent order period. If there was such a change, the applicant must submit a copy of the sales agreement, as well as provide the names and addresses of the previous or subsequent owners;

(8) A statement as to whether the applicant is or has been involved in any DOE enforcement proceedings or private actions filed under Section 210 of the Economic Stabilization Act. If these actions have been concluded, the applicant should furnish a copy of any final order issued in the matter. If the action is still in progress, the applicant should briefly describe the action and its current status. The applicant must inform OHA of any change in status while its Application for Refund is pending. *See* 10 CFR 205.9(d);

(9) A statement as to whether the applicant has received a refund, from any source, for the alleged overcharges identified in the ERA audits underlying this proceeding;

(10) A statement as to whether the applicant or a related firm has filed any other Applicants for Refund in this proceeding;

(11) A statement as to whether the claimant or a related firm has authorized any other individual(s) to file an Application for Refund on the claimant's behalf in the Shell proceeding; and

(12) The following statement signed by the applicant or a responsible official of the business or organization claiming the refund: "I swear [or affirm] that the information submitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205.283(c).

Applications for Refund should be sent to: Shell Refund Proceeding, Case No. RF315, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

All applications must be filed in duplicate and must be postmarked by November 30, 1989. A copy of each application will be available for public inspection in the Public Reference Room of the Office of Hearings and Appeals. Any applicant that believes that its application contains confidential information must submit two additional copies of its application from which the confidential information has been deleted, together with a statemen'

[11] Claimants who have relied upon their banked costs in order to be eligible to receive refunds in other special refund proceedings should subtract those refunds from the cumulative banked costs submitted in this proceeding. *See* Husky Oil Co./ Metro Oil Products, Inc., 16 DOE ¶ 85,090 at 88, 179 (1987).

[12] Retailers and resellers of motor gasoline were required to maintain cost bank data only until July 15, 1979 and April 30, 1980, respectively. Therefore, in showing injury with respect to their purchases of motor gasoline, such claimants will not be required to submit cost bank material all the way up to the January 28, 1981 decontrol date of motor gasoline.

[13] For motor gasoline, retailers and resellers have to submit the information detailed in Parts (2) and (3) only through July 15, 1979 and April 30, 1980, respectively. *See supra* note 12.

[14] We generally obtain average market price information from Platt's Oil Price handbook and Oilmanac (Platt's). If price data for a particular product is not available in Platt's, the burden of supplying alternative information will be on the claimant.

specifying why the information is confidential.

It Is Therefore Ordered That:

(1) Applications for Refund from the funds remitted to the Department of Energy by Shell Oil Company pursuant to the Consent Order finalized on March 26, 1987 may now be filed.

(2) All applications must be postmarked by November 30, 1989.

Date: January 13, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

BILLING CODE 6450-01-M

Suggested format for Application for Shell Oil Company Refund – RF 315

RF 315 -

DOE use only

1. Name of Applicant Firm during refund period (3/73-1/81): _____

Address during refund period: _____

_____

_____

2. To whom should refund check be payable? _____

Address to which check should be sent: _____

_____

_____

Contact Person: _____

Telephone No.: ( ) _____

3. Type of Applicant:

Gas Station_____ Consignee Agent_____ Petroleum Jobber_____ Public Utility_____Cooperative_____

Consumer_____ (please specify business use) Other_____ (please specify)

4. (a) Total gallonage for which refund is requested: _____ (Enter total gallons here)

(b) Product(s) (e.g., gasoline, propane): _____

(c) Source of your gallonage information: _____

(If estimates explain method on separate sheet)

5. If you are a petroleum marketer (refiner, reseller, or retailer) and you purchased more than 22,126,106 gallons of Shell products, do you elect to rely on the relevant petroleum marketer injury presumption (See Question & Answer 4)? If you are an end-user (consumer), check "Not Applicable" below

Yes ☐ No ☐ Not Applicable (end-users check here) ☐

If you do not elect the relevant petroleum marketer injury presumption, or if you are requesting a refund greater than $50,000, attach the required "injury" showing. (See the Decision & Order for details on the injury showing required.)

(Check One)

6. Was the product you bought Shell-branded? Yes ☐ No ☐

7. Were you supplied by Shell directly? Yes ☐ No ☐

If yes, please provide Shell customer number here_____. If no, (i)attach an explanation of why you believe the product was sold by Shell and (ii)include the name and address of the person or firm from which you purchased the product.

8. Is (was) your business owned all or in part by Shell? If yes, please explain. Yes ☐ No ☐

9. Have you been a party or are you currently a party in a DOE enforcement action or private Section 210 action? (See Q & A No. 7) If yes, please attach an explanation. Yes ☐ No ☐

10. Have you or a related firm filed any other application for refund involving any Shell product in this proceeding? If yes, attach an explanation. Yes ☐ No ☐

11. Have you or a related firm authorized any individual(s) other than those identified on this form to file an application on your behalf in this Shell refund proceeding? If yes, attach an explanation. Yes ☐ No ☐

12. Were you a Shell consignee agent? (See Q & A No. 8) Yes ☐ No ☐
If yes, attach information sufficient to rebut the presumption of non-injury for consignees (See Decision for details.)

13. Did ownership of your firm change during or since the refund period? Yes ☐ No ☐
If you answered yes, please provide an explanation that includes the names and addresses of any previous or subsequent owners and submit a copy of the purchase and sales agreement.

I swear (or affirm) that the information contained in this application and its attachments is true and correct to the best of my knowledge and belief. I understand that anyone who is convicted of providing false information to the federal government may be subject to a jail sentence, a fine, or both, pursuant to 18 U.S.C. 1001. I understand that the information contained in this application is subject to public disclosure. I have enclosed a duplicate of this entire application which will be placed in the OHA Public Reference Room.

_____ Date

_____ Signature of Applicant

_____ Title

SCHEDULE OF PURCHASES

Note: You do not need to complete this page if you attach the Shell Purchase Volume Schedule provided by the Office of Hearings and Appeals

RF 315

Name of Applicant: _____

MONTHLY PURCHASE VOLUMES OF _____
(PRODUCT)

	1973	1974	1975	1976	1977	1978	1979	1980	1981
January	*******	____	____	____	____	____	____	____	____
February	*******	____	____	____	____	____	____	____	*******
March	____	____	____	____	____	____	____	____	*******
April	____	____	____	____	____	____	____	____	*******
May	____	____	____	____	____	____	____	____	*******
June	____	____	____	____	____	____	____	____	*******
July	____	____	____	____	____	____	____	____	*******
August	____	____	____	____	____	____	____	____	*******
September	____	____	____	____	____	____	____	____	*******
October	____	____	____	____	____	____	____	____	*******
November	____	____	____	____	____	____	____	____	*******
December	____	____	____	____	____	____	____	____	*******
Yearly Total	____	____	____	____	____	____	____	____	____

TOTAL FOR THIS PRODUCT: _____ GALLONS

Claims for less than $15.00 will not be processed (64,160 gallons total purchases).

✔ **Do not include any purchases of product on or after that product's date of decontrol. (See below for decontrol dates)**

Product	Date Decontrolled	Product	Date Decontrolled
Motor Gasoline, Propane	January 28, 1981	Benzene and Toluene	September 1, 1976
Butane and Natural Gasoline	January 1, 1980	Diesel Fuel, Kerosene	July 1, 1976
Aviation Gas and Jet Fuel	February 26, 1979	No. 1 and No. 2 Heating Oil	July 1, 1976
Naphtha-Based Jet Fuel	October 1, 1976	Residual Fuel	June 1, 1976
Naphthas	September 1, 1976	Ethane and Asphalt	April 1, 1974

[FR Doc. 89-1418 Filed 1-19-89; 8:45 am]
BILLING CODE 6450-01-C

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3507-9]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared January 2, 1989 through January 6, 1989 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5074.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 22, 1988 (53 FR 13318).

Draft EISs

ERP No. DS-AFS-L65101-OR, Rating EC2, Deschutes National Forest, Land and Resource Management Plan, Additional Alternative and Specific Management Requirements Analysis, Implementation, Klamath, Deschutes, Jefferson and Lake Counties, OR.

Summary:

EPA is concerned that the No Charge Alternative does not include specific standards and guidelines for water quality protection.

ERP No. DR-COE-E32070-MS, Rating LO, Gulfport Harbor Deep Draft Navigation Project, Channel Improvements, Implementation, Garrison County, MS.

Summary:

EPA has no significant environmental objections to the proposed project.

Dated: January 17, 1989.

William E. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89-1354 Filed 1-19-89; 8:45 am]

BILLING CODE 6560-50-M

[SWH-FRL-3507-5]

Petition for Case-By-Case Extension of the Effective Date of the Land Disposal Restrictions on Certain Spent Solvent Hazardous Wastes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of petition.

SUMMARY: EPA is proposing to grant E.I. du Pont de Nemours and Co., Inc. (Du Pont) Chambers Works plant's request for an extension of the November 8, 1988, effective date of the land disposal restrictions applicable to hazardous solvent-containing sludges having less than 1% total F001-F005 solvent constituents. This action responds to a petition submitted under 40 CFR 268.5 which allows any person to request the Administrator to grant, on a case-by-case basis, an extension of the applicable effective date based on a showing that adequate alternative treatment, recovery, or disposal capacity for the petitioner's waste cannot reasonably be made available by the effective date due to circumstances beyond the person's control and that the petitioner has entered into a binding contractual commitment to construct or otherwise provide such capacity. If this proposed action is finalized, Du Pont can continue to dispose its primary and secondary spent solvent hazardous sludges in a minimum technology landfill at the Chambers Works plant until one year from the publication date of the final notice but not later than November 8, 1990, without being subject to the restrictions applicable to such wastes.

DATE: Comments on this notice must be received on or before February 22, 1989.

ADDRESS: The public must send an original and two copies of their comments to EPA RCRA Docket (S-2121), Office of Solid Waste (OS-333), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Place the Docket Number F-89-PCCN-FFFFF on your comments. The OSW docket is located at EPA RCRA Docket (Sub-basement), 401 M Street, SW., Washington, DC 20460. The docket is open from 9:00 to 4:00, Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials. Call (202) 475-9327 for appointments. The public may copy a maximum of 50 pages from any regulatory document at no cost. Additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: For general information contract RCRA Hotline, Office of Solid Waste (OS-300), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (800) 424-9346 (toll-free) or (202) 282-3000 locally.

For information on specific aspects of this notice contact Lisa E. Faeth, Office of Solid Waste (OS-333), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-4770.

SUPPLEMENTARY INFORMATION: .

I. Background

A. Congressional Mandate

Congress enacted the Hazardous and Solid Waste Amendments (HSWA) of 1984 to amend the Resource Conservation and Recovery Act (RCRA). HSWA imposes additional responsibilities on persons managing hazardous wastes. Sections 3004(d) through (g) prohibit the land disposal of certain hazardous wastes by specified dated in order to protect both human health and the environment for as long as the wastes remain hazardous. In particular, section 3004(e) prohibits the land disposal of F001-F005 solvent-containing hazardous wastes effective 24 months after the enactment of HSWA, section 3004(d) prohibits the land disposal of liquid hazardous wastes having a pH of less than or equal to two effective 32 months after the enactment of HSWA, and section 3004(g) prohibits the land disposal of at least one-third of all listed hazardous wastes (which includes K044 and K046 wastes) effective 45 months after the enactment of HSWA.

Under section 3004(m), wastes which meet treatment standards established by EPA are no longer prohibitied from land disposal. These standards must substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that threats to human health and the environment are minimized. EPA has interpreted this provision to call for standards developed based on the performance of the best demonstrated available technology.

Congress recognized that adequate alternative treatment, recovery, or disposal capacity which is protective of human health and the environment may not be available by the applicable statutory effective dates and authorized EPA to set effective date variances based on the earliest dates that such capactity will be available. Section 3004(h)(2) thus allows the Agency to grant national variances from the statutory effective dates, not to exceed two years. Hazardous solvent-containing sluges having less than 1% total F001-F005 solvent constituents at the point of initial generation were the subject of a two-year national capacity variance. The variance expired November 8, 1988. Under section 3004(h)(3), EPA can grant case-by-case extensions of the statutory deadlines for up to one year beyond the applicable deadlines. These extensions are renewable once for up to one additional year.

On November 7, 1986, EPA published a final rule (51 FR 40572) establishing the regulatory framework to implement the land disposal restrictions program and promulgated regulations enacting the first phase of the program as well as the procedures for submitting case-by-case extension petitions.

B. Demonstrations Evaluated During Petition Review

Case-by-case extension petitions must satisfy the requirements outlined in 40 CFR 268.5. The applicant must demonstrate that adequate alternative treatment, recovery, or disposal capacity will not be available by the applicable effective date of the land disposal restrictions by showing that he has made a good-faith effort to locate and contract with facilities nationwide to manage his waste. This demonstration also requires that the petitioner investigate the availability of adequate alternative on-site capacity for his waste (40 CFR 268.5(a)(1)). The applicant must show that he has entered into a binding contractual commitment to construct or otherwise provide adequate alternative treatment, recovery, or disposal capacity for all his waste, but due to circumstances beyond his control this capacity cannot reasonably be made available by the applicable effective date of the land disposal restictions (40 CFR 268.5(a)(2), (3), and (4)). The petitioner must submit a schedule showing the progress which will be made towards completing the project to provide adequate alternate capacity by including dates for obtaining required operating and construction permits and dates for completing key phases of the project (40 CFR 268.5(a)(5)). The applicant also is required to show that he has arranged for sufficient capacity to manage the entire quantity of waste which is the subject of his petition during the requested extension period and to document in his application the location of all sites at which the waste will be managed (40 CFR 268.5(a)(6)). During an extension period the restricted waste can be managed in a surface impoundment or landfill provided the unit meets the applicable minimum technology (RCRA section 3004(o)) requirements of 40 CFR 268.5(h)(2) which pertain to ground water monitoring and the installation of two or more liners and leachate collection systems (40 CFR 268.5(a)(7)).

After an applicant has been granted a case-by-case extension, the applicant is required to keep EPA informed of the progress being made towards obtaining adequate alternative treatment, recovery, or disposal capacity. Any change in the demonstrations made in the petition must be immediately reportd to the Agency (40 CFR 268.5(f)). Progress reports also have to be submitted which describe the progress being made towards obtaining adequate alternative capacity, identify any delay or possible delay in developing the capacity, and describe the mitigating actions being taken in response to the event (40 CFR 268.5(g)).

II. Petition

Du Pont has petitioned EPA to grant an extension of the November 8, 1988, effective date of the land disposal restrictions applicable to certain spent solvent hazardous wastes, namely wastewater treatment sludges derived from treatment of spent solvents, managed at its Chambers Works plant on the Delaware River estuary in southern New Jersey. Prior to November 8, 1988, sludges from the Chambers Works facility, other Du Pont plants, and commercial facilities were disposed in an on-site landfill which meets the minimum technology requirements of section 3004(O) of RCRA. Du Pont has indicated that, as of the November 8, 1988, effective date of the land disposal restrictions, it stopped receipt of F001–F005 wastes from outside sources. Du Pont is presently modifying the wastewater treatment plant (WWTP) at the facility. The company will restore and upgrade a presently unused carbon regeneration furnace to treat spent solvent-containing sludge to levels below the treatment standards. EPA is proposing to grant an extension of the effective date of the restrictions to one year from the publication date of the final notice but not later than November 8, 1990, for the sludge. Du Pont's petition request and supporting documentation are available in the public docket for this rulemaking. Interested persons are invited to submit written data, criticisms, or opinions on the petition. All comments will be considered by EPA and addesssed in a **Federal Register** notice stating the Agency's final decision to grant or deny the petition. A summary of the Du Pont petition, Petition Number 006, follows below.

A. Petition Summary

1. Waste Treatment Operations as of November 8, 1988

The Du Pont facility manufactures over 750 finished products which are primarily organic chemicals. The facility treats the wastewaters from these processes, wastewaters and other wastes from off-site Du Pont facilities, as well as wastewaters from commercial (i.e. non-Du Pont) sources. Prior to November 8, 1988, approximately 85% of the wastewaters manifested to treatment facilities in New Jersey were treated at the Chambers Works facility. Wastewaters from Chambers Works, other Du Pont plants, and commercial facilities, as well as ground water and landfill leachate pumped pursuant to a state compliance order, comprised the influent to the primary treatment step of the WWTP prior to November 8, 1988. Du Pont has informed EPA that it stopped accepting F001–F005 wastes from outside sources as of Novembler 8, 1988. The flow does contain *de minimis* levels of F001–F005 constituents from Chambers Works which Du Pont claims are not listed hazardous wastes under 40 CFR 261.3(a)(2)(iv), and it does contain ground water and leachate which carry the EPA hazardous waste numbers of the wastes disposed in the landfill in accordance with 40 CFR 261.3(c)(2).[1] The wastewaters have an average pH of 1.5 to 2.0 (prohibited wastes under HSWA section 3004(d)) and presently include K044 and K046 wastewaters all of which are prohibited from land disposal unless they meet the treatment standards in 40 CFR 268.41 and 40 CFR 268.43. An unlimited surface impoundment located before the headworks of the treatment system provides overflow/surge capacity for plant wastes not subject to the land disposal restrictions.

The primary treatment step of the WWTP is neutralization using lime. After treatment in the primary neutralization tank the resulting solids are flocculated and settled in the clarification system and then removed and processed through filter presses. Du Pont asserts that the wastewater treatment sludge from primary treatment meets the treatment standards for nonexplosive K046 wastes and is no longer corrosive. However, the sludge does not meet the treatment standards for F001–F005 wastes. Since Du Pont believes that the on-site spent solvent waste streams are exempt from regulation under 40 CFR 261.3(a)(2)(iv), if spent solvent wastes from outside sources are diverted the sludge will not have to meet the treatment standards for F001–F005 wastes. However, if the state and the EPA regional office find that Du Pont is not entitled to the claimed exemption the sludge will have to meet the relevant treatment

[1] Ground water and leachate contaminated with first-third wastes are currently covered by a court ordered stay of the August 8, 1988, land disposal restrictions.

standards. The wastewater treatment effluent from primary treatment complies with the prohibition on land disposal of liquid hazardous wastes having a pH of less than or equal to two. This wastewater stream also contains K044; however, this waste is not explosive and, therefore, meets the applicable treatment standards.

The secondary treatment step of the WWTP consists of powdered activated carbon treatment (PACT) of the flow from the primary clarification system. In aeration tanks, biological organisms break down the organics in the stream to CO_2–H_2O. Powdered activated carbon is added to the aerators and allows adsorption of complex organic compounds. Air provides oxygen and suspends the mixed liquor suspended solids, a mix of approximately 50/50 biomass and activated carbon. Flow from the aeration tanks is divided between parallel clarifiers in which the PACT flocculant settles and is pumped back to the aeration tanks. A portion of the flocculant is purged to maintain a constant mixed liquor suspended solids level in aeration. Wasted flocculant is returned to the primary neutralization tank. The flocculant, secondary sludge, does not meet the treatment standards for F001–F005 wastes and is combined with the primary sludge prior to disposal in the minimum technology landfill. The combined primary and secondary sludges are the subject of Du Pont's petition. Effluent from the secondary clarifiers is commingled with non-contact cooling water in piping and discharged to the Delaware River estuary in accordance with a National Pollutant Discharge Elimination System (NPDES) permit.

2. Interim Waste Treatment Operations

EPA is proposing to grant Du Pont an extension of the effective date of the land disposal restrictions for sludges having less than 1% total F001–F005 solvent constituents on condition that the facility further explore and implement, if practicable, certain interim waste treatment operating conditions. These modifications are expected to take one year to complete. First, Du Pont is to segregate both off-site Du Pont and commercial spent solvent waste streams so that spent solvents from off-site Du Pont and commercial sources will not be introduced into the primary treatment step and thus will not contaminate the primary sludge. These wastewaters are to be introduced directly into the secondary treatment aeration tanks after the pH is adjusted to meet the pH in the aerators. The primary sludge is to continue to be disposed in the facility's minimum technology landfill. If the state and the EPA regional office determine that the sludge is not exempt from regulation, the primary sludge may not continue to be disposed in the minimum technology landfill, unless the relevant treatment standards are met. The portion of the flocculant from the clarifiers which is not pumped back to the aeration tanks (the secondary sludge) is not to be returned to the primary neutralization tank. This flocculant is to be filtered and the resulting filter cake sent off-site for incineration to meet the treatment standards for F001–F005 wastes. The secondary sludge will be treated off-site until Du Pont's furnace is operational. Effluent from the secondary clarifiers is to be commingled with non-contact cooling water in pipes and discharged directly to the Delaware River estuary subject to NPDES permit limits.

3. Future Waste Treatment Operations

Du Pont will further modify the current wastewater treatment system by improving and reactivating a carbon regeneration furnace which allows on-site treatment to regenerate carbon from wasted PACT flocculant and to incinerate the flocculant so that the incinerator residue meets the treatment standards for this F001–F005 solvent-containing waste. Restoration and modification of the multi-hearth furnace will include adding two new hearth levels to the existing furnace to provide increased system flexibility and improved operating control. A new waste-flocculant storage tank, new pumps, in-line grinder, and piping will transfer wasted flocculant to the carbon regeneration furnace. New belt filters, installed above the furnace, will remove solids from the wasted flocculant (water will be returned to the WWTP). The exhaust gas leaving the furnace will be oxidized in a new afterburner/quencher and scrubbed in a new high-efficiency scrubber before discharge to the atmosphere through an existing stack. Regenerated carbon will be returned to the aeration tanks used for PACT biotreatment. Secondary solids from the carbon regeneration furnace, which Du Pont believes will meet the treatment standards, for F001–F005 wastes, will be washed with HC1 and HF in a settling tank, filtered, and then disposed in the secure landfill. Scrubber water will be recirculated. The non-minimum technology surface impoundment will be closed and replaced by tanks.

B. Petitioner's Demonstrations

Du Pont's application for an extension of the effective date of the land disposal restrictions applicable to its spent solvent primary and secondary sludges must include a showing that it has made a good-faith effort on a nationwide basis to locate and contract for adequate alternative treatment, recovery, or disposal capacity off-site or to establish such capacity on-site by the effective date of the restrictions. Du Pont specified that approximately 94,900 tons per year (wet weight basis) of its wastewater treatment sludge (i.e. the combined sludges from primary and secondary treatment) require treatment. The solids are mainly calcium salts, magnesium salts, and silica compounds contaminated with heavy metals and organic compounds. Du Pont has submitted data to EPA which shows that the wastewater treatment sludge meets the treatment standards for metals but not for spent solvents. Therefore, the search for treatment capacity focused on the availability of incineration.

1. Incineration Capacity for Residues from Current Wastewater Treatment Operations

Du Pont asked ten incineration facilities located throughout the nation whether they could treat the waste. Of these ten, only two facilities indicated they could accept the waste. Rollins Environmental Services, Inc., in Deer Park, Texas, initially indicated that they had capacity to treat all of Du Pont's wastewater treatment sludge in a slagging kiln and a rotary reactor, with principal reliance on the new rotary reactor. However, Du Pont questions whether the rotary reactor can adequately incinerate the extremely large quantity of sludge—an estimated 250 tons per day—generated by the Chambers Works facility. Du Pont claims that the radically different design and operation of the rotary reactor may not meet the treatment standards for the organic constituents. Specifically, Du Pont asserts that since this reactor recirculates hot sand, the high lime and solids content of the waste may lead to sand recirculation problems and incomplete burn out of organic contaminants. Hence, Du Pont maintains that Rollins does not have treatment capacity for all of the waste. However, Rollins claims their rotary reactor can meet the treatment standards and there is capacity for all of the waste. EPA believes that Du Pont must support its claim with results from a trial burn.

Ross Environmental Services, Inc., in Grafton, Ohio, and LWD, Inc., in Clay, Kentucky, initially indicated that they have capacity for a small portion of the waste. However, further examination determined that these firms are not currently permitted to incinerate this sludge, which carries the EPA hazardous

waste numbers of the wastes disposed in the landfill in accordance with 40 CFR 261.3(c)(2). Even if the firms were permitted to incinerate this sludge, the little capacity available at the facilities, 20,570 tons per year (wet weight basis) combined capacity, would not be sufficient to accommodate Du Pont's sludge.

2. Incineration Capacity for Residues from Interim Wastewater Treatment Operations

If Du Pont is granted an extension, it will be conditioned on the further exploration and implementation, if practicable, of the interim wastewater treatment operating conditions. The interim operations are estimated to result in the generation of 21,900 tons per year (wet weight basis) of secondary sludge for off-site incineration. At least one facility, Rollins, is believed to have capacity to treat this waste. EPA is requiring Du Pont to show, over the one year period of this extension, that the company is making a good-faith effort to complete necessary reconfigurations within the facility and to locate and contract for adequate incineration capacity to treat the secondary sludge.

3. Transport of Residues from Current Wastewater Treatment Operations

Assuming that adequate alternative off-site treatment capacity at Rollins is available Du Pont would have to transport the restricted waste to the facility by railcar or truck. Neither Rollins nor Du Point currently has a system to load and unload railcar shipments. Du Pont estimated that it would take more than 18 months to provide such a system. Furthermore, a minimum of 130 railcars, specially lined and covered, would be needed to ship the large volume of primary and secondary sludges. Du Pont determined that implementing the option to transport the combined primary and secondary sludges by truck would take a minimum of nine months. The company claims that in excess of 150 dumpster pans with waterproof lining, 130 flat bed trailers, and four hydraulic loading and unloading devices would be needed with procurement of the materials handling equipment alone taking in excess of six months. EPA believes that this assessment of the amount of transport capacity needed and the time necessary to provide this capacity are reasonable estimates. Hence, EPA is currently of the opinion that Du Pont is unable to locate and contract for adequate alternative incineration capacity off-site for its primary and secondary sludges.

4. Transport of Residues from Interim Wastewater Treatment Operations

If Du Pont is successful in contracting for sufficient alternative off-site treatment capacity for residues from its interim wastewater treatment operations, the necessary transport acquisitions will be made as part of the interim operations.

5. Other Treatment Capacity

The only other on-site treatment capacity Du Pont has been considering is stabilization, which has been evaluated since August, 1987. To date stabilization has not been demonstrated to be an effective technolgy for treatment of organic wastes. Therefore, EPA is of the view that the company is unable to establish adequate alternative on-site treatment capacity.

In addition to demonstrating that a good-faith effort has been made to establish or locate and contract for adequate alternative capacity to manage its waste by the effective date, Du Pont must show that it has entered into a binding contractual commitment to construct or otherwise provide such capacity. All design and construction work needed to upgrade the WWTP is being done internally. The non-minimum technology surface impoundment located before the headworks of the wastewater treatment system is currently being replaced by tanks. Du Pont's petition includes commitments for that replacement in excess of $4 million to provide material, labor, equipment, tools, facilities, supplies, and services not available at Du Pont. Design of the carbon regeneration furnace upgrade and segregation system for spent solvent wastes from outside sources is also under way. These modifications are expected to cost $15 to $16 million. Du Pont's extension request shows that its 1987 capital budget approves $30 million to be authorized in each of the years 1989 and 1990 for necessary improvements required by the land disposal restrictions program. Specific projects utilizing these funds will be authorized no later than January, 1989. EPA is currently of the opinion that Du Pont has demonstrated that it has satisfied the requirement that it has entered into a binding contractual commitment to upgrade the WWTP.

Du Pont was also required to demonstrate that the proposed on-site waste segregation and upgrade of the carbon regeneration furnace could not be implemented by the effective date of the restrictions due to reasons beyond its control. Du Pont has submitted information which indicates that changes to the WWTP have been under way since 1984. Open ditches are being replaced with an overhead pumped conveyance system and tanks, and the surface impoundment is being replaced with tanks. The company did, therefore, initiate activities at an early date to phase out dependence on land disposal in anticipation of future regulations restricting the land disposal of hazardous wastes. However, Du Pont found that due to complicated multiple-production operations and the very large volume of waste treated, it has taken considerable time to devise alternatives, to evaluate their ability to meet all applicable restrictions (including those imposed under Federal and State air and water pollution control programs), to establish priorities for projects with respect to multiple regulatory requirements, and to integrate projects to modify the WWTP.

Du Pont believes that the primary sludge is exempt from regulation under 40 CFR 261.3(a)(2)(iv) once the off-site spent solvent waste streams are segregated and diverted directly to the secondary treatment step. Du Pont supports its claim that the capacity of the modified WWTP will be sufficient to manage all the secondary sludge by comparing the volume of secondary sludge the company expects to generate with the design requirements of the carbon regeneration furnace. Du Pont claims that the furnace is sized to treat up to 40 tons per day of secondary sludge which is generated at an average rate of 10 to 15 tons per day (dry weight basis). The furnace is oversized to accommodate any future increases in waste volume.

The schedule for upgrading the WWTP submitted with the application spans a 75-month period from August, 1984, to October, 1990. Upgrades to the WWTP began in August, 1984, when Du Pont reached agreement with the New Jersey Department of Environmental Protection (NJDEP) on final terms and conditions of an Administrative Consent Order for eliminating all unlined process wastewater ditches and surface impoundments associated with the WWTP. The schedule shows that between August, 1988, and August, 1989 (the expiration date of the air permit for the carbon regeneration furnace), Du Pont will reapply for its air permit by submitting an application for revisions to the permit and it is anticipated that NJDEP will grant Du Pont the revised permit and all building and construction permits will be issued. Milestone dates for completion of the various activities to upgrade the WWTP are also given.

Du Pont states in its application that there is adequate capacity to manage its

restricted waste during the extension period in the on-site landfill which meets the minimum technology requirements of 40 CFR 268.5(h)(2). The company included in its application a map documenting the location of the minimum technology landfill. The entire quantity of restricted primary and secondary sludge generated during the proposed extension, approximately 80,000 yd ^{3} per year, can be disposed in the landfill. The landfill is divided into four areas. Area 1 was closed in late 1978. Areas 2 and 3 are currently accepting wastes, and the remaining 378,000 yd ^{3} of capacity is sufficient to manage the waste over the next five years. Construction of Area 4 which started in late 1987 will provide additional capacity. Since upgrading the WWTP is expected to take two years, there is adequate capacity to manage the restricted waste in Areas 2 and 3. The landfill is in compliance with the provisions of 40 CFR 268.5(h)(2), stipulating that the unit meet HSWA section 3004(o) requirements relating to ground water monitoring and the installation of two or more liners and leachate collection systems.

C. EPA's Proposed Action

For the reasons discussed above it appears that Du Pont's demonstrations have satisfied all the requirements for a case-by-case extension of the effective date of the land disposal restrictions applicable to sludges having less than 1% total F001–F005 solvent constituents provided the company pursues the interim plan to segregate wastewater streams and to incinerate secondary sludge off-site. Therefore, EPA is proposing to grant an extension of the November 8, 1988, effective date of the restrictions on hazardous solvent-containing sludge having less than 1% total F001–F005 solvent constituents. If the extension is granted, the primary and secondary sludge, which would not be prohibited from land disposal, could be disposed in the landfill over a one-year period starting from the publication date of the final notice but not later than November 8, 1990, while the interim plan is being implemented.

If Du Pont obtains a case-by-case extension, it would have to submit a progress report six months after the date the extension is granted addressing the progress being made to modify their furnace. In addition, EPA is requesting monthly progress reports addressing implementation of the interim plan. The Agency must also be notified of any change in the conditions specified in the petition. The extension remains in effect unless Du Pont fails to make a good-faith effort to meet the schedule for completion, the Agency denies or revokes any required permit, conditions certified in the application change, or Du Pont violates any laws or regulations implemented by EPA.

(Sections 1006, 2002(a), 3001, and 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6924))

Dated: January 11, 1989.

Jeffery D. Denit,

Deputy Director.

[FR Doc. 89–1366 Filed 1–19–89; 8:45 am]

BILLING CODE 6560–50–M

[FRL-3507-6]

Resource Conservation and Recovery Act; RCRA Docket Information Center: Relocation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of move and of closing of RCRA Docket during the move.

SUMMARY: The Resource Conservation and Recovery Act Docket will move from LG–100 to M2427 of EPA Headquarters, 401 M Street SW., Washington, DC 20460. The RCRA Docket will be closed from January 30, 1989 through February 3, 1989. Closing the Docket during the move will facilitate the moving of the Docket's collection and ensure the integrity of the regulatory dockets. This move will allow the Docket to provide improved services to its patrons.

As of Janaury 11, 1989, we identified that the following actions will be undergoing the public comment period during the time of the Docket's closing:

FR No.	Docket ID No.	Title	Closure date
53FR53282	F-88-WPWP-FFFFF	Listing of Wood Preservatives	2/28/89
53FR53330	F-88-WPDP-FFFFF	Tentative Denial of American Petition	2/28/89
54FR1056	F-89-LD10-FFFFF	Second Third Scheduled Wastes	2/27/89

The Docket staff will receive written comments during this time; however, the dockets will not be available for viewing.

FOR FURTHER INFORMATION CONTACT: RCRA Docket Information Center (OS–305) 401 M Street SW., Washington, DC 20460, (202/475–9327).

Date: January 12, 1989.

Sylvia K. Lowrance,

Director, Office of Solid Waste.

[FR Doc. 89–1365 Filed 1–19–89; 8:45 am]

BILLING CODE 6560–50–M

[OPP-36167; FRL-3507-2]

Publication of Addenda on Data Reporting to Pesticide Assessment Guidelines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: Addenda to the Pesticide Assessment Guidelines for certain studies have been finalized and are now available to the public from the National Technical Information Service (NTIS). The studies involved are: Acute and Subchronic Inhalation Toxicity Testing; General Metabolism; Metabolism (Qualitative Nature of the Residue): Food Animals; and Residues in Meat, Milk, Poultry and Eggs: Livestock Feeding Studies. The addenda supersede paragraphs in the Guidelines on data reporting and provide a format for the preparation of study reports by those submitting data to EPA. While these Guidelines are not mandatory at this time, data submitters are strongly encouraged to follow the format so that reports will be consistent, thereby increasing the efficiency of pesticide registration and other regulatory activities.

ADDRESS: Guidelines can be ordered from: National Technical Information Service, Attn: Order Desk, 5285 Port Royal Road, Springfield, VA 22161, (703–487–4650).

FOR FURTHER INFORMATION CONTACT:

Elizabeth M.K. Leovey, Hazard Evaluation Division (TS-769C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Office location and telephone number: Room 703B, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-2162).

SUPPLEMENTARY INFORMATION: The specific addenda, with NTIS order number and price, currently available from NTIS are as follows.

Document title	NTIS accession No.	EPA document No.	Hardcopy [1] price
Pesticide Assessment Guidelines, Subdivision F, Hazard Evaluation: Human and Domestic Animals. Series 81-3 and 82-4, Acute and Subchronic Inhalation Toxicity Testing, Adendum 6 on Data Reporting.	PB89-124077	540/09-89-007	$13.95
Pesticide Assessment Guidelines, Subdivision F, Hazard Evaluation: Human and Domestic Animals. Series 85-1, General Metabolism, Addendum 7 on Data Reporting.	PB89-124085	540/09-89-008	$13.95
Pesticide Assessment Guidelines, Subdivision O, Hazard Evaluation: Residue Chemistry. Series 171-4(a)(3), Metabolism (Qualitative Nature of the Residue): Food Animals, Addendum 7 on Data Reporting.	PB89-124598	540/09-89-009	$12.95
Pesticide Assessment Guidelines, Subdivision O, Hazard Evaluation: Residue Chemistry. Series 171-4(c)(3), Residues in Meat, Milk, Poultry, and Eggs: Livestock Feeding Studies, Addendum 8 on Data Reporting.	PB89-124606	540/09-89-010	$12.95

[1] Also available in microfiche at $6.95 each.

This is the fifth set of Data Reporting Guidelines published by the Agency. Publication of the previous sets were announced in the **Federal Register** of November 26, 1986 (51 FR 42931); September 23, 1987 (52 FR 35766); January 28, 1988 (53 FR 2535); April 13, 1988 (53 FR 12186); and June 1, 1988 (53 FR 20011). These documents were reviewed by the U.S. Department of Agriculture, the Food and Drug Administration, and other organizations within EPA. They underwent public comment announced in the **Federal Register** of March 25, 1987 (52 FR 9536), and May 25, 1988 (53 FR 18896). The documents were revised to reflect consideration of these comments and the public comments were addressed in the documents.

Order may be placed by mail or telephone. All orders should specify whether the document is requested in hard copy or microfiche form since prices vary for hard copy but are a consistent $6.95 for the microfiche. There is an additional $3.00 handling charge for each order. Payment may be made by charging against an NTIS deposit account; charging to VISA, MasterCard, or American Express, or by check or money order. In all orders, the document title, NTIS order number of the document, desired form of the document (microfiche or hard copy), and the price must be stated.

Data Reporting Guidelines for the remaining major studies in the Pesticide Assessment Guidelines will also be published. Publication will be announced in the **Federal Register**.

Dated: January 10, 1989.

William L. Burnam,

Acting Director, Health Effects Division, Office of Pesticide Programs.

[FR Doc. 89-1363 Filed 1-19-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to the Office of Management and Budget for Review

January 11, 1989.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507.

Copies of this submission may be purchased from the Commission's duplicating contractor, International Transcription Service, 2100 M Street NW., Suite 140, Washington, DC 20037, or telephone (202) 857-3815. Persons wishing to comment on an information collection should contact Eyvette Flynn, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, telephone (202) 395-3785. Copies of these comments should also be sent to the Commission. For further information contact Doris Benz, Federal Communications Commission, telephone (202) 632-7513.

OMB No.: 3060-0095.

Title: Annual Employment Report—Cable Television.

Form No.: FCC 395-A.

Action: Revision.

Respondents: Business (including small business).

Frequency of Response: Annually.

Estimated Annual Burden: 2,965 Responses, one hour and twenty minutes each.

Needs and Uses: Filing is required of cable television licensees with six or more employees. The data is used to assess compliance with the Commission's EEO requirements, and to enforce such compliance.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-1371 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

January 12, 1989.

The Federal Communications Commission has submitted the following information collection requirement to the Office of Management and Budget for review and clearance under the paperwork Reduction Act, as amended (44 U.S.C. 3501 *et seq.*).

Copies of the submission may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037. For further information on this submission contact Jerry Cowden, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Eyvette Flynn, Office of Management and Budget Room 3235

NEOB, Washington, DC 20503, (202) 395-3785.

OMB Number: 3060-0004.

Title: Environmental Information Collection Requirements: Section 1.1307, 1.1308, and 1.1311.

Action: Revision.

Respondents: Individuals, state or local governments, businesses (including small businesses), and non-profit institutions.

Frequency of Response: On occasion.

Estimated Annual Burden: 1,254 responses; 2,633 total hours; avg. 2.1 hours each.

Needs and Uses: In fulfilling its obligation under the National Environmental Policy Act, the Commission collects environmental information from applicants whose proposals to construct or modify communications facilities may have a significant environmental impact.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-1372 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

[Report No. 1765]

Petitions for Reconsideration and Clarification of Actions in Rule Making Proceedings

January 11, 1989.

Petitions for reconsideration and clarification have been filed in the Commission rule making proceeding listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street NW., Washington, DC, or may be purchased from the Commission's copy contractor International Transcription Service (202-857-3800). Oppositions to these petitions must be filed February 8, 1989. See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of § 73.202(b) Table of Allotments, FM Broadcast Stations. (Melbourne, Florida) Number of petitions received: 1.

Subject: Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules). (CC Docket No. 86-182) Number of petitions received: 1.

Subject: Amendment of § 73.202(b) of the Commission's Rules, FM Table of Allotments. (Broken Arrow and Bixby, Oklahoma, Coffeyville, Kansas) (MM Docket No. 87-475, RM's 5905 and 6209) Number of petitions received: 3.

Subject: Amendment of § 73.202(b), Table of Allotments, FM Broadcast Stations. (Arizona City, Arizona) (MM Docket No. 87-543, RM-5817) Number of petitions received: 1.

Subject: Amendment of Part 22 of the Commission's Rules to Revise Certain Filing Procedures for the Mobile Services Division Applications and to Eliminate Form 430. (CC Docket No. 88-161) Number of petitions received: 8.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-1373 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

[DA 89-43]

Advisory Committee on Advanced Television Service Steering Committee

January 18, 1989.

A meeting of the Steering Committee of the Advisory Committee on Advanced Television Service will be held on: January 24, 1989, 4:00 p.m., National Association of Broadcasters Building, 1771 N Street Northwest, McCollough Room, Washington, DC.

The agenda for the meeting will consist of:

1. Introduction
2. Approval of the last meeting's minutes
3. Discussion of draft report on U.S. "competitiveness"
4. Progress reports of the three subcommittees
5. Development of testing plans
6. Planning for the Second Interm Report to the FCC
7. Report on budget and funding
8. Date and location of next Steering Committee meeting
9. Other business
10. Adjournment

All interested persons are invited to attend. The fifteen (15) day prior notice regularly given for such meetings is not possible in this instance because the primary purpose of meeting at this time is to review a draft of a status report on U.S. "competitiveness" implications of advanced television which is due to the House Subcommittee on Telecommunications and Finance by February 1, 1989. In order to provide maximum notice to the interested public, we will contact by telephone those members of the public who attended either of the last two Steering Committee meetings (as reflected in the minutes of those meetings) to inform them of this meeting.

Interested parties may submit written statements at this meeting. Oral statements and discussion will be permitted under the direction of the Steering Committee Chairman.

Any questions regarding this meeting should be directed to Richard E. Wiley at (202) 429-7010 or David R. Siddall at (202) 632-7792.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-1495 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

Applications for Consolidated Hearing; Mary Karen Dodd et al.

1. The Commission has before it the following mutually exclusive applications for a new FM station:

I.

Applicant, city and State	File No.	MM Docket No.
A. Mary Karen Dodd; Claremore, OK.	BPH-871119MG	88-568
B. Educational Broadcasting Corp.; Claremore, OK.	BPED-871216MB	
C. Pamela Kay Warren; Claremore, OK.	BPH-871216MH	
D. Fred M. Weinberg; Claremore, OK.	BPH-871216MJ	

Issue Heading and Applicants

1. Comparative, A,B,C,D
2. Ultimate, A,B,C,D

II.

Applicant, city and State	File No.	MM Docket No.
A. A.P. Walter, Jr.; Panama City, FL.	BPH-870824MS	88-559
B. Ladies III Broadcasting, Inc.; Panama City, FL.	BPH-870824MV	
C. Voice of The Gulf Limited Partnership; Panama City, FL.	BPH-870824MU	
D. Beach Broadcasting; Panama City, FL.	BPH-870824MF	
E. Shell Island Broadcast Associates; Panama City, FL.	BPH-870821MC (previously dismissed)	
F. C.C. Broadcasting Ltd.; Panama City, FL.	BPH-870824MW (dismissed herein	

Issue Heading and Applicants

1. Air Hazard, C,D
2. Comparative, A-D
3. Ultimate, A-D

III.

Applicant, city and State	File No.	MM Docket No.
A. William L. Knowles; Yellowstone, MT.	BPH-851114MS	88-569
B. Mountain River Broadcasting, Inc.; Yellowstone, MT.	BPH-851115NT	

Issue Heading and Applicant(s)

1. Environmental Impact, B
2. Comparative, A,B
3. Ultimate, A,B

IV.

Applicant, city and State	File No.	MM Docket No.
A. Boyce Dooley; Trion, GA.	BPH-871021MA	88-580
B. Safe Broadcasting Corp.; Trion, GA.	BPH-871022MC	
C. Tri-State Broadcasting Co.; Trion, GA.	BPH-871023MJ	
D. Lynn S. Gwyn; Trion, GA.	BPH-871023MM	
E. Kay W. Abbott and John W. Abbott, d/b/a Faith Broadcasting; Trion GA.	BPH-871023MR	

Issue Heading and Applicants

1. Cross Interest, D
2. Comparative, A-E
3. Ultimate, A-E

2. Pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing in a consolidated proceeding upon the issues whose headings are set forth below. The text of each of these issues has been standardized and is set forth in its entirety under the corresponding headings at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issues in question applies to that particular applicant.

3. If there is any non-standardized issue in this proceeding, the full text of the issue and the applicants to which it applies are set forth in an Appendix to this notice. A copy of the complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street NW., Washington, DC 20037. (Telephone (202) 857-3800).

W. Jan Gay,

Assistant Chief, Audio Services Division, Mass Media Bureau.

[FR Doc. 89-1374 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

Applications for Consolidated Hearing; Don Werliger et al.

1. The Commission has before it the following mutually exclusive applications for a new AM station.

I.

Applicant, city and State	File No.	MM Docket No.
A. Don Werlinger; Las Vegas, NV.	BP-870331AD	88-562
B. Don H. Barden; Las Vegas, NV.	BP-870929AK	
C. Larry L. Cummings; Sun City-Youngtown, AZ.	BP-870929AM	
D. Peter D. Gureckis d/b/a Cave Creek Broadcasting Co; Cave Creek, AZ.	BP-810929AP	
E. Stephen E. Brisker d/b/a Tucson Radio; Tucson, AZ.	BP-870929AQ	

Issue Heading and Applicant(s)

1. Air Hazard, A
2. City Coverage, B
3. 307(b), All Applicants
4. Contingent Comparative, All Applicants
5. Ultimate, All Applicants

II.

Applicant, city and State	File No.	MM Docket No.
A. Western Indian Ministries, Inc.; Tse Bonito, NM.	BP-870929AN	88-557
B. Mesa Broadcasting Co.; Orchard Mesa, CO.	BP-880328AG	

Issue Heading and Applicant(s)

1. 307(b), All Applicants
2. Contingent Comparative, All Applicants
3. Ultimate, All Applicants

III.

Applicant, city and State	File No.	MM Docket No.
A. La Voz Broadcasting Co., Inc.; Santa Fe, NM.	BP-880113AF	88-560
B. Radio Property Ventures; Arvada, Co.	BP-880428AA	

Issue Heading and Applicant(s)

1. City Coverage, A
2. 307(b), All Applicants
3. Contingent Comparative, All Applicants
4. Ultimate, All Applicants

IV.

Applicant, city and State	File No.	MM Docket No.
A. Spann Communications; Surry, VA.	BP-860922AF	88-581
B. David H. Moran d/b/a Kitty Hawk Radio; Kitty Hawk, NC.	BP-870601AB	
C. Ultimate High Fidelity; Claremont, VA.	BP-870601AE	
D. David H. Moran d/b/a Midlothian Radio; Midlothian, VA.	BP-870601AC	Dismissed.

Issue Heading and Applicant(s)

1. (See Appendix), A.
2. (See Appendix), A
3. 307(b), All Applicants
4. Contingent Comparative, All Applicants
5. Ultimate, All Applicants

2. Pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing is a consolidated proceeding upon the issues whose heading are set forth below. The text of each of these issues has been standaradized and set forth in its entirety under the corresponding heading at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issue in question applies to that particular applicant.

3. If there is any non-standardized issue(s) in this proceeding, the full text of the issue an the applicant(s) to which it applies are set forth in an Appendix to this notice. A copy of the complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street NW., Washington, DC 20037. (Telephone No. (202) 857-3800).

W. Jan Gay,

Assistant Chief, Audio Services Division, Mass Media Bureau.

Appendix

1. To determine whether Pervis Spann, as a principal of Midway Broadcasting Company, misrepresented in an application for a new

broadcast station at Maywood-Chicago, Illinois, the identity of its consulting engineer, and in light of the evidence adduced, whether A (Spann Communications) possesses the basic qualifications to be a Commission licensee.

2. To determine whether Pervis Spann paid Daryl Williams to sign a false affidavit which Minority Broadcasting of the Midwest, Inc. filed with the Commission in a proceeding involving mutually exclusive proposals for a Memphis, Tennessee, broadcast station and in light of the evidence adduced, whether A (Spann Communications) possesses the basic qualifications to be a Commission licensee.

[FR Doc. 89-1375 Filed 1-19-89; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 207-011226.

Title: American Auto Carriers/ Autoship Joint Service Agreement ("Joint Service").

Parties: American Auto Carriers, Inc. Autoship, Inc.

Synopsis: The proposed Agreement would permit the parties to form a joint cargo service employing U.S.-flag roll-on roll-off type vessels owned or operated by the parties and contributed to the Joint Service by the parties in the trades between U.S. Atlantic ports from Maine to Key West and foreign ports in Europe, the United Kingdom, Eire, and islands of the Atlantic (including intermediate ports but not in U.S. domestic trade).

By order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: January 17, 1989.

[FR Doc. 89-1381 Filed 1-19-89; 8:45 am]

BILLING CODE 6730-01-M

GENERAL SERVICES ADMINISTRATION

Federal Supply Service; Consortium of Federal, Academic, and Industry Logistics Experts; Meeting

Notice is hereby given that the Consortium of Federal, Academic, and Industry Logistics Experts will meet February 1, 1989, from 10:00 am to 12:00 noon in Crystal Mall Building 4, Room 1129, Arlington, Virginia. The purpose of the meeting is to provide a forum for exchange on logistics issues among member civilian agencies.

The agenda for this meeting will include an update on the fiscal year 1989 agenda topics and a presentation on the Physical Distribution and Materials Management Program at Penn State University.

The meeting will be open to the public.

For further information contact Mr. William B. Foote, Assistant Commissioner for Customer Service and Marketing, GSA/FSS, Washington, DC 20406, telephone (703) 557-7970.

Dated: January 13, 1989.

Donald C.J. Gray,

Commissioner, Federal Supply Service, GSA.

[FR Doc. 89-1303 Filed 1-17-89; 11:30 am]

BILLING CODE 6820-24-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions and Delegations of Authority

Part A, Office of the Secretary, of the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services is amended to reflect the current organization within the Office of the Assistant Secretary for Management and Budget. Specifically, Chapter AM, HHS Management and Budget Office, as last amended at 53 FR 25543, dated July 7, 1988, is being reprinted in its entirety. In addition, Chapter AMN, as last amended at 53 FR 51587, dated December 22, 1988, should have reflected the deletion of paragraphs a. through j., under the Office of Financial Policy. Also delete Chapter AM, HHS Management and Budget Office, in its entirety and replace with the following:

AM.00 Mission. The mission of the HHS Management and Budget Office is to provide advice and guidance to the Secretary on administrative and financial management, excluding personnel management, and to provide for the direction and coordination of these activities throughout the Department on a day-to-day basis.

AM.10 Organization. The HHS Management and Budget Office, headed by the Assistant Secretary for Management and Budget who reports to the Secretary, consists of the following organizations:

The Immediate Office of the Assistant Secretary for Management and Budget (AM);
Office of Management and Acquisition (AME);
Office of Budget (AML);
Office of Information Resources Management (AMM);
Office of Finance (AMN);

AM.20 Functions

A. The Immediate Office of the Assistant Secretary for Management and Budget (AM) provides executive direction, leadership and guidance to the ASMB components. The Assistant Secretary for Management and Budget is the principal adviser to the Secretary on all aspects of administrative and financial management. By delegation from the Secretary, the incumbent exercises the full Departmentwide authority of the Secretary in the assigned areas of responsibility.

B. The Office of Management and Acquisition (AME) provides Departementwide policy leadership and advises senior HHS officials on management issues related to reorganizations, delegations of authority, postal management, real property, space management, occupational safety and health, and emergency preparedness; administers reports clearance, records management, equal employment opportunity, telecommunications, and space management programs for the Office of the Secretary; manages and operates the HHS Fitness Center; provides administrative and facilities management services to HHS components in the Southwest Washington D.C. area complex which include mail, property management, supplies, facilities maintenance, physical security, reprographics, and other office services; provides Departmental leadership in the areas of procurement, discretionary grants, and logistics through policy development, oversight and training; manages the Department's Small and Disadvantaged Business Utilization Program; and awards and administers contracts in support of the Office of the Secretary.

C. The Office of Budget (AML) oversees preparation of the Departmental budget estimates and

forecasts resources required to support programs and activities of the Department; analyzes budgetary and financial management implications of new or proposed legislation, programs or activities; appraises programs, activities and operations in terms of the policies, goals, and objectives of the Department; operates the HHS integrated funding system; recommends and administers policies and procedures for allocation and control of employment ceilings. Through studies, analyses and other survey methods, assesses the management processes and structures of the Department to ensure cost-effective and efficient practices. With particular reference to the Office of the Secretary (OS), is responsible for the overall formulation, presentation, and execution of the OS budget; serves as the focal point for OS budget operations, providing assistance in the development of budget policy and the management of positions and financial resources for the OS.

D. The Office of Information Resources Management (AMM) advises the Secretary and the Assistant Secretary for Management and Budget on issues and policies pertaining to the utilization of information resources, and establishes IRM control mechanisms and administers the Department's IRM strategic plan; guides and oversees the development of information systems and communication networks; develops strategies and frameworks for regional information systems; formulates and coordinates the Department's policies on the creation, processing, handling, storage, dissemination and disposition of information; guides and oversees the Department's printing management programs; provides and supports automated data processing and communications equipment and administrative application systems for the Office of the Secretary; and develops and supports Decision Support Systems for top-level Departmental managers.

E. The Office of Finance (AMN) advises the Secretary on all aspects of financial management; directs, oversees and coordinates financial management activities across the Department; provides leadership and coordination in the development of HHS financial systems, including their design, development and modification; serves as Departmental liaison with GAO, OMB, Treasury and other federal agencies on financial matters; manages the Department's Financial Integrity Act Program; maintains Departmental finance and accounting standards; resolves monetary audit findings and findings involving deficiencies in grantee/contractor accounting and management systems; directs the regional review and negotiation of cost allocation plans and indirect cost rates; formulates audit resolution policy, cost principles, and other policies for determining and reimbursing costs of grantee/contractor organizations and serves as Departmental liaison with OMB and other Federal agencies in these areas; recommends and implements Departmental budget execution policies and procedures and serves as the focal point for dealing with OMB on these matters. In addition, manages the Department-wide Payment Management System which pays all of the Department's grants and provides service to other Departments; and manages the day-to-day finance and accounting activities of the Office of the Secretary/Office of Human Development Services.

Date: January 12, 1989.

S. Anthony McCann,

Assistant Secretary for Management and Budget.

[FR Doc. 89-1244 Filed 1-19-89; 8:45 am]

BILLING CODE 4150-04-M

Alcohol, Drug Abuse, and Mental Health Administration

Research Demonstration Program To Reduce the Spread of AIDS by Improving Treatment for Drug Abuse

AGENCY: National Institute on Drug Abuse, Alcohol, Drug Abuse, and Mental Health Administration, HHS.

ACTION: Notice of request for applications.

Purpose: This announcement requests applications for research demonstration projects to improve the effectiveness of drug abuse treatment as an AIDS prevention strategy. Statutory authority for these grant awards is section 301 of the Public Health Service Act (42 U.S.C. 241). Funds will be available under this announcement for (1) establishing treatment research units and (2) for supporting individual and collaborative demonstration research projects. In both cases, funds may be requested to pay for treatment services as well as research costs.

The aim of the grant program is to demonstrate that improvements in drug abuse treatment result in greater decreases in AIDS-risk behaviors than treatment as usual. Toward this goal, applicants are expected to design carefully controlled studies to demonstrate the effectiveness of improvements in existing treatment strategies, or the efficacy of new treatment strategies. Funding will be restricted to the treatment of drug abuse typically associated with HIV transmission. This includes intravenous drug abuse (optiate and/or other drugs) as well as types of drug abuse frequently involving unprotected sex in exchange for drugs or money to purchase drugs—i.e., prostitution or the "sex for crack" phenomenon.

Background

AIDS is a serious medical disorder caused by the Human Immunodeficiency Virus (HIV). One of the principal modes of transmission of HIV is needle sharing by intravenous drug abusers. By recent estimate, 31% of all AIDS cases involve intravenous drug use, which is the second most common means of transmission of the virus. Drug abusers may be particularly susceptible to HIV infection due to the suppressive effects of some abused drugs on the immune system. While most intravenous drug abusers inject heroin, intravenous use of such nonopiate drugs as amphetamines and cocaine occurs as well.

In addition to needle sharing, some intravenous and non-intravenous drug users frequently engage in unprotected sexual activity, which may result in HIV infection of themselves or their sexual partners. Of particular public health concern are drug users who engage in unprotected sex for drugs, or for money to maintain a drug habit.

Both IV drug abusers and non-IV users who engage in risky sexual practices have the potential for spreading the virus into the heterosexual population. Approximately 80 percent of all HIV infection cases attributed to heterosexual transmission have been attributed to sexual contact with intravenous drug abusers. In addition, drug abuse is a major contributing factor in the perinatal transmission of HIV, with over two-thirds of perinatal cases of AIDS occurring in children born to intravenous drug abusers or their sexual partners.

While drug abuse treatment is widely regarded as an effective AIDS prevention strategy, a number of problems exist with current treatment approaches. These problems include unacceptably high client dropout rates and rates of illicit drug use during treatment, as well as relapse rates following treatment. Overcoming these problems is expected to make drug abuse treatment an even more effective AIDS prevention strategy. In addition to resolving problems with existing treatment approaches, new and

improved treatment approaches must also be developed.

The National Institute on Drug Abuse (NIDA) has a strong commitment to help curb the spread of HIV among drug abusers and from drug abusers to their sexual partners and children. An essential part of NIDA's efforts in this area is the development of more effective treatments for drug abusers, so that those presently at risk for HIV infection have better treatment available. NIDA is interested in supporting treatment research demonstration projects directed at eliminating or reducing drug use (and other behaviors which place individuals at risk for HIV infection) by increasing treatment program effectiveness.

Description of Program

Applications for grants under this announcement must focus on correcting deficiencies in existing treatment approaches and/or developing new treatment approaches. Outcome must be tailored toward reducing drug use, needle sharing and other behaviors that place an individual at risk for HIV infection. The interventions can be pharmacological or nonpharmacological, and may be based in a variety of settings (e.g., hospitals, residential programs, outpatient programs, correctional settings, etc.). Investigation in all types of treatment modalities is encouraged (including methadone maintenance, detoxification, drug-free outpatient, and therapeutic community or inpatient programs), as well as programs that seek to mainstream drug abuse treatment into the primary health care system.

Applicants are expected to establish new treatment slots with the money requested, in support of their research objectives. While applicants may request funds for HIV seropositivity testing and counseling, the focus of the demonstration program is on reducing risk behaviors and HIV testing is not required.

Treatment Research Units

One type of award possible under this announcement is to establish facilities for conducting controlled studies of treatment effectiveness. Treatment Research Units (TRUs) are expected to be fully staffed and operational clinical research components, in which established investigators in the treatment research field are provided with resources for designing and conducting studies on treatment effectiveness. Funding for TRUs will include costs for both clinical and research activities, including patient care costs and staff to recruit subjects, provide followup, etc. In addition to providing the resources necessary for establishing and operating a fully-equipped treatment research unit, TRUs are intended to provide qualified investigators with maximum flexibility in using such facilities to address treatment research issues. Thus, while the overall plan for establishing a TRU will be subject to IRG review, selection and approval of research studies to be conducted within each TRU will follow review and recommendation by an outside Scientific Advisory Group, which will be appointed by each facility.

Each TRU may be tailored to the specific research interests of the treatment investigator(s), and be organized around a research theme or set of general research objectives. For example, one TRU may involve a residential drug-free treatment program and study factors related to dropout from treatment, while another TRU may involve a methadone maintenance program and study factors related to illicit drug use during treatment. Still another facility may focus on the development of new pharmacological treatments for drug abuse. While the major focus of TRUs must be on improving treatment effectiveness, individual projects may address clinical factors that contribute to poor treatment performance or to relapse following treatment.

Each application for a TRU must include plans for establishing and operating the TRU, as well as a general overview of an expected 5-year research plan. The research plan should provide a statement of research directions and types of projects to be conducted in the TRU. Detailed research protocols are not required as part of the application, but applicants should include descriptions of general research methods that are expected to be employed, types of treatment to be evaluated, and characteristics of patient populations to be involved in the research. Applications must also include plans for establishing and operating the Scientific Advisory Group (including types of expertise needed, criteria and process for selection of members, plans for operation of the Group, and its relationship to the TRU), establishing linkages with the treatment community, protection of human subjects, and information dissemination. Applicants should specify how the effects of treatment improvement on high-risk behaviors for HIV transmission will be assessed. Applicants should provide adequate information regarding available facilities and staff, so that the IRG process may adequately review the applicant's capability and the feasibility of the plans to establish the TRU. Because their focus will differ, each program is expected to have unique staffing needs, which must be addressed in the grant application. All TRUs are expected to create new treatment capacity, and none of the funds provided under this announcement can be used to replace funding for existing treatment slots (although it is permissible to add staff to a facility containing both previously existing and new treatment slots). Up to $10 million will be available to fund 5 or more TRUs (i.e., average cost $2 million/grant) under this category.

Research Demonstration Projects

The second type of award possible under this announcement is for individual or collaborative demonstration research projects. The purpose of these projects is to implement and test promising treatment strategies that have not been widely used. In planning these projects, investigators are expected to use the most rigorous methodology consistent with the purposes of the research. It is expected that sound methodologies will be employed in all research activities. Thus, an investigator may wish to demonstrate the effectiveness of dosing schedule in methadone maintenance programs by randomly assigning subjects to fixed dose vs. flexible dose schedules, while another investigator may wish to demonstrate the effectiveness of treatment regimens by randomly assigning subjects to two types of treatment programs. However, it is recognized that experimental designs involving random assignment of subjects to treatments and double blind strategies may not be appropriate for all circumstances. In such cases, other types of controls may be used, including single-subject experimental designs, case controls, regression-discontinuity designs, etc. Applicants having access to a large number of programs are encouraged to conduct collaborative studies.

Research demonstration projects are expected to include the creation of new treatment slots. In designing research demonstration projects, the crucial importance of a sound evaluation plan and qualified research staff cannot be over-emphasized. Many agencies providing treatment services have a research department, but those who do not may wish to enter into collaboration with well-qualified researchers. All applications must address issues of project feasibility, implementation of the intervention, study design, sampling procedure, instrumentation and

measurement, data collection, tracking of clients, followup, and data analysis, as appropriate.

• Applicants should specify how the effects of treatment on high-risk behaviors for HIV transmission will be assessed.

• In collaborative arrangements, organizational lines of control and arrangements for cooperation by treatment programs and agencies must be clearly specified.

• The application should also include an information dissemination plan, to assure that research findings are communicated to the treatment field in a timely, efficient fashion.

• Applicants should provide adequate information regarding available facilities and staff, as well as plans to acquire new staff.

• Evidence that programs have been involved in research data collection may be useful in supporting an application.

While the costs of individual grants may differ widely, it is expected that 20 grants will be funded in this category, at an *average* cost of $1 million each.

Allowable Costs

For both Treatment Research Units and individual or collaborative research demonstration projects, funds may be expended on bed/slot costs, rental and operation of facilities, approved renovation and modification of facilities (subject to limits and conditions specified in Public Health Service grant policy), equipment costs, hiring and training of staff, program management, coordination of health and social services, and other costs normally allowable under existing Public Health Service grants policy. No funds from these research demonstrations grants may be used for new construction or to replace funding for existing treatment slots. Applicants are advised to request budgetary funds for two round trips to Washington, DC each year (2 days per trip) to confer with project officers and review findings.

Inclusion of Women and Minorities in Study Populations

ADAMHA urges applicants for grants to give added attention, where feasible and appropriate, to the inclusion of women and minorities in study populations for research on clinical studies of treatment and treatment outcomes. If women and minorities are not included in a given study, a clear rationale for their exclusion must be provided. Investigators are reminded that merely including arbitrary numbers of women and minority group participants in a given study is insufficient to guarantee generalization of results.

Protection of Human Subjects

Grants funded under this RFA are subject to the requirements of 45 CFR Part 46, Protection of Human Subjects. These regulations are available from the Office for Protection from Research Risks, National Institutes of Health, Bethesda, MD 20892. Telephone: (301) 496-7041.

Because of the expedited schedule for review and award of these grants, certifications of Institutional Review Board (IRB) approval should accompany applications for TRUs and individual/collaborative demonstration projects. It is recognized that some or all of the specific research studies to be conducted by a TRU may not have been developed at the time the application is submitted. However, IRBs should review the overall plan for the TRU, e.g., patient recruitment plans, types of treatment proposed, methodology, and study populations. To the extent that specific studies are described in the application, these also must be reviewed and approved by the IRB prior to submission of the application. For specific studies, IRB review and approval must be obtained and documentation submitted to NIDA prior to involvement of human subjects in specific research studies conducted by TRUs.

In addition, all applicants are advised to obtain from their IRB, a copy of the "Guidance for Institutional Review Boards for AIDS Studies," which was disseminated from the Office for Protection from Research Risks (OPRR) on December 16, 1984. If a copy is not available locally, one may be obtained from OPRR, Building 31, Room 4B09, National Institutes of Health, Bethesda, MD 20892, or by telephone on (301) 496-7005. This office may be contacted for advice on how to deal with difficult human subjects protections issues in AIDS research.

Progress Reports and Final Report Requirements

At 6-month intervals, grantees must provide reports describing their progress, problems encountered in implementing their TRU or project plan, proposed strategies for resolving such problems, and data on modalities in which treatment is provided, number of new treatment slots created, utilization of slots, retention rates, and number of clients or patients treated within each modality.

In addition, TRUs must provide descriptions of all projects and copies of all protocols at the time they are approved by the Scientific Advisory Group and before they are initiated. TRUs must provide copies of research findings (and resulting publications) from each project conducted in the TRU.

At the end of the period of support for demonstration projects grants, 3 copies of a final report should be submitted to NIDA within 90 days. This final report should include a complete description of the intervention provided, number and characteristics of clients served, and research findings. Also, as appropriate, the final report should include a description of collaborative arrangements, special materials (such as therapy manuals) developed in implementing the intervention, implications for reducing the spread of HIV infection among drug abusers, etc.

Application Procedure

Eligibility

Treatment Research Units. Applications for Treatment Research Units may be submitted by public or private for profit or nonprofit organizations such as universities, colleges, hospitals, units of State or local governments, and eligible agencies of the Federal Government. Organizations headed by women and minority staff are encouraged to apply.

Individual or Collaborative Projects. Applications for individual or collaborative research treatment demonstrations may be submitted by public or private nonprofit or profit-making community organizations such as universities, colleges, hospitals, laboratories, units of State or local governments, and eligible agencies of the Federal Government. The term "community" refers to geographic service areas, and may include States as well as metropolitan areas and rural districts. Organizations headed by women and minority staff are encouraged to apply.

Application Process

State and local government agencies may use form PHS-5161 (revised 3/86). All other applicants should use the standard PHS-398 (revised 9/86) research grant application form. "AIDS Research: 'Research Demonstration Program to Reduce the Spread of AIDS by Improving Treatment for Drug Abuse" should be typed in Item # 2 on the face page of the application. Separate applications are required for TRUs and demonstration project grants.

Application kits containing the necessary forms and instructions may be obtained from business offices or offices of sponsored research at most universities, colleges, medical schools,

and other major research facilities. If such a source is not available, the following office may be contacted for the necessary application material:

Grants Management Branch, National Institute on Drug Abuse, 5600 Fishers Lane, Room 10-25, Rockville, Maryland 20857. (301) 443-6710

The narrative portion of the application (sections A-D of the PHS 398), including tables and charts should not exceed 20 pages. Those exceeding this page limitation may be rejected by the Division of Research Grants, NIH. The signed original and 23 permanent legible copies of the complete application should be sent to:

AIDS Coordinator, Division of Research Grants, NIH, Westwood Bldg., Room 9, 5333 Westbard Avenue, Bethesda, Maryland 20892.

Applicants are strongly advised to contact the Deputy Chief, Treatment Research Branch, NIDA, prior to submitting applications to discuss the nature and extent of their project plans. Further information and consultation on program requirements can be obtained from:

Frank Tims, Ph.D., Deputy Chief, Treatment Research Branch, Division of Clinical Research, National Institute on Drug Abuse, 5600 Fishers Lane, Room 10A-30, Rockville, Maryland 20857. Telephone: (301) 443-4060

Letter of Intent

Prospective applicants are asked to submit, by February 8, a letter of intent that includes a descriptive title and a short abstract of the proposed research demonstration, the name and address of the principal investigator, and the names of other key personnel (if available), and the number of this Request for Applications (DA 89-01).

Although a letter of intent is not required, is not binding, and does not enter into the review of subsequent applications, the information which it contains is extremely helpful in planning for the review of applications. It allows NIDA staff to estimate the potential review workload, and to avoid possible conflict of interest in the review.

The letter of intent should be sent to:

Kursheed Asghar, Ph.D., Chief, Extramural Policy and Project Review Branch, Office of Science, National Institute on Drug Abuse, Parklawn Building, Room 10-42, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-2755.

Intergovernmental Review

The intergovernmental review requirements of Executive Order 12372, as implemented through DHHS regulations at 45 CFR Part 100, are applicable to this program. Through this process, States, in consultation with local governments, are provided the opportunity to review and comment on applications for Federal financial assistance. Applicants should contact the State's Single Point of Contact (SPOC) as early as possible to determine the applicable procedure. A current listing of SPOCs will be enclosed with the application kit. SPOC comments should be forwarded to: Chief, Office of Extramural Policy and Project Review, Office of Science, NIDA, 5600 Fishers Lane, Room 10-42, Rockville, Maryland 20857, by May 8, 1989.

Review Process

Applications received under this RFA will be reviewed for scientific merit by an Initial Review Group (IRG), consisting primarily of non-Federal technical and scientific experts. However, applications that are incomplete for review or non-responsive to this RFA will be screened out by NIDA staff upon receipt and returned to the applicants without further consideration.

Those applications which are complete and responsive may be subjected to a triage by an IRG to determine whether they are competitive relative to other applications received in response to this RFA. NIDA will withdraw from further review those applications judged to be noncompetitive and notify the applicant and institutional business official. Those applications judged to be competitive will be further evaluated for scientific/technical merit by an IRG convened for this purpose.

Depending on the number of applications reaching the final peer review for scientific merit, the summary statement prepared may reflect the use of a structured critique. This term refers to a format used to reduce the amount of written material submitted by the Initial Review Group members in preparing their evaluations, while maintaining the requirement for thoroughness in review by focusing on the major strengths and weaknesses of each application reviewed.

Notification of the review outcome will be sent to the applicant after the initial review. Applications will receive a second-level review by the National Advisory Council on Drug Abuse which may be based on policy as well as scientific merit considerations.

Application Receipt and Review Schedule

Applications received under this RFA will be reviewed under the accelerated special applications process (ASAP) provisions established for AIDS research. The deadlines and award dates shown below have been established by Division of Research Grants, NIH.

Receipt of Applications	Initial review	Advisory council review	Awards to be made by
Mar. 8, 1989	May-June 1989	Aug. 1989	Sept. 8, 1989

Applications under this RFA not received by the March 8, 1989 deadline cannot be accepted. Late applications will be returned to the applicants without further consideration.

Review Criteria—Treatment Research Units

Criteria for merit review of applications for Treatment Research Units will include the following:

- Scientific, clinical, and technical merit;
- Institutional commitment of adequate space and other resources necessary for the establishing of a unit to support high-quality research on the treatment of drug abuse;
- Experience and demonstrated ability of the applicant institution to establish and operate health care and research facilities of the highest quality;
- Organizational arrangements of the TRU within the applicant institution, including lines of administrative authority and control, evidence of administrative support and institutional commitment to the unit;
- Qualifications and experience of the scientific and clinic directors and clinical and research staff, including previous peer-reviewed research project support;

• Soundness of the plan for the establishment and operation of clinical and research activities within the TRU;
• Availability of a sufficient research client population;
• Appropriateness and adequacy of plans for establishment and operation of an outside Scientific Advisory Group to review and approve research plans and protocols, including provisions to ensure the selection of scientists with appropriate expertise and to ensure the adoption of high standards of excellence for review of protocols;
• Establishment of appropriate review criteria for use by the Scientific Advisory Group;
• Potential of the proposed facility to provide new and programmatically relevant knowledge regarding the efficacy and/or efficiency of specific interventions for treatment of drug abusers;
• Adequacy of provisions for assessment of treatment outcome, and impact of treatment on HIV;
• Adequacy of information dissemination plan;
• The appropriateness of budget estimates; and
• Adequacy of provisions for the protection of human subjects.

Award Criteria—Treatment Research Units

Funding to establish TRUs will be limited to institutions with organizational capability to establish, operate, and maintain a high-quality treatment research facility. The institution must also be willing to provide administrative management of the external review of research protocols to be conducted within the facility, and to provide administrative support and a strong commitment to the goals and objectives of the TRU. TRU applications recommended for approval by the National Advisory Council on Drug Abuse will be considered for funding on the basis of:
• Overall scientific, clinical, and technical merit of the proposed TRU, determined by peer review;
• Potential contributions to reducing the spread of HIV infection through investigation of more effective treatments for drug abusers;
• Appropriateness of budget estimates;
• National priorities in the drug abuse treatment field;
• Adequacy of protection of human subjects;
• Geographic and/or program balance;
• Comments received from the State Single Point of Contact; and
• Availability of funds.

Review Criteria—Individual or Collaborative Projects

Criteria for merit review of applications for individual and collaborative research demonstration projects will include the following:
• Scientific, clinical, and technical merit of the application;
• Potential of the proposed project to provide new knowledge regarding the efficacy and/or efficiency of specific interventions for treatment of drug abusers;
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• Potential contribution of the project to curtailing the spread of HIV infection among drug abusers and/or their sexual partners and/or their offspring.
• Adequacy of provisions for assessment of treatment outcome, and potential impact of treatment improvement on the spread of HIV infection;
• Adequacy of information dissemination plan;
• Qualifications and experience of the principal investigator, clinic director, clinical staff, and other key personnel;
• Availability of adequate facilities, other resources, and collaborative arrangements necessary for the treatment demonstration; and
• Adequacy of provisions for the protection of human subjects.

Award Criteria—Individual or Collaborative Projects

Applications recommended for approval by the National Advisory Council on Drug Abuse will be considered for funding on the basis of:
• Overall scientific, clinical, and technical merit of the proposed treatment expansion, determined by peer review;
• Potential contributions of the research area to reducing the spread of HIV infection through development of more effective treatments for drug abusers;
• Appropriateness of budget estimates;
• National priorities in the drug abuse treatment field;
• Program balance;
• Adequacy of provisions for the protection of human subjects;
• Comments received from the State Single Point of Contact; and
• Availability of funds.

Terms and Conditions of Support

Grant funds may be used for expenses clearly related and necessary to establish and operate TRUs, and to conduct treatment demonstration projects, including both direct costs which can be specifically identified with the project and allowable indirect costs of the institution. These costs must be justified in terms of research objectives, methods, and designs which promise to yield generalizable knowledge and/or make a significant contribution to theoretical concepts.

Grants must be administered in accordance with the *PHS Grants Policy Statement* (DHHS Publication No. (OASH) 82-50-000 GPO-017-020-00092-7 (rev.) January 1, 1987, available for $4.50 from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402). Title 42 of the Code of Federal Regulations (CFR), Part 52, "Grants for Research Projects," is applicable to these awards. While references to other applicable regulations may be found in the aforementioned reference, special attention is called to 42 CFR Part 2, "Confidentiality of Alcohol and Drug Abuse Patient Records."

Period of Support

Support will be provided for a period of up to five years (renewable for subsequent periods) subject to continued availability of funds and progress achieved.

Joseph R. Leone,
Associate Administrator for Management, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89-1310 Filed 1-19-89; 8:45 am]

BILLING CODE 4160-20-M

Food and Drug Administration

Consumer Participation; Open Meetings

AGENCY: Food and Drug Administration, HHS

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following district consumer meetings:

Orlando District Office, chaired by Douglas D. Tolen, District Director. The topic to be discussed is food safety.

DATE: Thursday, January 26, 1989, 1:30 p.m. to 3 p.m.

ADDRESS: Auditorium Sunshine Center, Office on Aging, 330 Fifth St., North, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Lynne Isaacs, Consumer Affairs Officer, Food and Drug Administration, 7200 Lake Ellenor Dr., Orlando, FL 32809, 407-855-0900.

New Orleans District Office, chaired by Robert O. Bartz, District Director. The topic to be discussed is health fraud.

DATE: Thursday, February 16, 1989, 8:30 a.m. to 3:30 p.m.

ADDRESS: Holiday Inn, Magnolia Rms. 1 and 2, 2375 North State St., Jackson, MS 39202.

FOR FURTHER INFORMATION CONTACT: Barbara Loyd, Consumer Affairs Officer, Food and Drug Administration, 4298 Elysian Fields Ave., New Orleans, LA 70122, 504-589-2420.

SUPPLEMENTARY INFORMATION: The purpose of the Orlando District Office meeting is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance relationships between local consumers and FDA's district offices, and to contribute to the agency's consumer education programs.

The purpose of the New Orleans District Office meeting is to educate and inform the public of matters pertaining to consumer fraud and quackery, to enhance relationships between local consumers and FDA's district offices, and to contribute to the agency's consumer education programs.

Dated: January 13, 1989.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-1295 Filed 1-19-89; 8:45 am]

BILLING CODE 4160-01-M

National Institutes of Health

Programs for Support of Minorities in Biomedical Research; Meeting

Notice is hereby given that the National Institutes of Health (NIH) will hold the first of a series of five regional public meetings to be conducted under the auspices of the Office of the Director, NIH, on "Programs for Support of Minorities in Biomedical Research." The purpose of the meetings is two-fold:

(1) To provide current information concerning the activities of the NIH by describing in broad terms existing programs offered by NIH, and

(2) To solicit through public testimony the views of biomedical researchers, university faculty and administrators, representatives of professional societies, and other interested parties regarding the nature and scope of programs to attract and support minorities in biomedical research.

The first meeting will be held on Wednesday, March 8, 1989, from 8:30 a.m. to 5:00 p.m. at Jackson State University, Jackson, Mississippi. Subsequent meetings will be held in Bethesda, Maryland (April 20), Atlanta, Georgia (Early Summer), Phoenix, Arizona (Late Summer), and Anchorage, Alaska (Early Fall). Notice of the exact time and location of additional meetings will be published later.

Following presentations by senior NIH staff, a panel composed of NIH program administrators will spend the remainder of the day receiving testimony from public witnesses. Each witness will be limited to a maximum of ten minutes. Attendance and the number of presentations will be limited to the time and space available. Consequently, all individuals wishing to attend or to present a statement at this public meeting should notify, in writing, William H. Pitlick, Ph.D., Executive Secretary, National Institutes of Health, Shannon Building, Room 250, Bethesda, Maryland 20892. Those planning to make a presentation should file a one-page summary of their remarks with Dr. Pitlick by February 17, 1989; a copy of the full text should be submitted for the record at the time of the meeting. Additional information may be obtained by calling Ms. Loretta Beuchert, Office of Extramural Programs, National Institutes of Health, at (301) 496-9743.

January 12, 1989.

William F. Raub,

Acting Director, National Institutes of Health.

[FR Doc. 89-1297 Filed 1-19-89; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Housing

[Docket No. N-89-1921]

Submission of Proposed Information Collection to OMB

AGENCY: Office of Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act.

ADDRESS: Interested persons may submit comments regarding the paperwork request. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). It is also requested that OMB complete its review within seven days.

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: January 11, 1989.

Thomas T. Demery,

Assistant Secretary for Housing.

Proposal: Survey of Tenants in Certain Properties with HUD-Held and Foreclosed Mortgages.

Office: Housing.

Description of the Need for the Information and its Proposed Use: This information will help the Department to determine how many units must be made available for low- and moderate-income tenants after a mortgage is assigned to HUD. This data collection effort is required by section 181 of the 1987 Housing and Community Development Act, as amended.

Form Number: HUD-9934, 9934A, and 9934B.

Respondents: Individuals of Households, Businesses or Other For-Profit, and Small Businesses or Organizations.

Frequency of Submission: On Occasion.

Reporting Burden:

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
One-Time Burden in 1989 for Currently HUD-Held Inventory							
Project Owners:							
(HUD-9934)	724		1		4		2,896
(HUD-9934A)	724		1		.25		181
(HUD-9934B)	724		1		1.5		1,086
Subtotal							4,163
Tenants: (HUD-9934)	86,913		1		.066		5,736
Total							9,899
Annual Burden for Mortgages Newly Assigned to HUD or Foreclosed							
Project Owners:							
(HUD-9934)	85 [1]		1		4		340
(HUD-9934A)	85		1		1.5		128
(HUD-9934B)	85		1		.25		21
Subtotal							489
Tenants: (HUD-9934)	9,038		1		.066		597
Total							1,086

[1] Assuming 75 assignments and 10 foreclosures per year.

Total Estimated Burden Hours: 10,985.
Status: New.
Contact: James J. Tashash, HUD (202) 426-3944, John Allison, OMB, (202) 395-6880.

Date: January 11, 1989.

[FR Doc. 89-1376 Filed 1-19-89; 8:45 am]

BILLING CODE 4210-01-M

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N-89-1917; FR-2606]

Notice of Excess and Surplus Federal Buildings and Real Property Determined by HUD to be Suitable for Use for Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies excess and surplus Federal property determined by HUD to be suitable for possible use for facilities to assist the homeless.

DATE: January 23, 1989.

ADDRESS: For further information, contact Morris Bourne, Director, Transitional Housing Development Staff, Room 9140, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 755-9075; TDD number for the hearing- and speech-impaired (202) 426-0015. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988, court order in *National Coalition for the Homeless* v. *Veterans Administration*, D.C.D.C. No. 88-2503-OG, HUD is publishing this Notice identifying Federal buildings and real property in the current excess and surplus inventory of the General Services Administration (GSA) that HUD has determined to be suitable for use for facilities to assist the homeless. HUD published the first Notice on January 9, 1989 (54 FR 667).

Suitability determinations are based on information provided by GSA. The determinations are classified as suitable buildings or as suitable vacant land. Each determination is subject to the property's being used in compliance with applicable Federal, state, and local requirements. Buildings and land found suitable are identified even though they may be currently occupied or in use. The issue of availability will be addressed by GSA or the Department of Health and Human Services (HHS). Detailed information about the property may be obtained from James Folliard ((202) 535-7052) or Richard Stinson ((202) 535-7067), Federal Property Resources Services, GSA, 18th and F Streets NW., Washington, DC 20405. (These are not toll-free numbers). (Please refer to the GSA identification number given with each identified property.)

Public bodies and private nonprofit organizations wishing to apply for use of a property published with this Notice should submit a written expression of interest and a request for the necessary application forms, within 30 days from the date of this publication, to Judy Breitman, Division of Health Facilities Planning, Public Health Services, HHS, Room 17A-10 Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857; telephone (303) 443-2265. (This is not a toll-free telephone number.)

Dated: January 17, 1989.

James E. Schoenberger,
General Deputy, Assistant Secretary for Housing—Federal Housing Commissioner.

Suitable Buildings

9-D-AK-0589D
Clear Air Force Station
Clear, AK

7-I-AR-415-Q
Hot Springs National Park, AR
1205 Whittington
416 Pullman
1730 East Blacksnake Rd.
904 Mount Valley
98 Shore Dr.
101 Ullman
106 Hudson Dr.

7-I-AR-415-R
Hot Springs National Park, AR
1706 East Grand
146 East Border
210 Earhart
515 Pullman
103 Ollie
609 Bower
119 Clinton
120 Mimosa
110 Sleepy Valley

2-B-IL-662
Carbondale Mining Technology Center
Rt. 2, Universal Match Rd.
Carterville, IL

1-G-MA-786
Portion, GSA Depot
Arsenal St., Bldgs. 234, 235, 236
Watertown, MA

7-D-MO-488
Army Reserve Center
1451 East Pythian St.
Springfield, MO

7-I-NM-543
Indian Dormitory
8th & Popular Sts.
Magdalena, NM

9-U-NV-461-A
FAA Housing Lot 6, Victoria St.
Tonopah, NV
2-I-NY-786
Fire Island Natl. Seashore
Houdeck House, 162 West Ave.,
Patchogue, NY
Kessler House, Blue Point Beach, Fire
Island, NY
9-U-OR-600-A
Point Adams Remote Site
Hecata St. & Pacific Dr.
Hammond, OR
I-G-RI-490
GSA Depot, Bldgs. W-9 and A-66
Davisville Road
West Davisville, RI
7-GR(3)-TX-548Y
Portion, Former Ft. Walters
Lee Road
Mineral Wells, TX

Suitable Land

9-U-CA-1064
Portion, USCG Training Center
599 Lomales Rd.
Petaluma, CA
2-D-MA-704-B
Portion, Ft. Devens Training Annex
Diagonal Rd. & Hudson Rd.
Sudbury/Hudson, MA

[FR Doc. 89-1378 Filed 1-19-89; 8:45 am]

BILLING CODE 4210-27-M

[Docket No. N-89-1912; FR-2604]

Mortgage and Loan Insurance Programs Under the National Housing Act—Debenture Interest Rates

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, (HUD).

ACTION: Notice of change in debenture interest rates.

SUMMARY: This notice announces changes in the interest rates to be paid on debentures issued with respect to a loan or mortgage insured by the Federal Housing Commissioner under the provisions of the National Housing Act (the "Act"). The interest rate for debentures issued under section 221(g)(4) of the Act during the six-month period beginning January 1, 1989, is 8⅝ percent. The interest rate for debentures issued under any other provision of the Act is the rate in effect on the date that the commitment to insure the loan or mortgage was issued, or the date that the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. The interest rate for debentures issued under these other provisions with respect to a loan or mortgage committed or endorsed during the six-month period beginning January 1, 1989, is 9¼ percent.

FOR FURTHER INFORMATION CONTACT: James B. Mitchell, Financial Policy Division, Room 9132, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Telephone (202) 426-4325 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 224 of the National Housing Act (24 U.S.C. 1715o) provides that debentures issued under the Act with respect to an insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4) of the Act) will bear interest at the rate in effect on the date the commitment to insure the loan or mortgage was issued, or the date the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. This provision is implemented in HUD's regulations at 24 CFR 203.405, 203,479, 2067.259(e)(6), and 220.830. Each of these regulatory provisions states that the applicable rates of interest will be published twice each year as a notice in the **Federal Register.**

Section 224 further provides that the interest rate on these debentures will be set from time to time by the Secretary of HUD, with the approval of the Secretary of the Treasury, in an amount not in excess of the interest rate determined by the Secretary of the Treasury pursuant to formula set out in the statute.

The Secretary of the Treasury (1) has determined, in accordance with the provisions of section 224, that the statutory maximum interest rate for the period beginning January 1, 1989, is 9¼ percent and (2) has approved the establishment of the debenture interest rate by the Secretary of HUD at 9¼ percent for the six-month period beginning January 1, 1989. This interest rate will be the rate borne by debentures issued with respect to any insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4)) with an insurance commitment or endorsement date (as applicable) within the first six months of 1989.

For convenience of reference, HUD is publishing the following chart of debenture interest rates applicable to mortgages committed or endorsed since January 1, 1980:

Effective rate (percent):	On or after	Prior to
9½	Jan. 1, 1980	July 1, 1980.
9⅞	July 1, 1980	Jan. 1, 1980.
11¾	Jan. 1, 1981	July 1, 1981.
12⅞	July 1, 1981	Jan. 1, 1982.
12¾	Jan. 1, 1982	Jan. 1, 1983.
10¼	Jan. 1, 1983	July 1, 1983.
10⅜	July 1, 1983	Jan. 1, 1984.
11½	Jan. 1, 1984	July 1, 1984.
13⅜	July 1, 1984	Jan. 1, 1985.
11⅝	Jan 1, 1985	July 1, 1985.
11⅛	July 1, 1985	Jan. 1, 1986.
10¼	Jan. 1, 1986	July 1, 1986.
8¼	July 1, 1986	Jan 1, 1987.
8	Jan. 1, 1987	July 1, 1987.
9	July 1, 1987	Jan. 1, 1988.
9⅛	Jan. 1, 1988	July 1, 1988.
9⅜	July 1, 1988	Jan. 1, 1989.
9¼	Jan. 1, 1989	

Section 221(g)(4) of the Act provides that debentures issued pursuant to that paragraph (with respect to the assignment of an insured mortgage to the Secretary) will bear interest at the "going Federal rate" in effect at the time the debentures are issued. The term "going Federal rate", as used in that paragraph, is defined to mean the interest rate that the Secretary of the Treasury determines, pursuant to a formula set out in the statute, for the six-month periods of January through June and July through December of each year. Section 221(g)(4) is implemented in the HUD regulations at 24 CFR 221.790.

The Secretary of the Treasury has determined that the interest rate to be borne by debentures issued pursuant to section 221(g)(4) during the six-month period beginning January 1, 1989, is 8⅝ percent.

HUD expects to publish its next notice of change in debenture interest rates in July 1989.

The subject matter of this notice falls within the categorical exclusion from HUD's environmental clearance procedures set forth in 24 CFR 50.20(1). For that reason, no environmental finding has been prepared for this notice.

(Authority: Secs. 211, 221, 224, National Housing Act, 12 U.S.C. 1715b, 1715l, 1715o; sec. 7(d), Department of HUD Act, 42 U.S.C. 3535(d)).

Dated: January 5, 1989.

Thomas T. Demery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 89-1379 Filed 1-19-89; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Klamath River Basin Fisheries Task Force and Klamath Fishery Management Council Meetings

AGENCY: Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of open meetings.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces meetings of the Klamath River Basin Fisheries Task Force and the Klamath Fishery Management Council, both established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss et seq.). The meetings are open to the public.

DATES: The Management Council will meet from 9:00 a.m. to 4:00 p.m., Wednesday, February 1, 1989, and from 8:00 a.m. to 1:00 p.m., Thursday, February 2, 1989. The Task Force will meet from 1:00 p.m. to 5:00 p.m., on Thursday, February 9, 1989, and from 8:00 a.m. to 12:30 p.m., Friday, February 10, 1989.

Place: Both the Task Force and the Management Council meetings will be held at the Red Lion Inn, 1929 4th Street, Eureka, California.

FOR FURTHER INFORMATION CONTACT: Dr. Ronald A. Iverson, Project Leader, U.S. Fish and Wildlife Service, 1312 Fairlane Road, Yreka, California 96097, telephone (916) 842-5763.

SUPPLEMENTARY INFORMATION: For background information on the Task Force and Management Council, please refer to the notice of their initial meetings that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639).

The Management Council will consider reports from technical staff on aspects of the 1988 salmon run, including harvests of various fisheries, spawning escapements to the Klamath River Basin, and fishery law enforcement. Development of Council recommendations for management of 1989 salmon fisheries will be initiated. Options for revising the Klamath River Salmon Management Long-Term Harvest Sharing Agreement will be reviewed. Reports will be provided by the Bureau of Reclamation on the outlook for Central Valley Project operations in 1989, and on the status of an environmental impact statement for water marketing.

The Task Force will review the status of Fiscal Year 1989 projects of the Klamath Fishery Restoration Program, and will begin developing a work plan for Fiscal Year 1990. Other topics will include guidelines for non-Federal contributions to the Restoration program, socioeconomic considerations in harvest allocation, and the salmon egg-taking program at the Bogus Creek weir.

Dated: January 6, 1989.

David L. McMullen,

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

[FR Doc. 89-1311 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-55-M

Bureau of Land Management

[UT-060-09-4320-12]

Environmental Assessment; Wilderness Study Areas, Utah

January 13, 1989.

AGENCY: Bureau of Land Management, Moab, Utah, Interior.

ACTION: Notice of a 30-day comment period on a draft environmental assessment that analyzes the impact of a proposed change of livestock grazing within two wilderness study areas.

SUMMARY: A draft environmental assessment has been prepared in response to an application for a permanent change of kind of livestock grazing from cattle to cattle and sheep in the McKay Flat Allotment. The allotment, which is located in the San Rafael Swell, contains portions of the Muddy Creek Wilderness Study Area (UT-060-007) and the Crack Canyon Wilderness Study Area (UT-060-028A). If the action proposed were to be implemented, the Bureau of Land Management would annually authorize grazing of 1,500 sheep from November 15 to March 15 and 197 cattle from November 1 to April 15. Portions of the allotment contain crucial desert bighorn sheep habitat and a wild horse herd area.

Interested parties may comment upon this environmental assessment for a period of 30 days from the date of publication of this notice. Comments should be addressed to James Dryden, Bureau of Land Management, San Rafael Resource Area, 900 North 700 East, Price, Utah 84501.

FOR FURTHER INFORMATION CONTACT: David Orr, BLM Range Conservationist at the above address or telephone (801) 637-4584.

Gene Nodine,

District Manager.

[FR Doc. 89-1423 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-DQ-M

[CA-010-09-4410-10]

Intent To Amend the Benton-Owens Valley Management Framework Plan; Bakersfield District, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: Pursuant to 43 CFR 1610.2(c), notice is hereby given that the Bishop Resource Area, Bakersfield District, California, will prepare an amendment to the Benton-Owens Valley Management Framework Plan (MFP). The amendment is necessary to provide restrictions and management direction on 4,040 acres of land administered by the Bureau of Land Management within the Mammoth/June lake Airport Planning Area in Mono County.

SUPPLEMENTARY INFORMATION: The MFP was approved in 1982 and covers 507,181 acres of land administered by the Bureau of Land Management in Mono and Inyo Counties. It and the Bodie-Coleville MFP, which covers the northern third of the Bishop Resource Area, will be replaced by the Bishop Resource Management Plan (RMP) which is in the early stages of development (see 53 FR 24153, June 27, 1988 for Notice of Intent). The airport amendment is needed to provide a basis for certain minor restrictions on geothermal and other possible developments on BLM land in the vicinity of the airport and to establish the airport as the primary land use for that area. It will be incorporated in the Bishop RMP which is expected to be approved in late 1990, about a year and a half after this amendment is approved.

The environmental document for this amendment will be the final Environmental Impact Report and Environmental Analysis for the Mammoth/June lake Airport Land Use Plan. This document was issued in October 1986, by the Mono County Airport Land Use Commission and the Inyo National Forest and incorporates extensive comments by the Bishop Resource Area. Copies of this document, an explanatory letter, and the proposed amendment will be available for review in February 1989. Following a 30-day review period the District Manager will sign a Finding of No Significant Impact (if appropriate) and give public notice of the amendment. Following review by the governor, it is anticipated the amendment will be signed by the BLM State Director in May 1989.

No issues outside the scope of the environmental docuement to be adopted are anticipated. Issues relevant to this

amendment include impacts on potential geothermal development and other activities on land administered by the Bureau of Land Management.

Disciplines represented on the interdisciplinary team that produced the environmental document that will be adopted include planning, wildlife, archaeology, botany, and noise impact analysis. Numerous organizations and agencies (including BLM) were also consulted. Planning, wildlife, and geology are represented on the team preparing the amendment.

FOR FURTHER INFORMATION CONTACT: James S. Morrison, Area Manager, Bureau of Land Management, Bishop Resource Area, 787 N. Main Street, Suite P, Bishop, CA 93514; (619) 872-4881. Documents relevant to this planning effort area available for public review at the same address.

Dated: January 13, 1989.

Robert D. Rheiner, Jr.,

District Manager.

[FR Doc. 89-1314 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-40-M

[CO-030-09-4322-10]

Montrose District Grazing Advisory Board Meeting

AGENCY: Bureau lf Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given in accordance with 43 CFR Part 1784, that a meeting of the Montrose District Grazing Advisory Board will be held on February 22, 1989 in Dolores, Colorado.

DATE: A meeting is scheduled February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Debbie Pietrzak, Bureau of Land Management, 2465 South Townsend, Montrose, CO 81401; telephone (303) 249-7791.

SUPPLEMENTARY INFORMATION: The Board will convene at 10:00 a.m. on February 22, 1989, in the multi-purpose room of the Anasazi Heritage Center near Dolores, Colorado. Agenda items will include: minutes of the previous meeting, public presentations and requests, new Board project proposals, updates on current issues, and arrangements for the next meeting. The meeting will adjourn at 4:30 p.m.

The meeting is open to the public. Anyone wishing to make an oral statement must notify the District Manager at the above address prior to the meeting date. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

Minutes of the Board meeting will be maintained in the District Office and be available for public inspection and reproduction (during regular business hours) within thirty (30) days following the meeting.

Dated: January 11, 1989.

Alan L. Kesterke,

District Manager.

[FR Doc. 89-1315 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-JB-M

[AZ-920-09-4212-13; A-22439]

Exchange of Public and Private Lands in Mohave County; AZ

January 11, 1988.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Exchange of Land.

SUMMARY: This action informs the public of the completion of an exchange between the United States and First American Title Insurance Agency of Mohave, Inc., an Arizona Corporation, as Trustee under Trust No. 5993. The United States transferred 640 acres in Mohave County and First American Title Insurance Agency of Mohave conveyed 3,554.72 acres, also in Mohave County.

FOR FURTHER INFORMATION CONTACT: John Gaudio, Arizona State Office, P.O. Box 16563, Phoenix, Arizona 85011, (602) 241-5534.

SUPPLEMENTARY INFORMATION: On December 30, 1988, the Bureau of Land Management transferred the following described land by Patent No. 02-89-0013, pursuant to the Federal Land Policy and Management Act of October 21, 1976:

Gila and Salt River Meridian

T. 21 N., R. 21 W.,
Sec. 16, all.

The area described comprises 640 acres in Mohave County.

In exchange the surface in the following described land was conveyed to the United States:

Gila and Salt River Meridian

T. 14 N., R. 13 W.,
Sec. 5, lots 1 to 4, incl. S½N½, N½SW¼, SW¼SW¼, E½SE¼SW¼, SE¼.
T. 15 N., R. 12 W.,
Sec. 13, all;
Sec. 15, N½, N½SW¼, E½SE¼SW¼, SE¼.
T. 15 N., R. 13 W.,
Sec. 11, W½, W½SE¼;
Sec. 19, lots 1 and 2, NE¼, E½NW¼;
Sec. 31, lots 1 to 4, incl., E½, E½W½.
T. 15 N., R. 14 W.,
Sec. 13, W½NE¼, E½W½, SE¼.

The area described comprises 3,554.72 acres in Mohave County.

The purpose of this notice is to inform the public and interested State and local government officials of the exchange of public and private land.

The surface of the land conveyed to the United States in this exchange will be administered by the Bureau of Land Management. The mineral estate in the reconveyed land remains out of Federal ownership.

John T. Mezes,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 89-1307 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-32-M

[NV-930-09-4212-11; N-41952]

Realty Action; Lease or Sale of Public Land for Recreation and Public Purposes; Douglas County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action classifying public land.

SUMMARY: The following described 10 acres of public land have been examined and identified as suitable to be classified for lease or sale under the Recreation and Public Purposes Act, as amended (43 U.S.C. 869, *et seq.*):

Mount Diablo Meridian, Nevada

T. 11 N., R. 21 E.,
Sec. 17, W½W½NW¼NW¼.

A 5-year lease with the option to renew or to purchase upon substantial development will be offered to Douglas County. The 10 acres of land would be used for expansion of the China Spring Youth Camp for juvenile offenders. It would be used for the Camp director and staff quarters, expansion of the existing vegetable gardens and development of livestock corrals and animal pens.

The land is not required for federal purposes. Classification and issuance of a lease is consistent with Bureau planning for this area and would be in the public interest.

The lease and/or patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior.

Detailed information concerning this action is available for review at the Bureau of Land Management Carson City District Office.

Upon publication of this notice in the **Federal Register**, the above described

land will be segregated from all forms of appropriation under the public land laws, including location under the general mining laws, but not the Recreation and Public Purposes Act, the mineral leasing laws, and material sales. The segregative effect will terminate as specified in an opening order to be published in the **Federal Register**.

For a period of 45 days from the date of publication of this Notice in the **Federal Register**, interested parties may submit comments to the District Manager, 1535 Hot Springs Road, Suite 300, Carson City, Nevada 89706. Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification of the land described in this notice will become effective 60 days from the date of publication in the **Federal Register**.

James W. Elliot,

District Manager.

Date: January 13, 1989

[FR Doc. 89-1346 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-HC-M

[NV-930-09-4212-11; N-41575]

Realty Action; Lease/Conveyance for Recreation and Public Purposes; Elko County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action; classification of Federal lands for lease/conveyance for recreation and public purposes.

SUMMARY: The following described lands have been examined and found suitable for classification and lease with the option to acquire title after development, under the Recreation and Public Purposes Act (R&PP) of June 14, 1926, as amended (43 U.S.C. 869 *et. seq.*). The lands will not be offered for lease until at least 60 days after the date of publication of this Notice in the **Federal Register**.

Mount Diablo Meridian, Nevada

T. 32 N., R. 55 E.

Sec. 26, NE¼, N½SE¼

Containing 240.00 acres.

These lands are hereby classified for public purpose use as a recreation area. The State of Nevada, Division of State Lands has made application for, and intends to use these public lands within the South Fork State Recreation Area to enhance wildlife and recreation. Development will include an interpretive trail, scenic overlooks, and an interpretive archaeological site.

The lease/patent, when issued, will be subject to the provisions of the R&PP Act, applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. All minerals.

2. A right-of-way thereon for ditches and canals constructed by the authority of the United States; Act of August 30, 1890 (26 Stat. 391; 43 U.S.C. 945).

The State of Nevada will be required to accept the lease/patent subject to existing grazing use of 10 AUMs held by Ed Tomera currently under grazing authorization number 1591. The rights of Ed Tomera to graze domestic livestock on the land according to the conditions and terms of grazing authorization number 1591 shall cease on July 13, 1990. The State of Nevada is entitled to receive annual grazing fees from Ed Tomera in an amount not to exceed that which would be authorized under Federal grazing fees published annually in the **Federal Register**.

The Recreation and Public Purposes Act, as amended by section 212 of the Federal Land Policy and Management Act of 1976, provides for conveyance of public lands without monetary consideration to governmental entities for recreational purposes. Therefore, the subject lands would be initially leased and after development, patented, for no monetary consideration to the State of Nevada.

The land is not required for any Federal purpose. The lease is consistent with the Bureau's planning for the area.

Upon publication of the Notice of Realty Action in the **Federal Register**, the subject lands will be segregated from appropriation under any other public land law, including locations under the mining laws.

Detailed information concerning this action is available for review at the Elko District Office, Bureau of Land Management. For a period of 45 days from the date of publication of this Notice in the **Federal Register**, interested parties may submit comments to District Manager, Elko District Office of the Bureau of Land Management, 3900 E. Idaho St., Elko, Nevada 89801. Any adverse comments will be evaluated by the District Manager and forwarded to the Nevada State Director, Bureau of Land Management, who may sustain, vacate or modify this realty action. In the absence of any objections, on the 60th day from the date of this publication in the **Federal Register**, this realty action will become the final determination of the Department of the Interior.

Date: January 11, 1989.

Rodney Harris,

District Manager.

[FR Doc. 89-1347 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-HC-M

[OR-943-09-4214-11; GP9-092; OR-44047]

Conveyance of Public Lands; Oregon; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice corrects the heading, the last sentence in the summary, deletes the last paragraph and adds two paragraphs in the Conveyance of Public Land; Oregon published in the **Federal Register** on December 22, 1988.

EFFECTIVE DATE: January 23, 1989.

FOR FURTHER INFORMATION CONTACT: Champ Vaughan, BLM Oregon State Office, P.O. Box 2965, Portland, Oregon 97208, 503-231-6905.

SUPPLEMENTARY INFORMATION: In FR Doc. 88-29410, published at page 51595 in the issue of December 22, 1988, make the following corrections:

The heading is corrected to read "Conveyance of Public Lands: Order Providing for Opening of Land; Oregon.

The last sentence in the summary is hereby corrected to read "The 154.79 acres of reconveyed land will not be opened to surface entry and mining because the land has been proposed for designation as an outstanding research natural area. This action will open the reconveyed land to mineral leasing."

The last paragraph is hereby deleted and the following two paragraphs are added:

The land will not be opened to operation of the public land laws, including the mining laws because it has been proposed for designation as an outstanding research natural area.

At 8:30 a.m., on February 27, 1989, the land will be open to applications and offers under the mineral leasing laws.

B. LaVelle Black,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 89-1424 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-33-M

[AK-932-09-4214-10; A-061696]

Conformance to Survey; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This Notice provides official publication of the surveyed description for a portion of Air Navigation Site (ANS) Withdrawal No. 176. The plat of survey was officially filed in the Alaska State Office, Bureau of Land Management, Anchorage, Alaska, September 26, 1988. United States Survey No. 9454, containing 25.83 acres, represents the land that was previously described as follows:

Seward Meridian, Alaska

Tps. 58 S., Rs. 58 and 59 W., unsurveyed
Commencing at a point at mean sea level of Cold Bay at approximately latitude 50°14' N. and longitude 162°43' W.,
Thence, west 3,000 feet more or less to a point;
Thence, south 12,000 feet to a point;
Thence, S. 24° 57' 30" E. 4,600 feet to a point;
Thence, east 4,500 feet to the true point of beginning of this description;
Thence, N. 45° E. 2,121.3 feet to a point;
Thence, south 1,500 feet to a point, being the Southeast corner of ANS No. 176;
Thence, west 1,500 feet to the point of beginning.

The tract as described contains approximately 25.82 acres.

ADDRESS: Inquiries about this land should be sent to the Alaska State Office, Bureau of Land Management, 222 W. 7th Ave., No. 13, Anchorage, Alaska 99513-7599.

FOR FURTHER INFORMATION CONTACT: Sandra C. Thomas, BLM Alaska State Office, 907-271-3342.

Sue A. Wolf,

Chief, Branch of Land Resources.

[FR Doc. 89-1312 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-JA-M

[CO-930-09-4214-10; C-49195]

Proposed Withdrawal; Scheduled Public Meeting; Colorado; Correction

January 13, 1989.

SUMMARY: The Notice of Proposed Withdrawal; Scheduled Public Meeting, published on Thursday, December 22, 1988, in **Federal Register** Volume 53, No. 246, page 51597, is hereby corrected as follows:

In column three under Sixth Principal Meridian, Arapaho National Forest, T. 7 S., R. 78 W. (Protraction Diagram No. 9, Accepted April 26, 1965), the line reading "Sec. 7, NW¼, fractional E½NW¼," is corrected to read "Sec. 7, NE¼, fractional E½NW¼,".

John R. Hodgins,

Acting Chief, Branch of Realty Programs.

[FR Doc. 89-1306 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-JB-M

Minerals Management Service

Environmental Documents Prepared for Proposed Oil and Gas Operations on the Alaska Outer Continental Shelf

AGENCY: Minerals Management Service (MMS), Department of the Interior.

ACTION: Notice of the availability of environmental documents prepared for Outer Continental Shelf (OCS) minerals exploration proposals on the Alaska OCS.

SUMMARY: The MMS, in accordance with Federal regulations (40 CFR 1501.4 and 1506.6) that implement the National Environmental Policy Act (NEPA), announces the availability of NEPA-related Environmental Assessments (EA's) and Findings of no Significant Impact (FONSI's) prepared by the MMS for oil and gas exploration activities proposed on the Alaska OCS. This listing includes all proposals for which FONSI's were prepared by the Alaska OCS in the 3-month period preceding this Notice.

Proposal

Amoco proposes to permanently abandon Sandpiper Island, an artificial gravel island. The island is located in the Beaufort Sea on Sale 71, Leases OCS-Y 0370 and 0371, about 15 miles northwest of Prudhoe Bay. The remaining work associated with the proposal consists of aerial monitoring/inspection of the island area, and would be conducted during the open-water period for 5 years. Any loose slope-protection material discovered during these inspections would be picked up. Also, a report will be furnished to MMS concerning the condition of the island area.

Location

Lease	*Block(s)*
OCS-Y 0370	423, 424
OCS-Y 0371	425

Environmental Assessment

EA No. AK 88-04

FONSI Date

October 28, 1988.

Proposal

Chevron proposes to drill, evaluate, test, and abandon one exploratory well in the Beaufort Sea from December 1988 to May 1989. The proposed action would occur on State of Alaska Lease ADL-312835 (the Karluk Prospect) in Stefansson Sound near the Boulder Patch area, about 3.5 miles southwest of Karluk Island. Although in State waters, the drilling may enter a Federal lease (OCS-Y 0194) if the bore hole drifts to the west or southwest (which is the reason EA 88-05 was prepared). The proposed drilling would occur from a spray-ice island (to be called King Ice Island) in 24 feet of water. An ice road would be constructed from the Endicott Causeway to the ice island (passing through State waters and the disputed Federal/State zone). Both the island and the road would be constructed from mid-December to mid-January. The proposed action would use existing onshore support facilities in Prudhoe Bay. The well would be plugged and abandoned in April or May 1989 and the site cleaned up and abandoned by mid- to late May 1989.

Location

Lease

ADL-312835 (Karluk Prospect)

Environmental Assessment

EA No. AK 88-05

FONSI Date

November 30, 1988.

FOR FURTHER INFORMATION CONTACT: Persons interested in reviewing environmental documents for the proposals listed above or obtaining information about EA's and FONSI's prepared for activities on the Alaska OCS are encouraged to contact the MMS office in the Alaska OCS Region.

The FONSIs and associated EA's are available for public inspection between the hours of 7:45 a.m. and 4:30 p.m., Monday through Friday at: Minerals Management Service, Alaska OCS Region, Library, 949 East 36th Avenue, Room 502, Anchorage, Alaska 99508-4302, phone: (907) 261-4435.

SUPPLEMENTARY INFORMATION: The MMS prepares EA's and FONSI's for proposals which relate to exploration for oil and gas resources on the Alaska OCS. The EA's examine the potential environmental effects of activities described in the proposals and present MMS conclusions regarding the significance of those effects. The EA is used as a basis for determining whether or not approval of the proposals constitutes major Federal actions that significantly affect the quality of the human environment in the sense of NEPA 102(2)(C). A FONSI is prepared in those instances where MMS finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly presents the basis for that finding and includes a summary or copy of the EA.

This Notice constitutes the public Notice of Availability of environmental documents required under the NEPA regulations.

Date: January 11, 1989.

Alan D. Powers;

Regional Director, Alaska OCS Region.

[FR Doc. 89-1321 Filed 1-19-89; 8:45 am]

BILLING CODE 4310-MR-M

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-290 (Sub-No.62)]

Southern Railway Co.; Abandonment Between Jacksonville and Piedmont in Calhoun County, AL; Findings

The Commission has issued a certificate authorizing the Southern Railway Company to abandon its 14-mile rail line between Jacksonville (milepost 48.00-N) and Piedmont (milepost 34.00-N) in Calhoun County, AL. The abandonment certificate will become effective 30 days after this publication unless the Commission also finds that: (1) A financially responsible person has offered financial assistance (through subsidy or purchase) to enable the rail service to be continued; and (2) it is likely that the assistance would fully compensate the railroad.

Any financial assistance offer must be filed with the Commission and the applicant no later than 10 days from publication of this Notice. The following notation shall be typed in bold face on the lower left-hand corner of the envelope containing the offer: "Rail Section, AB-OFA." Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR Part 1152.

Noreta R. McGee,

Secretary.

[FR Doc. 89-1478 Filed 1-19-89; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act and Other Statutes; Jagiella

In accordance with Departmental policy, notice is hereby given that a proposed consent decree in *United States of America* v. *Jagiella*, Civil Action No. 87 C 1406, was lodged with the United States District Court for the Northern District of Illinois. The first amended complaint filed by the United States in this action asserts claims against twenty-three parties under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9607, for recovery of response costs incurred by the United States in connection with two removal actions previously conducted at a drum and pail reconditioning facility known as the Calumet Container site, which spans the Illinois-Indiana border. The total response costs incurred by the United States to date in connection with the Calumet Container site, excluding pre-judgment interest, are approximately $567,000.

Under the proposed decree, nineteen settling defendants would be required to pay $380,000 to the United States within sixty days after entry of the decree by the court. The proposed decree a covenant by the United States, effective upon settling defendants' payment of $380,000, not to assert further claims against settling defendants for response costs that were incurred at the Calumet Container site prior to entry of the decree. The proposed decree reserves the rights of the United States to assert claims against settling defendants for matters not expressly resolved by the decree, including claims for injunctive relief or natural resource damages or claims for recovery of any response costs incurred at the Calumet Container site after entry of the decree.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC and should refer to the *United States* v. *Jagiella*, D.J. Ref. No. 90-11-3-193.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois, and at the Office of Regional Counsel, United States Environmental Protection Agency, Region V, 111 West Jackson Street, Third Floor, Chicago, Illinois 60604. Copies of the proposed Consent Decree may be examined at the Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice, Room 1748, Ninth Street and Pennsylvania Avenue NW., Washington, DC 20530. A copy of the proposed Consent Decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the U.S. Department of Justice. In requesting a copy, please enclose a check in the amount of $3.30 (ten cents per page reproduction cost) payable to the Treasurer of the United States.

Roger Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-1319 Filed 1-19-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to Clean Air Act; Washington

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on January 10, 1989 a proposed Consent Decree in *United States* v. *State of Washington, et al*, Civil Action No. C88-552R was lodged with the United States District Court for the Western District of Washington. The proposed Consent Decree concerns Defendant's alleged violations of the regulations pertaining to asbestos removal. The proposed Consent Decree requires the defendant to comply with all regulations applicable to asbestos removal, demolition and renovation, and to pay a civil penalty of $12,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *State of Washington, et al*, D. J. Ref. 90-5-2-1-1163.

The proposed Consent Decree may be examined at the office of the United States Attorney, Western District of Washington, 3600 Seafirst 5th Avenue Plaza, 800 Fifth Avenue, Seattle, Washington 98104 at the Region X Office of the Environmental Protection Agency, 1200 Sixth Avenue, SO-125, Seattle, Washington 98101. Copies of the Consent Decree may be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1517, Ninth Street and Pennsylvania Avenue NW., Washington, DC 20530. A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-1320 Filed 1-19-89; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

Background

The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. Chapter 35), considers comments on the reporting and recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review

As necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Officer will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in.

Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Who will be required to or asked to report or keep records.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions

Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Paul E. Larson, telephone (202) 523-6331. Comments and questions about the items on this list should be directed to Mr. Larson, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, Room 3208, Washington, DC 20503 (Telephone (202) 395-6880).

Any member of the public who wants to comment on a recordkeeping/reporting requirement which has been submitted to OMB should advise Mr. Larson of this intent at the earliest possible date.

Revision

Occupational and Safety and Health Administration
Fatality/Catastrophe Reporting
1218-0007; Form OSHA-36 (F) and (S)
State and local governments; farms; businesses or other for profit; non-profit institutions; small businesses or organizations
2,927 responses; 732 hours; 15 minutes per response; 2 forms
All workplace fatalities and catastrophes must be reported so that OSHA can schedule an inspection to investigate. Such reporting is required by law.

Extension

Departmental Management
National SAS Farmworker Survey (Seasonal Agricultural Services)
Individuals or households; farms; Businesses or other for-profit; 3,700 respondents; 3,700 total hours; 1 hour per response; 2 forms
The Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act (IRCA) requires the DOL and the USDA to estimate the departure rate from Seasonal Agricultural Services (SAS) agriculture and to analyze information about wages, working conditions and recruitment practices. This survey will gather data necessary to make these estimates and carry out these analyses.

Extension

Mine Safety and Health Administration
Mine Operator Dust Data Card
1219-0011
Bimonthly
Businesses and other for profit; small businesses or organizations
2,500 respondents; 38 responses per respondent; 1.016 hours per response; 96,520 total burden hours
Approximately 50 percent of coal mine operators are required to collect and submit respirable dust samples to MSHA for analysis. Pertinent information associated with identifying and analyzing these samples is submitted on the dust data card that accompanies the samples.

Extension

Employment and Training Administration
Work Application/Job Order Recordkeeping
1205-0001; Recordkeeping only
State or local governments
52 recordkeepers; 416 total hours; 8 hrs. per recordkeeper
Request is only for retention of information on work applications and job orders.

Extension

Employment Standards Administration
Application for a Farm Labor Contractor Employee Certificate of Registration
1215-0037; WH-512
Annually
Individuals or households; farms; businesses or other for-profit; small businesses or organizations
2,000 respondents; 1,000 total hours; .5 hours per response; 1 form.
The Migrant and Seasonal Agricultural Protection Act provides that no individual may perform farm labor contracting activities without a certificate of registration. Form WH-512 is an application form which provides the Department of Labor with the information necessary to issue a certificate specifying the farm labor contracting activities authorized.

Signed at Washington, DC this 17th day of January, 1989.

Paul E. Larson,

Departmental Clearance Officer.

[FR Doc. 89-1394 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-23-M

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or

threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 2, 1989.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 2, 1989.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC this 3rd day of January 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner: Union/workers/firm—	Location	Date received	Date of petition	Petition No.	Articles produced
Allied Amphenol Corp. (workers)	York, PA	1/3/89	11/30/88	22,310	Machinery.
Bassarrette (ACTWU)	Hamilton, AL	1/3/89	12/1/88	22,311	Ladies Robes.
Casco Belton, Inc. (ACTWU)	Lewiston, ME	1/3/89	12/13/88	22,312	Electric.
Coastal Oil & Gas Corporation (workers)	Midland, TX	1/3/89	11/30/88	22,313	Oil and Gas.
Cresent Petroleum (company)	Corpus Christi, TX	11/18/88	9/26/88	22,314	Crude Oil.
Damson Oil Corp., NCC (workers)	Yatesboro, PA	11/18/88	11/19/88	22,315	Oil and Gas.
Eagleline Corp. Exploration (company)	Pleasantville, PA	1/3/89	12/16/88	22,316	Crude Oil.
Explosives Technologies (workers)	Morris, IL	1/3/88	11/28/88	22,317	Explosives.
Fitkin Petroleum Corp. (company)	Oklahoma City, OK	11/18/88	10/3/88	22,318	Oil and Gas.
Florsheim Company (ACTWU)	Herman, MO	1/3/89	12/12/88	22,319	Men's Shoes.
General Motors Corp., BOC Leeds (UAW)	Kansas City, MO	1/3/89	12/9/88	22,320	J Cars.
General Motors Corp., CPC Lakewood (UAW)	Atlanta, GA	1/3/89	12/9/88	22,321	B Cars.
Iselin Preparation (UMWA)	Indiana, PA	1/3/89	12/12/88	22,322	Coal.
Jimco Electric (company)	Big Spring, TX	1/3/89	12/12/88	22,323	Oil Field Services.
Lee Company (UGWA)	Lenexa, KS	1/3/89	12/1/88	22,324	Denim Jeans/Jackets.
Lexington Products (workers)	Lexington, MS	1/3/89	12/13/88	22,325	Wire Harnesses.
Louisiana Land and Exploration (workers)	Houston, TX	1/3/89	12/9/88	22,326	Oil and Gas.
Manhattan Industries (company)	Glen Rock, NJ	1/3/89	12/5/88	22,327	Sportswear.
Petroleum Equipment (company)	Brownwood, TX	1/3/89	11/15/88	22,328	Oil field products.
Professional Geophysics (workers)	New Orleans, LA	1/3/89	12/14/88	22,329	Seismic Data.
Reynolds Energy (company)	San Angelo, TX	1/3/89	11/30/88	22,330	Oil Well Service.
S&P Manufacturing (ILGWU)	Andover, MA	1/3/89	12/12/88	22,331	Car Seat Covers.
Standard-Putnam (workers)	Tilton, NH	1/3/89	12/9/88	22,332	Sportswear.
Sunbelt Mining (workers)	Farmington, NM	1/3/89	12/11/88	22,333	Heavy Equipment.
Texas Apparel Co. (ACTWU)	Carrizo Springs, TX	1/3/89	12/1/88	22,334	Men's Jeans.
Troytown Shirt Corp. (ACTWU)	Cohoes, NY	1/3/89	12/1/88	22,335	Shirts and Blouses.
Vatco (ILGWU)	Andover, MA	1/3/89	12/12/88	22,336	Car Seat Covers.
Victory Energy Development Co. (company)	Indiana, PA	11/18/88	11/1/88	22,337	Oil and Gas.
Williams Exploration (workers)	Tulsa, OK	1/3/89	11/19/88	22,338	Oil and Gas.
Zenith Drilling (company)	Wichita, KS	1/3/89	12/10/88	22,339	Operates Drilling Rigs.

[FR Doc. 89-1395 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-21, 323]

Amerada Hess Corp. Onshore Exploration, Denver, CO; Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on October 17, 1988 in response to a worker petition which was filed on behalf of workers of the Onshore Exploration segment of Amerada Hess Corporation, Denver, Colorado.

The retroactive provisions of section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988 do not apply to workers who are engaged in the production of crude oil or refined petroleum products if such workers were eligible to be certified for benefits under the Trade Act prior to the implementation of the retroactive provisions.

All workers were separated from the Denver operation more than one year prior to the date of the petition. Section 223 of the Act specifies that no certification may apply to any worker whose last separation occurred more than one year before the date of the petition. Consequently further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, DC this 30th day of December 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 89-1396 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-30-M

Trade Adjustment Assistance for Workers; Financial Process for Revised Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of General Administration Letter No. 4-89.

SUMMARY: The Department of Labor publishes this notice and General Administration Letter (GAL) No. 4-89 to inform States and cooperating State agencies of the publication of the financial policies and procedures for the revised Trade Adjustment Assistance Program, except Trade Readjustment Allowances, and of the 30-day period for commenting on these policies and procedures.

FOR FURTHER INFORMATION CONTACT: Jim Giuliano, Employment and Training Administration, Office of the Comptroller, Washington, DC 20210,

(202) 535-8767; this is not a toll free telephone number. Comments should be received within 30 days of this notice. All comments should be submitted to the above individual.

SUPPLEMENTARY INFORMATION: On August 23, 1988 the President signed into law the "Omnibus Trade and Competitiveness Act of 1988." Part 3—Trade Adjustment Assistance, of Subtitle D of Title I of the Act concerns trade adjustment assistance for workers and firms.

The Department of Labor has issued operating instructions to the States and State agencies concerning trade adjustment assistance for workers. General Administration Letter (GAL) Nos. 7-88 and Change 1 to 7-88, Training and Employment Information Notice (TEIN) Nos. 6-88 and Change 1 to 6-88, and a proposed rule amending the regulations at 20 CFR Part 617 have been published in the **Federal Register.**

The purpose of the GAL published with this notice is to transmit the national financial policies and procedures with which these trade adjustment assistance activities will be administered.

For this reason, GAL No. 4-89 is published below, together with Training and Employment Information Notice No. 17-88.

Signed at Washington, DC, on January 11, 1989.

Roberts T. Jones,

Assistant Secretary of Labor.

BILLING CODE 4510-30-M

U.S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION TAA CORRESPONDENCE SYMBOL TSCS DATE January 9, 1989

DIRECTIVE : GENERAL ADMINISTRATION LETTER NO. 4-89

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : DONALD J. KULICK
Administrator
Office of Regional Management

SUBJECT : Financial Process for the Revised Trade Adjustment Assistance (TAA) Program

1. Purpose. To provide information and guidance on the financial process for the revised TAA program activities with the exception of Trade Readjustment Allowances (TRA).

2. References. The Trade Act of 1974, as amended; the Governor/Secretary of Labor Agreement; OMB Circular A-87; 20 CFR Part 617, as amended; and 29 CFR Parts 96, 97, and 98.

3. Background. The Omnibus Trade and Competitiveness Act (OTCA) of 1988 was signed by the President on August 23, 1988. Title I, Subtitle D, Part 3 of OTCA, amended Chapter 2 of Title II of the Trade Act of 1974, Trade Adjustment Assistance for Workers (TAA) Program. As a result of the OTCA amendments and other regulatory changes, several revisions must be made to the financial operation of the TAA program. The most significant changes include:

- Placing a time limit on the expenditure of funds;
- Providing advanced funding rather than requiring supplemental budget requests for each instance of need; and
- Establishing procedures to recapture and redistribute funds among the States.

4. Annual Financial Cooperative Agreement. In order to comply with the provisions of the revised OMB Circular A-102 and the common administrative regulations at 29 CFR Part 97, the revised TAA program will operate under an annual TAA Financial Cooperative Agreement (Attachment). The funding period for this

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DISTRIBUTION

annual agreement will be up to three years--the current fiscal year plus the two subsequent fiscal years. Upon a request from the State and concurrence by DOL, the term of this agreement may be extended from one to six months.

The terms and conditions of all prior year TAA grants, agreements, or other vehicles remain in effect for the next two fiscal years, i.e. through September 30, 1990. During this two-year period, States may obligate and expend all prior year funds which remain available. States should obligate and expend all prior year TAA funds before utilizing FY 1989 program funds.

5. Funding. The TAA funding process will consist of quarterly advances to States and supplemental requests for additional funds when the quarterly advances have been committed. This approach of providing funds ensures that States have funds available to provide TAA services on a timely and as needed basis and that States are not accumulating excess, uncommitted fund balances.

Training is an entitlement until such time as the Secretary, pursuant to Section 236(c)(1)(B) of the Trade Act announces that the demand for training is at a level that, if continued, would exceed the $80 million cap for training established in the law. At that time, the law provides that the balance of funds for training be apportioned among the States for the remainder of the fiscal year. States will be notified if and when this occurs.

a. Quarterly Advance. A quarterly advance of program funds will be made to enable States to immediately approve training, job search allowances, and job relocation allowances for certified, eligible workers. For FY 1989, these advances will be based initially on the number of workers in the State receiving TRA in relation to the total number of TRA claimants nationally. The formula factors for future years' quarterly advances are not yet finalized. In addition, each State will receive an amount for administrative costs which will be equal to 15 percent of the program funds advanced to the State. Many States will require funds in addition to the amount provided in these quarterly advances. To obtain additional TAA funds during a quarter, the States must submit a supplemental request for such funds. Adjustments may be made during a quarter to reduce the total amount of funds advanced based on reports submitted for the previous quarter.

b. Supplemental Fund Request. All requests for additional funds shall be for training, job search allowances, and job relocation allowances only. When a request is approved by ETA, an amount equal to 15 percent of the approved program funds will be added automatically for administrative costs. The State shall submit a request for additional funds which includes:

- o A Financial Report containing cumulative financial information as of the most recent month and a narrative justification. This justification should include:

  - The number of workers already approved but not currently receiving Job Search/Relocation allowances or training;

  - The number of additional workers expected to apply and be approved for training, job search allowances, and/or job relocation allowances for the next three months;

  - A description of the conditions which give rise to the particular supplemental fund request;

  - A discussion of the types of training and number of workers currently being funded; and

  - The level of activity expected beyond the three-month period for which this request is made.

- o Certification of this request must be signed by the Governor's official TAA program designee.

All requests for additional funds should be submitted to the Regional Office at least 30 calendar days prior to the date on which the available funds are expected to be exhausted. The request should include the estimated amounts required for each of the three program activities, listed individually, and should be prepared on the basis of projected need covering the next, full three-month period. This request should not include estimates for administration. To the extent that funds are available, States will be provided funds to meet the projected requirements. Adjustments to the next quarter's advance may also be made.

If the funds requested appear to be excessive based on previous usage and other available information including the number of workers certified, then the total funds requested for the three-month period may not be provided pending further review. The Regional Office will be responsible for reviewing, monitoring, and substantiating the information contained in the justification. States should ensure that realistic requests are submitted and that an explanation is provided for any request which is larger than prior experience would indicate.

Similarly, should the Secretary determine that the total amount available may not be adequate to finance nationwide activities over the next three months, it may be necessary to issue reduced

amounts covering a shorter time period. This situation is possible in FY 1989 since the amount presently appropriated is less than estimated requirements.

c. Federal Obligation of Funds. The level of TAA funds provided to States is subject to the availability of appropriated funds. Obligational authority will be issued to States which separately identifies funds available for program activities and for administration. The transfer of funds from program activities to administration is not authorized. However, funds designated for administration may be transferred to program activities if not used for administration.

d. Expenditure of Funds. All TAA funds must be expended by the State in accordance with the provisions of the annual TAA Financial Cooperative Agreement. Any expenditure of funds which does not comply with these provisions will be subject to disallowance.

6. Recapture of funds. The entitlement nature of the TAA program, plus the statutory limitation on the amount of funds which may be expended on training, requires the Department to institute procedures which ensure that States are funded equitably and that the $80 million training cap is not exceeded. Therefore, in addition to the possible actions on supplemental requests for funds discussed previously, the following procedures will be used in the event it becomes necessary to recapture funds not immediately needed by a State and provide them to another State with an immediate need. In general, funds will be recaptured if it is determined that: 1) the National Office reserve is insufficient to meet State requests for additional funds or 2) excess uncommitted funds exist in individual States.

a. Financial Reports will be reviewed regularly to determine whether excess funds remain uncommitted by each State. The determination of what constitutes excess funds will be based primarily on the obligations and commitments incurred to date plus any other program information available, such as approved and pending petitions. Quarterly adjustments to advances will be made based on this review.

b. The recapture of administrative funds will only be considered when the level of program funds recaptured exceeds $200,000. In no case will administrative funds be recaptured which will result in a State being over-obligated in this category.

c. Prior to withdrawing any funds, the State will be notified and provided with an opportunity for comment. This process will require prompt State response.

7. Financial Reporting.

a. States must submit a Financial Report to the Regional Office on a quarterly basis until such time as all funds have been expended or the term of the agreement has expired. Quarterly reports are due 30 days following the end of the quarter. Should the determination be made that available funds will be exhausted nationally before the end of the year, more frequent reporting may be required.

b. A final Financial Report must be submitted 90 days following either the expenditure of all obligational authority or the expiration of the annual TAA Financial Cooperative Agreement, whichever comes first.

c. An updated Financial Report must be included as part of any State request for additional funds.

8. Federal Register Publication. A copy of this General Administration Letter is being published in the Federal Register.

9. State Action. States should ensure that the designated TAA program operating agency is promptly informed of this policy guidance.

10. Inquiries. Inquiries should be directed to the appropriate Regional Office.

11. Attachment.

TAA Financial Cooperative Agreement (to be transmitted under separate cover.)

U.S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION TAA CORRESPONDENCE SYMBOL TSCS DATE January 9, 1989

TRAINING AND EMPLOYMENT INFORMATION NOTICE NO. 17-88

TO : ALL STATE JTPA LIAISONS
STATE WAGNER-PEYSER ADMINISTERING AGENCIES
WORKER ADJUSTMENT LIAISONS

FROM : ROBERTS T. JONES
Assistant Secretary of Labor

SUBJECT : Financial Policy for the Revised Trade Adjustment Assistance (TAA) Program

1. Purpose. To transmit information on the financial policy for the revised TAA program.

2. Background. As a result of the Omnibus Trade and Competitiveness Act (OTCA) of 1988 amending the Trade Act and the issuance of other regulatory changes, several revisions to the financial operation of the TAA program were required. The most significant changes include:

- Placing a time limit on the expenditure of funds;
- Providing advanced funding rather than requiring supplemental budget requests for each instance of need; and
- Establishing procedures to recapture and redistribute funds among the States.

The details regarding these changes were recently published in the attached General Administration Letter (GAL) No. 4-89 and in the Federal Register.

3. Action. The attached information should be provided to appropriate staff as soon as possible.

4. Inquiries. Inquiries should be directed to the appropriate Regional Office.

5. Attachment. GAL NO. 4-89

RESCISSIONS	EXPIRATION DATE

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[FR Doc. 89-1393 Filed 1-19-89; 8:45 am]
BILLING CODE 4510-30-C

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administraton, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue NW., Room S-3504, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Massachusetts:
MA89-3 (Jan. 6, 1989) ..... pp. 403-410.
New York:
NY89-1 (Jan. 6, 1989) ..... p. 680.
NY89-2 (Jan. 6, 1989) ..... pp. 684-688.
NY89-3 (Jan. 6, 1989) ..... pp. 702-703.
NY89-4 (Jan. 6, 1989) ..... pp. 710-711, 713.
NY89-5 (Jan. 6, 1989) ..... pp. 718, 720.
NY89-6 (Jan. 6, 1989) ..... pp. 728-735.
NY89-7 (Jan. 6, 1989) ..... pp. 738, 742.
NY89-8 (Jan. 6, 1989) ..... p. 756.
NY89-10 (Jan. 6, 1989) ..... pp. 770-773.
NY89-11 (Jan. 6, 1989) ..... pp. 782, 784.
NY89-12 (Jan. 6, 1989) ..... p. 790.
NY89-13 (Jan. 6, 1989) ..... pp. 800-801.
NY89-14 (Jan. 6, 1989) ..... p. 808.
NY89-15 (Jan. 6, 1989) ..... pp. 813-814.
NY89-17 (Jan. 6, 1989) ..... pp. 818, 820.
NY89-18 (Jan. 6, 1989) ..... pp. 828-830.
NY89-18 (Jan. 6, 1989) ..... pp. 828-830.
Tennessee:
TN89-1 (Jan. N6, 1989) ..... pp. 1078-1079.

Volume II

Iowa:
IA89-1 (Jan. 6, 1989) ..... p. 22.
IA89-2 (Jan. 6, 1989) ..... p. 28.
IA89-6 (Jan. 6, 1989) ..... p. 52.
Illinois:
IL89-19 (Jan. 6, 1989) ..... p. 240.
Missouri:
MO89-5 (Jan. 6, 1989) ..... p. 670.
MO89-6 (Jan. 6, 1989) ..... p. 676.

Volume III

Arizona:
AZ89-2 (Jan. 6, 1989) ..... p. 19.
Colorado:
CO89-1 (Jan. 6, 1989) ..... p. 106.
CO89-2 (Jan. 6, 1989) ..... p. 116.
CO89-4 (Jan. 6, 1989) ..... p. 125.
Washington:
WA89-1 (Jan. 6, 1989) ..... pp. 364-365 pp. 369, 374.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. (202) 783-3238

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 13th day of January 1989.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 89-1243 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-27-M

Mine Safety and Health Administration

[Docket No. M-89-1-C]

B. and B. Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

B. and B. Coal Company, 225 Main Street Joliett, Tremont, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.1405 (automatic couplers) to its Rock Ridge Slope (I.D. No. 36-07175) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that track haulage cars be equipped with automatic couplers.

2. Petitioner states that installation of automatic couplers on the track haulage cars would result in a diminution of safety to the miners affected due to the sharp radius curves in the track, the undulating pitch of the slopes, the different types of small lightweight cars, and the systems of haulage.

3. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: January 13, 1989.

[FR Doc. 89-1397 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-245-C]

Centralia Mines, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Centralia Mines, Inc., R.D. 2, Box 201, Shamokin, Pennsylvania 17872 has filed a petition to modify the application of 30 CFR 75.301 (air quality, quantity, and velocity) to its No. 1 Slope (I.D. No. 36-07835) located in Northumberland County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute.

2. Air sample analysis history reveals that harmful quantities of methane are nonexistent in the mine. Ignition, explosion, and mine fire history are nonexistent for the mine. There is no history of harmful quantities of carbon monoxide and other noxious or poisonous gases.

3. Mine dust sampling programs have revealed extremely low concentrations of respirable dust.

4. Extremely high velocities in small cross sectional areas of airways and manways required in friable Anthracite veins for control purposes, particularly in steeply pitching mines, present a very dangerous flying object hazard to the miners and cause extremely uncomfortable damp and cold conditions in the mine.

5. As an alternate method, petitioner proposes that:

a. The minimum quantity of air reaching each working face be 1,500 cubic feet per minute;

b. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries be 5,000 cubic feet a minute; and

c. The minimum quantity of air reaching the intake end of a pillar line be 5,000 cubic feet a minute, and/or whatever additional quantity of air that may be required in any of these areas to maintain a safe and healthful mine atmosphere.

6. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Date: January 12, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-1398 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-243-C]

L&W Coal Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

L&W Coal Company, Inc., R.D. No. 2, Box 201, Shamokin, Pennsylvania 17872 has filed a petition to modify the application of 30 CFR 75.1400 (hoisting equipment; general) to its No. 2 Slope (I.D. No. 36-07171) located in Northumberland County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirements that cages, platforms or other devices which are used to transport persons in shafts and slopes be equipped with safety catches or other approved devices that act quickly and effectively in an emergency.

2. Petitioner states that no such safety catch or device is available for the steeply pitching and undulating slopes with numerous curves and knuckles present in the main haulage slopes of this anthracite mine.

3. Petitioner further believes that if "makeshift" safety devices were installed they would be activated on knuckles and curves when no emergency existed and cause a tumbling effect on the conveyance.

4. As an alternate method, petitoner proposes to operate the man cage or steel gunboat with secondary safety connections securely fastened around the gunboat and to the hoisting rope, above the main connecting device. The hoisting ropes would have a factor of safety in excess of the design factor as determined by the formula specified in the American National Standard for Wire Rope for Mines.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All

comments must be postmarked or received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Date: January 12, 1989.

Patricia W. Silvey,

Director Office of Standards, Regulations and Variances.

[FR Doc. 89-1399 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-38-247-C]

New Era Coal Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

New Era Coal Company, Inc., 29501 Mayo Trail, Catlettsburg, Kentucky 41129 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its No. 1 Mine (I.D. No. 15-10753) located in Pike County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follow:

1. The petition concerns the requirement that the idled area of the mine be examined in its entirety on a weekly basis.

2. Due to rock falls and a large quantity of water, the idled area of the mine cannot be safely traveled. To restore one entry to a safe travelable condition would expose miners to hazardous working conditions.

3. As an alternate method, petitioner proposes to establish four evaluation points where a certified person would examine the water level and the quantity and quality of air used to ventilate the idled area. These examinations would be made on a weekly basis and the results recorded in a Weekly Examinations for Hazardous Conditions Book.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Date: January 13, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-1400 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-241-C]

Rhen Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Rhen Coal Company, R.D. No. 3, Box 21, Pine Grove, Pennsylvania 17963 has filed a petition to modify the application of 30 CFR 75.1714 (self-contained self-rescuers) to its Skidmore Slope (I.D. No. 36-08031) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that each operator make available to each person who goes underground a self-contained self-rescue device approved by the secretary which is adequate to protect such persons for one hour or longer.

2. The mine is always damp to wet. There is a small pump located at the foot of the slope.

3. Petitioner states that the distance from the mine portal to the actual working face is less than 2,000 feet. The mine can be evacuated in less than 15 minutes.

4. Petitioner states that the devices are too heavy, bulky, and cumbersome to be worn while working or in the narrow confines of the slope gun boat which serves as a mantrip at the mine.

5. Sections of the mine are subjected to freezing temperatures making constant availability of the devices questionable. In addition, the wet mine conditions make it difficult to locate a suitable dry storage location for the self-rescuers.

6. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Date: January 13, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-1401 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-242-C]

Rhen Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Rhen Coal Company, R.D. 3, Box 21, Pine Grove, Pennsylvania 17963 has filed a petition to modify the application of 30 CFR 75.1400 (hoisting equipment; general) to its Skidmore Slope (I.D. No. 36-08031) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that cages, platforms or other devices which are used to transport persons in shafts and slopes be equipped with safety catches or other approved devices that act quickly and effectively in an emergency.

2. Petitioner states that no such safety catch or device is available for the steeply pitching and undulating slopes with numerus curves and knuckles present in the main haulage slopes of this anthracite mine.

3. Petitioner further believes that if "makeshift" safety devices were installed they would be activated in knuckles and curves when no emergency existed and cause a tumbling effect on the conveyance.

4. As an alternate method, petitioner proposes to operate the man cage or steel gunboat with secondary safety connections securely fastened around the gunboat and to the hoisting rope, above the main connecting device. The hoisting ropes would have a factor of safety in excess of the design factor as determined by the formula specified in the American National Standard for Wire Rope for Mines.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or

received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Date: January 12, 1989.

Patricia W. Silvey,

Director Office of Standards, Regulations and Variances.

[FR Doc. 89-1402 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-235-C]

Jim Walter Resources, Inc., Petition for Modification of Application of Mandatory Safety Standard

Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, Alabama 35283 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its No. 3 Mine (I.D. No. 01-00758) located in Jefferson County, Alabama. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that trolley wires and trolley feeder wires, high-voltage cables and transformers not be located inby the last open crosscut and be kept at least 150 feet from pillar workings.

2. Petitioner proposes to install a second high-voltage longwall utilizing a.c. high-voltage (2300 v) cables in or inby the last open crosscut with specific equipment and conditions as outlined in the petition.

3. In addition, petitioner proposes that—

(a) The cables to be used would be a SHD-GC 5KV MSHA approved jacketed cable. These cables provide as safe a protection against potential for an ignition source as medium-voltage cables of the same type construction and better protection than low-voltage cables of non-shielded construction;

(b) The use of higher voltage motors results in lower current flows, thereby reducing the heating effect on the cable;

(c) A sensitive ground fault and lockout protection circuit would be provided to detect, trip and lockout any cable with a ground fault current of 90 milliamperes. Therefore, this application of high-voltage cables is safer than that of medium-voltage cables under similar faulted conditions;

(d) Compared to a 995 volt system, a 2300 volt system requires smaller current flows to power motors of similar horsepower ratings. Consequently, greater cable insulation protection is provided in the high-voltage system; and

(e) All high-voltage cables supplying all prime movers located inby the last open crosscut are deenergized at any time this equipment is not in operation. This provides added protection through reduced exposure time.

4. Petition states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 22, 1989. Copies of the petition are available for inspection at that address.

Date: January 13, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-1403 Filed 1-19-89; 8:45 am]

BILLING CODE 4510-43-M

NUCLEAR REGULATORY COMMISSION

Meeting To Review Valve Tests

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of public meeting.

SUMMARY: Tests were conducted to determine whether isolation valves in a specific high energy BWR pipe that penetrates containment will close against high flows in the event of a pipe break outside containment. The pipe system and environment that was simulated in the tests is the Reactor Water Cleanup (RWCU) line. The NRC licensing office has determined this to be a significant safety issue which has been identified as Generic Issue (GI) 87, "Failure of HPCI Steam Line Without Isolation." Although other pipes are also included as part of GI-87, the tests to date have concentrated on the RWCU line only. The results of these tests have been presented to the NRC staff and to representatives of valve and actuator manufacturers of equipment typically used in GI-87 related pipe lines. A meeting is planned for February 1, 1989, from 8:30 a.m. to 6:00 p.m. at the Crowne Plaza Holiday Inn at 1750 Rockville Pike, Maryland 20852, Phone (301) 468-1100. The Crowne Plaza is located near the Twinbrook Metro Station. In this meeting, the Idaho National Engineering Laboratory (INEL) will present the significant results of those tests so that the staff can make a determination that the research performed for the NRC is acceptable for demonstrating the performance of valves and diagnostic equipment and to develop the basis for focusing subsequent research that will be needed to resolve the issue. The meeting topics are listed below. Persons wishing to make statements on any of these topics should notify the contact listed below and submit a written request including the desired statement at least one week in advance of the meeting. The statement should be no longer than 3 minutes.

FOR FURTHER INFORMATION CONTACT: Gerald H. Weidenhamer, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, 5650 Nicholson Lane South (217B), Rockville, Maryland 20852, Telephone: (301) 492-3839, Facsimile: (301) 443-7804, or (301) 443-7836, Verification: (301) 492-3607.

Meeting Topics

1. Introduction & Agenda
2. Purpose and Format of Meeting
3. Meeting Goals, Potential Problems and Questions
4. Significant Test Results
5. Discussion of Potential Problems and Questions
6. Status of Industry Action to Remedy MOV Performance and Reliability Problems
7. Question, Statements and Comments from Floor (Time Permitting)
8. Meeting Wrap-up.

Dated at Rockville, Maryland this 12th day of January, 1989.

For the Nuclear Regulatory Commission.

Milton Vagins,

Chief, Electrical & Mechanical Engineering Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 89-1357 Filed 1-19-89; 8:45 am]

BILLING CODE 7590-01-M

Bi-Weekly Notice; Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations; Correction

On December 14, 1988, the **Federal Register** published the Bi-Weekly Notice of Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations. On page 50339, for the Browns Ferry Nuclear Plant, Unit 1 (application dated October 27, 1987—TS 235), the Amendment Nos. read, "158, 155, 130."

The correct Amendment Nos. should have been "159, 155, 130."

Dated at Rockville, Maryland this 13th day of January 1989.

Suzanne C. Black,

Assistant Director for Projects, TVA Projects Division, Office of Nuclear Reactor Regulation.

[FR Doc. 89-1351 Filed 1-19-89; 8:45 am]

BILLING CODE 7590-01-M

Regulatory Guide; Issuance, Availability

The Nuclear Regulatory Commission has issued a revision to a guide in its Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the Commission's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

Revision 1 to Regulatory Guide 10.9, "Guide for the Preparation of Applications for Licenses for the Use of Self-Contained Dry Source-Storage Gamma Irradiators," provides guidance on the type of information needed by the NRC staff in evaluating license applications for the use of self-contained dry source-storage gamma irradiators.

Comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time. Written comments may be submitted to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Regulatory guides are available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC. Copies of issued guides may be purchased from the Government Printing Office at the current GPO price. Information on current GPO prices may be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082, telephone (202)275-2060 or (202)275-2171. Issued guides may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161.

(5 U.S.C 552(a))

Dated at Rockville, Maryland this 11th day of January 1989.

For the Nuclear Regulatory Commission.

Eric S. Beckjord,

Director, Office of Nuclear Regulatory Research.

[FR Doc. 89-1356 Filed 1-19-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-309]

Maine Yankee Atomic Power Co.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR-36 issued to Maine Yankee Atomic Power Company (the licensee), for operation of the Maine Yankee Atomic Power Station in Lincoln County, Maine.

The proposed amendment would modify the Technical Specifications to reflect current knowledge of the Reactor Pressure Vessel (RPV) fast neutron fluences (E greater than 1.0 Mev.) and material properties. The proposed amendment would also incorporate revised 10 CFR Part 50 Appendix G limits. Included are changes for:

- Revised fluence projections which reflect results of measurements and flux reduction achieved in refueling cycle 8.
- Revised damage predictions which reflect the results of measurements and the application of Regulatory Guide (R.G.) 1.99, Revision 2.
- Revised Pressure-Temperature (P/T) limits developed following the requirements of 10 CFR Part 50 Appendix G.

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By February 21, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rule of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions that are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, United States Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public

Document Room, the Gelman Building, 2120 L Street NW., Washington DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-800-325-6000 (in Missouri 1-800-342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Richard H. Wessman, Project Directorate I-3: (petitioner's name and telephone number); (date petition was mailed); (plant name); and (publication date and page number of this **Federal Register** notice). A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to J.A. Ritsher, Ropes & Gray, 255 Franklin Street, Boston, Massachusetts 02210, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(8)-(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated December 2, 1988, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the Local Public Document Room, Wiscasset Library, High Street, P.O. Box 367, Wiscasset, Maine 04579.

Dated at Rockville, Maryland, this 13th day of January 1989.

For the Nuclear Regulatory Commission.

Richard H. Wessman,

Director, Project Directorate I-3, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-1350 Filed 1-19-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-133]

Pacific Gas and Electric Co., Humboldt Bay Power Plant Unit No. 3; Exemption

I

Pacific Gas and Electric Company (the licensee) is the holder of Facility License No. DPR-7, which authorizes possession but not operation of Humboldt Bay Power Plant, Unit No. 3 (Humboldt Bay Unit 3). The license provides, among other things, that it is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (the Commission) now or hereafter in effect. The facility consists of a permanently shut down boiling water reactor and stored spent fuel located at the licensee's site in Humboldt County, California.

II

Section 70.51(d) of the Commission's regulations requires a licensee authorized to possess special nuclear material to conduct a physical inventory of all such materials at intervals not to exceed 12 months. The licensee is requesting an exemption from the annual physical inventory.

Pursuant to 10 CFR 70.14 the Commission may grant exemptions from the requirements of the regulations which are authorized by law, will not endanger life or property or the common defense and security, and are otherwise in the public interest.

III

Humboldt Bay Unit 3 has been shut down since July 2, 1976. In 1983, the licensee decided to decommission Humboldt Bay Unit 3 and subsequently submitted a Proposed Decommission Plan, Proposed Technical Specifications (TS) and an Environmental Report. The licensee proposed (1) to amend License No. DPR-7 to possess-but-not-operate status; (2) to delete certain license conditions related to seismic modifications required before the NRC would authorize a return to power operation; (3) to revise the TS to reflect the possess-but-not-operate status; (4) to decommission Humboldt Bay Unit 3 in accordance with the plan included with the submittal; and (5) to extend License No. DPR-7 for 15 additional years, to November 9, 2015, to be consistent with the Decommissioning Plan.

On July 16, 1985 License No. DPR-7 was amended to possess-but-not-operate status. On July 19, 1988 License No. DPR-7 was amended to approve the decommissioning plan and the balance of Items 1 through 5 above.

On June 6, 1988 as revised July 19 and September 13, 1988 the licensee submitted a request for an exemption from the requirement for an annual inventory of the spent fuel on the basis of additional conditions and commensurate requirements.

Based on a review of the licensee's request the NRC staff finds that the following conditions and commensurate requirements support granting the requested exemption:

(1) A cover is installed over the spent fuel pool. Tamper-indicating seals are installed on the cover,

(2) Seal number and integrity shall be verified every 12 months,

(3) A physical inventory of all spent fuel shall be conducted whenever a seal has been found to be compromised. A physical inventory of all spent fuel shall be conducted after an authorized opening of the cover if the time since the last inventory is in excess of 12 months,

(4) A physical inventory of all spent fuel will also be conducted after an authorized removal of the spent fuel pool cover if the time period since the last inventory is less than 12 months unless:

(a) The entry into the refueling building while the cover was removed was made by at least two authorized individuals who attest in writing that no spent fuel was removed from the pool while they were in the refueling building; or

(b) While the cover was removed and in the absence of at least two authorized individuals in the refueling building, the alarms, cameras and other detection devices that make up the security system were OPERABLE and maintained in accordance with the security plan.

Based on the foregoing, and in accordance with 10 CFR 70.14 the staff concludes that the exemption from the requirements of 10 CFR 70.51(d) as discussed above, is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest.

Accordingly, the Commission hereby grants Pacific Gas and Electric Company an exemption from the requirement of 10 CFR 70.51(d) for the conduct of an annual inventory of spent fuel at Humboldt Bay Unit 3 provided the licensee satisfies the conditions set forth in Items 1 through 4 above.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this Exemption will have no significant impact on the environment (54FR876 on January 10, 1989).

This exemption is effective upon issuance.

For the Nuclear Regulatory Commission.

Gary M. Holahan,

Acting Director, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

Dated at Rockville, Maryland this 13th day of January 1989.

[FR Doc. 89-1352 Filed 1-19-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-206]

Southern California Edison Co. and San Diego Gas and Electric Co., San Onofre Nuclear Generating Station, Unit No. 1; Consideration of Issuance of Amendment to Provisional Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Provisional Operating License No. DPR-13 issued to Southern California Edison Company, *et al.* (the licensee), for operation of San Onofre Nuclear Generating Station, Unit No. 1, located in San Diego County, California. The request for amendment was submitted by letter dated January 11, 1989.

The proposed amendment would revise Appendix A Technical Specifications 2.1, "REACTOR CORE—Limiting Combination of Power, Pressure, and Temperature," 3.5.2, "Control Group Insertion Limits", 3.11, "Continuous Power Distribution Monitoring", 3.3.3, "Refueling Water Storage Tank" 4.1.1 "Operational Safety Items", and 4.2.1, "Safety Injection and Containment Spray System Periodic Testing" to allow San Onofre Unit 1 to be operated as described in the forthcoming report, "Reload Safety Evaluation, San Onofre Nuclear Generating Station, Unit 1, Cycle 10."

The Reload Safety Evaluation for Cycle 10 is currently underway. The technical specification changes identified above represent the expected scope of specifications impacted by the reload safety evaluation. Additional information and the actual values and setpoints will be provided when available as a supplement to the amendment request.

The reload safety evaluation is being performed to support plant operation at a reduced reactor coolant temperature with up to 20% of the steam generator tubes plugged. Recent steam generator tube inspections have resulted in steam generator plugging levels beyond the 15% value assumed in the existing safety analysis. Reanalysis to provide for the higher plugging levels (20%) is therefore required and is now underway.

In addition, the licensee has reanalyzed the reactor coolant pump shaft break event to require a revised reactor protection setpoint to account for operation at a reduced reactor coolant temperature.

Finally, the main steam line break event has been reanalyzed to model the injection of borated water through a single injection path and to permit a reduced concentration of boric acid in the injection lines.

Prior to issuance proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By February 22, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject provisional operating license, and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commision or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene shall be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to George W. Knighton: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel—White Flint, U.S. Nuclear Regulatory Commission,

Washington, DC 20555, and to Charles R. Kocher, Assistant General Counsel, and James Beoletto, Esq., Southern California Edison Company, P.O. Box 800, Rosemead, California 91770, attorneys for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714 (a)(1)(i)-(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room 2120 L Street NW., Washington, DC, and at the General Library, University of California, P.O. Box 19557, Irvine, California 92713.

Dated at Rockville, Maryland, this 13th day of January, 1989.

For the Nuclear Regulatory Commission.

George W. Knighton,

Project Director, Project Directorate V, Division of Reactor Projects—III, IV, V and Special Projects.

[FR Doc. 89-1353 Filed 1-19-89; 8:45 am]

BILLING CODE 7590-01-M

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

Columbia River Basin Fish and Wildlife Program; Proposed Amendments

AGENCY: Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

ACTION: Notice of extension of comment period on proposed long-term spill amendments to the Columbia River Basin Fish and Wildlife Program.

SUMMARY: On November 23, 1988, pursuant to the Pacific Electric Power Planning and Conservation Act (the Northwest Power Act, 16 U.S.C. 839, et seq.) the Pacific Northwest Electric Power and Conservation Planning Council (Council) issued notices of proposed amendments to the Columbia River Basin Fish and Wildlife Program (program). The proposed amendments dealt with the subject of fish spills at the federal dams on the mainstem Columbia and Snake Rivers, except Bonneville Dam, to provide improved survival for anadromous fish at the dams. The Council set December 28, 1988 as the deadline for written comment. On January 12, 1989, the Council determined to defer action on the proposed amendments, to set a special Council meeting to consider the proposed amendments on January 25, 1989, and to extend the period for written comment.

Extension of Period for Written Comment

Any additional written comments must be received in the Council's central office, 851 SW. Sixth Avenue, Suite 1100, Portland, Oregon, 97204, by 5 p.m. Pacific time on January 23, 1989. Comments should be submitted to Dulcy Mahar, Director of Public Involvement, at this address. Comments should be clearly marked "Spill Comments."

After the close of written comment, the Council may hold consultations with interested parties to clarify points made in written comment. Consultations may be held up to the time of the Council's final action in this rulemaking.

For a Full Copy of the Proposed Amendments, or for Further Information: Contact Judi Hertz at 851 SW. Sixth Avenue, Suite 1100, Portland, Oregon, 97204, or at (503) 222-5161, toll free 1-800-222-3355 in Idaho, Montana, and Washington or 1-800-452-2324 in Oregon.

Edward Sheets,

Executive Director.

[FR Doc. 89-1325 Filed 1-19-89; 8:45 am]

BILLING CODE 0000-00-M

PROSPECTIVE PAYMENT ASSESSMENT COMMISSION

Meetings

Notice is hereby given of meetings of the Prospective Payment Assessment Commission on Tuesday, January 31, 1989 at 9:30 a.m. and Wednesday, February 1, 1989 at 8:30 a.m. The meetings will be held in the Diplomat Room of the Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC.

All meetings are open to the public.

Donald A. Young,

Executive Director.

[FR Doc. 89-1367 Filed 1-19-89; 8:45 am]

BILLING CODE 6820-BW-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-26458; File No. SR-NASD-84-10]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change To Amend the NASD's Rules of Fair Practice To Permit Indeterminate Compensation in Connection With the Sale of Direct Participation Programs

On August 10, 1987, the National Association of Securities Dealers, Inc. ("NASD") submitted a second amendment to a proposed rule change pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b-4 thereunder,[2] to amend Appendix F to Article III, Section 34 of the NASD's Rules of Fair Practice, to allow for the receipt by broker-dealers of indeterminate compensation in connection with the sale of direct participation programs ("DPPs").[3] The purpose of the proposed rule change is to permit members engaging in a public offering of DPPs, to exchange a portion of their front-end compensation for a right to receive a back-end revenue participation.

Subsection 5(b)(5) of Appendix F currently prohibits any NASD member or person associated with a member from receiving indeterminate compensation in connection with the public offering of a DPP.[4] The proposed

[1] *See* 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1986).

[3] The proposed rule change was filed on May 14, 1984, and amended on October 15, 1984. Notice of the original filing, as amended, was given by Securities Exchange Act Release No. 21468, November 5, 1984, and by publication in the **Federal Register**, 49 FR 44966, November 13, 1984. The Commission received one comment letter that supported the proposed rule change. *See* letter from Bill E. Carter, President, International Association for Financial Planning, to George A. Fitzsimmons, Secretary, SEC, dated September 4, 1984. On November 15, 1984, the Commission staff submitted a letter to the NASD requesting further explanation of certain aspects of the original rule change. The NASD submitted a response to the Commission's letter on July 27, 1987, and an amendment to the proposed rule change on August 10, 1987. *See* letter from Stuart J. Kaswell, Branch Chief, SEC, to Frank J. Formica, Vice president, NASD, dated November 15, 1984, and letter from Frank J. Formica to Katherine A. England, Branch Chief, SEC, dated July 27, 1987.

[4] "Indeterminate compensation" refers to any item of compensation which is on-going in nature and for which a value cannot be determined at the time of the offering, including a percentage of the general partner's management fee, profit sharing arrangement, on overriding royalty interest, a net profits interest, a percentage of revenues and similar on-going compensation with an indeterminate dollar value.

rule change would permit a member to receive a back-end indeterminate interest in program distributions as compensation for distribution of a DPP if four conditions are satisfied: (1) Continuing compensation only is received after each investor in the DPP has received his cash distributions from the DPP aggregating an amount equal to his cash investment plus a 6% cumulative annual return on his adjusted investment; (2) the continuing compensation is calculated as a percentage of program cash distributions; (3) the amount of continuing compensation does not exceed 3% for each one percent that front-end retail and wholesale cash commissions fall below 9%. Also, there is a 12% ceiling on the amount of continuing compensation that a member may receive; and (4) if any portion of continuing compensation is derived from the limited partners' interest in the program cash distributions, the percentage of continuing compensation shall be no greater than the percentage of program cash distributions to which the limited partners are entitled at the time of payment.

Proposed section 5(b)(5)(iii) establishes a 9% base from which the reduction in front-end compensation must be calcuated [5] and is intended to assure that members that choose to receive continuing compensation actually reduce the amount of front-end fees charged.[6] A member, therefore, is entitled to receive 3% continuing compensation, calculated as a percentage of program cash distributions, for each 1% reduction in front-end compensation it takes, calculated from the 9% base.[7] The 12% ceiling on program cash distributions is intended to assure consistency in the structure of public DPPs in order to prevent widely differing compensation levels from outweighting relevant suitability standards, and to prevent undue discrimination against smaller broker-dealers that may not be able to bear the costs of distribution in exchange for deferred compensation. The three-for-one trade-off reflects the time value of the deferred compensation and the risk assumed by the broker-dealer. The provisions of paragraph (iv) prevent the limited partners from bearing the entire cost of a member's deferred compensation.

The NASD believes that the proposed rule change will substantially benefit public investors in several ways. First, because the broker-dealer is deferring some of its compensation, more capital will be invested in the project at the beginning of the program and investors may receive a better return on their investment. Second, broker-dealers will have an incentive to perform their due diligence obligations more thoroughly and remain informed of the DPP's performance because their compensation partially depends on the DPP's success. Notice of the amended proposed rule change together with the terms of substance of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26192, October 18, 1988) and by publication in the Federal Register (53 FR 41431, October 21, 1988).

The Commission received two comment letters on the proposed rule change.[8] The commentators generally support the proposed rule change but express specific concerns. One of the commentators argues that the proposal, as amended, is not beneficial enough to brokers. The commentator recommends that payment of continuing compensation not be contingent upon payment of a preferred return of 6% to investors. The commentator expresses concern over the inordinate period of time that could lapse before the broker would benefit form the arrangement because of the extended life of DPPs and the fact that asset liquidations generally do not occur until the DPPs have ended. The commentator suggests, as an alternative to the proposal, that the General Partner, regardless of its affiliation, be required to make payments from its ongoing compensation to the broker-dealer who sold the DPP in question; thus, contemplated compensation would be paid from the General Partner's compensation rather than the Limited Partnership.

The second commentator argues that creating a "fixed formula" for all DPPs is unduly restrictive and that the rule, as proposed and amended, does not contemplate various types of DPPs with varying risk profiles, member firm involvement and structures. The commentator suggests that the NASD permit indeterminate compensation if: (1) Adequate disclosure of the member firm's participation is set forth in the prospectus and (2) the issue is approved for lsiting on a national securities exchange, or (3) the issue complies with the relevant industry guidelines promulgated by the North American Securities Administrators Association ("NASAA").[9]

In response to the comment letters, the NASD first notes that this proposal provides an alternative method of structuring compensation in connection with the sale of DPPs; broker-dealers may continue to receive their compensation up-front.[10] The NASD drafted the proposed rule change in a manner that would ensure that broker-dealers only do well if investors are receiving at least some returns from their investments. Moreover, the 6% cumulative annual return, chosen as a prerequisite to the receipt by broker-dealers of continuing compensation, was adopted in response to concerns of NASAA. NASAA argued that some recognition of present value should be made in computing investors' return on capital.[11]

Second, in response to the commentator's suggestion that the General Partner make payments, the NASD has stated that this rcommendation would be too difficult to oversee and enforce, and would not necessarily guarantee a bona-fide relinquishment of front-end compensation by the member. Third, the NASD has represented that a "fixed formula" is necessary in this context; drafting a rule that separately addressed all the different types of DPPs with their varying risk profiles, member firm involvement and structures, would be difficult and present enforcement problems. In addition, the NASD, pursuant to its Corporate Financing Interpretation, reviews the fairness and reasonableness of the underwriting arrangements in connection with the distribution of securities; this cannot be done with the disclosure above.[12]

[5] Members normally are permitted maximum front-end compensation of 10% pursuant to Appendix F.

[6] In the NASD's experience, the majority of DPP offerings have included underwriting compensation of at least 9% to 10%.

[7] The NASD clarifies in its rule filing that the term "continuing compensation" is viewed as a percentage of cash distributions from the operation or dissolution of the program. Thus, a member may receive continuing compensation from the operations, from the sale of program assets, and from dissolution of the program. *See* 53 FR 41431.

[8] *See* letter from Robert G. Brunton, Vice President and Associate General Counsel, Prudential-Bache Securities, Inc., and Christopher L. Davis, President, Investment Partnership Association to Jonathan G. Katz, Secretary, SEC, dated November 17, 1988, and December 19, 1988.

[9] We note that NASD members must disclose all underwriting compensation and comply with relevant industry guidelines irrespective of this proposed rule change.

[10] Telephone conversation between Suzanne Rothwell, Associate General Counsel, NASD, and Katherine England, Branch Chief, SEC, and Arian Colachis, SEC, December 15, 1988.

[11] *See* Securities Exchange Act Release No. 26192, 53 FR at 41432.

[12] *See* Interpretation of the Board of Governors, Review of Corporate Financing; ¶ 2151.02.

The Commission carefully has considered the comment letters and believes that the NASD adequately has addressed the concerns expressed by the commentators. The Commission finds that the NASD has designed an alternative means of receiving compensation in connection with the sale of DPPs, which adequately takes into account competing concerns of the broker-dealer community and the investing community, and achieves a correct balance. Accordingly, the Commission believes it is appropriate for the NASD to require that all investors receive cash distributions from the DPP equal to 100% of their cash investment plus the 6% return, prior to the member's receipt of the indeterminate compensation.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD, and in particular the requirements of section 15A and the rules and regulations thereunder. The NASD has requested that the proposed rule change become effective February 1, 1989.[13] Specifically, the NASD states: "DPPs currently on file with the NASD Corporate Financing Department as of February 1, 1989 (which have not received an opinion of 'no objections' to the underwriting terms and arrangements) and DPPs subsequently filed on or after February 1, 1989 with the NASD Corporate Financing Department for review may include an underwriting arrangement that complies with the new indeterminate compensation provision of Appendix F. In addition, any DPP offering that has previously received an opinion of 'no objections' from the NASD Corporate Financing Department, may be resubmitted on or after February 1, 1989 for review of revised underwriting terms which include an indeterminate compensation arrangement, so long as the SEC or state regulatory authority (if an intrastate offering) has not declared the offering effective."

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, effective February 1, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

[13] *See* letter form Suzanne E. Rothwell, Associate General Counsel, NASD, to Katherine England, Branch Chief, SEC, dated December 20, 1989.

Dated: January 13, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-1408 Filed 1-19-89; 8:45 am]

BILLING CODE 8010-01-M

[File No. 500-1]

Chase Medical Group, Inc.; Order of Suspension of Trading

January 16, 1989.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information conecerning the securities of Chase Medical Group, Inc. (1) because of questions concerning unusual market activity in those securities, (2) because of questions concerning an accumulation of over fifty (50) percent of the company's outstanding securities by a broker-dealer, and certain of its customers and the resulting potential impact on the market for Chase Medical's securities and (3) because of the failure of several of these people to make payments to a broker-dealer in connection with the acquisition and maintenance of such securities as requested.

The Commission is of the opinion that the public interest and the protection of invetors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company, is suspended for the period from 11:00 a.m. EST, January 16, 1989 through 11:59 p.m. EST, on January 25, 1989.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-1322 Filed 1-19-89; 8:45 am]

BILLING CODE 8010-01-M

[File No. 500-1]

Fun Foods, Inc.; Order of Suspension of Trading

Janaury 17, 1989.

It appears to the Securities and Exchange Commission that there is a lack of adequate current information concerning the securities of Fun Foods, Inc., and that questions have been raised about the adequacy and accuracy of publicly disseminated information concerning the financial condition of the company, its current management, among other things, the identity of current officers and directors, and the location of its corporate headquarters.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Fun Foods, Inc.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the Securities Exchange Act of 1934, that the trading in the securities of Fun Foods, Inc., over-the-counter or otherwise, is suspended for the period from 9:30 a.m. EST, January 17, 1989 through 11:59 p.m. EST, on January 26, 1989.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-1323 Filed 1-19-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16755; 811-3643]

World of Technology, Inc.; Application for Deregistration

January 13, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "1940 Act").

Applicant: World of Technology, Inc.

Relevant 1940 Act Section: Section 8(f).

Summary of Application: Applicant seeks an order declaring that it has ceased to be an investment company under the 1940 Act.

Filing Dates: The application on Form N-8F was filed on September 1, 1988, and amended on October 21, 1988. A supplemental letter was filed January 9, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on February 6, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESS: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 6312 S. Fiddler's Green Circle, Suite 100N, Englewood, Colorado 80111.

FOR FURTHER INFORMATION CONTACT: Legal Technician Patricia Copeland (202) 272-3009, or Branch Chief Karen Skidmore, (202) 272-3023 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Applicant is a Colorado corporation and open-end diversified management investment company under the 1940 Act. On December 16, 1982, Applicant filed a Notification of Registration pursuant to section 8(a) of the 1940 Act on Form N-8A. On the same date, Applicant filed a registration statement under the Securities Act of 1933 and the 1940 Act on Form N-1A which was declared effective on April 26, 1983, and the initial public offering commenced shortly thereafter.

2. On January 13, 1988, the board of directors of the Applicant approved and adopted an Agreement and Plan of Reorganization (the "Plan") under which all of the net assets of the Applicant would be transferred to the Technology Portfolio of Financial Strategic Portfolios, Inc. ("FSP"), a registered management investment company, in exchange for shares of the Technology Portfolio. In determining to recommend to shareholders that the Fund be merged into the Technology Portfolio of FSP, the board of directors of the Fund, including a majority of the independent directors, concluded that the proposed reorganization would be in the best interests of shareholders of the Fund because it would (1) permit shareholders of the fund to pursue substantially the same investment objective In a larger and more economically viable fund; (2) reduce the advisory fee payable by the Fund from 1.00% of average net assets to 0.75% of average net assets; and (3) reduce the expense ratio of the combined funds by spreading fixed costs over a larger asset base. Applicant's shareholders approved the Plan at a special meeting held on May 12, 1988.

3. Pursuant to the Plan, FSP delivered to Applicant 386,881.48 shares of common stock, $.01 par value, of the Technology Portfolio ("Technology Portfolio Shares") in exchange for all of the net assets of the Applicant, which assets had a value of $4,003,971.93. The Technology Portfolio Shares were then distributed to shareholders of the Applicant. Each shareholder of the Applicant received that number of full and fractional Technology Portfolio Shares equal in value on May 12, 1988, to the value of such shareholder's shares of the Applicant. The net asset values per share of the Technology Portfolio Shares and shares of the Applicant were $10.3493 and $9.5743, respectively, on May 12, 1988. Accordingly, shareholders of the Applicant received .925 Technology Portfolio Share for each share of the Applicant held on May 12, 1988. Following implementation of the Plan on May 12, 1988, Applicant had no shareholders.

4. The expenses applicable to the exchange, consisting of accounting, printing, administrative and certain legal expenses were allocated equally between the parties to the exchange, with Applicant's share being $6,081. No brokerage commissions were paid in connection with the Plan.

5. Applicant currently has no assets and no liabilities. Applicant is not a party to any current or pending litigation or administrative proceeding. Applicant is not engaged, and does not propose to engage in any business activities other than those necessary for winding-up of its affairs.

6. Applicant will file a Statement of Intent to Dissolve and Articles of Dissolution with the Secretary of State of the State of Colorado.

7. Applicant represents that all of its required N-SAR filings have been made and it will file its Form N-SAR for the period ended August 31, 1988. If a Form N-SAR is required for any period from August 31, 1988, through the date the Applicant is deregistered, such form will be filed promptly after the earlier of the due date of the form or the issurance of the requested order.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-1409 Filed 1-19-89; 8:45 am]

BILLING CODE 8010-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Implementation of Modifications in Specialty Steel Import Relief

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: This notice revises or establishes for certain countries quota allocations currently applicable to imports of certain stainless steel bar and rod and alloy tool steel. This notice makes modifications in the Harmonized Tariff Schedule of the United States (HTS) to implement these changes.

EFFECTIVE DATE: January 20, 1989.

FOR FURTHER INFORMATION CONTACT: Robert Cassidy, Office of the United States Trade Representative, (202) 395-6160.

SUPPLEMENTARY INFORMATION: Presidential Proclamation 5679 of July 16, 1987 (58 FR 27308) provided for the temporary imposition of increased tariffs and quantitative restrictions on certain stainless steel and alloy tool steel imported into the United States, pursuant to section 203 of the Trade Act of 1974. Proclamation 5679 authorizes the U.S. Trade Representative to take such actions and perform such functions for the United States as may be necessary to administer and implement the relief, including negotiating orderly marketing agreements and allocating quota quantities on a country-by-country basis. The U.S. Trade Representative is also authorized to make modifications in the HTS headnote of items proclaimed by the President in order to implement such actions.

Accordingly, the U.S. Trade Representative has determined that the following modifications be applied to subheadings 9903.72.12, 9903.72.14, 9903.72.22, 9903.72.24, 9903.72.32 and 9903.72.34 of Subchapter III, chapter 99 of the HTS.

Add quota quantities for "Hungary" and replace those for "Other" in subheadings 9903.72.12 and 9903.72.14 as follows:

Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.12	Hungary	n/a	28,123
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter	107,956	76,204
9903.72.14	Hungary	11,794	3/
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter	32,659	3/

Add quota quantities for "Hungary" and replace those for "Austria" and "Other" in subheadings 9903.72.22 and 9903.72.24 as follows:

Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.22	Austria	48,988	90,719
	Hungary	n/a	56,246
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter	129,729	29,937
9903.72.24	Austria	9,979	3/
	Hungary	23,587	3/
	Other, except as provided for in U.S. note 4(g)(ii) to this subchapter	39,917	3/

Add quota quantities for "Hungary" and "Argentina" and replace the quota quantity and line item for "Other" in subheadings 9903.72.32 and 9903.72.34 as follows:

Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.32	Argentina	n/a	36,288
	Hungary	n/a	63,504
	Other, except as provided in U.S. note 4(g)(iii) to this subchapter	148,780	48,081
9903.72.34	Argentina	13,608	3/
	Hungary	27,216	3/
	Other, except as provided in U.S. note 4(g)(iii) to this subchapter	20,865	3/

I have determined that the above changes in the import relief are appropriate to carry out the authority granted by the President to the United States Trade Representative and the obligations of the United States, with due consideration to the interests of the domestic producers of such specialty steel. This action is subject to further modifications.

Clayton Yeutter,

United States Trade Representative.

[FR Doc. 89-1461 Filed 1-18-89; 11:27 am]

BILLING CODE 3190-01-M

Implementation of the Accelerated Tariff Elimination Provision in the United States-Canada Free Trade Agreement

AGENCY: Office of the U.S. Trade Representative.

ACTION: Notice of a procedure to implement the accelerated tariff elimination provision for products covered by Annexes 401.2 and 401.7 of the United States-Canada Free Trade Agreement (FTA).

SUMMARY: Section 201(b) of the United States-Canada Free Trade Agreement (FTA) Implementation Act of 1988 ("FTA Implementation Act") grants the President, subject to the consultation and layover requirements of section 103 of the FTA Implementation Act, the authority to proclaim such acceleration as the United States and Canada may agree to regarding the staging of any duty treatment set forth in Annexes 401.2 and 401.7 of the FTA. This publication gives notice of a procedure by which persons or entities may request the acceleration of tariff elimination in Article 401(5) of the FTA under the authority of section 201 of the FTA Implementation Act.

SUPPLEMENTARY INFORMATION: Requests for additional information regarding the implementation of the FTA accelerated tariff elimination provision should be directed to Rick Ruzicka, Director for Tariff Negotiations, Office of North American Affairs, Office of the United States Trade Representative, Room 501, 600 17th Street NW., Washington, DC 20506; telephone (202) 395-5663.

Background

The FTA entered into force on January 1, 1989. Annex 401.2 of the FTA establishes three principal timetables for the staged elimination of tariffs on all dutiable products in the United States and Canadian tariff schedules. These timetables are: (1) Immediate elimination of tariffs upon implementation of the FTA; (2) elimination in five equal annual cuts of 20 percent per year resulting in duty free treatment by January 1, 1993; and (3) elimination in ten equal annual cuts of 10 percent per year resulting in duty free treatment by January 1, 1988.

Article 401(5) of the FTA provides that at the request of either government, the two Parties are to undertake consultation to consider agreeing to accelerate the elimination of the duties on specific products in the tariff schedule of each Party (for example, by agreeing to reduce the staging period from 10 years to 5 years). Section 201(b) of the FTA Implementation Act grants the President, subject to certain consultation and layover requirements, the authority to proclaim any such agreed acceleration of the elimination of a U.S. duty. The Statement of Administrative Action approved by the Congress in the FTA Implementation Act, provides that the Administration will consider requests from interested private sector groups as a matter of priority in implementing the authority of section 201(b). The deadline for the submission of such requests is February 21 in 1989 and January 1 in subsequent years.

USTR will review the requests and decide which shall be accepted for consideration for consultations with the Canadian Government. In addition, the United States and Canadian Governments will exchange their respective list of requests for accelerated tariff elimination in order to facilitate the coordination of the consultations to be held under Article 401(5). Pursuant to section 103 of the

FTA Implementation Act, USTR will seek advice from the appropriate advisory committees established under Section 135 of the Trade Act of 1974 and from the U.S. International Trade Commission regarding accelerated tariff eliminations under consideration. The views of interested Parties may also be sought, as appropriate, by means of Trade Policy Staff Committee hearings. Following these consultations and pursuant to Section 103 of the FTA Implementation Act, USTR will submit reports with respect to proposed tariff accelerations still under consideration to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate. These reports will indicate the accelerated tariff eliminations proposed to be proclaimed, the reasons therefor, and the advice received pursuant to section 103 on these proposed accelerations. During the mandated 60 day layover period following the submission of these reports, USTR will consult with these Committees regarding the proposed accelerated tariff eliminations.

At the conclusion of the layover period, the President may proclaim those accelerations of duty elimination that have been agreed with Canada and for which the consultation and layover provisions of Section 103 have been followed.

It is anticipated that this procedure will be implemented on an annual basis until 1997 with requests to be submitted by January 1 of each year.

2. Information To Be Included in Requests for Accelerated Tariff Elimination

Each request should include the following information:

A. General Information

(1) Requestor's name, organization, address, individual in the organization to be contacted concerning the request, telephone number and date of request.

B. Product Information

(2) Product on which accelerated duty elimination is requested and whether the request pertains to the United States or Canadian import duty or both.

(3) Tariff subheading numbers at the eight-digit level in the United States and/or Canadian Harmonized System ("HS") tariff schedules in which the product is classified and the product description of the subheadings.

(4) Whether the request is for all products covered by a tariff subheading listed in number 3, or only the product identified in number 2 above.

C. Information Regarding the Tariff Elimination Staging

(5) Current staging of the tariff elimination contained in Annex 401.2 of the FTA for each product or tariff subheading.

(6) Requested accelerated staging of the tariff elimination.

(7) Reasons for requesting accelerated tariff elimination.

D. Statistical Information

(To be provided to the extent available. Business confidential material should be so marked so that special handling may be provided.)

(8) Requestor's exports to and/or imports from Canada for each product in the most recent three-year period for which data are available.

(9) Requestor's projected exports and/or imports for the product if tariff elimination is accelerated as requested.

(10) Value (in dollars) of requestor's U.S. and/or Canadian production for the most recent three year period for each product.

(11) Requestor's percentage share of U.S. and/or Canadian production for the most recent three years.

(12) Names and addresses of known U.S. manufacturers of the products in question.

3. Instructions for Submitting Requests

Requests should be type-written and submitted in 10 copies to: Rick Ruzicka, Director for Tariff Negotiations, Office of North American Affairs, Office of the U.S. Trade Representative, Room 501, 600 17th Street NW., Washington, DC 20506. Requests must be received by February 21 in 1989, to ensure consideration under the above procedures and by January 1 in subsequent years.

Peter O. Murphy,

Special Negotiator for U.S.-Canada Trade and Investment.

[FR Doc. 89-1338 Filed 1-19-89; 8:45 am]

BILLING CODE 3190-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Order 8-1-24]

Fitness Determination of Aero Freight, Inc.

AGENCY: Department of Transportation.

ACTION: Notice of commuter air carrier fitness determination; Order to show cause.

SUMMARY: The Department of Transportation is proposing to find Aero Freight, Inc., fit, willing, and able to provide commuter air service under section 419(d)(2) of the Federal Aviation Act.

Responses: All interested persons wishing to respond to the Department of Transportation's tentative fitness determination should file their responses with the Air Carrier Fitness Division, P-56, Department of Transportation, 400 Seventh Street, SW., Room 6420, Washington, DC 20590, and serve them on all persons listed in Attachment A to the order. Responses shall be filed no later than February 1, 1989.

FOR FURTHER INFORMATION CONTACT: Mrs. Kathy Lusby Cooperstein, Air Carrier Fitness Division (P-56, Room 6420), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-9721.

Dated: January 17, 1989.

Gregory S. Dole,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 89-1383 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-62-M

[Order 89-1-23; Dockets 45904 and 45905]

Applications of TEM Enterprises, Inc. d/b/a Casino Express for Certificate of Authority

AGENCY: Department of Transportation.

ACTION: Notice of order to show cause.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue orders finding TEM Enterprises, Inc. d/b/a Casino Express fit and awarding it certificates of public convenience and necessity to engage in domestic and foreign charter air transportation of persons and property.

DATES: Persons wishing to file objections should do so no later than February 1, 1989.

ADDRESSES: Objections and answers to objections should be filed in Dockets 45904 and 45905 and addressed to the Documentary Services Division (C-55, Room 4107), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Mrs. Kathy Lusby Cooperstein, Air Carrier Fitness Division (P-56, Room 6420), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-9721.

Dated: January 17, 1989.

Gregory S. Dole,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 89-1384 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-62-M

Coast Guard

[CGD 89-002]

Meeting of the Subcommittee on Coal Transportation, Chemical Transportation Advisory Committee

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Subcommittee on Coal Transportation of the Chemical Transportation Advisory Committee (CTAC) will hold a meeting on Monday, February 27, 1989 and Tuesday, February 28, 1989 in Room 6200, Department of Transportation, Nassif Building, 400 Seventh Street SW., Washington, DC. The Subcommittee is considering requirements for the safe transportation of coal in ships and barges. The meeting on Monday is scheduled to begin at 12:30 p.m. and end at 5:00 p.m. This meeting will be used by the working groups on Coal Categorization, Equipment and Procedures, and Responsibilities of Masters, Shippers and Terminal Operators, to develop recommendations to be presented to the Subcommittee on Tuesday. The Meeting on Tuesday is scheduled to run from 9:30 a.m. until 5:00 p.m.

Attendance is open to the public. Members of the public may present oral statements at the meeting. Persons wishing to present oral statements should notify the Executive Director of CTAC no later than the day before the meeting. Any member of the public may present a written statement to the Subcommittee at any time.

FOR FURTHER INFORMATION CONTACT: Mrs. D. Anderson or Mr. F. Wybenga, U.S. Coast Guard Headquarters (G-MTH-1), 2100 Second Street, SW., Washington, DC 20593, (202) 267-1217.

Dated: January 11, 1989.

J.D. Sipes,

Rear Admiral, U.S. Coast Guard; Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 89-1387 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-14-M

National Highway Traffic Safety Administration

[Docket No. IP89-01; Notice 1]

Receipt of Petition for Determination of Inconsequential Noncompliance; Cooper Tire & Rubber Co.

Cooper Tire & Rubber Company (Cooper) of Findlay, Ohio, has petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for an apparent noncompliance with 49 CFR 571.119, Federal Motor Vehicle Safety Standard (FMVSS) No. 119, "New Pneumatic Tires for Vehicles Other Than Passenger Cars", on the basis that it is inconsequential as it relates to motor vehicle safety.

This Notice of receipt of a petition is published under Section 157 of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1417) and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Paragraph S6.5(d) of FMVSS No. 119 requires that tires be labeled with single and dual maximum load ratings. Cooper manufactured 208 tires between the 47th and 48th production weeks of 1988 that do not comply with paragraph S6.5(d).

These tires are labeled with the incorrect single and dual maximum loads. They are identified by the DOT Nos. UPORCLJ478 and UPORCLJ488.

The tires were labeled as follows:
Maximum load single, 1060 kg—2335 lbs.
Maximum load dual, 975 kg—2150 lbs.

The correct labeling is:
Maximum laod single, 1190 kg—2623 lbs.
Maximum load dual, 1080 kg—2381 lbs.

Cooper believes its noncompliance to be "inconsequential because the maximum load appearing on the tires is understated and the tires actually are capable of carrying the prescribed maximum loads."

Interested persons are invited to submit written data, view and arguments on the petition of Cooper Tire & Rubber Company, described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street SW., Washington, DC, 20590. It is requested but not required that five copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the petition is granted or denied, the Notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: February 22, 1989.

(Authority: Sec. 102, Pub. L. 93-492, 88 Stat. 1470 (15 U.S.C. 1417); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on: January 17, 1989.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 89-1385 Filed 1-19-89; 8:45 am]

BILLING CODE 4910-59-M

Research and Special Programs Administration

[Docket No. IRA-46]

Chemical Waste Transportation Council; Application for Inconsistency Ruling Concerning City of Montevallo, AL; Ordinance on Hazardous Waste Transportation

AGENCY: Research and Special Programs Administration, DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: The Chemical Waste Transportation Council (CWTC) has applied for an administrative ruling determining whether sections 7-40 through 7-50 of the City of Montevallo, Alabama Code are inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted under section 112(a) of the HMTA.

DATES: Comments received on or before March 10, 1989, and rebuttal comments received on or before April 28, 1989, will be considered before an administrative ruling is issued by the Director of the Office of Hazardous Materials Transportation. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comment received may be reviewed in the Dockets Unit, Research and Special Programs Administration, Room 8421, Nassif Building, 400 7th Street SW., Washington, DC 20590. Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number, IRA-46. Three copies are requested. A copy of each comment and rebuttal comment must also be sent to Suellen Pirages, Director, Chemical Waste Transportation

Council, Suite 1000, 1730 Rhode Island Avenue NW., Washington, DC 20036, and to Mayor Ralph W. Sears, City Hall, 53 S. Main Street, Montevallo, Alabama 35115, and that fact certified to at the time comment is submitted to the Dockets Unit. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Ms. Pirages and Mayor Sears at the addresses specified in the **Federal Register**.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street SW., Washington, DC 20590, telephone 202-366-4362.

SUPPLEMENTARY INFORMATION:

1. Background

The HMTA (49 App. U.S.C. 1801 et seq.) at section 112(a) (49 App. U.S.C. 1811(a)) expressly preempts "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or the HMR issued thereunder.

Procedural regulations implementing section 112(a) of the HMTA and providing for the issuance of inconsistency rulings are codified at 49 CFR 107.201 through 107.211. An inconsistency ruling is an advisory administrative opinion as to the relationship between a state or political subdivision requirement and a requirement of the HMTA or HMR. Section 107.209(c) sets forth the following factors which are considered in determining whether a state or local requirement is inconsistent:

(1) Whether compliance with both the state or local requirement and the HMTA or HMR is possible (the "dual compliance" test); and

(2) The extent to which the state or local requirement is an obstacle to the accomplishment and execution of the HMTA and the HMR (the "obstacle" test).

Inconsistency rulings do not address issues of preemption under the Commerce Clause of the Constitution or under statutes other than the HMTA.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978.

2. The Application for Inconsistency Ruling

On January 3, 1989, the CWTC applied for an inconsistency ruling concerning sections 7-40 through 7-50 of the Code of the City of Montevallo, Alabama. Those sections are reproduced in Appendix A to this Notice.

CWTC stated that it is a council of the National Solid Wastes Management Association. It also stated that several of its commercial firm members have operations in Alabama and transport hazardous waste by truck and rail from its point of generation to its "management destination." Specifically, CWTC stated that some of its members go through Montevallo, Alabama, to service small waste generating customers in the vicinity.

CWTC provided the following summary of the City Code provisions it is challenging:

> The City of Montevallo Code requires the driver and his employer of a motor vehicle carrying hazardous waste within the corporate limits of the City to notify the Montevallo Police Department by telephone prior to 8:00 a.m. on the day that the hazardous waste will be transported through the City (section 7-47(a)). The notification must include the number of vehicles expected; the approximate time, within one hour, of arrival at the City limits; and the road on which the vehicle will arrive. Upon arrival at the City limits, the motor vehicle must travel on designated routes (section 7-42), is limited to 30 miles per hour (section 7-43), is not allowed to follow within 150 feet of any other vehicle except if following a police vehicle (section 7-44), is prohibited from operating from 6:30 a.m. to 8:30 a.m. and from 2:00 p.m. to 3:30 p.m. (section 7-45)), and is prohibited from operating when the temperature is below 35 °F and when rain or other precipitation has occurred within two hours of arrival (secction 7-46(a)). This is a partial listing of the City requirements. A full text of the City Code is attached for your review.

CWTC contended in its application that its affected members will not be able to comply with both the City Code provisions and the HMTA and the HMR. In addition, it alleged that the City's requirements pose obstacles to the accomplishment and execution of the HMTA and the HMR.

In its application, CWTC advanced several arguments against the consistency of the City's requirements. First, citing Inconsistency Ruling No. IR-2, 45 FR 71881 (Oct. 30, 1980), *correction* 45 FR 76838 (Nov. 20, 1980), and IR-3, 46 FR 18918 (Mar. 26, 1981), *appeal* 47 FR 18457 (Apr. 29, 1982), it argued that sections 7-43, 7-44, 7-45 and 7-46(a) are inconsistent because they would cause transportation delays.

Second, citing IR-23, 53 FR 16840 (May 11, 1988), CWTC argued that the routing requirements of section 7-42 are inconsistent because they discriminate against hazardous materials which happen to be in a waste form and were not (according to the City Attorney, CWTC claims) based on a complete safety analysis or preceded by consultations with all affected jurisdictions—but instead allegedly were imposed in an effort to thwart the siting of a hazardous waste incinerator.

Third, citing IR-6, 48 FR 760 (Jan. 6, 1983), CWTC contended that advance notice requirements such as those in section 7-47(a) generally are inconsistent.

3. Public Comment

Comments should be limited to the issue of whether the requirements of sections 7-40 through 7-50 of the City of Montevallo, Alabama, are inconsistent with the HMTA or the HMR. They should specifically address the "dual compliance" and "obstacle" tests described above under "Background."

Persons intending to comment on the application should examine the complete application in the RSPA Dockets Branch, Appendix A to this Notice, and the procedures governing the Department's consideration of applications for inconsistency rulings (49 CFR 107.201-107.211).

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

Issued in Washington, DC on January 13, 1989.

Appendix A—Montevallo City of Code of 1982

Section 7-40: The Montevallo City Council finds that the transportation of hazardous wastes on the streets of the City of Montevallo poses a danger to the physical welfare of the citizens, property, and waters of the City of Montevallo; and to minimize this danger adopts section 7-41 to section 7-50.

Section 7-41: Definitions: For the purposes of section 7-40 to section 7-49 the following terms shall mean:

(a) "Waste" means "solid waste" under regulations promulgated by the United States Environmental Protection Agency and codified at 40 CFR 261.2. 40 CFR 261.2 is incorporated by reference herein.

(b) "Hazardous waste" means a waste or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed, and includes:

(1) The meaning assigned that term in regulations promulgated by the United States Environmental Protection Agency and codified at 40 CFR 261.3. 40 CFR 261.3 is incorporated herein by reference. All lists in 40 CFR Part 261, Subpart D, and the Appendices to Part 261 are also expressly incorporated by reference.

(2) The term "high-level waste," as defined by the United States nuclear regulatory commission and Article II(d) of the Southeast Interstate Low-Level Radioactive Waste Management Compact.

(3) The term "low-level radioactive waste" as defined in Article 11(f) of the Southeast Interstate Low-Level Radioactive Waste Management Compact.

(4) The term "transuranic waste" as determined by the regulations of the United States nuclear regulatory commission.

(5) Spent nuclear fuel or by-product material as defined in section 11e(2) of the Atomic Energy Act of 1954.

(6) Any substance on the Alabama substance list, promulgated by the Alabama Department of Environmental Management, acting through the environmental management commission pursuant to section 22-33-4 of the 1975 Alabama Code.

(7) Any substance or mixture containing polychlorinated biphenyls ("PCBs") at greater than one tenth of one percent concentration when such substance or mixture is not intended for beneficial use or reuse.

(8) "Source material," including uranium, thorium, and any other material determined to be source material by the United States nuclear regulatory commission.

(9) "Special nuclear material," including plutonium, uranium 233, uranium enriched in the isotope 233 or in the isotope 235, any material artificially enriched by any of the foregoing, and any other material determined to be special nuclear material by the United States nuclear regulatory commission.

(c) "Storage" means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, moved, or stored elsewhere.

Section 7-42: Many of the streets of Montevallo being narrow and bending and not generally designed to accommodate heavy or constant truck traffic, the City Council hereby designates the following streets for transportation by truck or other vehicle of hazardous waste:

(i) Alabama 25
(ii) Alabama 119
(iii) Alabama 155

(b) All other streets are barred to any vehicle carrying hazardous waste, except by order of the Montevallo Police Department.

Section 7-43: Motor vehicles carrying hazardous waste within the City of Montevallo are hereby limited to 30 miles per hour (mph).

Section 7-44: No hazardous waste-carrying vehicle shall follow within 150 feet of any other vehicle when within the City limits, *provided*, that this section shall not apply to vehicles following state, county, or city police vehicles.

Section 7-45: Vehicles carrying hazardous waste shall not operate from 6:30 to 8:30 a.m. or from 2 to 3:30 p.m.

Section 7-46: (a) No vehicle carrying hazardous wastes may operate when the temperatures are below 35 °F (2 °C) and rain or other precipitation has occurred within the last two hours.

(b) No vehicle carrying hazardous wastes may be operated during any officially-designated hurricane or tornado watch.

(c) All vehicles carrying hazardous waste in the City of Montevallo shall operate with their headlights on at all times.

(d) All vehicles carrying hazardous waste in the City of Montevallo shall be equipped with citizens band radios, and shall monitor Channel 9.

Section 7-47: The driver, and his employer, of any vehicle carrying hazardous waste who proposes to transport hazardous wastes into or through the City of Montevallo shall:

(a) Notify the Montevallo Police Department by telephone prior to 8:00 am on the day that any such driver or employer expects to transport hazardous waste through the City of Montevallo. If more than one vehicle is expected, the employer shall state in one call the expected number. The approximate time(s) of arrival at the city limits, within one hour, shall be given. The road(s) on which the vehicle(s) will arrive shall be given and may not be changed without one hour's further notification.

(b) Mark or placard each vehicle in accordance with the requirements of the United States Department of Transportation.

Section 7-48: (a) Each vehicle shall carry and have available for inspection the manifest required for transportation of hazardous wastes under the Resource Conservation and Recovery Act, or federal or state regulations implementing that Act. Such manifest shall be presented upon request of any Montevallo police officer.

(b) Each driver of any vehicle shall immediately report any accident or collision involving his vehicle to the Montevallo police via his two-way CB radio.

(c) Every driver shall carry in his possession a valid driver's license and evidence of liability insurance covering the consequences of cargo spills.

Section 7-49: The storage of hazardous waste within the City of Montevallo is prohibited, except that materials defined as hazardous waste may be used for education or research in an accredited school or University, except that such materials may be used for industrial processes in industries operating within the city before the enactment of this ordinance, except that dry cleaning establishments and gasoline stations may continue their normal activities, and except by special permission of the city. The disposal of hazardous waste within the City of Montevallo is entirely prohibited.

Section 7-50: Section 7-40 to Section 7-49 are subject to, and meant to complement, federal and state legislation and regulations.

[FR Doc. 89-1386 Filed 1-19-89; 8:45 am]
BILLING CODE 4960-10-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[Delegation Order No. 244]

Delegation of Authority; Taxpayer Ombudsman and Problem Resolution Officers

AGENCY: Internal Revenue Service.

ACTION: Delegation of authority.

SUMMARY: The Commissioner of Internal Revenue Service delegates to the Taxpayer Ombudsman and Problem Resolution Officers the authority to substantiate taxpayer credits, to approve replacement checks and to abate certain penalties. The text of the delegation order appears below.

EFFECTIVE DATE: January 24, 1989.

FOR FURTHER INFORMATION CONTACT: James Hughes, C:PRP, Room 1023, 1111

Constitution Avenue, NW., Washington, DC 20224, Telephone: (202) 566-4946 (not a toll-free telephone number).

Damon O. Holmes,

Taxpayer Ombudsman.

Effective Date: January 24, 1989.

Authority of the Taxpayer Ombudsman and Problem Resolution Officers To Approve Replacement Checks, to Substantiate Credits, and To Abate Penalties

Pursuant to the authority vested in the Commissioner of Internal Revenue by Treasury Order No. 150-10, authority is hereby delegated to the Taxpayer Ombudsman and to Problem Resolution Officers (PROs) as follows:

1. To approve replacement checks for lost or stolen refunds without a credit balance on an account where hardship or unreasonable delay exists.

2. To substantiate credits to taxpayer accounts on those Problem Resolution Program (PRP) cases where a taxpayer furnishes proof of payment but the Service cannot locate the payment within a reasonable period of time.

3. To abate for reasonable cause Form W-4 civil penalties assessed per IRC Sec. 6682.

4. To abate for reasonable cause all automatically assessed penalties.

The above authorities shall be exercised only after compliance with all requirements of existing procedures for review.

The authority delegated herein may not be redelegated.

To the extent that the authority previously exercised consistent with this order may require ratification, it is hereby approved and ratified.

Approved:

Michael J. Murphy,

Senior Deputy Commissioner.

Date: January 4, 1989.

[FR Doc. 89-1240 Filed 1-19-89; 8:45 am]

BILLING CODE 4830-01-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 13
Monday, January 23, 1989

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).

BLACKSTONE RIVER VALLEY NATIONAL HERITAGE CORRIDOR

Meeting

Notice is hereby given in accordance with section 552b of Title 5, United States Code, that a meeting of the Blackstone River Valley National Heritage Corridor Commission will be held on Saturday, January 28, 1989.

The Commission was established pursuant to Pub. L. 99-647. The purpose of the Commission is to assist federal, state and local authorities in the development and implementation of an integrated resource management plan for those lands and waters within the Corridor.

The meeting will convene at 12:00 noon at the Lincoln Public Library, Old River Road, Lincoln, Rhode Island, for the following reasons:

1. Executive Director Selection Subcommittee status report and recommendation of a candidate for permanent Executive Director, followed by discussion and resolution by the Commission.

2. Public Information and Education Subcommittee status report of the logo development.

3. Agenda for a Commission status report to the Massachusetts and Rhode Island Congressional delegations.

4. Status report of the Treasurer on the status of funds.

5. Status report of the Ad Hoc Subcommittee on headquarters site selection.

It is anticipated that about twenty people will be able to attend the session, in addition to the Commission members.

Interested persons may make oral or written presentations to the Commission or file written statements. Such requests should be made prior to the meeting to: Lawrence D. Gall, Interim Executive Director, Blackstone River Valley National Heritage Corridor Commission, P.O. Box 34, Uxbridge, MA 01569, Telephone (508) 278-2143.

Further information concerning this meeting may be obtained from Lawrence Gall, Interim Executive Director of the Commission at the address below.

Lawrence D. Gall,
Interim Executive Director, Blackstone River Valley National Heritage Corridor Commission.

[FR Doc. 89-1502 Filed 1-18-89; 3:50 pm]

BILLING CODE 4310-70-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: 2:00 p.m. (Eastern Time) Monday, January 30, 1989.

PLACE: Clarence M. Mitchell, Jr., Conference Room, No. 200-C on the Second Floor of the Columbia Plaza Office Building, 2401 "E" Street, NW., Washington, DC 20507.

STATUS: Part of the Meeting will be Open to the Public and Part will be Closed to the Public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Vote(s).
2. Notice of Proposed Rulemaking Concerning ADEA Statute of Limitations Tolling for Private Litigants.
3. Regulations Implementing Section 504 of the Rehabilitation Act in the Commission's Federally Conducted Programs: Final Rule.

Closed Session

Litigation Authorization: General Counsel Recommendations.

Note.—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 634-6748 at any time for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Frances M. Hart, Executive Officer on (202) 634-6748.

Date: January 18, 1989.

Frances M. Hart,
Executive Officer, Executive Sescretariat.

This Notice Issued January 18, 1989.

[FR Doc. 89-1452 Filed 1-18-89; 12:30 pm]

BILLING CODE 6750-06-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, January 25, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Request by the General Accounting Office for Board comment on a draft report regarding competitive fairness in the check collection system.

2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: January 18, 1989.

William W. Wiles,
Secretary of the Board.

[FR Doc. 89-1453 Filed 1-18-89; 12:32 pm]

BILLING CODE 6210-01-M

LEGAL SERVICES CORPORATION TASK FORCE ON CLIENT BOARD MEMBER TRAINING MEETING

TIME AND DATE: The Task Force on Client Board Member Training will meet on January 26, 1989. The meeting will commence at 2:00 p.m. and continue until 5:00 p.m.

PLACE: The Washington Marriott Hotel, West End Ballroom A, 1221 22nd Street NW., Washington, DC 20037.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED: 1. Client Board Member Training.

Discussion and Public Comment to follow.

CONTACT PERSON FOR MORE INFORMATION: Maureen R. Bozell, Executive Office, (202) 863-1839.

DATE ISSUED: January 18, 1989.

Maureen R. Bozell,
Secretary.

[FR Doc. 89-1516 Filed 1-18-89; 3:50 pm]

BILLING CODE 7050-01-M

LEGAL SERVICES CORPORATION AUDIT AND APPROPRIATIONS COMMITTEE MEETING

TIME AND DATE: The meeting will be held on Friday, January 27, 1989, commencing at 9:00 a.m. and continuing until 11:00 a.m.

PLACE: The Washington Marriott Hotel, West End Ballroom A, 1221 22nd Street NW., Washington, DC 20037.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda.
2. Approval of Minutes—December 10, 1988.
3. Presentation of the Corporation's Audit Report.
4. Presentation of the Final Consolidated Operating Budget for FY 1988.
5. Allocation of FY 1988 Carryover Funds.
6. Discussion of the Corporation's FY 1989 Consolidated Operating Budget.
7. Review of Monthly Expenditures.

Discussion and Public Comments follow each item.

CONTACT PERSON FOR MORE INFORMATION: Maureen R. Bozell, Executive Office, (202) 863-1839.

DATE ISSUED: January 18, 1989.

Maureen R. Bozell,

Secretary.

[FR Doc. 89-1517 Filed 1-18-89; 3:50 pm]

BILLING CODE 7050-01-M

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS MEETING

TIME AND DATE: The Board of Directors will be held on January 27, 1989. The meeting will commence at 11:00 a.m., or immediately following the previous meeting, and continue until 5:00 p.m., with as luncheon recess from 12:30 p.m. until 1:30 p.m.

PLACE: The Washington Marriott Hotel, West End Ballroom A, 1221 22nd Street NW., Washington, DC 20037.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda.
2. Approval of Minutes—December 10, 1988.
3. Report from the President.
4. Report from the Audit and Appropriations Committee, Ratification of the Corporation's Consolidated Operating Budget.
5. Report from the Operations and Regulations Committee on Considerations of Part 1626, Restrictions on Legal Assistance to Aliens; and Part 1609, Fee Generating Cases.
6. Report from the Task Force on Client Board Member Training.

Discussion and Public Comment follow each item.

CONTACT PERSON FOR MORE INFORMATION: Maureen R. Bozell, Executive Office, (202) 863-1839.

DATE ISSUED: January 18, 1989.

Maureen R. Bozell,

Secretary.

[FR Doc. 89-1518 Filed 1-18-89; 3:50 pm]

BILLING CODE 7050-01-M

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Previously Held Emergency Meeting

TIME AND DATE: 10.05 a.m., Wednesday, January 18, 1989.

PLACE: 1776 G Street NW., Filene Board Room, 7th Floor, Washington, DC 2045.

STATUS: Closed.

MATTER CONSIDERED:

1. Administrative Action under section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (8), (9)(A)(ii), and (9)(B).

The Board voted unanimously that Agency business required that a meeting be held with less than the usual seven days advance notice.

The Board voted unanimously to close the meeting under exemptions (8), (9)(A)(ii), and (9)(B). Deputy General Counsel James Engel certified that the meeting could be closed under those exemptions.

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (202) 682-9600.

Becky Baker,

Secretary of the Board.

[FR Doc. 89-1503 Filed 1-18-89; 3:50 pm]

BILLING CODE 7535-01-M

SECURITIES AND EXCHANGE COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [54 FR 887 January 10, 1989].

STATUS: Closed meeting.

PLACE: 450 Fifth Street NW., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Wednesday, January 4, 1989.

CHANGES IN THE MEETING: Additional meeting.

The following item was considered at a closed meeting scheduled on Wednesday, January 11, 1989, at 5:00 p.m.: Litigation matter.

Commissioner Grundfest, as duty officer, determined that Commission business required the above change.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Alden Adkins at (202) 272-2000.

Jonathan G. Katz,

Secretary.

January 13, 1989.

[FR Doc. 89-1410 Filed 1-17-89; 4:32 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 54, No. 13
Monday, January 23, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 799

[OPTS-42092A; FRL-3503-7]

Testing Consent Order on Alkyl Phthalates

Correction

In rule document 89-299 beginning on page 618 in the issue of Monday, January 9, 1989, make the following corrections:

1. On page 620, in the fourth column of the table, the first entry should read "January 9, 1989".
2. On page 621, in the fourth column of the table, the 1st entry should read "January 9, 1989"; and the 2nd through the 12th entries should read "Do".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 799

[OPTS-42071B; FRL-3503-6]

Testing Consent Order for Octamethylcyclotetrasiloxane

Correction

In rule document 89-298 beginning on page 818 in the issue of Tuesday, January 10, 1989, make the following corrections:

On page 821, in the fourth column of the table, the first and second entries should read "January 10, 1989".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-180795; FRL 3491-1]

Emergency Exemptions

Correction

In notice document 88-28644 beginning on page 50289 in the issue of Wednesday, December 14, 1989, make the following corrections:

1. On page 50289, in the 2nd column, under **SUMMARY**, in the 17th line, "time" should read "timing".
2. On page 50290, in the first column, in the second line from the bottom, "methol" should read "menthol".

BILLING CODE 1505-01-D

federal register

Monday
January 23, 1989

Part II

Environmental Protection Agency

40 CFR Parts 260, 261, 262, 264, 265, 268 and 270

Hazardous Waste Management System; Testing and Monitoring Activities; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 262, 264, 265, 268 and 270

[FRL-3394-4]

Hazardous Waste Management System; Testing and Monitoring Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is today proposing to revise certain testing methods that are approved or required under Subtitle C of the Resource Conservation and Recovery Act (RCRA). EPA is also proposing to add several new testing methods that can be used to comply with the requirements of Subtitle C of RCRA. These new and revised methods are found in the Third Edition of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," SW-846 and the first update package to this Third Edition of SW-846. The Agency is also proposing to make specified Quality Control (QC) procedures mandatory for all testing conducted under the hazardous waste regulations of RCRA. These Quality Control procedures are also found in the Third edition of SW-846. Some modifications have also been made to Chapter One of the manual to provide clarification of definitions. The modified sections of Chapter One are found in the first update package to the Third Edition of SW-846, which is also being proposed in today's rule. The revisions to Chapter One contained in this first update package are given in Appendix A of this proposed rule. The appendix has been added to this proposed rule in order to provide the public with the specific language that will be substituted for the language currently found in Chapter One of the SW-846 manual. Today's action is necessary to provide better and more complete analytical test methods for RCRA-related testing and to document the quality of the data gathered for complying with the RCRA hazardous waste regulations. This proposed rule will provide more reliable analytical data and promote consistency in the analytical test methods used for compliance with RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

DATE: Comments on this proposed rule must be submitted on or before March 9, 1989.

ADDRESS: The public should submit an original and two copies of their comments on this proposed rule to: Docket Number F-89-WTMP-FFFFF, EPA RCRA Docket, OS-305 (Room SE-205), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Please place Docket number on all comments. The EPA RCRA Docket is located in the sub-basement at the above address and is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, except Federal holidays. The public must make an appointment to review docket materials by calling (202) 475-9327. The public may copy 100 pages of material from any one regulatory docket at no cost; additional copies cost $0.15 per page.

Copies of the Third Edition of SW-846 and of the proposed first update to the Third Edition are available from the Government Printing office, Superintendent of Documents, Washington, DC 20402, (202) 783-3238. The document number is 955-001-00000-1 and the cost is $110.00 for the four-volume set plus updates. Update packages will be automatically mailed to all subscribers. Non-subscribers may order the proposed first update package by calling the RCRA Hotline at (800) 424-9346 (toll free) or (202) 382-3000, or by writing the Communications and Training Section, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The requester must specify the appropriate document title, document number and "First Update Package."

Copies of the Second Edition of SW-846 are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, (703) 487-4600. The document number is PB87-120-291 and the cost is $48.95 for paper copies and $13.50 for microfiche.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline at (800) 424-9346 (toll free) or (202) 382-3000. For information on the technical aspects of this proposed rule contact Charles Sellers, Office of Solid Waste, OS-331, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-3282.

SUPPLEMENTARY INFORMATION:

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I. Background

On October 1, 1984 (49 FR 33786-33812), EPA proposed several changes to the RCRA hazardous waste regulations. These proposed changes included the following elements:

(1) Addition of new methods to SW-846.

(2) Mandatory adherence to the procedures and methods in SW-846 for all RCRA testing.

(3) Elimination of requirements to test for certain compounds when conducting ground water monitoring.

(4) Use of screening tests when monitoring ground water for hazardous constituents.

(5) Use of the Hierarchical Analysis Procedure for ground water screening.

Many comments were received on the proposal. The Agency evaluated these comments and, as a result, decided not to promulgate the October 1, 1984, proposal. Instead, the Agency revised SW-846 to incorporate many of the suggestions made in the comments and undertook other actions to address changes to the ground water monitoring regulations. On March 16, 1987, EPA announced the availability of the Third Edition of SW-846 in the **Federal Register** (50 FR 8072). The Third Edition contains 72 methods that are new to SW-846. Of these, 43 will be finalized in a soon to be released rulemaking and will be acceptable for use, where required in 40 CFR Parts 260 through 270, in conjunction with, or in addition to, the Second Edition of SW-846 as amended by Updates I and II. These 43 methods were first proposed in the 1984 Notice of Proposed Rulemaking (NPRM), and are not being reproposed in today's rulemaking. However, of the remaining methods, 28 methods not previously proposed for RCRA testing are being proposed, and one other method is being reproposed by the Agency in today's rulemaking.

Upon review and following comments and questions received from the public, it was determined that several errors existed in the manual. Comments also indicated the need to provide additional and improved analytical test methods for RCRA-related testing. To alleviate confusion arising from errors or confusing language in the test methods, an update package with revisions and

clarifications was deemed necessary. Thus, the Agency is also proposing the use of the first update package to the Third Edition, along with the Third Edition in today's rulemaking. The first update package contains revisions to methods in the Third Edition, as well as 14 methods that are new to SW-846. Of these, four will be finalized in a soon to be released rulemaking and will be acceptable for use, where required in 40 CFR Parts 260 through 270, in conjunction with, or in addition to, the Second Edition of SW-846 as amended by Updates I and II. These four methods were first proposed in the 1984 NPRM, and are not being reproposed in today's rulemaking. However, the remaining ten methods not previously proposed for RCRA testing, are being proposed by the Agency in today's rulemaking.

Promulgation of this proposal will allow the use of the Third Edition as revised by the first update package for all testing for which the Second Edition methods are mandated by current RCRA regulations (see PROPOSAL, Regulatory Status of the Third Edition) and will mandate certain Quality Control procedures detailed in Chapter One of the Third Edition and revised in the first update.

II. Proposal

A. Methods Substitutions

The Agency is today proposing to replace the SW-846 Second Edition methods with the versions contained in the Third Edition and the first update package. These replacements will allow the Third Edition as revised by the first update to be used for all RCRA testing. The Agency is making this substitution because it believes that the Third Edition and first update methods are improvements on those in the Second Edition. (See the Background Document included in the docket to this proposal for a specific discussion of these changes and why they are improvements.)

B. Methods Format

Comments on the October 1, 1984, **Federal Register** proposal also indicated that the Second Edition method formats were inconsistent and difficult to follow. The Agency agreed with these comments and made changes accordingly. The methods were reviewed by a work group composed of technical experts from within EPA and state hazardous waste testing programs. One of the aims of their efforts was to edit the text for technical clarity. The method formats were revised and standardized into the following format:

1.0 Scope and Application.
2.0 Summary.
3.0 Interferences.
4.0 Apparatus and Materials.
5.0 Reagents.
6.0 Sample Collection, Preservation, and Handling.
7.0 Procedure.
8.0 Quality Control.
9.0 Method Performance.
10.0 References.

Section 9.0, Method Performance, is new to the Manual. It contains available method precision and accuracy data. Such data are not available for all methods; however, the Agency is continuing its data gathering effort and will provide the data as they become available in future updates.

Comments also noted that detailed procedures and instrument calibration procedures were not consistent between the EPA solid waste management programs (i.e., RCRA and CERCLA), even when essentially identical methods were used. The Office of Solid Waste (OSW), therefore, worked with the CERCLA program to make the methods used in the two programs as consistent as possible. Particularly, OSW changed standards and surrogates, calibration procedures, and gas chromatographic (GC) analysis conditions of the gas chromatographic/mass spectrometric (GC/MS) methods.

In order to save space and eliminate duplication of information, each group of methods that applies to a specific class of analytes or concerns a general analytical technique (e.g., atomic absorption spectroscopy) is preceded by a general method that contains common information and analytical guidance. Thus, information is not repeated in the detailed directions for each analyte.

The comments also contained many requests for additional guidance on method selection. EPA responded by including a new chapter in the Third Edition. This chapter, "Choosing the Correct Procedure," aids the analyst in choosing appropriate methods for samples based on sample matrix, properties to be measured, and the regulations requiring the analysis. For example, an analysis scheme is presented for determining Appendix IX analytes in ground water. It give advice on suitable, cost-effective SW-846 methods for the volatile and semi-volatile organic analytes, taking into account the sample matrix and the regulatory requirements.

C. Regulatory Status of The Third Edition

The hazardous waste regulations under Subtitle C of RCRA require that specific testing methods described in the Second Edition of SW-846 be employed for certain applications. The following sections of 40 CFR require the use of SW-846 methods:

(1) Section 260.22(d)(1)(i)—Submission of data in support of petitions to exclude a waste produced at a particular facility.

(2) Section 261.22(a)—Evaluation of wastes against the Corrosivity Characteristic.

(3) Section 261.24(a)—Evaluation of wastes against the Extraction Procedure Toxicity Characteristic.

(4) Sections 264.314(a) and 265.314(d)—Evaluation of wastes to determine if free liquid is a component of the waste.

(5) Section 270.62(b)(2)(i)(C)—Analysis of wastes prior to conducting a trial burn in support of an application for a hazardous waste incineration permit.

The Agency is today proposing to replace the Second Edition methods with the Third Edition methods as revised by the first update package to the Third Edition for the reasons discussed previously (see PROPOSAL, Methods Substitutions).

D. Quality Control

EPA is today proposing to make selected Quality Control (QC) procedures in Chapter One of SW-846 (specifically Sections 1.2 and 1.3 and procedures referenced therein) mandatory for all RCRA testing. Chapter One has been modified in order to provide consistency and clarification of definitions within the regulatory community as well as the SW-846 manual. These modifications are contained in the first update to the Third Edition, also proposed in today's rule and are republished in Appendix A of this **Federal Register** Notice.

Appendix A has been added to this proposed rule in order to provide the public with the specific language that will be substituted for the language found in Chapter One of the Third Edition of the SW-846 manual. Additional information regarding the rationale for the first update's revisions to Chapter One proposed in today's rule and published in Appendix A of this **Federal Register** notice, is included in the docket to this proposed rule. These QC procedures are proposed to be mandatory for all chemical analyses required under RCRA regulations codified in 40 CFR Parts 260, 261, 262, 264, 265, 268, and 270 regardless of whether or not SW-846 analytical methods are used. Thus, the QC procedures are proposed to be mandatory for required RCRA analyses under these Parts when SW-846 analytical methods are used, whether or

not use of these methods are mandatory under the applicable RCRA regulations and where a method other than an SW-846 method is used. The Agency thus intends to document the quality of data generated to determine compliance with the RCRA hazardous waste regulations.

EPA is proposing to mandate the QC procedures which are contained in Section 1.2, (which discusses field and analytical laboratory QC), and Section 1.3 (which discusses method detection limits), as well as the procedures referenced in these two sections.

The other sections of Chapter One (1.1 Introduction, 1.4 Data Reporting, 1.5 Quality Control Documentation, and 1.6 References) do not contain QC procedures. They are included for completeness but are offered only as guidance. Many of the proposed mandated QC procedures listed in Section 1.2 and 1.3 are described more fully in Section 8.0 of the applicable SW-846 method located in later chapters of the manual. For example, while instrument calibration is mandated in Section 1.2.2.3.2, the diversity of calibration techniques which are peculiar to specific instruments and procedures, precludes the incorporation of all the calibration techniques described in the different methods set forth in Chapters Three through Eight and Ten of SW-846. Therefore, the reader is referred by Sections 1.2 and 1.3 to the applicable QC procedures contained in Section 8.0 of the applicable RCRA test method in these chapters of SW-846. These referenced procedures found in Section 8.0 of each test method shall also be mandatory when an SW-846 method is used. When an SW-846 method is not used, the referenced procedures located in Section 8.0 of the methods shall, of course, not be mandatory. QC sections in Chapter One, other than Sections 1.2 and 1.3 and those in other parts of the manual are offered only as guidance.

The Agency's philosophy is that a QC program must begin at the inception of a project, continue through collection and storage of samples, include all phases of chemical analyses, and extend through the interpretation and compilation of data results. Two basic concepts used in a QC program are to: (1) Control errors, and (2) verify that the entire analytical method is operating within acceptable performance limits. Use of qualified personnel, reliable and well-maintained equipment, appropriate calibrations and standards, and close supervision of all operations are important components of the QC system.

Some aspects of such a QC program are to: (1) Use matrix spikes and surrogates to provide a means for generating accurate analytical data of documented quality to determine that the required sensitivity is being achieved; (2) use duplicates to indicate the existence of gross errors; (3) use field QC to show that the sample is free from contamination errors introduced in sampling and handing; (4) use standard curves and check samples to indicate proper instrument calibration; and (5) use detection and quantification limit criteria to show that the method detection limit was adequate to detect analytes at or below a regulatory threshold and assist in the identification of possible sources of error and laboratory problems. A quality-control program can be divided into two main categories: (1) Field Quality Control and (2) Laboratory Quality Control.

1. Field Quality Control

It is the intention of the Agency to mandate the QC procedures in Section 1.2.1 of SW-846 in order to eliminate improper sampling and handling techniques and, thus, minimize potential errors that could skew data results. Areas of concern in field QC include sampling techniques; documentation of pre-field, field, and post-field activities; and generation of QC samples such as field duplicate samples (taken from the same sampling point in the field), trip blanks, field blanks and equipment blanks. Quality control in these areas is necessary to document that sampling equipment is properly calibrated, containers are appropriately prepared, representative samples are taken, and proper shipping procedures are followed.

This section of SW-846 mandates that documentation of compliance with the requirements for field activities be maintained and made available upon request.

2. Analytical Laboratory Quality Control

Section 1.2.2 discusses analytical laboratory QC procedures. The QC procedures described are intended to be applied to all chemical analytical procedures. The purpose of laboratory QC is to provide information about the quality of the data as they are being produced. Data quality is usually expressed in terms of accuracy, precision, and detection limit of the analytical method. Accuracy is a measurement of the closeness of an individual measurement, or an average of a number of measurements to the true value. Accuracy is generally represented as percent recovery.

Precision is defined as a measure of reproducibility among individual measurements of the same analyte under specified conditions. Instrument and overall method precision are often expressed as the coefficient of variation, standard deviation, percent difference, and/or relative standard deviation. The sections on precision are currently included in the interest of completeness. The Agency is not seeking to mandate the determination of precision in this rulemaking since significant precision data cannot be obtained from the analysis of one replicate or duplicate as proposed here. The Agency is soliciting comment on appropriate ways to determine method precision in the sample matrix, especially when the number of samples in the batch is limited.

More accurate results may be obtained by instituting a QC program which demands that the degree of variability of all operating parameters that are under the control of the analyst be kept within the control limits. However, the QC system does not ensure this. Results from QC procedures are used to document data quality, to verify that the analytical system is working well on a given matrix/analyte combination, to indicate whether instruments are operating properly, and to indicate when additional sample cleanup or other corrections need to be made. The QC data are indicators, but themselves do not change the quality of the analytical data.

Table 1 contains analytical QC requirements and their frequency of application. It also clarifies some of the terms used in Sections 1.2 and 1.3 of Chapter One. The QC requirements in Table 1 will produce qualitative and quantitative information about the generated data. If the QC data indicate that any aspect of the system is out of control, measures must be taken to bring it back into control. The Agency is considering including the use of control charts in the QC requirements and invites comments.

Standard curves covering the analytical range of interest for calibrating analytical instruments are required to define the linear calibration range which can be used for environmental sample analyses.

GC/MS Quality Control presents slightly expanded method-specific requirements that are necessary to guarantee proper determination and identification of the analytes. This involves special instrument tuning, verification of retention times, mass spectral correlation with an authentic standard of a particular analyte, and the use of surrogates. These QC procedures are found in the individual methods.

All QC data must be recorded and maintained by the laboratory for later

verification and must be available upon request for a period of 3 years from the date the data are reported.

TABLE 1—QC REQUIREMENTS AND FREQUENCY OF APPLICATION

QC Parameter	Frequency	Comments
Matrix spikes	One per analytical batch per matrix or every 20 samples, whichever is greater.	
Replicates (See Figure 1).	One per analytical batch per matrix or every 20 samples, whichever is greater.	Replicate samples are separate aliquots taken from the same sample container in the laboratory and analyzed independently. Evaluation of replicate data can indicate the existence of gross errors in the analysis. In cases where aliquoting is impossible (i.e., volatiles), duplicate samples must be taken for replicate analysis.
Blanks	One per analytical batch per matrix or every 20 samples, whichever is greater.	
Field duplicates (See Figure 1).	One per analytical batch per matrix or every 20 samples, whichever is greater.	Field duplicate samples are two separate samples taken from the same sampling point in the field (i.e., in separate containers and analyzed independently). Evaluation of duplicate data can indicate the existence of gross errors in the sampling technique.
Check standard	One per analytical batch or every 20 samples, whichever is greater.	
Surrogates	Add prescribed surrogates to every blank, standard, sample and QC sample.	Only for volatile and semi-volatile organics and pesticides.
Column check sample.	One per batch of adsorbent	Applies to adsorbent chromatography and back extractions of organic compounds.
Column check sample blank.	One per batch of adsorbent	Applies to adsorbent chromatography and back extractions of organic compounds.
Standard curves.	Refer to specific method for necessary periodic calibration	As prescribed by specific methods.
GC/MS instrument performance check.	Initial 5-point calibration is to be verified with a single point calibration once every 12 hrs of instrument operation and if the sensitivity and linearity criteria are not met, a new 5-point initial calibration must be generated.	Performed to meet tuning criteria of the instrument as specified in the GC/MS methods. Organic analytes shall be checked with a 4-bromofluorobenzene (BFB) for determination of volatiles and with decafluorotriphenylphosphine (DFTPP) for determination of semi-volatiles.

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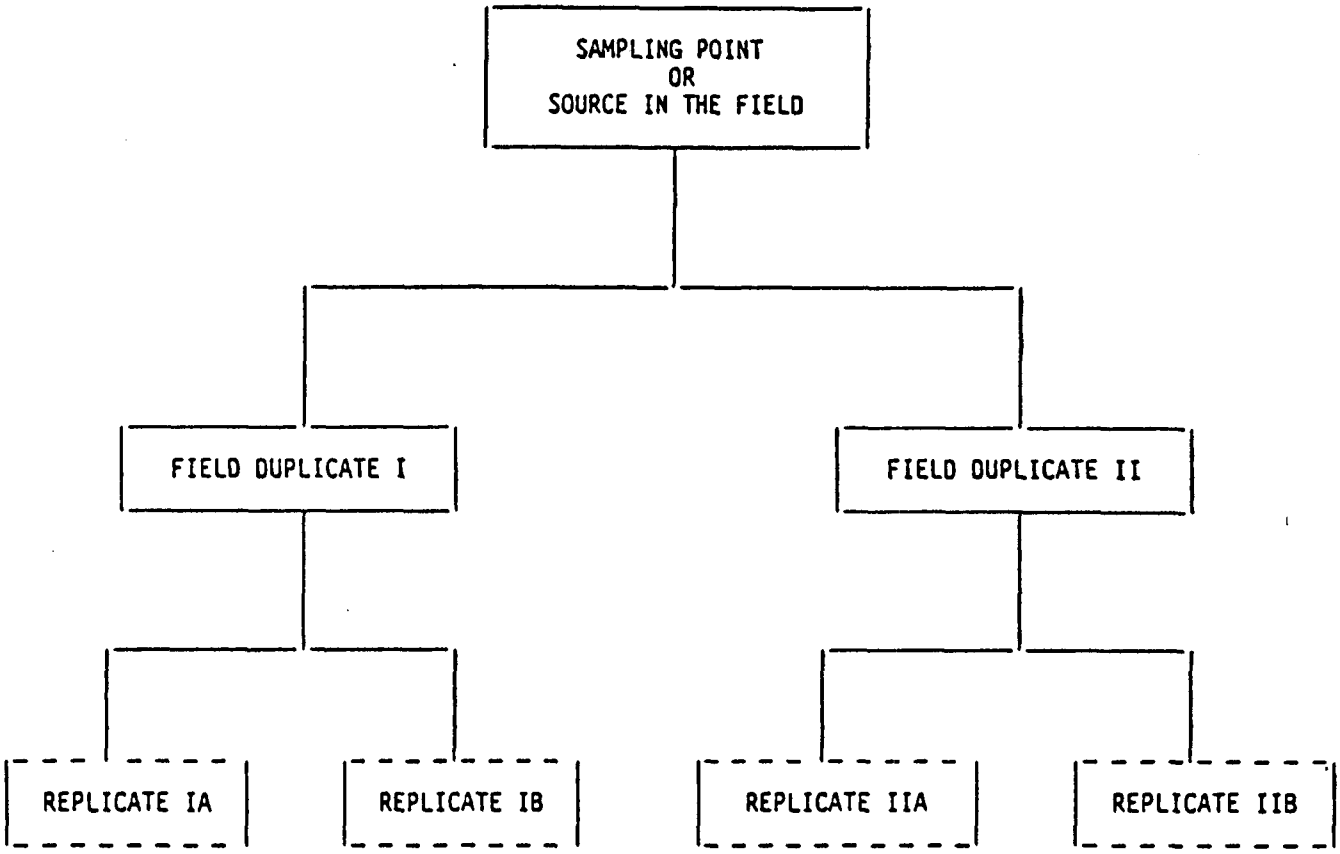

Figure 1. Sampling Chart for Field Duplicates and Replicates.

_____ Collected in the field

- - - - - - Analyzed in the laboratory

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When the analytical data are used to demonstrate compliance with a regulation, Data Quality Objective, or other study objective, any and all values reported as less than a specified regulatory threshold must be verified. If no regulatory threshold is mandated for the analyte of interest, any and all values reported as less than the method detection limit must be verified. The analyst must demonstrate the method's ability to detect the analyte of concern in the sample matrix. This is accomplished using a "clean" sample; for example, tint base would be a suitable "clean" representative matrix when testing paint waste; or upgradient ground water (from the same aquifer) could be a suitable "clean" representative matrix when testing monitoring well samples.

E. Methods Inclusion and Exclusion

The majority of the methods proposed for addition to SW-846 on October 1, 1984, are included in the Third Edition of SW-846. Some proposed methods and some methods in the Second Edition are not included because problems were encountered during their evaluation. Data generated by the public and by EPA demonstrated that the methods could not be used in their published form for the purpose stated in the method. These methods are listed in Table 2. More detailed information can be found in the technical support document, which is located in the EPA RCRA Docket F-89-WTMP-FFFFF.

TABLE 2.—METHODS NOT INCLUDED IN THE THIRD EDITION OF SW-846

Method	Title	Comments
1120	Electrochemical Corrosion	Method not equivalent to reference method.
3560	Reverse Phase Cartridge Extraction	Lack of sufficient data on column pre-treatment and conditioning, elution sequences, elution volumes, and the effect of the loading of organic compounds on the column to permit method to be adequately defined.
7551	Osmium (AA, Furnace Technique)	EPA study indicates accuracy problems.
8320	Miscellaneous Compounds by HPLC	No supporting data on effectiveness of cleanup procedures and HPLC to determine the analytes. Questionable precision and accuracy.
8330	Thioureas	No supporting data on effectiveness of cleanup procedures and HPLC to determine the analytes. Questionable precision and accuracy.
8410, 8411	Formaldehyde, Basic and Acidic Medium	Too susceptible to interferences for application to ground water and solid waste matrices.
8600	Heirarchical Analysis Protocol	Method not sensitive enough for its intended purpose.
8610	Total Aromatics by Ultraviolet Spectroscopy	Method not sensitive enough for its intended purpose.
8620	Total Nitrogen-Phosphorous Gas Chromatographable Compounds.	Method not sensitive enough for its intended purpose.
8630	Derivatization Procedure for Appendix VIII Compounds	Method not sensitive enough for its intended purpose.
9011	Photodegradable Cyanides	Uncertain how test and results relate to the environment and the regulations.
9037	Sulfate, Gravimetric	Precision and sensitivity not adequate. Interference-prone and therefore not appropriate for environmental assay.

The methods described in SW-846 are not mandatory for all testing under RCRA. Currently, only §§ 260.22(d)(1)(i), 261.22(a), 261.24(a), 264.314(c), 265.314(d), and 270.62(b)(2)(i)(C) of 40 CFR require use of SW-846 methods. The proposed Third Edition will not alter the current testing requirements.

The Third Edition contains 72 methods that are new to SW-846 and are listed in Table 3. Of these, 43 will be finalized in a soon to be released rulemaking, and will be acceptable for use, where required in 40 CFR Parts 260 through 270, in conjunction with, or in addition to, the Second Edition of SW-846 as amended by Updates I and II. Data generated by the public and by EPA for the 43 methods have demonstrated that the method precision and accuracy are adequate for the purpose stated. Although listed in Table 3, the Agency is not reproposing these 43 methods in today's rule. These methods are listed in Table 3 solely to notify the public that these methods are appearing for the first time in the Third Edition of SW-846. The Agency is today proposing the remaining 29 methods found in Table 3 for public comment. Of these 29 methods, some were extracted and reformatted from earlier methods. For example, some of the organic procedures in the Second Edition were made up of several methods (i.e., separation/extraction, cleanup, and determinative methods). Several of these procedures were divided and the component methods given individual numbers. Thus, these methods listed in Table 3 are not new to SW-846, but are simply appearing independently under a new number. Finally, one method, Method 9090, is being reproposed. This method was extensively revised since it was first proposed on October 1, 1984. The Agency seeks comment on this revised version and, therefore, decided to repropose this method rather than to finalize it.

TABLE 3.—NEW METHODS INCLUDED IN THE THIRD EDITION OF SW-846

Method	Title	Comments
0010 [a]	Modified Method 5 Sampling Train	Stack sampling method for semi-volatile compounds.
0020 [a]	Source Assessment Sampling System	Stack sampling method for semi-volatile compounds.
0030 [a]	Volatile Organic Sampling Train	Stack sampling method for organic compounds.
1320 [a]	Multiple Extraction Procedure	Extraction procedure used for delisting wastes that are stabilized, encapsulated, or chemically fixed.
1330 [a]	Extraction Procedure for Oily Wastes	Extraction procedures for removal of oil or grease that may interfere with the EP test.
3005	Acid Disgestion of Waters for Total Recoverable or Dissolved Metals for Analysis by Flame Atomic Absorption or ICP Spectroscopy.	Provides digestion technique for dissolved metals in a water matrix.
3500	Organic Extraction and Sample Preparation	Serves as an introduction to 35XX series methods dealing with quantitative extraction of volatile and semivolatile organic compounds from various sample matrices.

TABLE 3.—NEW METHODS INCLUDED IN THE THIRD EDITION OF SW-846—Continued

Method	Title	Comments
3580	Waste Dilution	Solvent dilution procedure for nonaqueous waste samples nonaqueous waste samples prior to cleanup and/or analysis.
3600	Cleanup	Serves as an introduction to 36XX series methods which diminish or eliminate extraneous materials from the waste sample.
3610[b]	Alumina Column Cleanup	Separation of analytes of a narrow polority range from interfering peaks of a different polarity.
3611[a]	Alumina Column Cleanup and Separation of Petroleum Wastes	Provies a cleanup technique for oily matrices. Proposed as Method 3570.
3620[b]	Florisil Column Cleanup	Separation of analytes of a narrow polarity range from interfering peaks of a different polarity.
3630[b]	Silica Gel Cleanup	Separation of analytes of a narrow polarity range from interfering peaks of a different polarity.
3640[b]	Gel-Permeation Cleanup	Separation of high molecular weight material from sample analytes.
3650[c]	Acid-Base Partition Cleanup	Separation of base/neutral organic extractable fraction from the acid organic extractable fraction.
3660	Sulfur Cleanup	Elimination of sulfur (which may cause peaks) from sample extracts.
3810	Headspace	Formerly Second Edition Method 5020. It is now approved only as a screening technique because of problems with precision and accuracy.
3820	Hexadecane Extraction and Screening of Purgeable Organics	Qualitative screening procedure for use with purge-and-trap GC or GC/MS.
5040[a]	Protocol for Analysis of Sorbent Cartridges from Volatile Organic Sampling Train.	Provides quantitative analysis method following VOST collection. Proposed as Method 3720.
6010[a]	Inductively Coupled Plasma Atomic Emission Spectroscopy	General method for multiple element determination.
7000	Atomic Absorption Methods	Serves as an introduction to 7XXX series methods dealing with quantitative analysis of metals.
7020	Aluminum (AA, Direct Aspiration)	Flame AA method.
7090[a]	Beryllium (AA, Direct Aspiration)	Flame AA method.
7091[a]	Beryllium (AA, Furnace Technique)	Graphite furnace AA method.
7140	Calcium (AA, Direct Aspiration)	Flame AA method.
7198[a]	Chromium, Hexavalent (Differential Pulse Polargraphy)	Differential pulse polarogyaphy method.
7200	Cobalt (AA, Direct Aspiration)	Flame AA method.
7201	Cobalt (AA, Furnace Technique)	Graphite furnace AA method.
7210[a]	Copper (AA, Direct Aspiration)	Flame AA method.
7380[a]	Iron (AA, Direct Aspiration)	Flame AA method.
7450	Magnesium (AA, Direct Aspiration)	Flame AA method.
7460[a]	Manganese (AA, Direct Aspiration)	Flame AA method.
7480	Molybdenum (AA, Direct Aspiration)	Flame AA method.
7481	Molybdenum (AA, Furnace Technique)	Graphite furnace AA method.
7550	Osmium (AA, Direct Aspiration)	Flame AA method.
7610	Potassium (AA, Direct Aspiration)	Flame AA method.
7770[a]	Sodium (AA, Direct Aspiration)	Flame AA method.
7840[a]	Thallium (AA, Direct Aspiration)	Flame AA method.
7841[a]	Thallium (AA, Furnace Technique)	Graphite furnace AA method.
7870	Tin (AA, Direct Aspiration)	Flame AA method.
7910[a]	Vanadium (AA, Direct Aspiration)	Flame AA method.
7911[a]	Vanadium (AA, Furnace Technique)	Graphite furnace AA method.
7950[a]	Zinc (AA, Direct Aspiration)	Flame AA method.
8000	Gas Chromatography	Serves as an introduction to 8XXX series methods dealing with quantitative analysis of organic analytes.
8280	The Analysis of Polychlorinated Dibenzo-p-dioxins and Polychlorinated Dibenzofurans.	Determination of tetra-penta-, hepta-, hexa-, and octachlorinated dibenzo-p-dioxins (PCDDs) and dibenzofurans (PCDFs) in chemical wastes.
9012	Total and Amenable Cyanides	Automated quantitative analytical method.
9022[a]	Total Organic Halides (TOX) by Neutron Activation Analysis	Neutron activation adds alternate analytical technique.
9035[a]	Sulfate	Automated chloranilate colorimetric method.
9036[a]	Sulfate	Automated methylthymol blue, autoanalyzer II colorimetric method.
9038[a]	Sulfate	Turbidimetric method.
9041	pH Paper Method	Paper method adds alternate analytical technique.
9045	Soil pH	Analytical technique to determine pH in solid matrices.
9050	Specific Conductance	Analytical technique to determine conductivity.
9060[a]	Total Organic Carbon	Infrared determination of carbon dioxide.
9065[a]	Phenolics	Manual 4-AAP with distillation spectrophotometric method.
9066[a]	Phenolics	Automated 4-AAP with distillation spectrophotometic method.
9067[a]	Phenolics	MBTH with distillation spectrophotometric method.
9070[a]	Total Recoverable Oil and Grease	Total oil and grease for liquids. Gravimetric, separatory funnel extraction.
9071[a]	Oil and Grease Extraction Method for Sludge Samples	Total oil and grease for solids.
9080[a]	Cation-Exchange Capacity of Soils	Soil liner evaluation using ammonium acetate.
9081[a]	Cation-Exchange Capacity of Soils	Soil liner evaluation using sodium acetate.
9090[d]	Compatability Test for Wastes and Membrane Liners	Liner compatability test for flexible membrane liners.
9100[a]	Saturated Hydraulic Conductivity, Saturated Leachate Conductivity, and Intrinsic Permeabilty.	General methods for hydraulic conductivity and liner permeability.
9131[a]	Coliform	Multiple tube fermentation technique.
9232[a]	Coliform	Membrane filter technique.
9200[a]	Nitrate	Brucine colorimetric method.
9250[a]	Chloride	Automated ferricyanide autoanalyzer I colorimetric method.
9251[a]	Choride	Automated ferricyanide autoanalyzer II colorimetric method.
9252[a]	Choride	Mercuric nitrate titrimetric method.
9310[a]	Gross Alpha and Beta	General radioactivity method.
9315[a]	Alpha-Emitting Radium Isotopes	Total radium method.
9320[a]	Radium-228	Radium 228 method.

[a] These methods will be finalized in a soon to be released rulemaking and, thus, are not being proposed in today's rule. They are, however, new to the Third Edition of SW-846.

[b] These methods were formerly sections within the 8000 method series in the Second Edition of SW-846.

[c] This method was formerly Method 3530 in the Second Edition of SW-846.

[d] This method is being reproposed due to extensive revision since it was first proposed on October, 1, 1984

Information on method precision, accuracy and a more detailed explanation of the Agency's rationale for the deletions and inclusions listed in Tables 2 and 3 can be found in the Technical Support Document, which is located in the EPA RCRA Docket F-89-WTMP-FFFFF.

Guidance methods issued by EPA on July 12, 1985, for the determination of reactive cyanides and sulfides in wastes have been included in the Third Edition for the convenience of persons evaluating wastes. These methods may be used for assessing whether a waste is a reactive waste by reason of toxic gas generation (reactivity), pending development and proposal of more accurate tests.

Table 4 summarizes the revisions included in the first update for the Third Edition of the methods manual and proposed today for public comment. These revised methods are being issued to subscribers in the first update package. More detailed information on these changes can be found in the Technical Support Document available in the RCRA docket.

TABLE 4.—REVISIONS INCLUDED IN UPDATE I, SW-846, THIRD EDITION

Method	Indication of change	Reason for change
Chapter 1	Partial revision	Clarification of the definitions.
Chapter 2	do	Change in TOX holding time; clarification on other analytes, and additions and deletions to analyte lists.
Chapter 4	do	Change in soil/sediment and concentrated waste holding time.
Chapter 7	do	Revision and clarification of reactive cyanide procedure.
1310—EP TOX Test Method	do	Addition of reference to Chapter 7.
1330—Extraction Procedure for Oily Wastes	do	Revision to procedure and calculation formula.
3005—Acid Digestion of Waters for Total Recoverable or Dissolved Metals for Analysis by FLAA or ICP.	do	Revision to list of applicable metals; clarification of appropriate determinative procedure.
3010—Acid Digestion of Aqueous Samples and Extracts for Total Metals for Analysis by FLAA or ICP.	do	Revision to list of applicable metals; clarification of procedure.
3020—Acid Digestion of Aqueous Samples and Extracts for Total Metals for Analysis by GFAA.	do	Revision to list of applicable methods.
3050—Acid Digestion of Sediments, Sludges, and Soils	do	Do.
3510—Separatory Funnel Liquid-Liquid Extraction	do	Clarification in procedure.
3520—Continuous Liquid-Liquid Extraction	do	Clarification in procedure.
3540—Soxhlet Extraction	do	Clarification specifies cycles/hr.
3600—Cleanup	do	Clarification in procedure.
3650—Acid-Base Partition Cleanup	Total Revision	Clarification in procedure; addition of Table of Analytes.
5030—Purge-and-Trap	Partial Revision	Clarification of method; additional solvents for waste; correction of errors.
6010—Inductively Coupled Plasma Atomic Emission Spectroscopy	Total Revision	Deletion of non-applicable steps; addition of metals.
7000—Atomic Absorption Methods	Partial Revision	Revision of list of applicable metals; clarification of procedure.
7061—Arsenic (AA, Gaseous Hydride)	do	Revision of quality control procedures.
7196—Chromium, Hexavalent (Colorimetric)	do	Revision of calibration standard and spike concentration.
7760—Silver (AA, Direct Aspiration)	Total Revision	Clarification on the use of cyanogen iodide.
8000—Gas Chromatography	Partial Revision	Revision of calculation formula.
8010—Halogenated Volatile Organics	do	Deletion of analytes from Table 1; clarification in procedure.
8015—Non-halogenated Volatile Organics	do	Deletion of analytes from Table 1.
8030—Acrolein, Acrylonitrile, Acetonitrile	do	Revision to stock standard preparation.
8040—Phenols	do	POL[1] listed for all matrices.
8120—Chlorinated Hydrocarbons	do	Deletion of analytes from Table 1.
8150—Chlorinated Herbicides	do	Addition of waste preparation step; addition of operational parameters; correction of errors.
8240—GC/MS for Volatile Organics	do	Addition of other operational parameters; additional solvents for waste; correction of errors.
8250—GC/MS for Semivolatile Organics: Packed Column Technique.	do	Text correction in matrix spikes.
8270—GC/MS for Semivolatile Organics: Capillary Column	do	Addition of other operational parameters; correction of errors.
9010—Total and Amenable Cyanide	Total Revision	Alternative determinative procedure; additional performance data.
9030—Acid-Soluble and Acid-Insoluble Sulfides	do	Addition of semi-quantitative method for acid insoluble sulfides; additional performance data.
9090—Compatibility Test for Wastes and Membrane Liners	Partial Revision	Clarification of procedure.

[1] Practical Quantitation Limit.

The first update to the Third Edition contains 14 methods that are new to SW-846 and are listed in Table 5. Of these, four will be finalized in a soon to be released rulemaking, and will be acceptable for use, where required in 40 CFR Parts 260 through 270, in conjunction with, or in addition to, the Second Edition of SW-846 as amended by Updates I and II. Although listed in Table 5, the Agency is not reproposing these four methods in today's rule. These methods are listed in Table 5 solely to notify the public that these methods are appearing for the first time in the Third Edition of SW-846. The Agency is today proposing the remaining ten methods found in Table 5 for public comment. These new methods are being issued to subscribers in the first update package. More detailed information on these new methods can be found in the Technical Support Document available in the RCRA docket.

TABLE 5.—NEW METHODS INCLUDED IN UPDATE I, SW-846, THIRD EDITION

Method	Reason for inclusion
**7081—Barium (AA, furnace technique)	Provides lower detection limit and analytical flexibility.
*7211—Copper (AA, furnace technique)	Provides lower detection limit and analytical flexibility.
*7381—Iron (AA, furnace technique)	Provides lower detection limit and analytical flexibility.
7430—Lithium (AA, direct aspiration)	No previous determinative method; needed to support incineration regulations.
*7461—Manganese (AA, furnace technique)	Provides lower detection limit and analytical flexibility.
**7761—Silver (AA, furnace technique)	Provides lower detection limit and analytical flexibility.
7780—Strontium (AA, direct aspiration)	No previous determinative method.
*7951—Zinc (AA, furnace technique)	Provides lower detection limit and analytical flexibility.
8011—1,2-Dibromoethane and 1,2-Dibromo-3-chloropropane in Water by Microextraction and Gas Chromatography.	Determines compounds not listed in any other SW-846 method.
8021—Violates in Water by Purge and Trap Capillary Column GC with PID and ELCD in Series.	Offers lower detection limit and improved resolution; allows concurrent analysis of aromatics and halocarbons.
8070—Nitrosamines	No previous determinative method.
8110—Haloethers	No previous determinative method.
8141—Organophosphorus Pesticides	Capillary column technique; additional performance data for soil samples.
8260—GC/MS for Volatile Organics: Capillary Column Technique	Determines volatile organics using GC/MS capillary (as opposed to packed) column technique.
9021—Purgeable Organic Halides	Provides quick screening procedure; eliminates need for carbon adsorption.
9031—Extractable Sulfides	Includes additional matrices.

*These methods will be finalized in a soon to be released rulemaking. They are, however, being submitted to subscribers for the first time in this update.
**These methods were finalized in the Second Edition of SW-846. They were inadvertently omitted from the Third Edition and are not being proposed as new.

III. State Authority

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003 and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

B. Effect on State Authorizations

Today's rule proposes standards that would not be effective in authorized States since the requirements would not be imposed pursuant to the Hazardous and Solid Waste Amendments of 1984. Thus, the requirements will be applicable only in those States that do not have interim of final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State law.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modifications to EPA for approval. The deadline by which the State must modify its program to adopt this proposed regulation will be determined by the date of promulgation of the final rule in accordance with § 271.21(e). These deadlines can be extended in certain cases (40 CFR 271.21(e)(3)). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those in today's rule. These State regulations have not been assessed against the Federal regulations being proposed today to determine whether they meet the tests for authorization. Thus, a State is not authorized to carry out these requirements in lieu of EPA until the State program modification is submitted to EPA and approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law.

States that submit their official application for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, the State must modify its program by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of those standards must include standards equivalent to these standards in their application. 40 CFR 271.3 sets forth the requirements a State must meet when submitting its final authorization application.

IV. Economic and Regulatory Impacts

A. Regulatory Impact Analysis

Under Executive Order 12291, EPA must determine whether a regulation is "Major" and, therefore, subject to the requirement of a Regulatory Impact Analysis. The total additional annualized cost for substituting the Second Edition of SW-846 with the Third Edition of SW-846 and for mandating specified Quality Control procedures for all testing conducted under the hazardous waste identification and management regulation of RCRA has been conservatively estimated at $60 million, which is well below the $100 million that constitutes a major regulation. EPA has also determined that this proposed rule will not cause a major increase in prices, and will not have a significant adverse effect on competition or the ability of U.S. enterprises to compete with foreign enterprises. Increased costs

could result from the minimal additional quality control compliance and recordkeeping involved in implementing this proposed rule. Since the procedures mandated by these rules are those already performed by reputable laboratories, few laboratories are likely to be significantly impacted by this rule. Detailed information on the costs of the proposal and a brief regulatory impact analysis can be found in the background document located in EPA RCRA Docket F-89-WTMP-FFFFF.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601-612, Pub. L. 96-354, September 19, 1980), whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis (RFA) that describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required, however, if the head of the agency certifies that the rule will have a significant impact on a substantial number of small entities.

This rule will not require the purchase of new instruments or equipment. The proposed Quality Control is basic and the Agency believes that most laboratories have already implemented the use of these QC procedures. The regulation requires no new reports beyond those now required. The analytical techniques approved here can either be handled by small facilities, or are widely available by contract at a reasonable price. EPA is certifying that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (as defined by the RFA). Thus, the proposed regulation does not require a RFA. Therefore, in accordance with 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant adverse economic impact on a substantial number of small facilities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request document has been prepared by EPA (ICR No. 1485) and a copy may be obtained from Richard Westlund, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, or by calling (202) 382-2745.

Public reporting burden for this collection of information is estimated to average 0.5 hour per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Parts 260, 261, 262, 264, 265, 268, and 270

Chemical, physical and biological treatment, General facility standards, Ground water monitoring, Hazardous waste, Hazardous waste incinerator permits, Incinerators, Intergovernmental regulations, Interim status standards for owners and operators of hazardous waste treatment facilities, Landfills, Land treatment, Reporting and recordkeeping requirements, Storage and disposal facilities, Surface impoundment, Thermal treatment, Waste piles, Waste treatment and disposal.

Dated: December 14, 1988.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, it is proposed that Chapter I of Title 40 of the Code of Federal Regulations be amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

The authority citation for Part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

Subpart A—General

2. Section 260.1 is amended by adding (c) to read as follows

§ 260.1 Purpose, scope and applicability.

* * * * *

(c) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 260 must comply with the quality control procedures specified in Sections 1.2 and 1.3, and, where an SW-846 method is used, the additional procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

Subpart B—Definitions

3. Section 260.11 is amended by revising the fourth reference in paragraph (a) to read as follows:

§ 260.11 References

(a) * * * "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, Third Edition, 1987, as amended by Update I. This document is available as document number 955-001-00000-1 from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238, on a subscription basis. Future updates will automatically be mailed to the subscriber.

* * * * *

Subpart C—Rulemaking Petitions

4. Section 260.22 is amended by adding paragraph (a)(3) to read as follows:

§ 260.22 Petitions to amend Part 261 to exclude a waste produced at a particular facility.

(a) * * *

(3) Information submitted under paragraphs (a) (1) and (2) of this section must be based on appropriate test methods prescribed in Appendix III of Part 261. The test methods must follow the quality control procedures specified in Sections 1.2 and 1.3, and procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. The testing and quality control requirements of this section also apply to § 260.22 (b), (c), (d), and (e) below.

* * * * *

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

5. The authority citation for Part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6922.

Subpart A—General

6. Section 261.1 is amended by adding paragraph (d) to read as follows:

§ 262.1 Purpose and scope.

* * * * *

(d) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 261 must comply with the quality control procedures specified in Section 1.2 and 1.3 and, when an SW-846 method is used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical methods.

Appendices

7. Appendix III of Part 261 is revised to read as follows:

Appendix III—Chemical Analysis Test Methods

Tables 1, 2, and 3 specify the appropriate analytical procedures described in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", incorporated by reference in § 260.11 that shall be used to determine whether a sample contains a given Appendix VII or VIII toxic constituent.

Table 1 identifies each Appendix VII or VIII organic constituent along with the approved measurement method. Table 2 identifies the corresponding methods for inorganic species. Table 3 summarizes the contents of SW-846 and supplies the specific section and method number for sampling and analysis methods.

Prior to final sampling and analysis method selection, the analyst should consult the specific section or method described in SW-846 for additional guidance on which of the approved methods should be employed for a specific sample analysis situation. In all cases, the sampling and analytical determinations must comply with quality control procedures specified in Sections 1.2 and 1.3, and those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, incorporated by reference in § 260.11.

These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

TABLE 1.—ANALYSIS METHODS FOR ORGANIC CHEMICALS CONTAINED IN SW-846

Compound	Method(s)
Acetonitrile	8030, 8240
Acetophenone	8250, 8270
Acrolein	8030, 8240
Acrylamide	8015
Acrylonitrile	8030, 8240
Aldrin	8080, 8250, 8270
4-Aminobiphenyl	8250, 8270
Aniline	8250, 8270
Benzal chloride	8120
Benzene	8020, 8021, 8240, 8260
Benzidine	8250, 8270
Benzo(b)fluoranthene	8100, 8250, 8270, 8310
Benz(a)anthracene	8100, 8250, 8270, 8310
Benzo(j)fluoranthene	8100
Benzo(a)pyrene	8100, 8250, 8270, 8310
Benzotrichloride	8120
Benzyl chloride	8010, 8120, 8240
Bis(2-chloroethoxy)methane	8010, 8110, 8250, 8270
Bis(2-chloroethyl)ether	8110, 8250, 8270
Bis(2-chloroisopropyl)ether	8010, 8110, 8250, 8270
Bis(2-ethylhexyl)phthalate	8060, 8250, 8270
Bromoform	8010, 8021, 8240, 8260
4-Bromophenyl phenyl ether	8110, 8250, 8270
Butyl benzyl phthalate	8250, 8270
Carbon disulfide	8240
Carbon tetrachloride	8010, 8021, 8240, 8260
Chlordane	8080, 8250, 8270
Chlorinated biphenyls	8080
Chlorinated dibenzo-p-dioxins	8280
Chlorinated dibenzofurans	8280
4-Chloroaniline	8250, 8270
Chlorobenzene	8010, 8020, 8021, 8240, 8260
2-Chloroethyl vinyl ether	8010, 8240
Chloroform	8010, 8021, 8240, 8260
Chloromethane	8010, 8021, 8240, 8260
Chloromethylmethyl ether	8010
2-Chloronaphthalene	8120, 8250, 8270
2-Chlorophenol	8040, 8250, 8270
Chrysene	8100, 8250, 8270, 8310
Creosote [1]	8100, 8250, 8270
Cresol(s)	8040
Creyslic acid(s)	8040, 8250, 8270
2,4-D	8150
4,4'-DDD	8080, 8250, 8270
4,4'-DDE	8080, 8250, 8270
4,4'-DDT	8080, 8250, 8270
Dibenz(a,h)acridine	8100
Dibenz(a,j)acridine	8100, 8250, 8270
Dibenz(a,h)anthracene	8100, 8250, 8270, 8310
7H-Dibenzo(c,g)carbazole	8100
Dibenzo(a,e)pyrene	8100, 8270
Dibenzo(a,h) pyrene	8100
Dibenzo(a,i)pyrene	8100
Di-n-butylphthalate	8060, 8250, 8270
Dichlorobenzene(s)	8010, 8020, 8021, 8120, 8220, 8250, 8260
3,3'-Dichlorobenzidine	8250, 8270

TABLE 1.—ANALYSIS METHODS FOR ORGANIC CHEMICALS CONTAINED IN SW-846—Continued

Compound	Method(s)
Dichlorodifluoromethane	8010, 8021, 8240, 8260
Dichloroethane(s)	8010, 8021, 8240, 8260
1,1-Dichloroethylene	8010
1,2-Dichloroethylene	8010, 8240
Dichloromethane	8010
2,4-Dichlorophenol	8040, 8250, 8270
2,6-Dichlorophenol	8040, 8250, 8270
1,2-Dichloropropane	8010, 8021, 8240, 8260
trans-1,3-Dichlorophropylene	8010
Dichloropropene(s)	8240
Dieldrin	8080, 8250, 8270
Diethyl phthalate	8060, 8250, 8270
4-Dimethylaminoazobenzene	8250, 8270
7,12-Dimethylbenz(a)anthracene.	8250, 8270
alpha-,alpha-Dimethylphenethylamine.	8250, 8270
2,4-Dimethylphenol	8040, 8250, 8270
Dimethyl phthalate	8060, 8250, 8270
Dinitrobenzene(s)	8090, 8270
2,4-Dinitrophenol	8040, 8250, 8270
2,4-Dinitrotoluene	8090, 8250, 8270
2,6-Dinitrotoluene	8090, 8250, 8270
Dinoseb	8150, 8260
Di-n-octylphthalate	8060
Diphenylamine	8250, 8270
1,2-Diphenylhydrazine	8250, 8270
Disulfoton	8140, 8270
Endosulfan(I & II)	8080, 8250, 8270
Endrin	8080, 8250, 8270
Ethyl ether	8015
Endrin metabolites	8080, 8250, 8270
Ethyl methanesulfonate	8250, 8270
Fluoranthene	8100, 8250, 8270, 8310
Heptachlor	8080, 8250, 8270
Heptachlor epoxide	8080, 8250, 8270
Hexachlorobenzene	8120, 8250, 8270
Hexachlorobutadiene	8021, 8120, 8250, 8260, 8270
Hexachlorocyclopentadiene	8210, 8250, 8270
Hexachloroethane	8120, 8250, 8270
Indeno(1,2,3-cd)pyrene	8100, 8250, 8270, 8310
Lindane	8080
Maleic anhydride	8250, 8270
Methoxychlor	8080, 8250, 8270
3-Methylcholanthrene	8100, 8250, 8270
Methyl ethyl ketone	8015
Methyl isobutyl ketone	8015, 8240
Methylmethanesulfonate	8250, 8270
Naphthalene	8021, 8100, 8250, 8270, 8310
Naphthoquinone	8090, 8270
1-Naphthylamine	8250, 8270
2-Naphthylamine	8250, 8270
4-Nitroaniline	8250, 8270
Nitrobenzene	8090, 8250, 8270
4-Nitrophenol	8040, 8250, 8270
N-Nitrosodibutylamine	8250, 8270
N-Nitrosodimethylamine	8250, 8270
N-Nitrosopiperidine	8250, 8270
Paraldehyde (trimer of acetaldehyde).	8015
Parathion	8140, 8141, 8270
Pentachlorobenzene	8250, 8270
Pentachloronitrobenzene	8250, 8270
Pentachlorophenol	8040, 8250, 8270
Phenacetin	8250, 8270
Phenol	8040, 8250, 8270
Phorate	8140, 8141
Phthalic anhydride	8270
2-Picoline	8240, 8250, 8270
Pronamide	8250, 8270

TABLE 1.—ANALYSIS METHODS FOR ORGANIC CHEMICALS CONTAINED IN SW-846—Continued

Compound	Method(s)
Tetrachlorobenzene(s)	8120, 8250, 8270
Tetrachloroethane(s)	8010, 8021, 8240, 8260
Tetrachloroethane	8010, 8021, 8240, 8260
Tetrachlorophenol	8040, 8250, 8270
Toluene	8020, 8021, 8240, 8260
Toxaphene	8080, 8250, 8270
1,2,4-Trichlorobenzene	8021, 8120, 8250, 8260, 8270
Trichloroethane(s)	8010, 8021, 8240
Trichloroethene	8010, 8021, 8240
Trichlorofluoromethane	8010, 8021, 8240
Trichlorophenol(s)	8040, 8250, 8270
Trichloropropane	8010, 8021, 8240
Vinyl chloride	8010, 8021, 8240, 8260
Xylene(s)	8020, 8021, 8240, 8260

[1] Analyze for phenanthrene and carbazole; if these are present in a ratio between 1.4:1 and 5:1 creosote should be considered present.

TABLE 2—ANALYSIS METHODS FOR INORGANIC CHEMICALS AND MISCELLANEOUS GROUPS OF ANALYTES CONTAINED IN SW-846

Compound	Method(s)
Aluminum	6010, 7020
Antimony	6010, 7040, 7041
Arsenic	6010, 7060, 7061
Barium	6010, 7080, 7081
Beryllium	6010, 7090, 7091
Cadmium	6010, 7130, 7131
Calcium	6010, 7140
Chromium	6010, 7190, 7191
Chromium, Hexavalent	7195, 7196, 7197, 7198
Cobalt	6010, 7200, 7201
Copper	6010, 7210, 7211
Iron	6010, 7380, 7381
Lead	6010, 7420, 7421
Lithium	6010, 7430
Magnesium	6010, 7450
Manganese	6010, 7460, 7461
Mercury	7470, 7471
Molybdenum	6010, 7480, 7481
Nickel	6010, 7520
Osmium	7550
Phosphorus	6010
Potassium	6010, 7610
Selenium	6010, 7740, 7741
Silver	6010, 7760, 7761
Sodium	6010, 7770
Strontium	6010, 7780
Thallium	6010, 7840, 7841
Tin	7870
Vanadium	6010, 7910, 7911
Zinc	6010, 7950, 7951
Cyanide	9010, 9012
Total Organic Halogen	9020, 9022
Purgeable Organic Halides	9021
Sulfide	9030, 9031
Sulfate	9035, 9036, 9038
Total Organic Carbon	9060
Phenolics	9065, 9066, 9067
Oil and Grease	9070, 9071
Total Coliform	9131, 9132
Nitrate	9200
Chloride	9250, 9251, 9252

TABLE 2—ANALYSIS METHODS FOR INORGANIC CHEMICALS AND MISCELLANEOUS GROUPS OF ANALYTES CONTAINED IN SW-846—Continued

Compound	Method(s)
Gross Alpha and Gross Beta	9310
Alpha-Emitting Radium Isotopes	9315
Radium-228	9320

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846

Title	Chapter No.	Method No.
Quality control	1.0	
Introduction	1.1	
Quality control	1.2	
Method detection limit	1.3	
Data reporting	1.4	
Quality control documentation	1.5	
References	1.6	
Choosing the correct procedure	2.0	
Purpose	2.1	
Required information	2.2	
Implementing the guidance	2.3	
Characteristics	2.4	
Ground water	2.5	
References	2.6	
Metallic analytes	3.0	
Sampling considerations	3.1	
Sample preparation methods	3.2	
Acid digestion of waters for total recoverable or dissolved metals for analysis by flame AAS or ICP	3.2	3005
Acid digestion of aqueous samples and extracts for total metals for analysis by flame AAS or ICP	3.2	3010
Acid digestion of aqueous samples and extracts for total metals for analysis by furnace AAS	3.2	3020
Dissolution procedure for oils, greases, or waxes	3.2	3040
Acid digestion of sediments, sludges and soils	3.2	3050
Methods for the determination of metals	3.3	
Inductively coupled plasma atomic emission spectroscopy	3.3	6010
Atomic absorption methods	3.3	7000

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846—Continued

Title	Chapter No.	Method No.
Aluminum, flame AAS	3.3	7020
Antimony, flame AAS	3.3	7040
Antimony, furnace AAS	3.3	7041
Arsenic, furnace AAS	3.3	7060
Arsenic, gaseous hydride AAS	3.3	7061
Barium, flame AAS	3.3	7080
Barium, furnace AAS	3.3	7081
Beryllium, flame AAS	3.3	7090
Beryllium, furnace AAS	3.3	7091
Cadmium, flame AAS	3.3	7130
Cadmium, furnace AAS	3.3	7131
Calcium, flame AAS	3.3	7140
Chromium, flame AAS	3.3	7190
Chromium, furnace AAS	3.3	7191
Chromium, hexavalent, coprecipitation	3.3	7195
Chromium, hexavalent, colorimetric	3.3	7196
Chromium, hexavalent, chelation/extraction	3.3	7197
Chromium, hexavalent, differential pulse polarography	3.3	7198
Cobalt, flame AAS	3.3	7200
Cobalt, furnace AAS	3.3	7201
Copper, flame AAS	3.3	7210
Copper, furnace AAS	3.3	7211
Iron, flame AAS	3.3	7380
Iron, furnace AAS	3.3	7381
Lead, flame AAS	3.3	7420
Lead, furnace AAS	3.3	7421
Magnesium, flame AAS	3.3	7450
Manganese, flame AAS	3.3	7460
Manganese, furnace AAS	3.3	7461
Mercury in liquid waste, manual cold vapor technique	3.3	7470
Mercury in solid or semisolid waste, manual cold-vapor technique	3.3	7471
Molybdenum, flame AAS	3.3	7480
Molybdenum, furnace AAS	3.3	7481
Nickel, flame AAS	3.3	7520
Osmium, flame AAS	3.3	7550
Potassium, flame AAS	3.3	7610
Selenium, furnace AAS	3.3	7740

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846—Continued

Title	Chapter No.	Method No.
Selenium, gaseous hydride AAS	3.3	7741
Silver, flame AAS	3.3	7760
Silver, furnace AAS	3.3	7761
Sodium, flame AAS	3.3	7770
Thallium, flame AAS	3.3	7840
Thallium, furnace AAS	3.3	7841
Tin, flame AAS	3.3	7870
Vanadium, flame AAS	3.3	7910
Vanadium, furnace AAS	3.3	7911
Zinc, flame AAS	3.3	7950
Zinc, furnace AAS	3.3	7951
Organic analytes	4.0	
Sampling considerations	4.1	
Sample preparation methods	4.2	
Extraction and preparations	4.2.1	
Organic extraction and sample preparation	4.2.1	3500
Separatory funnel liquid-liquid extraction	4.2.1	3510
Continuous liquid-liquid extraction	4.2.1	3520
Soxhlet extraction	4.2.1	3540
Ultrasonic extraction	4.2.1	3550
Waste dilution	4.2.1	3580
Purge-and-trap	4.2.1	5030
Protocol for analysis of sorbent cartridges from VOST	4.2.1	5040
Cleanup	4.2.2	
Cleanup	4.2.2	3600
Alumina column cleanup	4.2.2	3610
Alumina column cleanup and separation of petroleum wastes	4.2.2	3611
Florisil column cleanup	4.2.2	3620
Silica gel cleanup	4.2.2	3630
Gel-permeation cleanup	4.2.2	3640
Acid-base partition cleanup	4.2.2	3650
Sulfur cleanup	4.2.2	3660
Determination of organic analytes	4.3	
Gas chromatographic methods	4.3.1	
Gas chromatography	4.3.1	8000
Halogenated volatile organics	4.3.1	8010
EDB and DBCP	4.3.1	8011
Nonhalogenated volatile organics	4.3.1	8015
Aromatic volatile organics	4.3.1	8020

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846—Continued

Title	Chapter No.	Method No.
Volatile organic compounds in water by purge-and-trap capillary column GC with PID and electrolytic conductivity detector in series	4.3.1	8021
Acrolein, acrylonitrile, acetonitrile	4.3.1	8030
Phenols	4.3.1	8040
Phthalate esters	4.3.1	8060
Nitrosamines	4.3.1	8070
Organochlorine pesticides and PCBs as aroclors	4.3.1	8080
Nitroaromatics and cyclic ketones	4.3.1	8090
Polynuclear aromatic hydrocarbons	4.3.1	8100
Haloethers	4.3.1	8110
Chlorinated hydrocarbons	4.3.1	8120
Organophosphorous pesticides	4.3.1	8140
Organophosphorus pesticides: capillary column	4.3.1	8141
Chlorinated herbicides	4.3.1	8150
Gas chromatographic/mass spectroscopic methods	4.3.2	
GC/MS volatiles	4.3.2	8240
GC/MS semivolatiles, packed column	4.3.2	8250
GC/MS for volatiles capillary column	4.3.2	8260
GC/MS semivolatiles, capillary column	4.3.2	8270
Analysis of chlorinated dioxins and dibenzofurans	4.3.2	8280
High performance liquid chromatographic methods (HPLC)	4.3.3	
Polynuclear aromatic hydrocarbons	4.3.3	8310
Miscellaneous screening methods	4.4	
Headspace	4.4	3810

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846—Continued

Title	Chapter No.	Method No.
Hexadecane extraction and screening of purgeable organics	4.4	3820
Miscellaneous test methods	5.0	
Total and amenable cyanide (colorimetric, manual)	5.0	9010
Total and amenable cyanide (colorimetric, automated)	5.0	9012
Total organic halides (TOX)	5.0	9020
Purgeable organic halides (POX)	5.0	9021
Total organic halides (TOX) by neutron activation analysis	5.0	9022
Acid-soluble and acid-insoluble sulfides	5.0	9030
Extractable sulfides	5.0	9031
Sulfate (colorimetric automated, chloranilate)	5.0	9035
Sulfate, (colorimetric automated, methylthymol blue, AA II)	5.0	9036
Sulfate, (turbidimetric)	5.0	9038
Total organic carbon	5.0	9060
Phenolics (spectrophotometric, manual 4-AAP)	5.0	9065
Phenolics (colorimetric automated, 4-AAP)	5.0	9066
Phenolics (spectrophotometric, MBTH)	5.0	9067
Total recoverable oil and grease (gravimetric, separatory funnel extraction)	5.0	9070
Oil and grease extraction method for sludge samples	5.0	9071
Total coliform: multiple tube fermentation	5.0	9131
Total coliform: membrane filter	5.0	9132
Nitrate	5.0	9200
Chloride (colorimetric automated, ferricyanide AAI)	5.0	9250
Chloride (colorimetric automated, ferricyanide AAII)	5.0	9251
Chloride (titrimetric, mercuric nitrate)	5.0	9252
Properties	6.0	
Multiple extraction procedure	6.0	1320
Extraction procedure for oily wastes	6.0	1330
pH electrometric measurement	6.0	9040
pH paper method	6.0	9041

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846—Continued

Title	Chapter No.	Method No.
Soil pH	6.0	9045
Specific conductance	6.0	9050
Cation-exchange capacity of soils (ammonium acetate)	6.0	9080
Cation-exchange capacity of soils (sodium acetate)	6.0	9081
Compatibility test for wastes and membrane liners	6.0	9090
Paint filter liquids test	6.0	9095
Saturated hydraulic conductivity, saturated leachate conductivity, and intrinsic permeability	6.0	9100
Gross alpha and gross beta	6.0	9310
Alpha-emitting radium isotopes	6.0	9315
Radium-228	6.0	9320
Introduction and regulatory definitions	7.0	
Ignitability	7.1	
Corrosivity	7.3	
Reactivity	7.3	
Test method to determine hydrogen cyanide released from wastes	7.3	
Test method to determine hydrogen sulfide released from wastes	7.3	
Extraction procedure toxicity	7.4	
Methods for determining characteristics	8.0	
Ignitability	8.1	
Pensky-Martens closed-cup method	8.1	1010
Setaflash closed-cup method	8.1	1020
Corrosivity	8.2	
Corrosivity toward steel	8.2	1110
Reactivity	8.3	
Toxicity	8.4	
Extraction procedure (EP) toxicity test method and structural integrity test	8.4	1310
Sampling plan	9.0	
Design and development	9.1	
Implementation	9.2	
Sampling methods	10.0	
Modified method 5 sampling train, appendix A and B	10.0	0010
Source assessment sampling system (SASS)	10.0	0020
Volatile organic sampling train	10.0	0030

TABLE 3.—SAMPLING AND ANALYSIS METHODS CONTAINED IN SW-846—Continued

Title	Chapter No.	Method No.
Ground water monitoring	11.0	
Background and objectives	11.1	
Relationship to the regulations and to other documents	11.2	
Revisions and additions	11.3	
Acceptable designs and practices	11.4	
Unacceptable designs and practices	11.5	
Land treatment monitoring	12.0	
Background	12.1	
Treatment zone	12.2	
Regulatory definition	12.3	
Monitoring and sampling strategy	12.4	
Analysis	12.5	
References and bibliography	12.6	
Incineration	13.0	
Introduction	13.1	
Regulatory definition	13.2	
Waste characterization strategy	13.3	
Stack-gas effluent characterization strategy	13.4	
Additional effluent characterization strategy	13.5	
Selection of specific sampling and analysis methods	13.6	
References	13.7	

Subpart C—Characteristics of Hazardous Waste

8. Section 261.22 is amended by revising paragraphs (a)(1) and (2) to read as follows:

§ 261.22 Characteristic of corrosivity.

(a) * * *

(1) It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using either an EPA test method or an equivalent test method approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21. The EPA test method for pH is specified in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. In all cases, the sampling and analytical determinations must comply with the quality control procedures specified in Sections 1.2 and 1.3, and where an SW-846 method is used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of SW-846.

(2) It is a liquid and corrodes steel (SAE 1020) at a rate greater than 6.35 mm (0.250 inch) per year at a test temperature of 55° C (130° F) as determined by the test method specified in NACE (National Association of Corrosion Engineers) Standard TM-01-69 as standardized in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11, or an equivalent test method approved by the Administrator under the procredures set forth in §§ 260.20 and 260.21. In all cases, the sampling and analytical determinations must comply with the quality control procedures specified in Sections 1.2 and 1.3, and, where an SW-846 method is used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of SW-846.

* * * * *

9. Section 261.24 is amended by revising paragraph (a) to read as follows:

§ 261.24 Characteristic of EP toxicity.

(a) A solid waste exhibits the characteristic of EP toxicity if, using the test methods and procedures described in Appendix II or equivalent methods approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21, the extract from a representative sample of the waste contains any of the contaminants listed in Table 1 at a concentration equal to or greater than the respective value given in that table. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering, is considered to be the extract for the purposes of this section. In all cases, the determinations must comply with the quality control procedures specified in Sections 1.2 and 1.3, and, where an SW-846 method is used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846 as incorporated by reference in § 260.11.

* * * * *

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

10. The authority citation for Part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922, 6923, 6924, 6925, and 6937.

Subpart A—General

11. Section 262.11 is amended by adding, paragraph (e) to read as follows:

§ 262.11 Hazardous waste determination.

* * * * *

(e) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 262 must comply with the quality control procedures specified in Sections 1.2 and 1.3, and, where the SW-846 methods are used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. These quality control requirements must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

12. The authority citation for Part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

Subpart A—General

13. Section 264.1 is amended by adding (i) to read as follows:

§ 264.1 Purpose, scope, and applicability.

* * * * *

(i) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 264 must comply with the quality control procedures specified in Section 1.2 and 1.3, and, where SW-846 methods are used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

Subpart N—Landfills

14. Section 264.314 is amended by revising paragraph (c) to read as follows:

§ 264.314 Special requirements for bulk and containerized liquids.

* * * * *

(c) To demonstrate the absence or presence of free liquids in either a containerized or a bulk waste, the following test must be used: Method 9095 (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. The sampling and analytical determinations performed to demonstrate the absence or presence of free liquids in a containerized or bulk waste must comply with the appropriate quality control procedures specified in Section 1.2, and those procedures set forth in Section 8.0 of Method 9095 referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11

* * * * *

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

15. The authority citation for Part 265 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935.

Subpart A—General

16. Section 265.1 is amended by adding paragraph (f) to read as follows:

§ 265.1 Purpose, scope, and applicability.

* * * * *

(f) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 265 must comply with the quality control procedures specified in Sections 1.2 and 1.3, and, where SW-846 methods are used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

Subpart N—Landfills

17. Section 265.314 is amended by revising paragraph (d) to read as follows:

§ 265.314 Special requirements for bulk and containerized liquids.

* * * * *

(d) To demonstrate the absence or presence of free liquids in either a containerized or a bulk waste, the following text must be used: Method 9095 (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. The sampling and analytical determinations performed to demonstrate the absence or presence of free liquids in a containerized or bulk waste must comply with the appropriate quality control procedures specified in Section 1.2, and those procedures set forth in Section 8.0 of Method 9095 referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11.

* * * * *

PART 268—LAND DISPOSAL RESTRICTIONS

18. The authority citation for Part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921 and 6924.

Subpart A—General

19. Section 268.1 is amended by adding paragraph (e) to read as follows:

§ 268.1 Purpose, scope and applicability.

* * * * *

(e) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 268 must comply with the quality control procedures specfied in Sections 1.2 and 1.3, and those additional procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

* * * * *

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

20. The authority citation for Part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6925, 6927, 6939, and 6974.

Subpart A—General Information

21. Section 270.1 is amended by adding paragraph (d) to read as follows:

§ 270.1 Purpose and scope of these regulations.

* * * * *

(d) In all cases, the sampling and analytical determinations performed to meet the requirements of Part 270 must comply with the quality control procedures specified in Sections 1.2 and 1.3, and those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 270.6. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

22. Section 270.6 is amended by revising the first reference in paragraph (a) to read as follows:

§ 270.6 References.

(a) * * * "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, Third Edition, 1987, as amended by Update I. This document is available as document number 955-001-00000-1 from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238, on a subscription basis. Future updates will automatically be mailed to the subscriber.

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Subpart F—Special Forms of Permits

23. Section 270.62 is amended by revising paragraph (b)(2)(i)(C) to read as follows:

§ 270.62 Hazardous waste incinerator permits.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(C) An identification of any hazardous organic constituents listed in Part 261, Appendix VIII of this chapter, which are present in the waste to be burned, except that the applicant need not analyze for constituents listed in Part 261, Appendix VIII, of this chapter which would reasonably not be expected to be found in the waste. The constituents excluded from analysis must be identified, and the basis for the exclusion stated. The waste analysis must rely on analytical techniques specified in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 270.6, or their equivalent. In all cases, the sampling and analytical determinations performed to meet the requirements of this Part must comply with the quality control procedures specified in Sections 1.2 and 1.3, and, where an SW-846 method is used, those procedures set forth in Section 8.0 of the methods contained in Chapters Three through Eight and Ten which are referenced therein, of Chapter One of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 270.6. These quality control procedures must be followed when using any SW-846 method, whether mandatory or not mandatory, and when using any other analytical method.

* * * * *

Editorial Note: This appendix will not appear in the Code of Federal Regulations.

Appendix A—Chapter One Changes in SW-846, Third Edition

Page No. in Chapter One

1. ONE-7—In section 1.1.8, revise the definition of ACCURACY to read as follows:

Accuracy is the nearness of a measurement or the mean (x) of a set of measurements to the true value. Accuracy is assessed by means of reference samples and percent recoveries.

2. ONE-7—Add this sentence after the last sentence in the present definition of ANALYTICAL BATCH:

Analytical batch: "* * * Samples in each batch should be of similar composition (e.g. ground water, sludge, ash, etc.)

3. ONE-7—Replace present definition for BLANK with the following: Blanks:

ONE-7—*Calibration blank:* Usually an organic or aqueous solution that is as free of analyte as possible and prepared with the same volume of chemical reagents used in the preparation of the calibration standards and diluted to the appropriate volume with the same solvent (water or organic) used in the preparation of the calibration standard. The calibration blank is used to give the null reading for the instrument response versus concentration calibration curve. One calibration blank should be analyzed with each analytical batch or every 20 samples, whichever is greater.

ONE-8—*Equipment blank:* Usually an organic or aqueous solution that is as free of analyte as possible and is tranported to the site, opened in the field, and poured over or through the sample collection device, collected in a sample container, and returned to the laboratory. This serves as a check on sampling device cleanliness. One equipment blank should be analyzed with each analytical batch or every 20 samples, whichever is greater.

ONE-8—*Field blank:* Usually an organic or aqueous solution that is as free of analyte as possible and is transferred from one vessel to another at the sampling site and preserved with the appropriate reagents. This serves as a check on reagent and environmental contamination. One field blank should be analyzed with each analytical batch or every 20 samples, whichever is greater.

ONE-8—*Reagent blank:* Usually an organic or aqueous solution that is as free of analyte as possible and contains all the reagents in the same volume as used in the processing of the samples. The reagent blank must be carried through the complete sample preparation procedure and contains the same reagent concentrations in the final solution as in the sample solution used for analysis. The reagent blank is used to correct for possible contamination resulting from the preparation or processing of the sample. One reagent blank should be prepared for every analytical batch or for every 20 samples, whichever is greater.

ONE-8—*Trip blank:* Usually an organic or aqueous solution that is as free of analyte as possible and is transported to the sampling site and returned to the laboratory without being opened. This serves as a check on sample contamination originating from sample transport, shipping, and from the site conditions. One trip blank should be analyzed with each analytical batch or every 20 samples, whichever is greater.

4. ONE-8—Delete CALIBRATION CHECK and insert the following:

Check standard: A material of known composition that is analyzed concurrently with test samples to evaluate a measurement process. An analytical standard that is analyzed to verify the calibration of the analytical system. One check standard should be analyzed with each analytical batch or every 20 samples, whichever is greater.

5. ONE-8—Add the definition of MATRIX SPIKE as follows:

Matrix spike: A *matrix spike* is employed to provide a measure of accuracy for the method used in a given matrix. A matrix spike analysis is performed by adding a predetermined quantity of stock solutions of certain analytes to a sample matrix prior to sample extraction/digestion and analysis. The concentration of the spike should be at the regulatory standard level or the PQL for the method. When the concentration of the analyte in the sample is greater than 0.1%, no spike of the analyte is necessary.

6. ONE-9—Delete MQL and insert the following:

MDL: The method detection limit (MDL) is defined as the minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is

determined from analysis of a sample in a given matrix containing the analyte.

7. ONE-9—Revise the definition of PRECISION to read as follows:

Precision is the agreement between a set of replicate measurements without assumption or knowledge of the true value. Precision is assessed by means of duplicate/replicate sample analysis.

8. ONE-9—Add the heading SAMPLES, with the following definitions:

ONE-9—Delete MATRIX SPIKE/ DUPLICATE ANALYSIS and insert the following:

Duplicate samples: Duplicate samples are two separate samples taken from the same source (i.e. in separate containers and analyzed independently).

ONE-10—Delete CHECK SAMPLE and insert the following:

Quality control reference sample: A sample prepared from an independent standard at a concentration other than that used for calibration, but within the calibration range. An independent standard is defined as a standard composed of the analyte(s) of interest from a different source than that used in the preparation of standards for use in the standard curve. A quality control reference sample is intended as an independent check of technique, methodology, and standards and should be run with every analytical batch or every 20 samples, whichever is greater. This is applicable to all organic and inorganic analyses.

ONE-10—Replace the definition of REPLICATE SAMPLE with the following:

Replicate Samples: Replicate samples are two aliquots taken from the same sample container and analyzed independently. In cases where aliquoting is impossible, as in the case of volatiles, duplicate samples must be taken for replicate analysis.

9. ONE-10—Replace the definition of STANDARD CURVE with the following:

Standard curve: A *standard curve* is a curve which plots concentrations of known analyte standards versus the instrument response to the analyte. Calibration standards are prepared by diluting the stock analyte solution in graduated amounts which cover the expected range of the samples being analyzed. Standards should be prepared at the frequency specified in the appropriate section. The calibration standards must be prepared using the same type of acid or solvent and at the same concentration as will result in the samples following sample preparation. This is applicable to organic and inorganic chemical analyses.

10. ONE-10—Replace the definition of SURROGATE with the following:

Surrogate: Surrogates are organic compounds which are similar to analytes of interest in chemical composition, extraction, and chromatography, but which are not normally found in environmental samples. These compounds are spiked into all blanks, calibration and check standards, samples (including duplicates and QC reference samples) and spiked samples prior to analysis. Percent recoveries are calculated for each surrogate.

11. ONE-11—Replace the definition of WATER with the following:

Water: Any reference to water in a Chapter or Method refers to ASTM Type II reagent water (unless otherwise specified) which is free of contaminants that may interfere with the analytical test in question.

12. ONE-11—In section 1.2.1, revise FIELD QUALITY CONTROL to read as follows:

1.2.1 *Field Quality Control* "* * * Quality Assurance Project Plan (QAPP) shall include as appropriate:"

13. ONE-11—In section 1.2.2 revise *Analytical Quality Control* by deleting the last sentence in the second paragraph:

"The frequencies of these procedures shall be as stated below or at least one with each analytical batch."

14. ONE-12—Replace section 1.2.2.1.1 with the following:

1.2.2.1.1 *Matrix Spiked Sample:* A matrix spiked sample shall be analyzed with every analytical batch or every 20 samples, whichever is greater. The sample shall be spiked with the analyte(s) of interest (see the appropriate method). The sample to be spiked should be typical or representative of the batch. Ideally, it should be an intermediate between the cleanest and the most contaminated samples based on the best information available. It is recommended that the spike be made in a replicate of the field duplicate samples. This is applicable to all organic or inorganic chemical analyses.

15. ONE-12—Add section 1.2.2.1.2 to read as follows:

Field Duplicate Samples shall be analyzed with every analytical batch or every 20 samples, whichever is greater. This procedure is applicable to all organic and inorganic chemical analyses.

16. ONE-12—Add the following sentence to the discussion under section 1.2.2.1.4, FIELD SAMPLES/SURROGATE COMPOUNDS, delete the term "Field Samples" from the heading, and replace check sample with the following:

1.2.2.1.4 *Surrogate Compounds:* "* * * evaluation of analytical quality then will rely on the quality control embodied in the quality control reference sample and spiked and duplicate samples. This is applicable to organic analyses only."

17. ONE-12—In section 1.2 2.1.5, the term CHECK SAMPLE has been changed to QUALITY CONTROL REFERENCE SAMPLE and the definition rewritten as follows:

1.2.2.1.5 *Quality Control Reference Sample:* A *quality control reference sample* is a sample prepared from an independent standard at a concentration other than that used for calibration, but within the calibration range. An independent standard is defined as a standard composed of the analytes of interest from a different source than that used in the preparation of standards for use in the standard curve. A quality control reference sample is intended as an independent check of technique, methodology, and standards and should be run with every analytical batch or every 20 samples, whichever is greater. This is applicable to all organic and inorganic analyses.

18. ONE-13—Insert section 1.2.2.1.6, CHECK STANDARD, to read as follows:

1.2.2.1.6 *Check Standard*: A standard of known concentration prepared by the analyst to monitor and verify instrument performance on a daily basis.

19. ONE-13—In section 1.2.2.2, add the following sentence at the end of the discussion on CLEAN-UPS:

"This is applicable to organic analyses only."

20. ONE-13—In section 1.2.2.2.1, add the following sentence at the end of the discussion on *Column check Sample*:

"This is applicable to organic analyses only."

21. ONE-13—In section 1.2.2.2.2, remove "sample" from the heading for COLUMN CHECK SAMPLE BLANK, delete the present discussion, and insert the following:

1.2.2.2.2 *Column Check Blank*: "* * * The *column check blank* shall be run after activating or deactivating a batch of adsorbent. This is applicable to organic analyses only."

22. ONE-13—In section 1.2.2.3.1, add the following sentence to INSTRUMENT ADJUSTMENT: TUNING, ALIGNMENT, ETC. and alter the heading as follows:

1.2.2.3.1 *Instrument Adjustment, Tuning, and Alignment: "* * * appropriate procedures. This is applicable to all organic and inorganic analyses."*

23. ONE-14—In section 1.2.2.3.2, revise CALIBRATION to read as follows:

"* * * procedures employed. Methods 6010, 7000, and 8000 as well as the appropriate analytical procedure * * *"

24. ONE-14—In section 1.2.2.3.3, revise ADDITIONAL QC REQUIREMENTS FOR INORGANIC ANALYSIS to read as follows:

"Standard curves derived from data consisting of one calibration blank and three concentrations * * *"

25. ONE-16—In section 1.3, rvise METHOD DETECTION LIMIT to read as follows:

For operational purposes, when it is necessary to determine the method detection limit in the sample matrix, the MDL defined in One-9 shall be determined by multiplying by 7 the standard deviation obtained from the triplicate analyses of a matrix spike containing the analyte of interest at a concentration three to five times the estimated MDL.

- Determine the estimated MDL as follows:
- Obtain the concentration value that corresponds to:
- a) an instrument signal/noise ratio within the range of 2.5 to 5.0, or
- b) the region of the standard curve where there is a significant change in sensitivity, i.e., a break in the slope of the standard curve.
- Determine the variance (S^2) for each analyte as follows:

$$S^2 = 1/(n-1)\left[\sum_{i=1}^{n} X_i^2 - 1/n\left(\sum_{i=1}^{n} X_i^2\right)\right]$$

• Determine the standard deviation (S) for each analyte as follows: $S = (S^2)^{1/2}$

• Determine the MDL for each analyte as follows: $MDL = t_{(n-1,\ 1-\alpha=0.99)}(S)$ where $t_{(n-1,\ 1-\alpha=0.99)} = 6.965$ for three replicates as determined from the table of student's t values at the 99 percent level.

26. ONE-16—Revise section 1.5 QUALITY CONTROL DOCUMENTATION to read as follows:

"* * * This package can be obtained from * * *"

[FR Doc. 89-1 Filed 1-19-89; 8:45 am]

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federal register

Monday
January 23, 1989

Part III

Department of Housing and Urban Development

Office of the Secretary

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Part 14 et al.
Implementation of the Fair Housing Amendments Act of 1988; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Parts 14, 100, 103, 104, 105, 106, 109, 110, 115, and 121

[Docket No. R-89-1425; FR-2565]

Implementation of the Fair Housing Amendments Act of 1988

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

ACTION: Final rule.

SUMMARY: HUD is adopting regulations to implement the changes made in Title VIII of the Civil Rights Act of 1968 by the Fair Housing Amendments Act of 1988, which was enacted September 13, 1988 and will become effective on March 12, 1989. Title VIII has prohibited discrimination in the sale, rental, and financing of dwellings based on color, religion, sex, or national origin. The Fair Housing Amendments Act expands the coverage of Title VIII to prohibit discriminatory housing practices based on handicap and familial status, establishes an administrative and judicial enforcement mechanism for cases where discriminatory housing practices cannot be resolved informally, and provides for monetary penalties in cases where housing discrimination is found. The Fair Housing Amendments Act also establishes design and construction requirements for certain new multifamily dwellings for first occupancy on or after March 13, 1991 (30 months after the date of enactment) and an exemption from the prohibitions against discrimination on the basis of familial status for certain housing for older persons.

This final rule adopts new regulations describing the nature of conduct made unlawful with respect to the sale, rental and financing of dwellings or in the provision of services and facilities in connection therewith (24 CFR Part 100); establishing procedures for the investigation of complaints of discriminatory housing practices (24 CFR 103); and establishing procedures for administrative proceedings involving discriminatory housing practices (24 CFR Part 104).

HUD is also revising existing regulations issued under Title VIII to reflect the expanded coverage of Title VIII. In addition, HUD is amending the regulations providing for the recognition of substantially equivalent state and local fair housing laws (24 CFR Part 115) to provide for the new certification procedure established by the Fair Housing Amendments Act.

DATE: This rule will become effective on March 12, 1989. The incorporation by reference of the American National Standard for buildings and facilities providing accessiblity and usability for physically handicapped people (ANSI A117.1-1986) is approved by the Director of the Federal Register as of March 12, 1989.

FOR FURTHER INFORMATION CONTACT: Harry L. Carey ((202) 755-5570, Office of the General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC, 20410-0500. (The telephone number set forth above is not a toll-free number.) The toll-free TDD number is 1-800-543-8294.

This rule will be available in braille and on tape for persons with vision impairments in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, at the above location.

SUPPLEMENTARY INFORMATION: The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980. The OMB control number, when assigned, will be announced in a separate notice in the **Federal Register**. The public reporting burden for each of these collections of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burdens is provided under the preamble heading, *Other Matters*. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Background

Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601-3619) made it unlawful to discriminate in any aspect relating to the sale, rental or financing of dwellings or in the provision of brokerage services or facilities in connection with the sale or rental of a dwelling because of race, color, religion, sex, or national origin. Under the provisions of Title VIII, persons who believed that they had been subjected to, or were about to be subjected to, a discriminatory housing practice could file a complaint with the Secretary of Housing and Urban Development. Title VIII required the Department of Housing and Urban Development to investigate each complaint and, where the Department determined to resolve the matters raised in a complaint, to engage in informal efforts to conciliate the issues in the complaint.

However, where these informal efforts to conciliate a case were unsuccessful, Title VIII did not provide the Secretary with any administrative mechanism for redressing acts of discrimination against an individual. In addition, while the Secretary could refer a case involving a pattern or practice of discrimination to the Attorney General for the initiation of a civil action, Federal courts did not award individual relief to the victims of discrimination in such cases.

The Fair Housing Amendments Act of 1988 (Pub. L. 100-430, approved September 13, 1988) was enacted to strengthen the administrative enforcement provision of Title VIII, to add prohibitions against discrimination in housing on the basis of handicap and familial status, and to provide for the award of monetary damages where discriminatory housing practices are found. The amended law, referred to as the Fair Housing Act, will become effective on March 12, 1989.

The provisions in the Fair Housing Act describing the nature of conduct which constitutes a discriminatory housing practice have been revised to extend the protections of the Fair Housing Act to persons with handicaps and to families with children. In this respect, sections 804, 805, and 806 of the Fair Housing Act prohibit discrimination in any activities relating to the sale or rental of dwellings, in the availability of residential real estate-related transactions, or in the provision of services and facilities in connection therewith because of race, color, religion, sex, handicap, familial status, or national origin.

The Fair Housing Act also specifically makes it unlawful to refuse to permit, at the expense of the handicapped person, reasonable modifications to existing premises occupied or to be occupied by such a person if such modifications are necessary to afford such person full enjoyment of the premises (section 804(f)(3)(A)). With respect to rental housing, the Fair Housing Act provides that a landlord may, where reasonable, condition permission for a modification

on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonalbe wear and tear excepted. The Act also makes it unlawful to refuse to make reasonable accommodations in rules, policies, practices, or services to afford a handicapped person equal opportunity to use and enjoy a dwelling.

Further, the Fair Housing Act makes it unlawful to design and construct certain multifamily dwellings for first occupancy after March 13, 1991, in a manner that makes them inaccessible to persons with handicaps. All premises within such dwelling also are specifically required to contain several features of adaptive design so that the dwelling is readily accessible to and usable by persons with handicaps.

With respect to the new protection for families with children, the Fair Housing Act prohibits discrimination because of familial status (generally, the presence of children under 18 in a family) in the sale or rental of housing. However, the act provides an exemption from this prohibition for housing which qualifies as "housing for older persons".

Section 805 of the Fair Housing Act, as revised, prohibits discrimination related to "residential real estate-related transactions" rather than merely referring to "financing". In addition, the definition of the term residential real estate-related transaction specifically indicates that the Fair Housing Act applies to the selling, brokering and appraising of dwelling and to secondary mortgage market activities with respect to securities affected or supported by dwellings, as well as to the making and purchasing of loans and other financial assistance for dwellings. The Act, however, does not prohibit a person engaged in the business of furnishing appraisals from taking into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

Section 810 of the Fair Housing Act provides that any person who believes that he or she has been, or will be, subjected to a discriminatory housing practice because of race, color, religion, sex, handicap, familial status, or national origin may file a complaint with the Secretary of Housing and Urban Development. The section also authorizes the Secretary of Housing and Urban Development to file complaint on the Secretary's own initiative and to investigate housing practices in order to determine whether a complaint should be filed. Complaints must be filed not later than one year after an alleged discriminatory housing practice has occurred or terminated.

Upon the filing of a complaint, the Secretary is required to notify any respondent named in the complaint of the acceptance of the complaint and the discriminatory housing practice alleged in the complaint. The respondent may file, not later than 10 days after receipt of the notice of a complaint, an answer to the complaint. The Secretary is required to make an investigation of the alleged discriminatory housing practice and to complete the investigation within 100 days after the filing of the complaint, unless it is impracticable to do so.

At the end of each investigation, the Secretary is required to prepare a final investigation report. Under section 810(d), the final investigation report will be available to an aggrieved person or a respondent, upon request, at any time after the investigation is complete.

Section 810(b) of the Act directs the Secretary, to the extent feasible, to engage in efforts to conciliate the matters raised in the complaint at any time after the filing of the complaint.

Section 810(e) of the Act empowers the Secretary to authorize the Attorney General to file a civil action seeking appropriate preliminary or temporary relief pending final disposition of a complaint if, at any time after the filing of such complaint, the Secretary concludes that such action is necessary to carry out the purposes of the Act.

Whenever a complaint alleges a discriminatory housing practice within a State or locality which has a Fair Housing law or ordinance which has been certified by the Secretary as being substantially equivalent to the Fair Housing Act, the Secretary must refer the complaint to the agency administering such law or ordinance before taking any action with respect to the complaint. Except with the consent of a certified agency, or in other limited situations such as where a complaint is not being processed in a timely fashion or the State or local law or ordinance is found no longer to be substantially equivalent, the Secretary may not take any further action with respect to complaints referred to such agencies.

Section 810(f) of the Act permits the Secretary to certify an agency only where the Secretary determines that the rights protected by the agency, the procedures followed by the agency, the remedies available to the agency, and the availability of judicial review of the agency's actions are substantially equivalent to those created in the Fair Housing Act.

This section also provides that agencies which the Secretary has determined administer State and local fair housing laws which provide rights and remedies for discriminatory housing practices that were substantially equivalent to those contained in Title VIII of the Civil Rights Act of 1968, or agencies which had been recognized for interim referral of complaints under Title VIII, will be considered certified for a period not to exceed 48 months for the purpose of referring complaints under the Fair Housing Act with respect to matters for which they had been certified on the day before the date of enactment of the Fair Housing Act (*i.e.*, September 12, 1988).

Section 810(g) of the Act requires the Secretary, in cases where the matters raised in a complaint cannot be resolved by conciliation, to determine, based upon the facts, whether reasonable cause exists to believe a discriminatory housing practice has occurred or is about to occur. Such a finding must be made by the Secretary within 100 days after the filing of a complaint or within 100 days after the Secretary has commenced action on a complaint which had been referred to a certified agency, unless it is impracticable to do so. Where the Secretary makes a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary must immediately issue a charge on behalf of the aggrieved person commencing a formal administrative proceeding before an administrative law judge.

Section 812(a) of the Act provides any complainant, aggrieved person, or respondent with an opportunity to elect not to proceed before an administrative law judge but to move the case to an appropriate Federal district court. Such an election must be made within 20 days after the receipt of the service upon such person of the charge filed by the Secretary. Upon notification that a person has elected to proceed to Federal district court, the Secretary will authorize the Attorney General to file a civil action on behalf of the aggrieved person. An action authorized by the Secretary must be brought within 30 days after the election is made.

Where no election is made, the case will be heard by an administrative law judge. Under section 812(c) of the Act, the Federal Rules of Evidence will apply to the presentation of evidence in the same manner that they apply to evidence presented in a civil action in Federal district court. Section 812(g) requires the administrative law judge to issue findings of fact and conclusions of law within 60 days after the end of a hearing.

Where the administrative law judge finds that a respondent has engaged in a

discriminatory housing practice, the Fair Housing Act provides for the issuance of an order for such relief as is appropriate, which may include actual damages and injunctive or other equitable relief. In order to vindicate the public interest, the order of an administrative law judge may assess a civil penalty against the respondent.

The decision of the administrative law judge can be reviewed by the Secretary. However, this review must be completed within 30 days after the decision is issued. Any final agency decision on the issue of discriminination is subject to review on appeal by the United States Courts of Appeals.

The Fair Housing Amendments Act directs the Secretary of Housing and Urban Development to issue regulations implementing the Fair Housing Act. Section 13 of the Fair Housing Amendments Act provides that "[I]n consultation with other appropriate Federal agencies, the Secretary shall, not later than the 180th day after the enactment of this Act, issue rules to implement title VIII as amended by this Act." That section also required the Secretary to give notice and opportunity for comment with respect to such rules.

On November 7, 1988, the Department published in the **Federal Register** (53 FR 44992) a proposed rule to provide the interpretation of the Secretary of Housing and Urban Development on the scope of the coverage provided and the nature of activities made unlawful by the Fair Housing Act. The proposed rule also contained the procedures which would be applicable to the receipt and processing of complaints and the initiation and conduct of formal enforcement proceedings.

Specifically, the Department proposed to add the three new parts to Subtitle B of Title 24 of the Code of Federal Regulations. The new Part 100 described the conduct made unlawful under the Fair Housing Act. The new Part 103 set forth the procedures for the receipt, investigation and conciliation of complaints and for the issuance of charges commencing formal administrative proceedings. The new Part 104 established rules for the conduct of administrative hearings before administrative law judges and provided rules of discovery in connection with such administrative proceedings.

It was further proposed that the existing departmental regulations authorizing the Secretary to collect racial, sex and ethnic data in departmental programs, located at 24 CFR Part 100, be redesignated as 24 CFR Part 121. These regulations were revised in the proposal to reflect the additional data requirements for HUD programs to meet the Department's responsibility to provide reports to Congress and to make available to the public data on persons eligible to participate and who are participating in HUD programs.

The proposed rule also made revisions in four existing departmental regulations implementing the Fair Housing Act to reflect the expansion of the coverage of the law to include handicap and familial status. Those regulations are: Fair Housing Administrative Meetings under Title VIII of the Civil Rights Act of 1968 (24 CFR Part 106), Fair Housing Advertising (24 CFR Part 109), Fair Housing Poster (24 CFR Part 110) and Certification of Substantially Equivalent Agencies (24 CFR Part 115).

The proposal provided a 30-day period for the submission of comments by the public, ending December 7, 1988. The Department received 6,425 public comments on the proposed rule by the end of the comment period. In addition, a substantial number of comments were received by the Department after the December 7 deadline. Even though those comments were not timely filed, they were reviewed to assure that any major issues raised were adequately addressed in comments that were received by the deadline.

Despite the extraordinary number of comments submitted (there were several thousand comments just from mobile home owners and operators of mobile home parks), each of the timely comments was read, and a list of all significant issues raised by those comments was compiled. All these issues were considered in the development of this rule.

In addition to consideration of public comments, HUD staff members met with representatives of several major interest groups who requested an opportunity to elaborate on the views expressed in their written comments. These staff members (with responsibility for the development of this rule) met with representatives of the National Apartment Association, the Society of Real Estate Appraisers, the American Institute of Real Estate Appraisers, the National Association of Home Builders, the Western Mobile Home Association, the Leadership Conference on Civil Rights, National Association for the Advancement of Colored People, NAACP Legal Defense Fund, Children's Defense Fund, American Civil Liberties Union, Mental Health Law Project, and representatives of various other Fair Housing Organizations. In each instance, the organization or organizations presented views identical to or consistent with positions taken in previously submitted written comments. A record of each meeting was made, including the names of persons attending, the date, and a brief summary of the issues discussed. These meeting records appear in the Department's public comment file. The staff members also met with staff of the Senate Judiciary Committee.

Part 100—Discriminatory Conduct Under the Fair Housing Act

Part 100 is a new part titled "Discriminatory Conduct Under The Fair Housing Act". The new Part 100:

—Indicates the conduct which is made unlawful under the Fair Housing Act;
—Includes guidance as to the responsibility of persons to permit reasonable modifications to dwellings and to make reasonable accommodations to rules and practices for persons with handicaps and further provides information as to the design and construction requirements applicable to certain new construction multifamily housing for first occupancy after March 13, 1991; and
—Describes the requirements which must be met for housing to be exempted from the prohibitions against discrimination based on familial status because it qualifies as housing for older persons.

The comments received with respect to Subparts A, B, and C of Part 100 raised several issues of general importance.

Standard for Proving a Violation

The proposed rulemaking indicated that the descriptions of unlawful conduct contained in this part generally mirrored the language of the statutory prohibitions against discrimination under the Fair Housing Act. The proposed rule indicated that the specific prohibitions in each section of the regulations were amplified by examples of unlawful conduct provided in those sections. The preamble to the proposed rule stated that many of the practices so identified have been the subject of court decisions since the passage of Title VIII of the Civil Rights Act of 1968. The preamble further stated that other examples reflect the interpretation of HUD based on its experience since 1968 in the investigation of complaints of discriminatory housing practices. In addition, the preamble cautioned that the illustrations in Part 100 were only examples of the types of conduct made unlawful under the Fair Housing Act.

Although the Department viewed the illustrations of conduct unlawful under the Fair Housing Act in Part 100 to be descriptive of the types of conduct

prohibited, several commenters suggested that, in some instances, the illustrations could be read to suggest that the Department was using them to establish the legal standards for determining liability in the adjudication of matters under the Fair Housing Act.

Specifically, these commenters asserted that four illustrations in the proposed rule were susceptible to misinterpretation. With regard to §§ 100.70(c)(3), 100.75(c)(3) and 100.80(b)(3), they asserted that the use of the phrases "in order to discourage", "in order to deny" and "in order to preclude" could be viewed as limiting the types of activities which would constitute unlawful conduct. Similarly, these commenters asserted that, in § 170.70(d)(1), the phrase "to encourage, permit or reward" could also imply that intentional discriminatory conduct was necessary to establish that a discriminatory housing practice occurred. While the Department believes that the cited illustrations do not in any way imply the standard for determining the liability of persons, these regulations are not designed to resolve the question of whether intent is or is not required to show a violation and in order to assure that there will be no confusion as to the scope of Part 100, the illustrations in § 100.70(c)(3), 100.75(c)(3) and 100.80(b)(3) have been revised. The illustration in § 100.70(d)(1) has been deleted from the final rule for the reasons discussed in the following section of this preamble.

Affirmative Fair Housing Activities

Several commenters suggested that the proposed rule did not address affirmative efforts by localities to further the achievement of the goal of fair housing through the implementation of programs to promote integrated housing. Several commenters, including fair housing groups, persons and organizations involved in promoting fair housing and a number of local governments, interpreted certain illustrations of conduct made unlawful in the proposed rule as prohibiting the use of governmentally approved programs designed to promote greater housing opportunities for persons.

On the other hand, a comment from an association representing persons involved in the sale and rental of dwellings urged that the proposed rule be revised to make it clear that such practices are prohibited by the Fair Housing Act.

The Department does not believe that the proposed rule could be interpreted to make affirmative marketing programs, designed to make available information which broadens housing choices for persons, a violation of the Fair Housing Act.

The Department of Housing and Urban Development, shortly after the enactment of Title VIII of the Civil Rights Act of 1968, published regulations designed to promote greater opportunities for persons to participate in its housing programs. These Affirmative Fair Housing Marketing Regulations (24 CFR 200.600) implement the Department's policy of assuring that persons of similar income levels in a housing market area have a like range of housing choices available to them, regardless of race, color, religion, sex, or national origin.

The regulation provides for the development and implementation of an affirmative fair housing marketing plan. As part of this plan, participants in HUD housing programs must carry out an affirmative program to attract buyers or tenants, regardless of sex, of all minority and majority groups to the housing. In addition, the Department requires program participants to identify any groups of persons who are not likely to be aware of the available housing and to undertake special marketing efforts designed to make such persons aware of the available housing and their ability to obtain it on a nondiscriminatory basis.

Nothing in the amendments to the Fair Housing Act or their legislative history would support a conclusion that Congress sought to make choice-broadening activities, such as the Department's Affirmative Fair Housing Marketing Program, unlawful discriminatory housing practices.

Beyond these activities, both groups of commenters recommended that the final rule should indicate whether other practices designed to promote integrated housing patterns are permissible under the Fair Housing Act. Generally, these "pro-integrative" programs involve practices which are designed and operated to provide incentives for persons to make housing choices in a manner which results in the furtherance of integrated housing patterns.

The issue of programs designed to promote integrated housing patterns was considered by the Congress in connection with an amendment to the Fair Housing Amendments Act offered in the House which would have made it unlawful to use any preferences in the provision of any dwelling based on race, color, religion, gender or national origin. Before the amendment was defeated, Congressman Don Edwards, one of the chief sponsors of the Fair Housing Amendments Act, agreed to hold hearings on the subject of pro-integrative programs. (See 134 Cong. Rec. H4903 (daily ed. June 29, 1988).)

Very recently, on December 12, 1988, the House Committee on the Judiciary Subcommittee on Civil and Constitutional Rights held oversight hearings on Fair Housing. In this hearing, the subcommittee heard testimony concerning the issues raised in pro-integration efforts. In fact, much of the testimony involved activities which are the same as or similar to those referred to in the comments on the proposed rule.

In view of the legislative history concerning pro-integration programs and the Congressional action in this area, the Department has determined that it would not be appropriate to address the issue of pro-integration programs in this final rule.

Commenters pointed to several of the illustrations in the proposed rule which they believed could be read as indicating that the Department would view pro-integration activities as constituting unlawful conduct.

The Department believes that the illustrations contained in the proposed rule accurately reflect the types of activities which, when they result in choice limitations, would constitute unlawful conduct. However, in order to assure that the Department's rule implementing the Fair Housing Act does not impact on the consideration of the scope of permissible affirmative activities to promote integration, the Department has removed the illustrations that the commenters asserted could be construed as impacting either positively or negatively on the Congressional evaluation. Specifically, the illustrations in §§ 100.60(b)(5), 100.65(b)(2), 100.70(c)(1), 100.70(d)(1) and (2), 100.120(b)(1), (3), (4), (5), 6, and (7), 100.130(b)(1) and (4) and 100.135(d)(1), (2), and (3) have been removed. Further, the Department has rejected comments suggesting changes in § 100.70(a), and the addition of new illustrations in §§ 100.70(c), 100.75(c), 100.130(c), and 100.135(d) to indicate that pro-integration practices are unlawful.

In addition, several commenters requested that the provisions of the proposed rule regarding unlawful advertising practices in §100.50(b)(4) be revised. The language in this section has been changed to mirrow the language contained in section 804(c) of the Fair Housing Act relating to unlawful advertising with respect to the sale or rental of a dwelling.

Protection of New Covered Classes

In the preamble to the proposed rule, the Department indicated that it interpreted the protections afforded to

handicapped persons and families with children in the same manner as the protections provided to others under the Fair Housing Act. A number of commenters suggested that it was unreasonable to assume that Congress intended to provide the same protections to the new classes of persons afforded protection under the amendments. One commenter supported this position by suggesting that it would be more appropriate to utilize standards developed under the Equal Protection Clause of the Fourteenth Amendment to the Constitution in determining the nature of the protections provided to handicapped persons and families with children. This commenter indicated that, under such a standard, classifications based on race and sex would stand on a different footing from classifications based on handicap and familial status, and that differential treatment of the handicapped or families with children in some particular contexts could be justified by a rational relationship to legitimate interests, even where similar differential treatment based on race or sex could not be justified.

While it is true that the Congress, in enacting Title VIII of the Civil Rights Act of 1968, sought to assure that persons would be accorded equal protection of the law, the Constitutional underpinnings of the law are also rooted in the Commerce Clause.

In a memorandum on the constitutionality of the Fair Housing Law, the Department of Justice set forth the support in the Commerce Clause for the legislation, stating:

"Discrimination in housing affects this interstate commerce in several ways. The confinement of Negroes and other minority groups to older homes in ghettoes restricts the number of new homes which are built and consequently reduces the amount of building materials and residential financing which moves across state lines. Negroes, especially those in the professions or in business, are less likely to change their place of residence to another state when housing discrimination would force them to move their families into ghettoes. The result is both to reduce the interstate movement of individuals and to hinder the efficient allocation of labor among the interstate components of the economy.

"The Commerce Clause grants Congress plenary power to protect interstate commerce from adverse effects such as these. The power is not restricted to goods or persons in transit. It extends to all activities which affect interstate commerce, even if the goods or persons engaged in the activities are not then, or may never be, traveling in commerce. The power exists even when the effects upon which it is based are minor, or when taken individually, they would be insignificant. It is sufficient if the effects, taken as a whole, are present in measureable amounts. And it does not matter that when Congress exercises its power under the Commerce Clause, its motives are not solely to protect commerce. It can as validly act for moral reasons." (footnotes omitted) 114 Cong. Rec. 2536–2537. (February 7, 1968)

The Department believes that the legislative history of the Fair Housing Act and the development of fair housing law after the protections of that law were extended in 1974 to prohibit discrimination because of sex (Congress amended sections 804, 805, and 806 by adding sex to the classes of persons protected under Title VIII, see section 808(b)(1) of the Housing and Community Development Act of 1974, Pub. L. 93–383) support the position that persons with handicaps and families with children must be provided the same protections as other classes of persons.

Increased Liability

A significant number of commenters asserted that providing protections to persons with handicaps and families with children would restrict their ability to establish reasonable rules relating to the availability and the use of facilities provided in connection with dwellings. These commenters also suggested that a regulation requiring full access of handicapped persons and children to all facilities provided in connection with dwellings, and requiring the rental of dwellings on upper floors of a high-rise building, would result in increased tort liability.

The Department does not believe that, in enacting the Fair Housing Amendments Act, the Congress sought to limit the ability of landlords or other property managers to develop and implement reasonable rules and regulations relating to the use of facilities associated with dwellings for the health and safety of persons. However, there is no support for concluding that it is permissible to exclude handicapped persons or families with children from dwellings on upper floors of a high-rise, based on the assertion that such dwellings per se present a health or safety risk to such persons. Further, to permit such a practice would render meaningless the provisions of the law requiring that all dwellings in buildings consisting of 4 or more units and having one or more elevators be accessible to and usable by handicapped persons.

A number of commenters also urged the Department, in its final rule, to provide that a high-rise building could be exempted from the familial status provisions of the Act if it were certified that the high-rise building did not provide a safe and healthy living environment for children. In support of this type of exemption, several commenters pointed to language contained in Section 201 of the Housing and Community Development Act of 1977 which directed that the Secretary of HUD "prohibit high-rise elevator projects for families with children unless there is no practicable alternative." (See section 8(c)(1) of the Housing Act of 1937 (42 USC 1437f(c)(1)).). There is nothing in the Fair Housing Act to indicate that Congress in any way sought to limit the ability of families with children to obtain dwellings in a building other than those specifically exempted under the Act. Further, the department does not believe that the language in the Housing and Community Development Act of 1977, requiring HUD approval of the use of high-rise projects for providing housing for families with children would support a provision in this final rule which would provide an exemption from coverage of the Fair Housing Act for such buildings. As a result, these comments have not been adopted.

However, there is nothing in the provisions of the Fair Housing Amendments Act or its legislative history that indicates that Congress sought to impose any new liability on the owners and managers of housing. This interpretation is supported by a colloquy between Senator Specter and Senator Kennedy regarding the issue of liability:

Mr. Specter. It is my understanding that, as a result of this bill, a property owner does not assume a greater degree of vicarious liability as a result of injuries that may be caused by the tenants in the expanded categories of protected classes established under this bill. I believe it would be useful for the manager to confirm that it is not the intent of Congress that property owners will incur greater vicarious tort liability as a result of this statute because of the physical or mental characteristics of the tenants covered by this bill.

Mr. Kennedy. The Senator is correct. Congress does not intend to alter vicarious or secondary State tort law through the provisions of this bill. There is no objective evidence to link concerns about increased liability with any of the protected classes, and none should be assumed. Thus, we are stating, as a matter of clarification, that there is no relationship between this bill and existing State vicarious and secondary liability tort laws. 134 Cong. Rec. S10549 (daily ed. Aug. 2, 1988).

Subpart A—General

Section 100.1 Authority.

The Fair Housing Amendments Act authorizes the Secretary of Housing and Urban Development to issue regulations implementing the provisions of the Fair Housing Act (42 U.S.C. 3600–3620). The regulations contained in Part 100 are being issued under the Secretary's authority for the administration and enforcement of the Fair Housing Act.

Section 100.5 Scope.

The Fair Housing Act provides, within constitutional limitations, for fair housing throughout the United States. It provides that no person shall, on the basis of race, color, religion, sex, handicap, familial status, or national origin, be subjected to discrimination in the sale, rental or advertising for sale or rental of dwellings, in the provision of brokerage services, or in residential real estate-related transactions. Section 100.5(a) and (b) indicates that this part provides guidance as to the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of real estate-related transactions.

Section 100.10 Exemptions.

The Fair Housing Act exempts certain types of housing from the coverage of the law. Section 807 of the Fair Housing Act provides that, under certain circumstances, religious organizations and private clubs may limit the sale, rental or occupancy of housing, owned or operated for other than a commercial purpose, to their members. Section 807 also provides that nothing in the provisions regarding familial status applies to housing for older persons. Section 803 of the Fair Housing Act provides that nothing in the Fair Housing Act, other than the prohibitions against discriminatory advertising, applies to the sale or rental by an owner of certain single family houses without the use of a real estate broker or to the rental of rooms in dwellings containing living quarters occupied by no more than four families, provided that the owner actually occupies one of the units. Section 100.10 of this part reflects these exemptions to the coverage of the law.

Section 100.10(a)(3) states that nothing in this regulation limits the applicability of any reasonable local, State or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. This paragraph incorporates into the regulation the revisions to section 807 of the Fair Housing Act contained in section 6(d) of the Fair Housing Amendments Act of 1988. That provision is intended to allow reasonable governmental limitations on occupancy to continue as long as they are applied to all occupants, and do not operate to discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin. H.R. Rep. No. 711, 100th Congress, 2d Sess. 31 (1988) ("House Report"). No changes have been made in this section of the regulations.

A number of commenters indicated that the proposed rule did not adequately address the question of what occupancy standards, if any, can be used by persons in connection with the sale and rental of dwellings. Many of these commenters, generally persons involved in the rental of dwellings and associations representing owners and managers of rental dwellings, recommended that the final rule include a HUD-developed occupancy standard, and state that in the absence of a State or local occupancy code, owners or managers complying with the HUD standard would be considered to be in compliance with the Fair Housing Act with respect to the treatment of families with children. In the alternative, several commenters recommended that HUD indicate in the final rule that owners and managers of rental housing would be in compliance with the Fair Housing Act if they developed and implemented occupancy standards which are no less stringent than occupancy guidelines currently used in connection with HUD-assisted housing programs.

While the statutory provision providing exemptions to the Fair Housing Act states that nothing in the law limits the applicability of any reasonable Federal restrictions regarding the maximum number of occupants, there is no support in the statute or its legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code. This interpretation is consistent with Congressional reliance on and encouragement for States and localities to become active participants in the effort to promote achievement of the goal of Fair Housing. Further, while the Department has developed occupancy guidelines for use by participants in HUD housing programs, these guidelines are designed to apply to the types and sizes of dwellings in HUD programs and they may not be reasonable for dwellings with more available space and other dwelling configurations than those found in HUD-assisted housing.

On the other hand, there is no basis to conclude that Congress intended that an owner or manager of dwellings would be unable in any way to restrict the number of occupants who could reside in a dwelling. Thus, the Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit. In this regard, it must be noted that, in connection with a complaint alleging discrimination on the basis of familial status, the Department will carefully examine any such nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children.

Several commenters requested advice regarding the application of the Fair Housing Act to the sale of condominium and cooperative units and mobile homes by private persons.

As indicated in the proposed rule, the prohibitions against discrimination apply to all types of dwellings, including condominiums, cooperatives and mobile homes. Thus, discrimination in the sale or rental of such dwellings would be unlawful. However the Fair Housing Act provides a limited exemption for the sale of certain single family houses, and § 100.10(c) describes this statutory exemption. Specifically, this section indicates that the Fair Housing Act exempts from the provisions prohibiting discrimination any single family house sold by an owner, subject to certain conditions: the owner may not own or have an interest in more than three such houses at any one time; in the case of the sale of a single family house in which the owner was not the most recent occupant prior to its sale, the owner may not have made any other such sale within the preceding twenty-four months; and the unit must be sold or rented without the use of a real estate broker or agent, and without the use of any discriminatory advertisement.

Thus, the sale of a single family house, including the sale of a condominium or cooperative unit or a mobile home, by an owner would not be covered by the provisions of the Fair Housing Act, provided that the limitations in § 100.10(c) are met. However, it must be noted that the exemption in this section applies only to the *owner* of such a dwelling, and that the cooperative or condominium or mobile home park would be prohibited from engaging in any discriminatory conduct with respect to the dwelling notwithstanding the fact

that the conduct of the owner was not covered.

Section 100.20 Definitions.

Section 100.20 provides definitions to be used for terms in Part 100. The definition of the term "dwelling" in the proposed rule stated that the term include mobile home parks, condominiums and cooperatives. A number of comments aruged that cooperatives, condominiums and mobile homes are not "dwellings" within the meaning of the statutory definition of the term. The Department disagrees. The statutory definition of a dwelling is "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." This definition is clearly broad enough to cover each of the types of dwellings enumerated in the proposed rule: mobile home parks, trailer courts, condominiums, cooperatives, and time-sharing properties. Several commenters suggested that the definitions of the terms "dwelling" and "person" should be expanded to provide some illustrations, particularly in the areas relating to handicap and familiar status.

Other commenters recommended that the final rule should contain the same definitions as those provided in the Fair Housing Act. These commenters indicated that the addition of certain types of persons, or certain examples of dwellings, could be viewed as indicating a restriction not contemplated in the law.

The Department has determined that, on balance, the need to leave open the extent and scope of the terms defined in the Fair Housing Act outweighs the need to provide comprehensive examples in connection with this rulemaking. As a result, the definitions of the terms "dwelling" and "person" have been revised to read as set forth in the statute.

A number of commenters objected to the inclusion of the phrase "is about to occur" in the definition of the term "aggrieved person". These commenters suggested that the addition of this phrase was inappropriate in that it would make unlawful acts that have not occurred.

The definition of the term "aggrieved person", as any person who claims to have been injured by a discriminatory housing practice, or who believes that he or she will be injured by a discriminatory housing practice that is about to occur, is statutory and has not been changed in the final rule. The phrase "is about to occur" applies to a number of situations in which it is clear to a person that, if he or she takes an action, he or she will be subjected to a discriminatory act which will result in an injury. In such cases, the Fair Housing Act does not require these persons to expose themselves to the injury involved with the actual act of discrimination before filing a comlaint.

A number of commeters suggested that the definition of aggrieved person be expanded to incorporate into the text of the rule the statement in the preamble to the proposed rule that an "aggrieved person includes a fair housing organization as well as a tester or other person who seeks information about the availability of dwellings to determine whether discriminatory housing practices are occurring." In addition, several commenters suggested that references to providers of group homes for handicapped persons also be added to the definition.

As indicated above, the Department has determined that the definitions in these regulations which are terms defined in the Fair Housing Act should contain the statutory language. However, the Department has consistently interpreted the provisions of the fair housing law to permit the filing of a complaint by any person or organization which alleges that a discrimintory housing practice has occurred or is about to occur and which will result in an injury to them.

The proposed rule defined the "broker" or "agent" as any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts, and the administration of matters regarding such offers, solicitations or contracts or any real estate-related transactions. Several commenters pointed out that the Fair Housing Act did not contain a definition of these terms. These commenters also pointed out that the specific definition of these terms, for the purpose of this regulation, could result in a limitation on the types of persons who would be considered as brokers or agents in connection with any other aspect of a housing transaction.

The Department did not intend, in the proposed rule, to establish a universal definition of the terms "broker" or "agent." However the Department believes that since these terms appear in numerous places throughout the rule, guidance is necessary with respect to the scope of persons who are considered to be brokers and agents, particularly when such persons are involved in the sale or rental of dwellings. Therefore, a definition of the terms "broker" or "agent" has been retained in the final rule. In order to avoid confusion as to whether persons otherwise involved in housing transactions are acting as brokers or agents, the definition has been revised to provide that a broker or agent "includes" rather than "means" persons described in the definition.

Several persons indicated that the term "person in the business of selling or renting dwellings", which was included as a defined term in the proposed rule, was never used in the text of the rule. These commenters suggested that the definition of this term be deleted. These commenters are in error, since the term appears in the exemption for the sale or rental of a single family house by an owner, in § 100.10(c)(l)(ii). The definition, which is taken from section 803(c) of the Fair Housing Act, has been retained in the final rule.

The remaining definitions in the proposed rule have not been changed in the final rule.

Subpart B—Discriminatory Housing Practices

Section 100.50 Real estate practices prohibited.

Section 100.50 of the rule states that Subpart B provides the Department's interpretation of the conduct made unlawful under section 804 and section 806 of the Fair Housing Act. In general, these provisions describe conduct made unlawful with regard to any aspect related to the sale, rental, or advertising of dwellings and to the provisions of brokerage services and facilities in connection with the sale or rental of dwellings.

Section 100.50(b) describes the specific conduct made unlawful in relation to the sale or rental of dwellings. The conduct described in this section forms the basis for the subsequent sections in Subpart B. Each of the subsequent sections provides illustrations of the scope and applicability of the rule to specific sales, rental and brokerage activities.

While the illustrations are set forth under the section of Subpart B which is most applicable to the discriminatory conduct described, § 100.50 indicates that an action described in one section can constitute a violation under other sections as well. In addition, the illustrations of discriminatory conduct in this subpart are only examples of discriminatory conduct that violates the Fair Housing Act and are not intended to limit the scope of discrimination in

housing made unlawful under the Fair Housing Act.

With the exception of the revision of § 100.50(b)(4), which was discussed earlier in this preamble, no changes have been made in the text of § 100.50.

Section 100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.

Section 100.60 describes the actions which constitutes a refusal to sell or rent a dwelling when a *bona fide* offer is made or a refusal to negotiate with persons for the sale or rental of a dwelling and which are unlawful when they are taken because of race, color, religion, sex, handicap, familiar status, or national origin.

As discussed earlier, the illustration contained in § 100.60 (b) (5) has been removed, and the subsequent illustration has been renumbered accordingly. No other changes have been made in this section of the final rule.

Section 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

Section 100.65 provides that differences in the treatment of persons in connection with the provision of services and facilities or in the terms or conditions relating to the sale or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin constitute discriminatory housing practices.

The illustrations in § 100.65(b) indicate that the coverage of this section extends beyond restrictions or differences in a lease or sales contract and the provision of different levels of maintenance. This section provides that denials of, or limitations on the use of privileges, services or facilities, relating to the sale or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin are also discriminatory housing practices.

In order to indicate the broad range of conduct which would constitute different terms and conditions, the department has added another illustration to this section (§ 100.65(b)(5)) indicating that denying or limiting services or facilities to persons based on a person failing or refusing to grant sexual favors can constitute a discriminatory housing practice.

A large number of comments received from persons owning or managing rental housing and associations representing such persons disagreed with the Department's interpretation of the Fair Housing Act as precluding different security deposit require nents for persons with handicaps and families with children. These comments generally took the position that mobility impaired persons in wheelchairs and small children would cause more damage to the interior of dwellings, thus justifying the need for additional security to cover the exposure of the owner or manager to make needed repairs when units occupied by such persons are vacated. Since the Department has determined that in enacting the Fair Housing Act, Congress sought to provide the same protections to persons with handicaps and families with children as were made available to other classes of protected persons, no change in the illustration in § 100.65(a)(1) has been made.

A number of commenters indicated that they customarily provided for reduced security deposits for elderly persons renting units and asked whether continuing such practice would place them in violation of the Fair Housing Act. As long as such a policy is based solely on age, is available to persons if there are children in the family, and is not otherwise operated in a manner that results in the exclusion of families with children, such a practice would not be unlawful.

Another commenter indicated that charges for the provision of water, electricity, refuse collection and other services have have been based on the number of persons who occupy a dwelling and asked whether such a policy would be permissible. In order to determine whether such a policy is permissible, it would be necessary to understand more fully why it was implemented and how it actually operates. Further, since policies such as this would require review on a case by case basis, the Department has determined that addressing this issue in the final rule would not be appropriate.

As discussed earlier in the preamble, the illustration in § 100.65(b)(2) has been removed, pending Congressional review of pro-integration programs.

Section 100.70 Other prohibited sale and rental conduct.

Section 100.70 provides that restricting or attempting to restrict the housing choices of persons, or engaging in any conduct relating to the sale or rental of a dwelling that otherwise makes unavailable or denies dwellings, because of race, color, religion, sex, handicap, familial status, or national origin, is a discriminatory housing practice.

Section 100.70(c) describes actions which result in limitations of housing choice that would violate the Fair Housing Act. These practices, which are commonly referred to as "steering," include practices designed to discourage persons from seeking housing in a particular community, neighborhood, or development because of race, color, religion, sex, handicap, familial status, or national origin.

The illustrations in § 100.70(c)(1), (d)(1) and (d)(2) of the proposed rule have been removed in response to comments regarding Congressional activity in the area of affirmative action to promote integrated housing. In addition, it should be pointed out that the Department did not intend in the illustration in § 100.70(d)(2) of the proposed rule to imply that language or sign interpreters were required with respect to transactions involving a person who can not speak English or who has a hearing or vision impairment. The remaining illustrations in the section have been renumbered.

In the preamble discussion of § 100.70 in the proposed rule, it was stated, as an example, that a private developer's market-based decision to include only efficiency apartments in a new development would not violate the Fair Housing Act even though, "as a practical matter, such housing would be unavailable to families with children." A commenter pointed out that it would be possible for a single parent and child to live in an efficiency or one bedroom apartment, and that the example was not illustrative of a situation in which housing would be unavailable to families with children. The Department agrees with the commenter's assertion. However, even though the example may have been flawed, the Department wishes to reiterate that it does not interpret the Fair Housing Act as precluding the construction of apartment buildings with small units.

In order to clarify that an unlawful refusal to deal with brokers and agents includes a refusal based on the race, color, religion, sex, handicap, familial status, or national origin of the broker or agent as well as the race, color, religion, sex, handicap, familial status, or national origin of one or more of their clients the illustration in § 100.70(d)(2) has been revised.

A number of commenters suggested that the proposed rule did not address specifically situations in which families are discouraged from obtaining housing because of the presence or possible presence of children. As discussed earlier in this preamble, the illustrations provided in the final rule are intended to described discriminatory housing practices generally and are not intended to be exhaustive descriptions of all conduct made unlawful under the Fair

Housing Act. For this reason, the department has determined not to add a separate illustration with respect to steering conduct based on familial status. Further, the illustrations in § 100.70(c) (2) and (3) indicate conduct designed to discourage persons from obtaining a dwelling by exaggerating drawbacks or by communicating that certain persons are incompatible with existing residents is unlawful. The department believes that these illustrations make it clear that representing that certain housing would not be appropriate for, or would not be available to families with children would be prohibited under the Act.

Several commenters also noted that the proposed rule did not address discriminatory local land use, health and safety, and zoning rules that eliminate community housing opportunities. As indicated in the preamble discussion relating to Subpart D of this rule, the department has determined not to publish rules regarding issues relating to local government exercise of police powers in the areas of land use and zoning. However, as discussed in the preamble to the proposed rule, discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including refusals to provide municipal services or adequate property or hazard insurance because of race, color, religion, sex, handicap, familial status or national origin render housing unavailable in violation of the Fair Housing Act. In order to indicate that the refusal to provide, or the provision of different municipal services or facilities and property or hazard insurance for dwellings because of race, color, religion, sex, handicap, or national origin can constitute a violation of "the otherwise make unavailable or deny" provisions in the Act, the language in § 100.70(d) has been revised and a new illustration (§ 100.70(d)(4)) has been added. In addition, the illustration relating to discriminatory advertisements in § 100.70(d)(6) of the proposed rule has been removed, since such practices are more appropriate to the conduct made unlawful under § 100.75 of the rule.

Section 100.75 Discriminatory advertisements, statements, and notices.

Although the Fair Housing Advertising Regulations (24 CFR Part 109) apply to all advertising for dwellings, the Department believes that it is appropriate, in connection with regulations describing prohibited conduct related to the sale or rental of housing, to include additional guidance as to prohibited conduct regarding this specific area. Section 100.75 describes prohibited conduct related to advertisements, notices and statements by persons engaged in the sale or rental of housing or in the printing and publishing of such advertisements, notices and statements.

No comments raised substantial issues regarding this provision, and it has been included in the final rule as it was proposed.

Section 100.80 Discriminatory representations on the availability of dwellings.

Section 100.80 states that the provision of inaccurate or untrue information about the availability of dwellings for sale or rent because of race, color, religion, sex, handicap, familial status, or national origin constitutes a violation of the Fair Housing Act. A person who receives the inaccurate or untrue information need not be an actual seeker of housing in order to be the victim of a discriminatory housing practice under this section.

A number of commenters requested that the final rule specifically indicate that the provision of inaccurate information to "testers" because of race, color, religion, sex, handicap, familial status, or national origin is unlawful under the Fair Housing Act. These commenters also recommended that the final rule should state that "testers" who are provided inaccurate information are persons aggrieved by a discriminatory housing practice who may file a complaint with the Secretary.

In response to these comments, an additional illustration has been added to this section which indicates that the provision of false or inaccurate information regarding the availability of dwellings to any person, including testers, because of race, color, religion, sex, handicap, familial status, or national origin would be unlawful under the Fair Housing Act.

Section 100.85 Blockbusting.

Blockbusting consists of any effort, for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry into a neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin, or with a handicap. Proposed § 100.85(b) stated that it was not necessary that there be in fact a profit realized as a result of blockbusting, as long as the availability of profit was a factor involved in the blockbusting activity. A number of commenters indicated that the term "blockbusting" was archaic and could be misread as meaning only efforts to get people to move out of a block. In addition, these commenters suggested that the language "as long as the availability of profit was a factor" would be confusing, since most law in the area has focused on whether a profit-oriented business is involved as well as whether the actions were taken for profit.

The description of the conduct made unlawful under § 100.85 follows the statutory prohibitions against discrimination under section 804(e) of the Fair Housing Act. These practices have generally been referred to as blockbusting, and the term appears in the statute. The specific activities made unlawful under section 804(e) would not be limited merely because of the use of the term "blockbusting". Therefore, the Department has determined that, while another more current term also may aptly describe the type of activities covered by this section (e.g. panic selling and panic buying), changing the terminology in this area could result in substantial confusion as to whether the change in accepted terminology implied any change in the coverage of the provision. In addition, the Department believes that the language in the proposed rule regarding profit as a factor in unlawful blockbusting activities accurately describes the breadth of activities covered.

Because the illustration in § 100.85(c)(3) could be misinterpreted as implying that blockbusting activity involving uninvited solicitations for listings would violate the Act only if different or more intensive solicitation activity were involved, this illustration has been removed in the final rule. However, in order to make clear that such practices can constitute discriminatory housing practices, the illustration in § 100.85(c)(1) has been revised to include a specific reference to uninvited solicitation for listings which would constitute a violation of the Act.

Section 100.90 Discrimination in the provision of brokerage services.

Section 100.90 reflects the prohibition in the Fair Housing Act against denying any person access to, or membership or participation in, any multiple listing service, real estate brokers' organization or facility relating to the business of selling or renting dwellings on account of race, color, religion, sex, handicap, familial status, or national origin. This section also states that it is unlawful to discriminate against any person in the terms or conditions of such access, membership or participation because of race, color, religion, sex, handicap,

familial status, or national origin. Several commenters requested that the Department provide an additional example of unlawful conduct relating to restrictions on access to service through area limitations. In response to these commenters, a new illustration describing unlawful discrimination in establishing geographic boundaries or office or residence requirements because of race, color, religion, sex, handicap, familial status, or national origin has been added to this section.

Subpart C—Discrimination in Residential Real Estate-Related Transactions

Section 100.110 Discriminatory practices in residential real estate-related transactions.

Section 100.110 indicates the general prohibition against discrimination in the availability of, or in the terms or conditions imposed in, any residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin. The prohibitions against discrimination in Subpart C apply to any person or other entity whose business includes engaging in residential real estate-related transactions.

Several commenters recommended that the statement of general prohibition against discrimination in residential real-estate related transactions incorporate by reference, into the Fair Housing Act regulations, the regulatory implementation of the Equal Credit Opportunity Act by Federal financial regulatory agencies.

The Equal Credit Opportunity Act (15 U.S.C. 1691) makes it unlawful, in part, to discriminate against persons on the basis of race, color, religion, sex, national origin, marital status or age in any aspect related to a credit transaction.

The Equal Credit Opportunity Act provides for administrative enforcement by specified Federal financial regulatory agencies and empowers the Federal Trade Commission to provide for overall enforcement of the Act.

HUD has no enforcement authority under the Equal Credit Opportunity Act and no enforcement responsibility with respect to implementing regulations published by the Federal financial regulatory agencies under the Equal Credit Opportunity Act. As a result, the inclusion of such regulations in this section by reference would have no legal effect. This comment has been rejected.

Section 100.115 Residential real estate-related transactions.

This section incorporates into Part 100 the definition of the term "residential real estate-related transaction" contained in section 6(c) of the Fair Housing Amendments Act of 1988.

Section 100.120 Discrimination in the making of loans and in the provision of other financial assistance.

Section 100.120 states that it is unlawful for a person or entity engaged in residential real estate-related transactions to discriminate against persons because of race, color, religion sex, handicap, familial status, or national origin in making available loans or other financial assistance relating to dwellings. The prohibitions against discrimination in the making of loans and in the provision of other financial assistance reflects the language relating to discrimination in the financing of housing under Title VIII of the Civil Rights Act of 1968.

In connection with the development of § 100.120, the Department has been guided by its experience in connection with the past administration and enforcement of Title VIII. Since the definition of the term "residential real estate-related transactions" covers loans and other financial assistance which are secured by residential real estate, the defininition expands the types of financing transactions which were previously covered by the nondiscrimination requirements of Title VIII. However, there is nothing in the legislative history of the Fair Housing Amendments Act of 1988 to indicate that the Congress intended that loans and other assistance secured by a dwelling be treated any differently than loans for the purchase, construction, improvement, repair, or maintenance of a dwelling. Thus, this section applies equally to both types of loans.

As discussed earlier in this preamble, the illustrations of the application of this section that were contained in § 100.120(b)(1), (3), (4), (5), (6), and (7) of the proposed rule have been removed, pending Congressional action on the issue of pro-integration activities.

Section 100.125 Discrimination in the purchasing of loans.

The principal change in the nature of the conduct made unlawful regarding loans and other assistance with respect to dwellings is the inclusion of activities relating to the purchase of such loans. In prohibiting discrimination in the purchasing of loans, Congress extended the coverage of the Fair Housing Act to conduct in the secondary mortgage market. However, the House Report on the Fair Housing Amendments Act of 1988 states, with regard to this expanded coverage, "The Committee does not intend that those purchasing mortgage loans be precluded from taking into consideration factors justified by business necessity (including requirements of Federal law) which relate to the financial security of the transaction or the protection against default or diminution in the value of the property." House Report at 30.

Section 100.125 sets forth the new coverage of secondary mortgage market activities under the Fair Housing Act. Since the protections provided under this section are new, the illustrations of discriminatory housing practices in this section focus on general areas of unlawful conduct under the Act. In this respect, the illustrations indicate that conduct made unlawful with regard to secondary mortgage market activities includes actions taken with respect to the purchase and pooling of mortgage loans as well as with respect to the terms and conditions of the sale of securities issued on the basis of such loans.

Commenters on this section were in general agreement with the overall content of the provisions in the proposed rule but recommended that certain language in the House Report, which they pointed out was also used by Senator Kennedy in a colloquy with Senator Sasser on the floor of the Senate, see 134 Cong. Rec. S10549 (daily ed. Aug. 2, 1988), be included in the text of the rule. Since there is a clear indication of congressional intent with respect to transactions involving the purchasing of loans, language relating to factors justified by business necessity have been added. Thus, this provision would not preclude considerations employed in normal and prudent transactions provided that no such factor may in any way relate to race, color, religion, sex, handicap, familial status or national origin.

One commenter representing mortgage bankers indicated that the term "purchasing" of housing loans in the mortgage banking business could involve a number of different and unrelated types of activities. This commenter described mortgage loan activities engaged in by mortgage bankers as involving the originating, selling and servicing of mortgages. This commenter pointed out that, in mortgage banking, the term "purchasing" has been used loosely to describe the purchase of rights to service mortgages. In this process, the equitable interest in the loan remains unaffected but the legal

title to the loan and the right to service the loan and retain servicing fees has been purchased. Based on this description, the commenter indicated its belief that such transactions would be outside the coverage of the Fair Housing Act because such transactions did not involve any financing decision by the purchaser (since the loan had been closed prior to the purchase of servicing rights) and suggested that the final rule define the term "purchase" in a manner to exclude such transactions from the Fair Housing Act.

Section 805 of the Civil Rights Act of 1968 made it unlawful "to deny a loan or other financial assistance to a person applying therefor * * * or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance * * *"

In amending this section of the Fair Housing Act, Congress revised the thrust of the prohibitions covered under Section 805 to protect persons from discrimination in residential real estate-related transactions which were defined to include "the purchasing of loans * * * secured by residential real estate."

Under the Fair Housing Act, the nature of discriminatory conduct no longer can be limited to matters relating to the actual provision of financing. Further, the fact that the interest transferred in the servicing transaction involves only the legal title to the loans would not be a basis for concluding that there has not been a residential real estate-related transaction. For these reasons the recommendation in the comment has not been adopted in the final rule.

Section 100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.

Section 100.130 states that it is unlawful to impose different terms or conditions for the availability of a loan or other financial assistance for a dwelling or which is, or will be secured by a dwelling because of race, color, religion, sex, handicap, familial status, or national origin.

As discussed earlier in the preamble, the illustrations proposed in § 100.130(b) (1) and (4) have been removed from the final rule in order to avoid anticipating the results of ongoing congressional analysis of issues relating to pro-integrative programs. Other illustrations and the general provision regarding discriminatory conduct under this section were not the subject of significant comment and have been retained in the final rule.

A substantial number of commenters had significant concerns relating to the issue of "redlining" as it was discussed in the preamble to the proposed rule. Much of the concern relating to this discussion focused on the statement that financial transactions in many cases involve "legitimate business judgments and complex financial, economic and social issues and problems". Many of the commenters asserted that this statement could be read to indicate that proof of actual intent to discriminate would be required in order to establish unlawful redlining under the Fair Housing Act. Other commenters indicated that the quoted language could be read as creating other considerations beyond those necessary in the business of making a decision on a loan (i.e., economic and social issues and problems) which have not been traditionally evaluated in the investigation of fair housing complaints and which are not relevant to the making of loans.

The Department agrees with the commenters that economic and social issues and problems are not relevant in connection with the review and analysis of cases under the Fair Housing Act. However, the Department does not believe that the reference to legitimate business judgments implies that proof of intent to discriminate is or is not required in redlining cases. The language in the preamble was intended to indicate that, in the decision to provide loans or other financial assistance, a lender may consider factors justified by business necessity, provided that such factors are unrelated to race, color, religion, sex, handicap, familial status, or national origin. This articulation is consistent with the preamble discussion relating to the purchasing of loans and the revised text of § 100.125 of the final rule.

Several commenters urged that the prohibition against redlining be included in the rule text. However, in view of the removal of the illustrations in § 100.130(1) (b) and (4), the Department has determined that it would not be appropriate to add such an illustration.

Section 100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.

The prohibitions against discrimination because of race, color, religion, sex, handicap, familial status, or national origin in connection with residential real estate-related transactions apply to the selling, brokering and appraising of residential real property. Section 100.135(a) of the proposed rule stated that it is unlawful for any person whose business includes engaging in the selling, brokering or appraising of residential real property to discriminate against any person in making available such services, or in the terms or conditions of such services, because of race, color, religion, sex, handicap, familial status, or national origin. Paragraph (a) of the final rule has been revised for the sake of clarity. It states that it is unlawful for any person or other entity whose business includes engaging in the selling, brokering or appraising of residential real property to discriminate against any person in making available such services or in the performance of such services because of race, color, religion, sex, handicap, familial status or national origin.

For the purpose of this rule, the term "appraisal" means an estimate or opinion of the value of a specified residential real property made in a commercial context in connection with the sale, rental, financing or refinancing of a dwelling or with any other residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally.

The Fair Housing Act provides a specific exemption related to appraisals, stating that nothing in the Act prohibits a person in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, sex, handicap, familial status, or national origin. However, the Department indicated in the preamble to the proposed rule its position that consideration of any factor because of race, color, religion, sex, handicap, familial status, or national origin *does* constitute a discriminatory housing practice.

Two professional organizations representing appraisers agreed with the description of the coverage of appraisal practices but suggested that the language used in the illustrations could be read as precluding, in certain instances, the use of observable, verifiable data that affect the market value of property in a particular area, such as the proximity of certain facilities or services. In this respect, they suggested that the illustrations in this section should be revised to reflect more clearly the fact that appraisers can consider any factors other than race, color, religion, sex, handicap, familial status, or national origin in the appraisal of residential real property.

The illustrations in § 100.135(d) (1), (2), and (3) have been removed in the final rule, pending the result of congressional action with respect to the issue of pro-integrative activities, and since the regulation incorporates the

statutory language on the use of other factors. In addition, paragraph (d) has been shortened and revised so that it will not inadvertently prohibit appraisers from considering factors which may lawfully be considered. Paragraph (d) of the final rule states that practices which are unlawful under §100.135 include, but are not limited to, using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status or national origin. The word "improperly" was added so that it will be absolutely clear that an appraisal may, for example, consider an adaptable physical environment as a positive factor in estimating the value of residential real property. However, the Department wishes to stress that it would not be proper or lawful, for example, to consider factors such as race, sex or national origin in appraising residential real property.

These commenters also indicated that the use of the term "commercial context" in §100.135(b) would lead to confusion within the appraisal industry as to the type of structures to which the nondiscrimination requirements in the Fair Housing Act apply.

The use of the term "commercial context" in the regulation was intended to indicate that the situations covered were directly related to conduct of the business of appraising and were not intended to diminish the rights of persons with respect to their private rights under the First Amendment. To avoid the possibility of confusion in this area, the word "business" has been substituted for "commercial" in this section.

Subpart D—Prohibitions Against Discrimination Because of Handicap

Section 100.200 Purpose.

Section 100.200 is unchanged from the proposed rule. It explains that the purpose of Subpart D is to effectuate the provisions concerning handicap in the Fair Housing Amendments Act of 1988. No comments were received on § 100.200.

Section 100.201 Definitions.

Section 100.201 proposed definitions to be used for terms used only in Subpart D. The definitions in Subpart A also apply to Subpart D. Substantial comments were received on the definitions in the proposed rule that are discussed below. The other definitions have not been modified.

An editorial change has been made to the final definition of "accessible". The proposed rule stated that a public or common use area that complies with the appropriate requirements of ANSI A117.1 or another standard that affords handicapped persons access essentially equivalent to or greater than that required by ANSI A117.1 is "accessible". The final rule states more simply that a public or common use area that complies with the appropriate requirements of ANSI A117.1–1986 or a comparable standard is "accessible". The final sentence of the definitions of "accessible route" and "building entrance on an accessible route" have also been changed for the sake of consistency.

"ANSI A117.1" means the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people. The American National Standards Institute, Inc. (ANSI) is a private, national organization that publishes standards on a wide variety of subjects. The Secretariat that developed the 1986 edition of the ANSI standard was composed of the National Easter Seal Society, the President's Committee on Employment of the Handicapped, and HUD. The current version of these standards was published in 1986 and is referred to as "ANSI A117.1–1986".

The preamble of the proposed rule explained that whenever ANSI A117.1 is used in Subpart D, the reference is to the most recently published edition of ANSI A117.1 as of the date bids for construction of a particular building are solicited. A number of commenters suggested that this statement should appear in the text of the regulation. Other commenters objected that an "open-ended" reference to future ANSI standards represents an unlawful delegation of the Department's rulemaking authority. According to these commenters, HUD should refer to a specific edition of the AMSI standards in its rule and should incorporate future editions only through rulemaking proceedings. Because of this concern the definition of ANSI A117.1 in the final rule is defined as the 1986 edition of ANSI ("ANSI A117.1–1986."). The Department intends to propose to amend the definition of ANSI as future editions of ANSI are published.

"Building" means a structure, facility or the portion thereof that contains or serves one or more dwelling units. For example, a structure that serves one or more dwelling units includes a structure containing recreational facilities for residents of an apartment complex. A substantial number of comments were received on this definition as it applies to townhouses. The application of Subpart D to townhouses is discussed in connection with the definition of the term "covered multifamily dwellings". The definition of "building" has not been changed from the proposed rule.

"Common use areas" means rooms, spaces or elements inside or outside a building that are made available for the use of residents of a building or the guests thereof. The proposed rule cited as examples of common areas hallways, lounges, lobbies, laundry rooms, refuse rooms and passageways among and between buildings. A number of commenters suggested that mailrooms and recreational areas be added to this list. Other commenters, including the National Apartment Association, argued that the definition should not include "public amenities" such as swimming pools, jacuzzis, hot tubs, saunas or exercise facilities. They suggest that the legislative history is silent with respect to such facilities.

The definition of common use areas in the rule is a close adaptation of the definition of the term "common use" in ANSI A117.1–1986. Since the Act makes specific reference to ANSI, the Department believes that Congress intended that the ANSI definition apply. Furthermore, the House Report states that the Act's requirement that the public and common use portions of covered multifamily dwellings be readily accessible to and usable by handicapped persons "means that hallways, lounges, lobbies, passageways among and between buildings and other common areas *and facilities* not contain barriers to entrance and use by handicapped persons." House Report at 26 (emphasis supplied). Mailrooms and recreational areas can fairly be read as falling within this description. Therefore, these two additional examples have been added to the list of common use areas because they fall within the definition. The list in the final rule is illustrative and not exclusive. In this regard, the Department notes that the House Report states that the Act does not require that all entrances to public and common use areas be made accessible to handicapped persons. Rather, the Act requires that "one regular entrance to such areas be accessible to handicapped persons for the same purpose for which it is used by others." *Id.* Further, the Act does not require that amenities be installed. "The intent of the language is that only if such amenities are provided, then they must be readily accessible to and usable by handicapped persons." *Id.*

A "covered multifamily dwelling" means buildings consisting of 4 or more

dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units. The preamble of the proposed rule explained that a single structure consisting of 5 two-story townhouses is not a "covered multifamily dwelling" if the units do not have elevators, because the entire dwelling unit is not on the ground floor. In contrast, a single-story townhouse is a covered multifamily dwelling. A number of commenters agreed with this interpretation; some reasoned that townhouses are not multifamily buildings because each unit typically has a separate outside entrance.

Other commenters objected to this interpretation, arguing that townhouses are covered because Congress intended that there be a broad interpretation of the Act. They believe that Congress intended to exempt otherwise covered dwellings from accessibility requirements only if *no* part of the dwelling unit touched the ground floor. These commenters cited in support of their position a statement made by Senator Kennedy during the Senate debate on the Act, in which he referred to the need to make the ground floor of multi-level housing accessible so that friends and relatives with mobility impairments can visit. Specifically, Senator Kennedy stated as follows: "This legislation does not affect the single-family home. What we are talking about is the multifamily dwelling with four or more units. You only have to meet these very simple [accessibility] requirements if you actually have an elevator, or, if you do not have an elevator, only the bottom floor *unit* is covered." 134 Cong. Rec. S. 10538 (daily ed. August 2, 1988) (emphasis added). Senator Kennedy's later reference to the importance of making units accessible so that friends and relatives can visit was in response to Senator Humphrey's proposal to limit the scope of the Act's accessibility requirements to 20 percent of the units. *Id.* The Department believes that the Senate debate referenced by these commenters supports its interpretation because Senator Kennedy spoke of "bottom floor units." The first floor of a multi-story townhouse is not a bottom floor unit because the entire unit is not on the bottom or ground floor.

Most significantly, the accessibility requirements of the Act itself extend only to "ground floor units" in buildings without elevators. The commenters' position would require reading "ground floor units" as "ground floor *portions of* units." The Act also requires that all premises within covered multifamily dwellings have an accessible route into and through the dwelling. A "covered" townhouse of more than one story would in most cases require an elevator in order to provide an accessible route throughout. This result would make the Act's distinction between buildings with elevators and buildings without elevators meaningless. Beyond this, the House Report (at p. 25) makes it clear that the Act was not intended to require the installation of elevators.

For these reasons the Department continues to believe that townhouses consisting of more than one story are covered only if they have elevators and if there are four or more such townhouses. Accordingly, the definition of "covered multifamily dwellings" in the final rule is unchanged from the proposed rule.

"Dwelling unit" was defined in the proposed rule as "any building, structure or portion thereof, which is occupied as, or designed or intended for occupancy as, a residence by one person or family." 53 FR 45029 (November 7, 1988). A significant number of comments, including comments submitted by Senators Kennedy and Specter and Representative Edwards, were concerned that the phrase "one person or family" would be too restrictive in that individuals with handicaps may require a personal attendant to live with them, or may find it beneficial to live with another individual, who is or is not also handicapped. For example, an individual with a disability may live with an attendant who is not a member of his or her family. Other commenters were concerned that the definition of "dwelling unit" is too similar to the definition of "dwelling" in § 100.20. They found the similarity confusing. In order to accommodate these concerns the definition of "dwelling unit" has been revised substantially in the final rule. The final rule defines "dwelling unit" as "a single unit of residence for a family or one or more persons." The definition in the final rule also contains a more comprehensive list of examples of dwelling units in order to further clarify the types of units that may be covered. Examples of dwelling units include a single family home and an apartment unit within an apartment building. In other types of dwellings (as defined in § 100.20) in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep are "dwelling units". For example, dormitory rooms and sleeping accommodations intended for occupancy as a residence in shelters for homeless persons are "dwelling units".

"First occupancy" means a building that has never before been used for any purpose. This definition is unchanged from the proposed rule. A number of commenters stated that HUD should state explicitly that substantial rehabilitation is not covered. The Department believes that the definition clearly excludes a substantially rehabilitated building because one could not reasonably argue that such a building "has never before been used for any purpose."

"Ground floor" means any floor of a building with a building entrance on an accessible route. A building may have more than one ground floor. This definition was the subject of considerable public comment. Many commenters interpreted the proposed rule as *requiring* that covered buildings have more than one ground floor. This is not what the Department proposed. Section 100.205(a) requires that covered multifamily dwellings for first occupancy after March 13, 1991, be designed and constructed to have *at least one* building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. The regulation does not require that any building have *more* than one ground floor; a covered building with one building entrance on an accessible route (*i.e.*, ground floor) satisfies the requirements of the regulation with regard to accessibility to the building. However, if a covered building in fact has more than one floor with a building entrance on an accessible route, then the rule requires that the units on *each* floor with an accessible building entrance satisfy the Act's accessibility requirements.

Other commenters correctly interpreted the proposed rule as requiring that there be one building entrance on an accessible route but nonetheless argued that *even if* a particular building, because of the terrain, has accessible entrances to more than one floor, the units on only one such floor should be required to meet the Act's accessibility requirements. The Department does not believe that Congress intended to exempt from the Act's accessibility requirements dwelling units that are on a floor of a building that can be entered through a building entrance on an accessible route. If a building does not have an elevator, then all of the units on accessible floors must meet the Act's accessibility requirements.

Definition of "Handicap". The term "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities; a record of having such an impairment; or being regarded as having such an impairment. However, this term does not include current, illegal use of or addiction to a controlled substance. The term also does not include an individual solely because that individual is a transvestite. Paragraphs (a), (b), (c) and (d) of the definition clarify the key phrases in the definition: "physical or mental impairment"; "major life activities"; "has a record of such an impairment"; and "is regarded as having an impairment".

A substantial number of comments were received on the definition of "handicap" in the proposed rule. They fall generally into two different groups.

One group of commenters, including the National Association of Homebuilders and the National Association of Realtors, requested that paragraphs (a), (b), (c) and (d) of the definition in the proposed rule be deleted. These commenters are concerned that these paragraphs broaden the definition of handicap "far beyond" the intent of Congress as expressed in the plain language of the statute. Moreover, they are concerned that the definition of handicap is so broad that housing providers will be powerless to exclude handicapped persons with a tendency toward antisocial or dangerous behavior.

With the exception of current, illegal use of or an addiction to a controlled substance, the definition of "handicap" in the Act is very similar to the definition of the term "individual with handicaps" in the Rehabilitation Act of 1973. 29 U.S.C. 706. Congress intended that the definition of "handicap" in the Fair Housing Amendments Act be interpreted in a manner that is consistent with regulations interpreting the meaning of the similar provision found in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. House Report at 22; 134 Cong. Rec. S10492 (daily ed. August 1, 1988) (statement of Sen. Chafee); 134 Cong. Rec. H4689 (daily ed. June 23, 1988) (statement of Rep. Pelosi); 134 Cong. Rec. H4612 (daily ed. June 22, 1988) (statement of Rep. Schroeder).

Section 504 of the Rehabilitation Act prohibits discrimination against otherwise qualified individuals with handicaps in programs or activities receiving federal financial assistance as well as in federally conducted programs and activities. The Department of Justice's section 504 coordination regulation for federally assisted programs is at 28 CFR Part 41. HUD's section 504 regulation for federally assisted programs is at 24 CFR Part 8. Paragraphs (a), (b), (c) and (d) of the definition of "handicap" closely follow the definitions of these key phrases used in regulations interpreting section 504. In light of the clear legislative history indicating that Congress intended that the definition of "handicap" be fully as broad as that provided by the Rehabilitation Act, the Department does not believe that it would be appropriate to delete paragraphs (a), (b), (c) and (d) from the definition.

Some of the commenters who requested this change appear erroneously to assume that a housing provider must admit any person who has a handicap as defined in the rule. This is not the case. Just because an applicant for housing has a handicap does not preclude a housing provider from lawfully rejecting that particular applicant. For example, alcoholism is considered a "physical or mental impairment" and therefore alcoholics frequently will fall within the definition of "handicap". However, the fact that alcoholism may be a handicap does not mean that housing providers must ignore this condition in determining whether an applicant for housing is qualified. On the contrary, a housing provider may hold an alcoholic to the same standard of performance and behavior (*e.g.*, tenant selection criteria) to which it holds others, even if any unsatisfactory performance or behavior is related to the applicant's alcoholism. In other words, while an alcoholic may not be rejected by a housing provider because of his or her alcoholism, the behaviorial manifestations of the condition may be taken into consideration in determining whether or not he or she is qualified.

Thus, a housing provider may judge handicapped persons on the same basis it judges all other applicants and residents. A housing provider may consider for *all* applicants, including handicapped applicants, such concerns as past rental history, violations of rules and laws, a history of disruptive, abusive, or dangerous behavior. However, a housing provider may not treat handicapped applicants or tenants less favorably than other applicants or tenants. For example, a housing provider may not presume that applicants with handicaps are less likely to be qualified than applicants without handicaps.

Another group of commenters asked HUD to clarify that persons who are infected with the Human Immunodeficiency Virus ("HIV" or "AIDS virus") are understood to be persons with a "handicap" protected by the Act. The legislative history of the Act contains numerous statements that HIV-infected individuals are covered by the Act. *See* House Report at 22, n. 55; 134 Cong. Rec. H4922 (daily ed. June 29, 1988) (statement of Rep. Owens); 134 Cong. Rec. at H4221 (daily ed. June 29, 1988) (statement of Rep. Waxman); 134 Cong. Rec. H4612 (daily ed. June 22, 1988) (statement of Rep. Schroeder); 134 Cong. Rec. H4613 (daily ed. June 22, 1988) (statement of Rep. Coelho); 134 Cong. Rec. H4689 (daily ed. June 23, 1988) (statement of Rep. Pelosi). In addition, the Office of Legal Counsel of the U.S. Department of Justice issued an opinion dated September 17, 1988 concluding that section 504 of the Rehabilitation Act of 1973 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity, so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth by the U.S. Supreme Court in *School Board of Nassau County v. Arline,* 107 S. Ct. 1123 (1987) (*Arline*). This opinion is significant because, as previously noted, the legislative history of the Fair Housing Amendments Act makes it clear that Congress intended the same definition of the term handicap that applies under section 504 to apply to the Fair Housing Act. In light of these authorities, the Department has added "Human Immunodeficiency Virus infection" to the illustrative list of "physical or mental impairments" in the final rule's definition of handicap.

"Interior" means the spaces, parts, components or elements of an individual dwelling unit. The comments received relative to this definition are discussed in connection with comments received on § 100.203 of the proposed rule relating to modifications of existing premises. The definition of "interior" has not been changed from the proposed rule.

"Premises" means the interior or exterior spaces, parts, components or elements of a building or a dwelling unit, including individual dwelling units and the public and common use areas of a building. The comments received relative to this definition are discussed in connection with the comments received on § 100.203 of the proposed rule relating to modifications of existing premises. The definition has not been changed from the proposed rule.

Section 100.202 General prohibitions against discrimination because of handicap.

Section 100.202 contains the general prohibitions against discrimination because of handicap and serves as the analytical foundation for the remaining sections of the subpart. The remaining sections of Subpart D explain in greater detail what conduct is discriminatory. Thus, whenever a person has violated any of the subsequent sections of Subpart D, that person has also violated § 100.202

Paragraph (a) is unchanged from the proposed rule. It restates the Fair Housing Amendments Act's mandate of nondiscrimination in the sale or rental of dwellings. Under paragraph (a), it is unlawful to discriminate against any person in the sale or rental of, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling after it is so sold, rented, or made unavailable, or any person associated with that buyer or renter.

Paragraph (b) is also unchanged from the proposed rule. It restates that Act's ban of discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling. Paragraph (b) makes it unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available, or any person associated with that person.

Land Use and Zoning Rules and Practices. The thrust of the public comments received on the general prohibitions in paragraphs (a) and (b) is that the rule does not address explicitly discriminatory local land use, health and safety, and zoning rules that "eliminate" community housing opportunities for persons with disabilities. These commenters ask that the Department add to the regulation a prohibition on rules and practices which establish unique requirements for housing for persons with disabilities and which create barriers to the development of such housing. These commenters correctly point out that the House Report discusses such matters in considerable detail. Specifically, the House Report states that the prohibition against discrimination against those with handicaps was intended to apply to zoning decisions and practices: "The Act is intended to prohibit the application of special restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." House Report at 24.

The Department does not believe that it would be appropriate to address the issue in these regulations. This concern is heightened since, under section 810(g)(2)(C) of the Fair Housing Act, as amended, if the Secretary determines that a matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 814 of the Fair Housing Act. Since the Secretary has no power to issue a charge of discrimination in matters involving zoning or other land use law, the Department believes that it is inappropriate to address this specific issue in these regulations. However, it should be noted that failing or refusing to provide municipal services for dwellings or providing such services differently because of race, color, religion, sex, handicap, familial status or national origin is a violation of § 100.70(c)(6) of these regulations.

Applicant Selection Inquiries. Paragraph (c) is an adaptation of the "pre-employment inquiries" provision in the section 504 regulations; it prohibits inquiries to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is sold, rented or made available, or any person associated with that person has a handicap or to make inquiry as to the nature or severity of a handicap of such person.

Paragraph (c) also states that it does not prohibit five types of inquiries, provided these inquiries are made of all applicants, whether or not they have handicaps. Paragraph (c) resulted in considerable public comment.

Paragraph (c)(1) clarifies that a housing provider may inquire into an applicant's ability to meet the requirements of ownership or tenancy. Commenters generally considered this particular inquiry helpful in providing guidance to both housing providers and housing applicants.

Paragraph (c)(2) states that paragraph (c) does not prohibit inquiry to determine whether an applicant is qualified for a dwelling that is available only to persons with handicaps or to persons with a particular type of handicap. Paragraph (c)(3) provides that paragraph (c) does not prohibit an inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap. These two inquiries where criticized by organizations representing persons with disabilities, including the Consortium for Citizens with Developmental Disabilities. These commenters fear that such inquiries will be abused by housing providers as a means of impermissibly inquiring about the extent or severity of a disability. Nonetheless, some of these commenters recognized that the ability to make these inquiries often is necessary to determine eligibility for government housing programs; for example, some Federal and State housing is designed for, and occupied by, persons with handicaps. Only persons with handicaps are eligible to live in such dwellings. Beyond this, as the Department explained in the proposed rule, the Fair Housing Amendments Act does not prohibit the exclusion of non-handicapped persons from dwellings. A privately owned unsubsidized housing facility may lawfully restrict occupancy to persons with handicaps. The owner or operator of such a housing facility must therefore be permitted to inquire of applicants to determine whether they have a handicap for the purpose of determining eligibility.

A housing provider may also choose to offer some or all of its units to persons with handicaps on a priority basis and may inquire whether applicants qualify for such a priority. For example, a housing provider may offer accessible units to persons with mobility impairments on a priority basis and may ask applicants whether they have a mobility impairment which would qualify them for such a priority but may not in such circumstances ask applicants whether they have other types of impairments.

After carefully considering the comments received the Department continues to believe that the inquiries permitted by paragraphs (c) (2) and (3) are consistent with the Act and that the benefits of permitting these inquiries outweigh the potential for abuse, because the circumstances in which such inquiries can be made are carefully circumscribed. A dwelling must either be available only to persons with handicaps or to persons with a particular type of handicap or the dwelling must genuinely be available on a priority basis to persons with a handicap or to persons with a particular type of handicap. Otherwise, such an inquiry cannot be made.

Paragraph (c)(4) provides that paragraph (c) does not prohibit inquiring

whether an applicant for a dwelling is a current illegal abuser of or addict to a controlled substance. The definition of "handicap" in the Fair Housing Amendments Act does not include current, illegal use of or addiction to a controlled substance. *See* House Report at 30. Paragraph (c)(4) was not the subject of substantial comment and is unchanged from the proposed rule.

Paragraph (c)(5) provides that paragraph (c) does not prohibit inquiring whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance. Section 807(b)(4) of the Fair Housing Act states that nothing in the Act prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance. Paragraph (c)(5) was not the subject of substantial comment and is unchanged from the proposed rule.

Paragraph (d) restates new section 804(f)(9) of the Fair Housing Act which provides that nothing in section 804(f) requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. This paragraph was criticized by organizations representing disabled persons because it simply repeats the statutory language and provides no guidance concerning its proper implementation. Furthermore, the placement of the language contained in paragraph (d) was questioned, in that it follows a list of questions that housing providers are permitted to ask to determine the qualifications of applicants. These commenters fear that the absence of any detail beyond the statutory language might suggest that a housing provider need not follow any objective method for determing that an applicant "would constitute a direct threat to the health or safety of other individuals." At the same time, these commenters recognized that the preamble of the proposed rule contained considerable explanation of paragraph (d). 53 FR 45001–02 (November 7, 1988). The preamble discussion was considered by these commenters to be consistent with the intent of the statute. A number of commenters suggested that the preamble language be incorporated in the rule.

On the other hand, organizations representing housing providers are concerned that property owners or managers will not be able to determine whether or not an applicant poses a threat to the safety of others without substantial amounts of information and that they ultimately will be subject to increased liability. They ask that the regulations be revised expressly to permit a property owner or manager to inquire into a prospective tenant's "history of antisocial behavior or tendencies." Alternatively, it was suggested that HUD promulgate a regulation that absolves a property owner or manager of liability for any injury caused by reason of a condition of a person with a handicap.

The Department does not believe that it is necessary or appropriate to incorporate detailed preamble language discussing the Supreme Court decision in *School Board of Nassau County v. Arline*, 107 S Ct. 1123 (1987), into the regulation. This is especially true since the case law in this area continues to develop at a relatively rapid pace. However, the Department wishes to stress that it will interpret and enforce paragraph (d) consistent with the discussion in the preamble of the proposed rule and envolving case law.

The Department also does not believe that it would be appropriate to revise § 100.202 expressly to permit inquiries into "antisocial" behavior or "tendencies." Language such as this might well be seen as creating or permitting a presumption that individuals with handicaps generally pose a greater threat to the health or safety of others than do individuals without handicaps. Such a presumption is unwarranted and would run counter to the intent and purpose of the Act. House Report at 28. Likewise, a regulatory provision stating that housing provides shall not be liable for personal injury or property damages caused by reason of another person's handicap could also be seen as creating a presumption that persons with handicaps are more likely to pose a threat to persons or property that are other persons and would run counter to the intent of the Act, since Congress made no such presumption. For example, the House Committee on the Judiciary stated that it did not "foresee that the tenancy of any individual with handicaps would pose any risk, much less a significant risk, to the health or safety of others by the status of being handicapped * * *." *Id.*

For these reasons, § 100.202 is unchanged from the proposed rule.

Section 100.203 Reasonable modifications of existing premises.

Paragraph (a) implements section 804(f)(3)(A) of the Fair Housing Act, as amended. Under paragraph (a), it is illegal to refuse to permit a tenant with disabilities to make reasonable modifications, at his or her expense, of existing premises if the proposed modifications are necessary for the full enjoyment of the premises. In the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

Paragraph (a) allows reasonable modifications at the expense of the individual with handicaps to existing "premises". "Premises" is defined in § 100.201 to mean the interior or exterior parts, components or elements of a building or a dwelling unit, including the public and common use areas of a building. Thus, an individual with handicaps would be able, at his or her own expense, to make reasonable accommodations to lobbies, main entrances of apartment buildings, laundry rooms and other common and public use areas necessary to the full enjoyment of the premises. The Department proposed to define the term "premises" to encompass the public and common use areas because it appears that this is what Congress intended. The Act allows reasonable modifications of "existing premises" if necessary to afford the handicapped person full enjoyment of the premises. If the laundry room is not accessible, for example, a person with a mobility impairment will not have "full enjoyment" of the premises. "interior" is defined as the spaces, parts, components or elements of an individual dwelling unit.

Restoration of Modifications to Public and Common Use Areas. The Department specifically invited public comment on the definitions of the terms "premises" and "interior", especially in light of the fact that section 15 of the Fair Housing Amendments Act provides that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the *interior* of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

Many of the comments received on this question were in agreement with the Department's definitions of these terms. For example, the American Institute of Architects stated that since the types of modifications made to the public and common use areas of a building's interior are on the order of those made to the exterior of the building, it would not be reasonable for the landlord to require the tenant to restore such

modifications to the preexisting condition.

Other commenters argued that public and common use areas should not be excluded from the restoration requirement, suggesting that the interpretation proposed by the Department will have the effect of forcing owners to take a narrow view of what constitutes a reasonable modification of a public or common use area.

After careful consideration, the Department continues to believe that the proposed rule's treatment of these issues is faithful to the statute. As the Department stated in the preamble of the proposed rule, reasonable modifications to public and common use areas will not detract significantly from the public and common use areas modified, and may be of benefit to other persons with and without handicaps.

Some commenters complained that the proposed rule did not discuss how a landlord's responsibilities under § 100.204 to make reasonable accommodations mesh with § 100.203. These commenters note that § 100.204 applies to services, and interpreted the proposed rule as assuming, for example, that if a laundry room is inaccessible, the only option open to the tenant is to pay for physical modifications necessary to make the room accessible. One commenter requested that the Department clarify that if the tenant chooses to ask a friend to do his or her laundry in the laundry room, the landlord must accommodate this situation by waiving any rule that prohibits non-tenants from gaining access to the laundry room. The Department agrees that this is the sort of accommodation required by § 100.204.

"Security Deposits." The final sentence of paragraph (a) of the proposed rule stated that a landlord may not increase for handicapped persons any customarily required security deposit for the purpose of securing payment for modifications. The Department invited public comment on this question as well, 53 FR 45003 (November 7, 1988), and received substantial comments on both sides of this issue.

A number of commenters stated their belief that a prohibition on an increased security deposit for handicapped persons who make modifications at their own expense is required by the Fair Housing Act. They point out that section 804(f)(2) of the Act makes it unlawful to discriminate in the terms, conditions, or privileges of the rental of a dwelling because of handicap and state that such deposits should not be necessary and would create an undue burden on persons with handicaps not intended by the Act.

On the other side of this issue, commenters speaking from the standpoint of housing providers urged the Department to provide that a landlord may require a reasonable additional security deposit to secure a renter's agreement to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. These commenters point out that such a deposit is particularly necessary in case of the occupant's death, or abandonment of the unit without any notice. The National Association of Homebuilders stated that it is standard practice to require additional security deposits as a condition of a housing provider's granting permission for modifications to be made to a dwelling unit. These commenters argue that deposits are necessary so that all tenants, handicapped and non-handicapped alike, are treated equally and fairly.

Upon further consideration of this question, the Department has come to the view that this is not truly a question relating to a traditional security deposit. Security deposits are generally paid at the time a tenant moves in. A tenant with handicaps may request a landlord's permission to make modifications at any time. For example, a tenant may become disabled during his or her tenancy and then ask for permission to make modifications. At this point the tenant has already paid any customarily required security deposit. Further, the Department agrees that there is no basis for requiring that handicapped persons pay a higher customarily required security deposit than is paid by non-handicapped persons. However, the Department is mindful of the financial exposure of a landlord who may be required to permit a tenant to make extensive modifications to the interior of a dwelling unit that can reasonably be expected to interfere with the landlord's or the next tenant's use and enjoyment of the premises. The Department believes that there are specific instances where it would be reasonable for a landlord to condition permission for making modifications on the tenant paying into an interest bearing escrow account a reasonable amount of money to ensure that funds will be available to pay for those restorations that the tenant is legally required to make at the end of the tenancy. Accordingly, paragraph (a) of § 100.203 has been revised to reflect this view.

The third sentence of paragraph (a) continues to state that the landlord may not increase, for handicapped persons, any customarily required security deposit. A new fourth sentence states that, where it is reasonable to do so, the landlord may negotiate as part of a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable time period, a reasonable amount of money not to exceed the cost of restoring the modifications. The interest in any such account shall accrue to the benefit of the tenant.

The language added to paragraph (a) balances the interests of a handicapped person seeking to make modifications to a dwelling unit so that he or she will be able to live in the unit with the interests of the landlord in assuring that all required restorations are made at the end of the tenancy at the expense of the tenant. The new language makes it clear that escrow payments may be negotiated only where it is reasonable to do so. Thus, a landlord may not routinely require that escrow payments be made. Rather, the landlord must make a case-by-case determination based upon such factors as the extent and nature of the proposed modifications, the expected duration of the lease, the credit and tenancy history of the individual tenant, and other information that may bear on the risk to the landlord that the premises will not be restored. It can be expected that generally a tenant making extensive modifications to a unit at his or her own expense will plan to live in that unit for more than a brief period of time. Both the amount and terms of the escrow payment are subject to negotiation between the landlord and the tenant. For example, if the proposed modifications which are subject to restoration are minor and the tenant has a good credit history or otherwise can provide reasonable assurances that he or she will be able to ensure that the restorations are carried out, then it would not be reasonable for the landlord to require any payment. On the other hand, if the tenant wishes to make extensive modifications that must be restored and has only a "fair" credit history, or other factors suggest that the tenant would not be able to ensure that the restorations are carried out, then it might be reasonable for a landlord to require a payment. Of course, the landlord may not require that the total amount to be paid exceed the reasonable cost of restoring the modifications that must be restored at the end of the tenancy. The Department expects that frequently a smaller amount will suffice to protect the interests of the landlord. Furthermore, landlords may not assume that persons with handicaps are less creditworthy

than persons without handicaps. Just because the facts warrant requiring *a payment* does not mean that the landlord may reasonably require that the full restoration costs be paid before the modifications are even made.

If a person with handicaps seeking to make modifications believes that a landlord is unreasonably withholding permission to make the requested modifications or has required an unreasonable escrow payment he or she may file a complaint with HUD.

The Department wishes to stress that the Fair Housing Act does not require a tenant to restore all modifications. For example, as example (2) in paragraph (b) makes clear, if a handicapped tenant seeks a landlord's permission to widen a doorway for a wheelchair to pass, it is unlawful for the landlord to refuse to permit the applicant to make the modification. Further, the landlord may not, in usual circumstances, condition permission for the modification on the applicant paying for the doorway to be narrowed at the end of the lease because a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises. However, if a tenant seeks, for example, to lower the kitchen cabinets to a height suitable for a person in a wheelchair, the landlord may condition permission on the tenant agreeing to restore the cabinets to their original height and, if it is reasonable to do so considering the financial resources and credit-worthiness of the tenant, may seek a reasonable escrow deposit. At the end of the lease the landlord may require that the tenant restore the cabinets to their original height unless the next occupant prefers that the cabinets remain where they are. If the next occupant does not wish that the modification be restored then the landlord must promptly return the tenant's escrow deposit, if any, in full. The landlord, in such a situation, may, where it is reasonable to do so, require that the new tenant establish a new interest bearing escrow account.

Comments from housing providers also asked that the rule state that housing providers have an "absolute right" to reject any proposed modifications if they are unreasonable and that the housing provider should have the authority to select or approve the party making the modifications. These commenters point out that prior approval is necessary so that the housing provider can be assured of quality workmanship done in accordance with local building code specifications.

Paragraph (a) makes it plain that the applicant or tenant must seek the landlord's approval before making modifications. A landlord, of course, is entitled to know what the proposed modifications are as well as reasonable assurances from the tenant that any required building permits will be obtained and that the work will be performed in a workmanlike manner. In order to address these concerns the Department has added a new paragraph (b) to § 100.204. It states that a landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be performed in a workmanlike manner and that any required building permits will be obtained. The description may be oral or written depending on the extent and nature of the proposed modifications. The Department does not believe it would not be possible, as some commenters suggested, to spell out a detailed approval procedure that would be applicable in all instances. What is reasonable will vary with the extent, location and nature of the modifications a particular tenant wishes to make. Some requested modifications will be simple and the approval process in such instances should be straightforward (e.g., installation of grab bars in a bathroom that already has the requisite blocking). Other requested modifications to the interior of a unit or public or common use area will be more complex. In such instances, the landlord may withhold permission until the tenant has described in reasonable detail the modifications to be made and identified to the landlord a responsible party to perform the work in question. However, since the tenant is paying for the modification, the landlord may not specify that only one particular contractor make the modifications. The modifications may be accomplished by any party reasonably able to complete the work in a workmanlike manner.

Paragraph (c) contains two examples that illustrate the application of paragraph (a). Some commenters felt the examples in paragraph (c) (paragraph (b) of the proposed rule) "raise more questions than they answer." These examples are intended to be illustrative and not exhaustive. The Department continues to believe that the regulation is clearer with these examples than without them. Therefore, they have been retained unchanged from the proposed rule.

Section 100.204 Reasonable accommodations.

Section 100.204 implements section 804(f)(3)(B) of the Fair Housing Act which makes it unlawful to refuse to make reasonable accommodations in rules, policies, practices, or services if necessary to afford a person with handicaps equal opportunity to use and enjoy a dwelling. The concept of "reasonable accommodation" is also used in regulations and case law interpreting section 504 of the Rehabilitation Act of 1973. *See*, 28 CFR 41.53; 24 CFR 8.11 and 8.33; *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Alexander v. Choate*, 469 U.S. 287 (1985).

The principal comments received on this section discuss the relationship between §§ 100.204 and 100.203 relating to reasonable modifications of existing premises. These comments were discussed in connection with § 100.203.

Paragraph (a) closely follows the statutory language and is unchanged from the proposed rule. It states that it is unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas. A number of commenters were concerned that this language could be interpreted as requiring that housing providers provide a broad range of services to persons with handicaps that the housing provider does not normally provide as part of its housing. The Department wishes to stress that a housing provider is not required to provide supportive services, *e.g.*, counseling, medical, or social services that fall outside the scope of the services that the housing provider offers to residents. A housing provider is required to make modifications in order to enable a qualified applicant with handicaps to live in the housing, but is not required to offer housing of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can live in the housing that the housing provider offers; not whether the applicant could benefit from some other type of housing that the housing provider does not offer.

Paragraph (b) illustrates the application of paragraph (a) with two examples of reasonable accommodations. No substantial comments were received on these examples and they remain as they were proposed.

Section 100.205 Design and construction requirements.

Section 100.205 implements section 804(f)(3)(C) of the Fair Housing Act which places accessibility requirements

on "covered multifamily dwellings" designed and built for first occupancy 30 months after enactment.

The term "covered multifamily dwellings" means buildings consisting of 4 or more dwelling units if the building has one or more elevators, and "ground floor" dwelling units in other buildings consisting of 4 or more dwelling units. The ground floor is any floor of a building with a building entrance on an accessible route. A building may have more than one ground floor. A "building" is a structure, facility or the portion thereof that contains one or more dwelling units.

Unusual Terrain or Site Characteristics. Paragraph (a) of the proposed rule provided that "covered multifamily dwellings" for first occupancy after March 13, 1991 be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. Paragraph (a) was the subject of considerable public comment.

Some commenters objected to the portion of paragraph (a) that exempts buildings from having an accessible building entrance where it is impractical to provide such an entrance because of the terrain or unusual characteristics of the site. These commenters argue that the statute contains an "absolute" requirement that "covered multifamily dwellings" for first occupancy after March 13, 1991 be made accessible. They believe that paragraph (a) introduces an exception not found in the Act.

Other commenters did not altogether object to an "impracticality" standard but considered the standard of "impracticality" proposed by the Department to be too broad. These commenters feel that the "impracticality" standard in paragraph (a) allows designers and builders to use their own standards and claim that because it is "impractical" to do so, they need not make their buildings accessible. In the view of these commenters, this "loophole" was not intended by Congress; they suggest that HUD establish a more specific standard. Some commenters stated that, where feasible, grading be made mandatory. Other commenters urged that the "impracticality" exemption accrue to dwellings where the *only* access is stairs which are higher than 10 feet. At this point they argue it is impractical for a ramp to be built.

Representative Barney Frank of Massachusetts submitted a comment stating his belief that the word "impractical" could be more of a loophole than was intended by Congress. Mr. Frank suggested tightening the standard by modifying the word "impractical" with adverbs such as "highly" or "extremely". Mr. Frank also stressed that it ought to be made clear that only unusual physical characteristics of the site would justify the invocation of the tighter standard of impracticality he suggested.

Other commenters argued for a broader standard than the one proposed by the Department. They did not interpret the proposed standard as relating in any way to the economic impact of designing and constructing a building on a particular site to have an accessible building entrance. These commenters argued that the Department should consider the economic impact of requiring at least one building entrance on an accessible route and not only whether access is physically impractical. These commenters noted that if the cost of providing an accessible entrance is too great, the project may become economically infeasible. They pointed out that Congress was sensitive to the impact of the Act's requirements on housing affordability. For example, the Act's accessibility provisions "carefully facilitate the ability of tenants with handicaps to enjoy full use of their homes without imposing unreasonable requirements on homebuilders, landlords and non-handicapped tenants." House Report at 27. These commenters suggest that economic loss beyond a *de minimis* amount is in many cases a viable and fair determinant of the impracticality of providing an accessible entrance.

Congress did not intend to impose an absolute standard that all covered multifamily dwelling units be made accessible without regard to the impracticality of doing so. Even though the statute itself does not contain an impracticality standard the legislative history makes it clear that Congress "was sensitive to the possibility that certain natural terrain may pose unique building problems." House Report at 27. For example, the House Report explicitly recognizes that in some locales it is common to construct housing on stilts because of flooding problems. A requirement that housing on such sites have an accessible entrance on an accessible route may be tantamount to prohibiting the construction of covered multifamily housing on such sites. This is not what Congress intended. The House Report further states that the "Committee does not intend to require that the accessibility requirements of this Act override the need to protect the physical integrity of multifamily housing that may be built on such sites." *Id.*

Further, the Department does not believe that it would be appropriate to constrain designers by adopting a highly specific building accessibility standard, as suggested by some commenters. For example, some commenters suggested that the rule state that, where feasible, grading be mandatory. A developer is required by paragraph (a) to design and construct one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. As a practical matter, it may sometimes be necessary to provide grading for persons in wheelchairs so that the requirements of paragraph (a) will be met and in many cases it will be the least expensive means of doing so. However, in other instances, it may be possible to design and construct an accessible building entrance in some other fashion. Designers are free to use any reasonable design that obtains the required result. The Department does not believe that Congress intended to dictate the method a designer must use to provide an accessible entrance. Innovative designs that are accessible to handicapped persons should be encouraged.

Since the statute itself does not contain an exemption, the Department feels constrained to follow closely the intent of Congress on this issue as expressed in the Act's legislative history. The discussion in the House Report on this issue is of "unique building problems" along the order of examples (1) and (2) in paragraph (b). The impracticality standard in paragraph (a), however, does not go so far as to require that it be "impossible" to design and construct a building entrance on an accessible route, because the Department does not believe that Congress intended that the standard be limited to such extreme instances.

On balance, and after carefully considering the various comments received on this issue, the Department believes that, based upon specific language in the House Report, Congress intended to apply the test the Department proposed for determining when the burdens of providing an accessible entrance are too great. Only when the terrain or unusual site characteristics make it impractical to design and construct an accessible building entrance at a particular site did Congress consider the burdens of providing such an entrance to be unreasonable. Since the standard in paragraph (a) already takes into account the burdens of making a building

accessible, the Department does not believe that it would be faithful to the statute to revise the standard to refer to an open-ended "economic impracticality" standard unrelated to the sorts of unusual site problems Congress expressly considered relevant.

Determining "First Occupancy" After March 13, 1991. A number of commenters stated that while the proposed rule properly limits the Act's design and construction requirements to covered multifamily housing for first occupancy after March 13, 1991, it fails to indicate how it will be determined whether covered multifamily housing is "for first occupancy after March 13, 1991." These commenters are concerned that coverage of the design and construction requirements *must* be determinable at the beginning of planning and development, arguing that it is unreasonable to base this determination on the actual date of first occupancy since this date may be affected by a variety of unexpected and uncontrollable events occurring during the lengthy planning and development process. In order to accommodate these legitimate concerns on the part of the building industry, the Department has added a sentence to paragraph (a). It states that, for purposes of § 100.205, covered multifamily dwellings shall be deemed to be designed and constructed for first occupancy *on or before* March 13, 1991 if they are occupied by that date or if the *last* building permit or renewal thereof for the covered multifamily dwellings is issued by a State, County or local government on or before January 13, *1990.* In other words, if a developer obtains a building permit on or before January 13, 1990 (which is not renewed after that date) and completes construction under that permit, the building in question need not comply with the accessibility requirements of § 100.205. Thus, a developer will not be penalized if a strike or Act of God prevents occupancy by a certain time. The date of January 13, 1990 was selected because it is fourteen months before March 13, 1991. Fourteen months represents a reasonable median construction time for multifamily housing projects of all sizes based upon data contained in the "Marshall Valuation Service." The Department considered adopting different construction times for different sized projects but ultimately found this approach cumbersome from an administrative and enforcement standpoint. The Department chose the issuance of a building permit as the appropriate point in the process, since such permits are issued in writing by governmental authorities. Such a standard has the advantage of being clear and objective. In addition, any project that actually achieves first occupancy before March 13, 1991 will be judged to have met this standard even if the last building permit or renewal thereof was issued after January 13, 1990.

Accessibility Guidelines. Paragraph (b) contains three examples that illustrate the application of paragraph (a). Some commenters stated that the examples illustrating the application of paragraph (a) may reduce noncompliance at the extremes but do not satisfactorily indicate what constitutes sufficient compliance in most day-to-day situations. The Department does not believe that it is feasible to publish more specific guidance at this time. However, the Department will endeavor to provide as much additional guidance as possible in the accessibility guidelines HUD plans to develop. Many commenters expressed a desire to have an opportunity to comment on these guidelines. HUD intends to publish these guidelines in the **Federal Register** for full public comment as soon as they are ready.

The only change made to these three examples is a minor change to example (1). In the proposed rule example (1) related to a developer who planned to construct six townhouses on a site with hilly terrain. Some commenters were confused by the reference to townhouses, in view of the Department's interpretation that four or more townhouses are not covered multifamily dwellings unless the entire unit is on the ground floor or unless the townhouses have an elevator. In order to avoid this confusion, the reference to townhouses has been deleted. Instead, the example refers simply to six units of covered multifamily dwelling units. The purpose of the example is to explicate site impracticality because of hilly terrain.

Example (3), which describes an instance where building accessibility can be achieved only at the cost of a 4.7 percent density loss, was the subject of criticism by builders. They argued that a 4.7 percent density loss may render a project economically infeasible. Even though this may well be the case in some situations, the Department does not believe, in light of the discussion above, that Congress necessarily intended that a reduction of five units in a 105-unit building would be sufficient to exempt that building from the accessibility requirements of the Act. A more stringent standard was intended. (However, this example was not intended to mean that *any* loss of density, no matter how great, would be insufficient to establish site impracticality.)

Paragraph (c) requires that all covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route satisfy certain accessibility requirements set forth in paragraph (c). Paragraphs (c) (1) and (2) set forth the specific accessibility requirements for covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route. Many commenters complained that the guidance provided in paragraph (c) is inadequate. Some commenters made highly detailed suggestions that the Department will carefully consider as it develops accessibility guidelines to help builders understand and comply with the specific accessibility requirements of the Fair Housing Act. The guidelines would, of course, not be mandatory. Rather, they would provide technical assistance to persons who must comply with paragraph (c). Until these guidelines are published for public comment, designers and builders may be guided by the requirements of ANSI in meeting the specific accessibility requirements of the Act.

Paragraph (d) provides two examples that illustrate the application of paragraph (c). These examples were not the subject of substantial public comment and are unchanged from the proposed rule.

Paragraph (e) states that compliance with the appropriate requirements of ANSI A117.1 suffices to satisfy the requirements of paragraph (c)(3). Paragraph (e) implements section 804(f)(4) of the Fair Housing Act. This section does not require that designers and builders follow ANSI A117.1 exclusively. However, if designers and builders do follow ANSI A117.1, then they will have satisfied the requirements of paragraph (c)(3). House Report at 27. Paragraph (e) was not the subject of substantial public comment, closely follows the statutory language and is unchanged from the proposed rule.

Paragraphs (f) and (g) implement the provisions of the Fair Housing Amendments Act designed to encourage enforcement, by the States and local governments, of the provisions of the Act regarding adaptability and accessibility requirements for newly constructed multifamily dwellings. 134 Cong. Rec. S10456 (daily ed. August 1, 1988) (Memorandum of Senators Kennedy and Specter Regarding Their Substitute Amendment).

Paragraph (f) states that compliance with a duly enacted law of a State or

unit of general local government that includes the requirements of paragraphs (a) and (c) satisfies the requirements of paragraphs (a) and (c). Paragraph (f) was not the subject of substantial public comment and is unchanged from the proposed rule.

Paragraph (g)(1) was not the subject of substantial public comment and is unchanged from the proposed rule. It declares that it is the policy of HUD to encourage States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraphs (a) and (c).

Paragraph (g)(2) states that a State or unit of general local government may review and approve newly constructed multifamily dwellings for the purpose of making determinations as to whether the requirements of paragraphs (a) and (c) are met. Paragraph (g)(2) was not the subject of substantial public comment and is unchanged from the proposed rule.

Determinations of Compliance by State or Local Agencies. Paragraph (h), which is unchanged from the proposed rule, states that determinations of compliance or noncompliance by a State or a unit of general local government under paragraph (f) or (g) are not conclusive in enforcement proceedings under the Fair Housing Act. Some commenters argued that this paragraph should be revised to state that determinations by State and local governments will be given substantial weight. These comments concede that neither the statute nor its legislative history indicates the weight to be given to such determinations. The Department believes it would be inappropriate to accord particular "weight" to determinations made by a wide variety of State and local government agencies involving a new civil rights law, without first having the benefit of some experience reviewing the accuracy of the determinations made by State and local authorities under the Fair Housing Act.

Paragraph (i) states that subpart D does not invalidate or limit any law of a State or political subdivision of a State that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subpart. Paragraph (i) was not the subject of substantial public comment. It is unchanged from the proposed rule.

Subpart E—Housing for Older Persons

The Fair Housing Act prohibits discrimination because of familial status. However, the Act exempts "housing for older persons" from the prohibitions against discrimination because of familial status. The purpose of the prohibitions against discrimination because of familial status and the housing for older persons exemption is to protect families with children from discrimination in housing, without unfairly limiting housing choices for elderly persons. 134 Cong. Rec. S10465–66 (daily ed. August 1, 1988) (statement of Sen. Karnes). The statutory definition of "housing for older persons" comprises three categories of housing: (1) Housing provided under any State or Federal program that the Secretary of HUD determines is specifically designed and operated to assist elderly persons; (2) housing intended for, and solely occupied by, persons 62 years of age or older; and (3) housing intended for, and solely occupied by, at least one person 55 years of age or older per unit, provided that various criteria are met.

Mobile Home Parks. The Department received thousands of comments relating to the housing for older persons exemption. A significant portion of these comments came from people who live in mobile home parks which are currently restricted to adults. These commenters point out that mobile home park living is unique. Mobile home park residents typically own their own homes but rent the space. Frequently, there is relatively little space between homes. Many of these commenters state that they prefer to live in an all-adult atmosphere and that if children are admitted there will in most cases be no place for them to play. Furthermore, many commenters made it plain that they do not want or need special services or facilities. Rather, they want mobile home parks to provide an environment where they can be with others of their age group, while at the same time remaining independent and self-sufficient.

Some commenters asked that mobile home parks be exempted outright from the Fair Housing Act. Mobile home parks are covered by the Fair Housing Act. The Fair Housing Act makes it unlawful to refuse to sell or rent a "dwelling" because of race, color, religion, sex, handicap, familial status, or national origin. The statutory definition of "dwelling" includes vacant land which is offered for sale or lease for the construction or location thereon of a structure. In addition, the legislative history of the Fair Housing Amendments Act indicates that Congress intended that mobile home parks would be covered by the Act, and specifically by the familial status provisions. *See* 134 Cong. Rec. S10551 (daily ed. Aug. 2, 1988) (colloquy between Sens. Wilson and Specter). Thus, the Department has no basis for exempting mobile home parks from the prohibition of discrimination against families with children.

Other commenters asked HUD to create an additional exemption for "over 40" or for "all-adult" mobile home parks. There is nothing in the Fair Housing Amendments Act or its legislative history to indicate that Congress intended that mobile home parks be afforded a housing for older persons exemption that is broader than the exemption that applies to other types of housing (*e.g.*, apartments and condominiums). To the contrary, the legislative history indicates that "mobile home parks ar eligible for the same exemptions as are other communities under the 'housing for older persons' provisions * * *" of the Act. *Id.* Therefore, mobile home parks are subject to the same rules that apply to other types of housing. More specific comments received on this subpart will be discussed in connection with the exemption for "55 or over" housing.

"Dual Purpose Housing Facilities." A number of commenters raised the question of whether it is permissible to operate a "dual purpose" housing facility. In a "dual purpose" housing facility specified units or sections would be designated for older persons and other units or sections would be open to everyone. For example, one commenter representing the interests of mobile home park owners suggested that regulations be promulgated to permit the operation of "dual purpose" properties, so that certain sections or units are not restricted to persons of a certain age and others are designated for housing for older persons. This commenter stated that the proposed rule did not address this question. However, this issue was addressed in the proposed rule. Section 100.70(c)(5) of the proposed rule (53 FR 45025, November 7, 1988) stated that it is unlawful to assign "any person to a particular section of a community, neighborhood or development or to a particular floor of a building because of * * * familial status * * *." This same prohibition appears as § 100.70(c)(4) of the final rule. As the Department explained in connection with public comments received on subpart A, the legislative history of the Fair Housing Act and the development of fair housing law after the protections of the Fair Housing Act

were extended in 1974 to prohibit discrimination because of sex support the position that persons with handicaps and families with children are entitled to the same protections as other classes of persons. For example, "dual housing" facilities segregated by race, color or religion clearly would violate the Fair Housing Act. Similarly, the Department believes that it is unlawful for a housing facility to segregate because of familial status.

Section 100.300 Purpose.

Section 100.300 explains that the purpose of subpart E is to effectuate the housing for older persons exemption in the Fair Housing Amendments Act. This section was not the subject of public comment and is unchanged from the proposed rule.

Section 100.301 Housing for Older Persons Exemption.

Section 100.301 provides the analytical framework for subpart E. Paragraph (a) implements the second sentence of section 807(b)(1) of the Fair Housing Act, as amended. It states that the prohibitions against discrimination because of familial status in this part do not apply to housing which satisfies the requirements of §§ 100.302 (*"State and Federal Elderly Housing Programs"*), 100.303 (*"62 or Over Housing"*), or 100.304 (*"55 or Over Housing"*). Paragraph (a) was not the subject of public comment and is unchanged from the proposed rule.

Paragraph (b) states that nothing in this part limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Paragraph (b) implements the first sentence of section 807(b)(1) of the Fair Housing Act. Many jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit; HUD also issues occupancy guidelines in its assisted housing programs. Reasonable limitations do not violate the Fair Housing Act as long as they apply equally to all occupants. A substantial number of comments were received asking that the Department adopt occupancy restrictions that housing providers can apply in jurisdictions that do not have governmentally-adopted occupancy restrictions, and in jurisdictions where the governmentally-adopted restrictions are tantamount to no restrictions. There comments are discussed in the preamble discussion relating to Subpart A.

Section 100.302 State and Federal Elderly Housing Programs.

Section 100.302 implements section 807(b)(2)(a) of the Fair Housing Act. Section 100.302 exempts housing provided under any Federal or State program that the Secretary determines is specifically designed and operated to assist elderly persons, as defined in the State or Federal program from the prohibitions against discrimination because of familial status in this part. Section 100.302 was not the subject of substantial public comment and is unchanged from the proposed rule. It should be noted that the eligibility requirements for housing for elderly persons in HUD-assisted and insured programs differ from the requirements in §§ 100.303 and 100.304. State or Federal definitions are not superseded by those established in this Part for other housing.

Section 100.303 62 or Over Housing.

Section 100.303 implements § 807(f)(2)(B) of the Act. It exempts from the prohibitions against discrimination because of familial status housing intended for, and solely occupied by, persons 62 years of age or older.

Transition Provision. Paragraph (a)(1) contains a transition provision to ensure that the interests of current residents of housing that excludes children will not be unduly disturbed by the Fair Housing Act. 134 Cong. Rec. S10456 (daily ed. August 1, 1988) (Memorandum of Sens. Kennedy and Specter Regarding Their Substitute Amendment). It provides that housing satisfies the requirements of § 103.303 even though there were persons residing in such housing on September 13, 1988 who are under 62 years or age, *Provided* That all new occupants thereafter are persons 62 years of age or older.

Section 6(d) of the Fair Housing Amendments Act provides that housing shall not fail to meet the requirements for housing for older persons by reason of "persons residing in such housing *as of the date of enactment of this Act* [*i.e.*, September 13, 1988]" who do not meet the age requirements of the housing for older persons exemption, provided that all new occupants meet the age requirements of the housing for older persons exemption. Section 13(a) of the Act provides that "[t]his Act and the Amendments made by this Act shall take effect on the 180th day beginning after the date of enactment of this Act." The date described in section 13(a) is March 12, 1989. Several commenters questioned whether the appropriate date for the transition provision in § 100.303(a)(1) is September 13, 1988 or March 12, 1989.

In the preamble of the proposed rule the Department explained that if section 6(d) of the Act is applied literally, then housing providers, in order to avail themselves of this transition provision, had to begin filling units in accordance with the age requirements of the housing for older persons exemption on September 13, 1988, which is before the effective date of the Act. The proposed rule adopted this interpretation, but in view of the consequences of such a determination, invited public comment on the question. Comments were received on both sides of the issue.

One group of commenters argued that the transition rule should become effective on March 12, 1989 instead of September 13, 1988 as proposed by the Department. Some of these commenters conceded that the proposed rule followed the plain meaning of the statute, but argued that this is a case where adherence to the statute's plain language will frustrate Congress' intent to provide a workable transition rule that ensures that the interests of current residents of housing that excludes children will not be unduly disturbed by passage of the bill. 134 Cong. Rec. S10456 (daily ed. August 1, 1988) (Memorandum of Sens. Kennedy and Specter Regarding Their Substitute Amendment). These commenters also stated that a March 12, 1989 transition date would be fairer.

A different group of commenters agreed with the Department's interpretation of the transition provision that appeared in the proposed rule as consistent with the plain meaning of the Act and Congressional intent. These commenters agreed with the Department's statement in the preamble of the proposed rule that the general language in section 13(a) was not intended to render the more specific language in section 6(d) a nullity. Moreover, under the interpretation of the Act in the proposed rule there is no inconsistency between sections 6(d) and 13(a) of the Fair Housing Act. The Act will take effect on March 12, 1989 and, by its terms, the housing for older persons exemption will be satisfied even though, on September 13, 1988, there were persons in the housing facility who did not meet the age requirements, provided that all new occupants after September 13, 1988 meet the age requirements. Some commenters added that under fundamental principles of statutory construction the more specific language of the Act prevails over more general language covering the same subject. *See e.g., Ginsberg & Sons. v.*

Popkin, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."). Therefore, these commenters concluded that the more general language in section 13(a) describing the effective date of the Act as a whole should not be interpreted to delete the specific language in section 6(d) defining the appropriate date for the transition provision.

After carefully considering the comments received on this question, the Department has determined not to modify its interpretation of the transition provision that was included in the proposed rule because it appears that this is what Congress intended. The transition provision in section 805(b)(3) of the statute relating to persons residing in a housing facility who do not meet the age restrictions for housing for older persons is expressly limited to "persons residing in such housing as of the date of enactment of this Act." The same date (September 13, 1988) is, for the same reasons, referenced in §100.304(d)(1) ("*55 or Over Housing*").

In addition, some commenters proposed that the rule state that a mobile home park may change its age requirements to either family, 55 or over or 62 or over, at any time—arguing that such a provision would be consistent with the legislative intent of the Act to stop discrimination against families with children but to allow for distinct housing opportunities for older persons. As previously explained, the Department sees no legal basis for providing special treatment or exceptions for mobile home parks in light of the legislative history to the contrary. Furthermore, the transition provision in section 807(b)(3)(A) makes specific reference to the date of enactment. In light of this temporal limitation in the statute the Department does not believe it would be faithful to the statute to create in this rule a procedure permitting a housing provider to change its age requirements at any time in order to exclude families with children.

A related issue raised by some commenters is the relationship between the Act and various State laws that regulate existing relationships between landlords and tenants. For example, under the California Mobilehome Residency Law, a rule or regulation of a mobile home park may be amended at any time with the consent of a homeowner, or without his or her consent upon written notice to him or her of not less than six months. Calfornia Civil Code § 798.25 (1982 & Supp. 1988). These commenters pointed out that this and other notice requirements made it very difficult, and in some cases, impossible for mobile home park owners to avail themselves of the transition provision in section 807(b)(3)(A) of the Act. On October 21, 1988 the General Counsel of HUD, J. Michael Dorsey, issued a legal opinion on this question. In that opinion, Mr. Dorsey concludes that the Fair Housing Act does not preempt or supersede § 798.25 of the California Civil Code since there is no language in the Fair Housing Act, as amended, or its legislative history to support a conclusion that the Act was intended to invalidate or limit any State law, unless that State law requires or permits a discriminatory housing practice. 42 U.S.C. 3616 (as redesignated by the Act). Section 798.25 of the California Civil Code neither requires nor permits a discriminatory housing practice; it simply sets forth a procedure that a mobile home park must follow in order to change a rule or regulation. In addition, the comments submitted by Senators Kennedy and Specter and Representative Don Edwards state as follows:

> Since enactment of the 1988 Amendments to the Fair Housing Act, many mobile home parks have changed their status from an eighteen and older "adult" park, which is allowed under existing California law, but prohibited by the Fair Housing Amendments Act to a "housing for older persons" park in order to qualify for an exemption under the Act. Many of these parks have claimed that the Act preempts California law, and thus six months' notice of a change in policy is not required. This is an incorrect interpretation of the Act. It was not the intent of Congress to preempt this notice requirement, and the regulations should so specify. (Footnotes omitted.)

Paragraph (a)(2) states that housing satisfies the requirements of §100.303 even though there are unoccupied units (at any time), provided that such units are reserved for occupancy by persons 62 years of age or over. Paragraph (a)(2) was not the subject of substantial comment and is unchanged from the proposed rule.

A new paragraph (a)(3) has been added to the final rule. It states that housing satisfies the requirements of § 100.303 even though there are units occupied by employees of the housing (and their family members residing in the same unit) who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing. This paragraph was added by the Department in recognition of the fact that it is common for a manager of a housing facility or maintenance worker to reside in one of the units. Frequently, such arrangements benefit the residents of the housing facility. The Department does not believe that Congress intended for a housing owner to lose its "62 or over" exemption simply because the manager of the facility or a maintenance worker resides there. However, the Department wishes to stress that any employees who live at the housing facility must perform substantial duties directly related to the management or maintenance of the housing in question. For example, if the employee works primarily at a different housing facility, then that employee does not satisfy the requirements of paragraph (b)(3) and the housing facility where that employee lives will not qualify for the "62 or over" exemption.

Paragraph (b) contains two examples that illustrate the application of paragraph (a). These examples were not the subject of substantial comment and are unchanged from the proposed rule.

Section 100.304 55 or Over Housing.

Section 100.304 implements section 807(b)(2)(C) of the Fair Housing Act, which exempts housing intended and operated for occupancy by at least one person 55 years of age or over per unit that satisfy certain criteria. This section of the proposed rule was the subject of many public comments. As an initial matter, a number of commenters asked that the Department clarify the meaning of the phrase "housing intended and operated for occupancy *by at least one person* 55 years of age or older, per unit * * *" in paragraph (a).

Specifically, these commenters asked that HUD address the issue of the age of any other person occupying the unit along with a person 55 years of age or older per unit. A housing provider may use any non-discriminatory method of qualifying for the exemption that comports with applicable State and local laws. Since the Fair Housing Amendments Act does not prohibit discrimination because of age, nothing in the Act prohibits a housing provider seeking to qualify for the exemption for "55 or over" housing from setting age restrictions that are *more* stringent than those set forth in the Act. Thus, a housing provider *may*, for example, require that *all* residents be 55 years of age or older, provided that such a rule is consistent with applicable State and local laws. The other comments on § 100.304 fall within four areas.

First, some commenters stated that § 100.304(c)(1) should state that all units, upon initial occupancy, must be

occupied by at least one person 55 years of age or older. Under the Act, the exemption for housing for persons 55 years of age or older requires, among other things, that 80 percent of the dwellings have at least one resident who is 55 years of age or older *and* that the housing complex adhere to policies demonstrating an intent to provide housing to persons of that age group. Section 807(b)(2)(C). The Children's Defense Fund and other commenters state that Congress' purpose in permitting up to 20 percent of the units to be occupied solely by persons under the age of 55 was to prevent disruption of the lives of surviving spouses and cohabitants under age 55, when the over 55 member of a household dies or otherwise leaves the unit. *See* 134 Cong. Rec. H 6498 (daily ed. August 8, 1988) (statement of Representative Edwards); House Report at 31. Specifically, these commenters argue that the "55 or over" exemption was not meant to permit the owner of housing for older persons to "set aside" 20 percent of its units for *incoming* households (as opposed to surviving spouses or companions). These commenters feel that such a "set aside" is inconsistent with the exemption's requirement that the owner or manager demonstrate an intent to provide housing for persons 55 years of age or older.

These commenters correctly point out that statements in the legislative history discuss the need to permit up to 20 percent of the units to be occupied by persons all of whom are under 55 years old in 55 or over housing in order to accommodate persons such as surviving spouses under the age of 55 and nurses and other personnel to care for the elderly 134 Cong. Rec. H 6498 (daily ed. August 8, 1988) (statement of Representative Edwards); House Report at 31. However, the Department does not believe that the examples that appear in the legislative history were intended to be exhaustive. Particularly, the Department is not of the view that these units for persons under 55 years of age cannot be occupied by *incoming* households (as opposed to surviving spouses or companions). Indeed, some incoming households may be persons under 55 related in some way to residents who are over 55 years old. For example, an elderly owner of a condominium might die and leave the condominum to a relative who is under 55 years old. If the 20 percent of the units available to persons under 55 years old were not open to incoming households then the recipient of the legacy would be in the anomalous situation of not being able to live in a condominium he or she owns. Further, the Department does not believe that the proposed rule can fairly be characterized as establishing a 20 percent "set-aside" for persons under 55 years of age. In order to be assured of preserving the exemption, an owner of "55 or over" housing will not, as a practical matter, be able to sell or rent a full 20 percent of the units to incoming persons, all of whom are under 55 years of age, because if the owner does so he or she will risk losing the exemption if some of the over-55 occupants die with surviving spouses who are under 55 years old. In this regard, a number of commenters expressed concern about the last sentence of example 1A in paragraph (e). This sentence indicates that a housing provider could rent a unit to persons (John and Mary in the example) all of whom are under 55 years old even if doing so would reduce the percentage of units occupied by at least one person 55 years of age or older to just a fraction above 80 percent. Although the housing provider in fact could rent to John and Mary without losing the "55 or over" exemption the Department agrees that doing so is not advisable under the circumstances described in the example. Since the owner would be just a fraction above the 80 percent minimum required to maintain the "55 or over" exemption, renting to John and Mary could lead to the owner losing the exemption if some of the over-55 occupants die with surviving spouses who are under 55. In order to avoid any confusion, therefore, the last sentence of example 1A in paragraph (e) of the proposed rule has been deleted in the final rule.

Beyond this, the owner must take care to publish and adhere to policies and procedures which demonstrate an intent to provide housing for persons 55 years of age or older. For example, this requirement would preclude an owner or manager from marketing 80 percent of the units for persons 55 years of age or older and marketing the remaining 20 percent in a radically different way (*e.g.*, young adults). The policies and procedures for the housing facility *as a whole* must demonstrate an intent to provide housing for persons 55 years of age or older. "In essence, this means that the housing in question must in its marketing to the public and in its internal operations, hold itself out as housing for persons aged 55 or older." 134 Cong. Rec. S10456 (Memorandum of Senators Kennedy and Specter Regarding Their Substitute Amendment). Accordingly, the Department has determined not to revise paragraph (d)(2).

The second major issue relating to 55 or over housing concerns paragraph (c)(1), which requires that at least 80% of the units in the housing facility be occupied by at least one person 55 years of age or older unit *except that* a newly constructed housing facility for first occupancy after March 12, 1989 need not comply with paragraph (c)(1) of this section until 25% of the units in the facility are occupied. The exception for partially occupied newly constructed housing facilities was proposed by HUD to deal with the practical problem of filling units in a new and unoccupied housing facility in a reasonable manner, consistent with the "55 or over" exemption. For example, it would be unreasonable for a large newly constructed housing facility that intends to qualify for the exemption to lose its right to claim the exemption simply because the first unit happens to be filled with persons all of whom are under 55 years of age. However, once a certain percentage of units has been filled the housing facility can reasonably be expected to comply with the percentage requirement in paragraph (c)(1). Thus, the Department proposed to require that a housing facility comply with the 80% requirement in paragraph (c)(1) once 25% of the units in the housing facility have been filled and invited comment on the question of whether the 25% point is too high or too low.

The National Association of Homebuilders, among other commenters, felt this percentage was too low to make a meaningful assessment of a particular housing facility. The National Multi Housing Council argued that a building should be eligible for the "55 and Over" exemption during initial occupancy so long as not more than 20 percent of the total units are occupied by non-qualifying residents. The Council argues that marketing and market conditions will vary widely throughout the country and suggest that it is unnecessary for HUD to attempt to fix a universal demarcation point on this subject. The Council proposes that the final rule permit an owner to sell or rent the first 20 percent of the units to non-qualifying occupants, if he or she wishes.

On the other hand, the Children's Defense Fund and the Leadership Conference on Civil Rights, among other commenters, objected to paragraph (c)(1) since the 25 percent point referenced in the proposed regulation is not contained in the Act or its legislative history. These commenters further argue that this 25 percent point of reference be deleted because it stems from what they

regard as an incorrect interpretation of the 55 or over exemption. In other words, if the 20 percent of the units for non-qualifying households were restricted to surviving spouses, nurses and companions there would be no need for the 25 percent point of reference for initial occupancy.

Since the Department has not adopted the narrow interpretation of the 20 percent limitation urged by some commenters, the Department continues to believe that the regulation must contain some point of reference so that everyone concerned will know how to calculate whether a housing facility has complied with the 80 percent requirement during initial occupancy. However, the Department does not believe it would be consistent with the intent of the statute to permit an owner or manager seeking to qualify for the "55 or Over" exemption to sell or rent the first 20 percent of the units to persons all of whom are under 55 years of age. Filling so many units with non-qualifying persons might create an impression that the housing is not intended for older persons. Further, the owner would not have any leeway to provide for units occupied by under 55 surviving spouses and nurses or companions. For these reasons, the Department has retained paragraph (c)(1) as it was proposed.

In addition, as in § 100.303(a)(3), a new paragraph (d)(3) has been added to § 100.304 of the final rule. It states that housing satisfies the requirements of this section even though there are units occupied by employees of the housing (and family members residing in the same unit) who are under 55 years of age provided they perform substantial duties directly related to the management or maintenance of the housing. Thus, as in § 100.303, units occupied by employees of the housing who do not meet the age threshold are not considered in determining a project's eligibility as housing for older persons.

"Significant Facilities and Services". Third, the Department received a great many comments asking for clarification of the phrase "significant facilities and services designed to meet the physical or social needs of older persons." A large number of commenters viewed the definition in proposed paragraph (b)(1) as requiring facilities and services on the order of what one might expect to find in a facility for severely disabled elderly persons who are not able to care for themselves. Other commenters want to qualify for the "55 or Over" exemption and want to know precisely what services and facilities must be provided in order to qualify for the exemption.

Paragraph (b)(1) of the proposed rule stated that "significant facilities and services specifically designed to meet the physical or social needs of older persons" include an accessible physical environment, congregate dining facilities, social and recreational programs, emergency and preventive health care or programs, continuing education, welfare, information and counseling, recreational, homemaker, outside maintenance and referral services, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them. The list of significant facilities and services designed to meet the physical or social needs of older persons in the proposed rule is drawn from section 202(f) of the Housing Act of 1959, 12 U.S.C. § 1701q, listing examples of facilities and services for older persons. The House Report (at p. 32) relies heavily upon the listing in section 202(f) of the Housing Act of 1959 in its discussion of such facilities. In addition, the proposed rule made it clear that the housing facility need not have all of these features to qualify for the exemption.

Based upon the reaction hundreds of commenters had to the proposed definition of "significant facilities and services designed to meet the physical or social needs of older persons" it appears that the presence early on in the definition of "congregate dining facilities" and an "accessible physical environment" may have created an impression that only housing for older persons who are not capable of living independently would satisfy the requirements of paragraph (b)(1). The Department wishes to stress that a housing facility may have significant facilities and services designed to meet the physical *or* social needs of older persons and still provide housing for active older persons who live very independently. A housing facility, for example, need *not* necessarily have congregate dining facilities or an accessible physical environment in order to qualify. In fact, many of the facilities and services on the list can readily be associated with active older persons. These include social and recreational programs, preventive health care, information and counseling, recreational services, and transportation to facilitate access to social services. Moreover, the list of services on this list was not intended to be exclusive. As a result of this reaction, the Department has reordered the list of services and facilities in the final rule. In addition, "welfare" has been deleted from the list because it appears only to have relevance in the context of governmental programs for elderly persons which are covered by § 100.301.

The facilities and services designed to meet the physical or social needs of older persons must be "significant" in order to satisfy paragraph (b)(1). It is not possible for the Department to define precisely what services and facilities must be present before they are considered "significant." The services and facilities will necessarily vary based on the geographic location and the needs of the residents. However, it is clear, for example, that the installation of a ramp at the front entrance of a housing facility would not constitute a "significant" facility designed to meet the physical needs of older persons. Similarly, the provision of minor amenities—such as putting a couch in a laundry room and labeling it a recreation center—would not constitute a "significant" facility designed to meet the social needs of older persons. House Report at 32.

"Important Housing Opportunities for Older Persons". Some commenters suggested that the Department establish a "precertification" procedure which would enable housing providers to seek HUD certification that a housing facility has "significant facilities and services designed to meet the physical or social needs of older persons" or that the housing facility satisfies the requirements of paragraph (b)(2). One commenter representing the interests of mobile home park owners argued that such a procedure would prevent many lawsuits and "frivolous" administrative complaints of discrimination from being filed. The Department does not believe at this early stage of the enforcement of the Fair Housing Amendments Act that there is a reasonable basis to conclude that many "frivolous" complaints will be filed unless a "pre-certification" procedure is established. Further, the Department does not believe that it has sufficient resources to support such a procedure. However, if experience with enforcement of the exemption for "55 or over" housing shows that such a procedure would be cost-effective the Department will consider adding a "pre-certification" procedure in the future.

The fourth area of major public comment concerns paragraph (b)(2) of the proposed rule. A housing facility may qualify for the "55 or over" exemption even if it does not satisfy the requirements of paragraph (b)(1). Under paragraph (b)(2), a housing facility that does not provide significant facilities

and services specifically designed to meet the physical or social needs of older persons may nonetheless qualify for the "55 or over" exemption. Such a housing facility must demonstrate that it is not practicable for it to provide significant facilities and services designed to meet the physical or social needs of older persons, and must also demonstrate that the housing facility is necessary to provide important housing opportunities for older persons.

The proposed rule contained eight factors, among others, that the Department proposed to consider in determining whether a housing facility satisfies the requirements of paragraph (b)(2). Paragraph (b)(2) was criticized by many commenters for not being sufficiently precise. These commenters state that listing eight factors is not sufficient, especially since the proposed rule did not state how many (or how few) of the factors must be fulfilled in order to obtain a waiver of the requirement of providing significant services and facilities.

Further, some commenters cited legislative history which they believe is helpful in construing the exception. Senator Kennedy stated that the exception was intended "to be narrowly used only when it can be demonstrated that the costs of providing the facilities and services would result in depriving low- and moderate-income persons of needed and desired housing. Independent and objective evidence must be provided to establish impracticability." 134 Cong. Rec. S10549 (daily ed. August 2, 1988) (statement of Sen. Kennedy). Representative Edwards explained that § 807(b)(2)(C)(i) was "not intended to provide a broad exemption * * *." 134 Cong. Rec. H6498 (daily ed. August 8, 1988) (statement of Representative Edwards). Mr. Edwards went on to explain the impracticability test as follows:

> The fact that the facilities and services are expensive to provide is not alone sufficient to meet the standard of impracticability. This standard cannot be satisfied only by estimates of increased costs, business inefficiency or loss of profit. Independent and objective evidence must be provided to establish impracticability. Mere opinion that the provision of such facilities and services is impracticable is not sufficient.

Id.

With regard to the requirement that the housing qualify as an "important housing opportunity for older persons" Representative Edwards stated that it must be shown that "[a]ffordable housing for older persons of low or moderate incomes must not be otherwise available in the community." *Id.*

The Department agrees that additional guidance is needed and the Department has been guided by this legislative history in revising paragraph (b)(2) to provide for a somewhat more precise definition of this exception. The first sentence of paragraph (b)(2), which mirrors the statute, is unchanged from the proposed rule. The following sentence explicates this statutory test in a manner that is consistent with the legislative history regarding this exception. It states that an owner or manager, in order to satisfy the requirements of paragraph (b)(2), must demonstrate through credible and objective evidence that the provision of significant facilities and services designed to meet the physical or social needs of older persons would result in depriving older persons in the relevant geographic area of needed and desired housing. The Department believes that the revised standard is both clearer and consistent with the intent of Congress.

The eight factors in the proposed rule have been reduced to seven factors in the final rule. Specifically, the first and second factors that appeared in the proposed rule have been consolidated and clarified in the final rule. The seven relevant factors in the final rule are as follows:

(i) Whether the owner or manager of the housing facility has endeavored to provide significant facilities and services designed to meet the physical or social needs of older persons either by the owner or some other entity. Demonstrating that such services and facilities are more expensive to provide is not alone sufficient to demonstrate that the provision of such services is not practicable. The preceding sentence relating to the cost of providing significant services and facilities is based on the legislative history. *See* 134 Cong. Rec. H6498 (daily ed. August 8, 1988) (statement of Representative Edwards) ("The fact that the facilities and service [sic] are expensive to provide is not alone sufficient to meet the standard of impracticability.")

(ii) The amount of rent charged, if the dwellings are offered for rent. The price of the dwellings, if they are offered for sale.

(iii) The income range of the residents of the housing facility.

(iv) The demand for housing for older persons in the relevant geographic area.

(v) The range of housing choices for older persons within the relevant geographic area.

(vi) The availability of other similarly priced housing for older persons in the relevant geographic area. If similarly priced housing for older persons with significant facilities and services is reasonably available in the relevant geographic area, then the housing facility does not meet the requirements of paragraph (b)(2). The second sentence is new and has been added to clarify the appropriate application of this factor.

(vii) The vacancy rate of the housing facility.

Subpart F—Interference, Coercion or Intimidation

Section 100.400 Prohibited interference, coercion or intimidation.

Subpart F provides the interpretation of the Department as to the conduct which constitutes a discriminatory housing practice under section 818 of the Fair Housing Act.

Section 100.400(b) states that it is unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any person in the exercise or enjoyment of, any right granted or protected by Part 100. Such conduct can also involve harassment of persons because of race, color, religion, sex, handicap, familial status, or national origin.

The illustrations in this section also indicate that a broad range of activities can constitute a discriminatory housing practice. Threatening or intimidating actions include acts against the possessions of persons, such as damage to automobiles or vandalism, which limit a person's ability to have full enjoyment of a dwelling. In addition, the protections against discrimination reach any person, including persons selling or renting dwellings and persons engaged in activities promoting fair housing. Further, persons who are not involved in any aspect of the sale or rental of a dwelling are nonetheless prohibited from engaging in conduct to coerce, intimidate, threaten or interfere with persons in connection with protected activities, or from retaliating against any person involved in any way in a proceeding under the Fair Housing Act.

Part 103—Fair Housing Complaint Processing

Enforcement responsibility within HUD

Generally, the proposed regulations placed the responsibility for the reasonable cause determination and the prosecutorial functions with the General Counsel, while retaining the investigation and conciliation functions with the Assistant Secretary for Fair Housing and Equal Opportunity.

Several commenters urged that the Department modify the rule to leave all aspects of Fair Housing enforcement responsibility with the Assistant Secretary for Fair Housing and Equal Opportunity. Among other arguments, the experience of the Assistant Secretary in administering the several civil rights-related responsibilities of HUD was cited—particularly the twenty years of experience in administering the Fair Housing Act itself. In addition, commenters pointed out that the Civil Rights Act of 1968 provided for the creation of a new HUD assistant secretary position—clearly intended to serve as the lead official for civil rights responsibilities of the Department.

The Department agrees with the commenters that full utilization of the Assistant Secretary's experience must be assured, and that the original Fair Housing Act indeed intended that there be appointed an assistant secretary specializing in civil rights concerns. Had the proposed rule suggested removal of the responsibilities of the Assistant Secretary for Fair Housing and Equal Opportunity and the awarding of those responsibilities to the General Counsel, the above-summarized arguments would be well-taken. No such proposal has been made, however. Under the enforcement scheme set out in the proposed rule, the responsibilities of the Assistant Secretary as they relate to Fair Housing enforcement have been retained. The Assistant Secretary continues to have full responsibility for complaint intake, investigations, conciliations and for all related communications with the parties concerning their procedural rights and obligations. Quite clearly, given the greatly increased enforcement authority provided by the Fair Housing Amendments Act and the addition of important newly protected classes, the responsibilities of the Assistant Secretary have been augmented greatly.

It proves too much, however, to argue that the creation of a new assistant secretary's position in the 1968 Act somehow implies a duty in the Secretary to delegate subsequently enacted authority to that single officer. First, we note that the 1968 statute creating the new assistant secretary did not provide for administration or judicial enforcement of the Act, but only for the investigation and attempted conciliation of complaints. More importantly, both the 1968 Act and the 1988 Amendments Act refer, in *all* their substantive provisions, to responsibilities of the *Secretary* of Housing and Urban Development. Nothing in either Act purports to require the Secretary to delegate this responsibility to any particular officer or officers. It is clear, then, that an argument that the Secretary is legally bound to delegate his authority in a particular manner cannot be supported.

Commenters also argued that as a matter of policy, the delegation to the General Counsel is inappropriate. Commenters noted that the Assistant Secretary for Fair Housing and Equal Opportunity does not share responsibility with any other office of the Department relative to the Assistant Secretary's exercise of authority under other civil rights statutes. These commenters are correct—up to a point—although they ignore the fact of HUD General Counsel participation in any and all matters involving civil rights and equal opportunity at the stage where the Department becomes involved in formal enforcement, either through the initiation of administrative enforcement proceedings or the referral of matters to the Department of Justice for the initiation of civil actions.

Given the clear intention of the amended Act that a HUD reasonable cause determination will create a virtual certainty of litigation, either in an administrative tribunal or in a Federal District Court, it is not only rational and sensible but consistent with current delegations of authority in the area of civil rights to provide that responsibility for such determinations be in the hands of the Department's legal officer. Similarly, the delegation of authority to the General Counsel to conduct hearings before administrative law judges under the Fair Housing Act seems to the Department not only to be a rational decision, but a rather obvious one. Such a division of responsibility is consistent with the practice of other agencies whose administrative processes make a separation of functions necessary or desirable.

One commenter noted that proposed § 109.16(a) provided that the Assistant Secretary is to make reasonable cause determinations in advertising cases. The proposed rule intended to delegate all responsibility for reasonable cause determinations to the General Counsel. This section has been revised.

Under the final rule, the General Counsel is delegated the responsibility for making the reasonable cause determination and for prosecuting administrative cases under the 1988 Amendments. One commenter noted that the General Counsel also has the responsibility to defend against charges that HUD has violated the Fair Housing Act. While the number of such cases may be small, the commenter argued that proposed procedures cast suspicion on the impartiality of the General Counsel in such matters. In the rare instances that complaints involving such circumstances are filed, the Secretary will delegate the General Counsel's responsibility for the reasonable cause determination and, where an administrative proceeding is conducted, HUD's prosecuting duties to another qualified employee of the Department. Since such circumstances will rarely, if ever, occur, the text of the rule has not been revised to reflect this eventuality.

The division of responsibility in the final rule has been modified slightly to transfer certain duties from the General Counsel to the Assistant Secretary. These include: (1) The ability to elect to have the claims asserted in a charge decided in a civil action where HUD is the complainant (§§ 103.410 and 104.410); (2) the duty to notify the aggrieved person and the respondent when a reasonable cause determination can not be made within described time periods (§ 104.400(c)); and (3) the duty to notify Federal, State and local licensing and regulatory agencies under § 104.935(a). In addition, the final rule has been revised to require the notification of the Assistant Secretary at certain points during the administrative proceeding (see e.g. §§ 104.700(a), 104.910(d), 104.920 and 104.930(d)).

Statutory limitations on HUD's complaint processing authority.

In several instances, commenters suggested revisions to the proposed rules that cannot be adopted because they conflict with statutory limitations contained in the Fair Housing Act. The statutorily impermissable proposals included:

1. Some commenters argued that the rules should require complainants to file their complaint within 60 days of the date that an alleged discriminatory practice has occurred or terminated. Section 810(a)(1)(A)(i) of the Act permit complainants to submit complaints not later than one year after an alleged discriminatory housing practice has occurred or terminated. (See Subpart A.)

2. Commenters argued that respondents should have from 20 to 30 days to respond to the complaint. Section 810(a)(1)(B)(iii) of the Act provides that each respondent may file an answer to the complaint not later than 10 days from the date of receipt of the notice. (See §§ 103.50(b)(3) and 103.55.)

3. Commenters argued that the final rule should not permit the referral of cases to agencies until they are found to be substantially equivalent under the

new law, or should be revised to permit the complainant to choose whether to permit the referral under such circumstances. Under section 810(f)(4), each agency certified for the purposes of Title VIII on the day before the enactment date must be considered certified with respect to those matters for which the agency was certified on that date. The transition period is 40 months from the date of enactment. Under section 810(f)(1), HUD is required to make these referrals. (See Part 115)

4. Several commenters urged HUD to retain the existing practice of making a threshold determination to resolve based on facts developed in the investigation before commencing conciliation. Such procedures would be contrary to section 810(b)(1) which requires HUD to engage in conciliation with respect to the complaint, to the extent feasible, during the period *beginning with the filing of the complaint and ending with the filing of the charge or dismissal by HUD.*

5. Commenters objected to § 103.330(b) which permits the nondisclosure of conciliation agreements, where the aggrieved person and the respondent request the nondisclosure and the Assistant Secretary determines that disclosure is not required to further any purpose of the Fair Housing Act. Under section 810(b)(4), nondisclosure is permitted under such circumstances.

6. Commenters objected to the requirement for the public disclosure of complaints dismissed based on a finding of no probable cause. Section 810(g)(3) requires public disclosure.

Subpart A—Purpose and Definitions

Section 103.1 Purpose and applicability.

Applicability. Except for complaints involving allegations of discriminatory housing practices occurring before and continuing after the effective date of the 1988 Amendments (March 12, 1989), the proposed rule provided that:

—Complaints alleging discriminatory housing practices that occurred before the effective date of the 1988 Amendments are governed by the procedures in Part 105.

—Complaints alleging discriminatory housing practices that occur on or after the effective date of the 1988 Amendments are governed by the procedures in Part 103.

For complaints alleging violations that occur before and continue after March 12, 1989, the proposed rule provided:

—Complaints filed after March 12, 1989 would be processed under Part 103.

—Complaints filed before March 12, 1989 would continue to be processed under Part 105; however, the Department would provide the complainant with a reasonable opportunity to elect to have the complaint processed under Part 103 in lieu of the Part 105 procedures.

Commenters argued that the final rules must be revised to provide retroactive application of the Act's new remedies and enforcement procedures to all complaints pending on March 12, 1989, including those that do not involve continuing violations. Other commenters argued that the regulations should not apply to any complaints filed under part 105 prior to March 12, 1989.

HUD has reviewed its determination regarding the applicability of the 1988 Amendments. Upon reconsideration, HUD believes that the proposed rules unduly restrict the cases to which the new remedies under the 1988 Amendments will be applied. It is clear that Congress did not intend the Act to receive the restricted application proposed by HUD. Significantly, the plain language of section 815 places no limitation upon its applicability, but rather provides: "This Act and the amendments made by this Act shall take effect on the 180th day beginning after the date of enactment of the Act." At no point does the Act suggest that its provisions should receive less than the broadest application of the effective date provision.

The general rule of statutory construction is that remedial and procedural legislation not affecting vested rights must be applied to any claim cognizable under the prior law that is pending on the effective date or that is filed thereafter. *Bradley v. Richmond School Board*, 416 U.S. 696 715–16 (1974). While it is true that statutes that affect substantive rights ordinarily may not be applied retroactively, *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982), this principle has no applicability here. The 1988 Amendments (except as to discriminatory housing practices involving handicap and familial status) do not create new legal duties or responsibilities. Rather, they merely provide a new process by which aggrieved persons may enforce existing rights protected under Title VIII. *I.e.*, The 1988 Amendments create new procedures for the filing, investigation and conciliation of complaints concerning discriminatory housing practices and strengthen the remedies available to victims of housing discrimination by providing for administrative hearings, and by increasing the availability of civil penalties, attorney's fees, etc. Because the new remedies and enforcement procedures do not affect vested rights, retroactive application is entirely appropriate, unless a manifest injustice would result. *See, e.g., Bradley, supra.* (increased availability of attorney's fees); *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985) (extension of limitations period); *Montana Power Co., v. Federal Power Comm.*, 445 F.2d 739 (D.C. Cir. 1970) (change in tribunal); and *Grummitt v. Sturgeon Bay Winter Sports Club*, 354 F.2d 564 (7th Cir. 1965 (change in procedure)).

To bring the final rule into conformance with the Act and the well-settled law, Parts 103 and 105 have been revised. Under the final rule, Part 103 will be applicable to all complaints alleging discriminatory housing practices on account of race, color, religion, sex or national origin pending on March 12, 1989 or filed thereafter; and to all complaints alleging discriminatory housing practices on account of handicap or familial status occurring on or after March 12, 1989. Part 105 will have no continuing validity and will be removed.

One commenter asked for clarification whether complaints that allege discriminatory housing practices involving handicap and familial status that occur before March 12, 1989 and will continue after that date may be filed prior to March 12, 1989. Discriminatory housing practices involving handicap or familial status do not violate the Act until March 12, 1989. Since it will be impossible to predict whether an individual will continue a previous practice after the practice becomes a violation of the Act, HUD will not accept any complaints alleging such discrimination filed before March 12, 1989. To ensure that complainants are aware of their right to file if the practice continues, the rejection will be accompanied by an explanation of the complainant's right to refile after March 12, 1989.

Applicability of Part 103 to State and local agencies. Several commenters sought clarification concerning the applicability of various requirements in Part 103 (and Part 104) to complaints filed with or referred to State and local agencies. Part 103 contains the procedures for the investigation and conciliation by HUD of complaints filed under section 810 of the Act and Part 104 contains the rules of practice and procedure applied by HUD's ALJs in administrative proceedings adjudicating charges issued under Part 103. These parts do not, by themselves, impose any requirements on the processing of complaints at the State or local level. Part 115, on the other hand, sets forth the criteria for HUD's certification that a

State or local law is substantially equivalent, and its requirements parallel many of the requirements contained in Parts 103 and 104.

Some commenters urged language specifically stating that certain provisions (e.g., HUD procedures for the investigation of complaints) are not binding on State and local agencys. HUD believes that §§ 103.1, 104.10 and 115.1 clearly state the applicability of the parts and that further clarification is unnecessary.

Complaint processing and Section 504. Proposed § 103.1(c) provided that HUD will conduct investigations and conciliations in accordance with section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). One commenter argued that this paragraph should only apply when a complaint involves an allegation of discrimination that is based on handicap. The proposed section was designed to provide for the reasonable accommodation of persons with disabilities who are participants in the fair housing complaint process. The provisions of this section were not intended to be limited to complaints involving allegations of discrimination based on handicap. This section has been clarified in the final rule.

Section 103.9 Definitions.

In addition to revisions of aggrieved person, dwelling unit and person discussed in the comments to Part 100 above, comments on the definitions of personal service and receipt of notice were received.

One commenter argued that HUD should delete these proposed definitions and incorporate requirements for personal service and for receipt of service contained in the Federal Rules of Civil Procedure. Another commenter urged HUD to abandon certified mail as a permissible means of service on non-agency participants because service may be frustrated by an addressee's refusal to claim. HUD's current rules provide for the service of documents by certified mail or through personal service. (see § 105.18). These methods have not, as yet, presented significant practical difficulties in the processing of complaints and have been retained in the final rule.

Subpart B—Complaints

Section 103.10 Submission of information.

Proposed § 103.10 contains provisions governing the submission of information concerning alleged discriminatory housing practices and notes that, if the submitted information warrants, HUD may concurrently initiate compliance reviews under other civil rights authorities. In response to commenters, the Age Discrimination Act of 1975 has been added to the list of civil rights authorities in this section and §103.5, and minor editorial change has been made for clarity.

Section 103.15 Who may file complaints.

Section § 103.15 permits any aggrieved person or the Assistant Secretary to file a complaint. One commenter noted that individuals who are subject to housing discrimination are likely to be low-income persons who cannot read, write, or express themselves articulately. The commenter suggested that § 103.15 be amended to require HUD personnel to provide full and comprehensive assistance throughout the complaint process, including assignment of an attorney. Similar revisions were requested for §§ 103.10(a), 103.30(b), 103.300(b), and 104.10(b). Section 103.15 also provides that a complaint may be filed with the assistance of an authorized representative of an aggrieved person, including any organization acting on behalf of an aggrieved person. One commenter would modify this provision to require HUD to notify the authorized representative acting on behalf of the aggrieved person, concerning the status of cases.

The Department agrees that it is vital that HUD provide full assistance to persons who wish to file a complaint and that HUD continue to provide assistance throughout the complaint processing procedure. Accordingly, the Department intends to pursue its current practice of providing appropriate assistance to such persons. In addition, HUD will, at the request of a complainant, provide information concerning the status of the complaint to an authorized representative in the same manner as such notification is provided to complainants. While the Department intends to provide such information, HUD does not believe that it is necessary to codify these policies in the regulations.

Section 103.20 Persons against whom complaints may be filed.

Under proposed § 103.20(a), a complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage in a discriminatory housing practice. Commenters urged the deletion of language permitting complaints against respondents that are "about to engage" in a discriminatory housing practice. The cited language is a necessary adjunct to the definition of aggrieved person found in the statute ("Aggrieved person means any person who * * * believes that such person will be injured by a discriminatory housing practice that is about to occur.") The cited regulatory provision is retained.

Proposed § 103.20(b) provides that a complaint may also be filed against any person who directs or controls or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising, or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwelling, if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged or is about to engage in a discriminatory housing practice.

Commenters argued that the definition of agency relationships described in this paragraph is confusing, may be too narrow, and does not correspond to the standards established by case law. Other commenters suggested that this provision could be improved by the provision of examples drawn from case law and that problems concerning this section could be remedied by the deletion of the language "within the scope of his or her authority".

Paragraph (b) expands on the general provisions contained in § 103.20(a). This provision reflects HUD's current rules governing the types of persons against whom complaints may be filed (see § 105.13(b)). This Part 105 regulation was adopted in the final rule issued June 27, 1988 (53 FR 24184). In that rule, HUD explained that the provision was based on judicial precedent to the effect that persons involved in the sale, rental or financing of dwellings have a nondelegable duty to assure that all conduct relating to any aspect of the sale, rental or financing of dwellings complies with the Fair Housing Act and that a person who supervises, directs or employs other persons can be legally responsible for actions of such other persons which violate the Fair Housing Act. See *U.S. v. Youritan Construction Co.*, 370 F.Supp. 643 (N.D. Calif. 1973), modified as to relief and affirmed, 509 F.2d 623 (9th Cir. 1975); *Northside Realty v. U.S.*, 605 F.2d 1348 (5th Cir. 1979); *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974); *U.S. v. Northside Realty*, 474 F.2d 1164 (5th Cir. 1973); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975); *Johnson v. Jerry Pals, Real Estate*, 485 F.2d 528 (7th Cir. 1973); *Dillion v. AFBIC Development Corp.*, 420 F.Supp. 572 (S.D. Ala. 1976); and *U.S. v. Real Estate Development Corp.*, 347 F.Supp. 776 (N.D. Miss. 1972). Commenters on that rule asserted that

the judicial decisions did not establish a rule of liability without fault as the proposed rule (published October 16, 1984 (49 FR 40528)) suggested; and that the decided cases focused only on the liability of a broker for conduct of his or her salepersons, but did not manage absolute liability on the mere basis to direct or control without reference to instructions, policies, compliance programs, and other actions of the principal. In response to these comments, HUD announced that it was not its intent to impose absolute liability on any principal, but rather to follow the existing case law of the liability of the principal. As a result of this discussion, the language "acting within his or her authority" was added. The commenters on the proposed rule implementing the 1988 Amendments have presented no argument that convinces the Department that its current analysis of the case law on this point is incorrect.

Section 103.25 Where to file complaints.

Section 103.25 permits aggrieved persons to provide information to be contained in a complaint by telephone to HUD Regional and Field Offices. While some commenters have argued for the deletion of this procedure, HUD does not believe that the filing of complaints should be limited in the manner the commenters suggest. The final rule continues HUD's practice of reducing information provided by telephone to writing on the complaint form and sending the form to the aggrieved person for signature and affirmation.

A substantially equivalent agency complained that HUD's proposed procedures do not recognize that State and local agencies may have their own filing procedures and complaint formats. The agency argued that HUD's regulations should state that complaints may be filed with such agencies in accordance with their filing procedures and that complaints submitted on the agency forms will be accepted if they meet the requirements of § 103.30(c). These requirements are contained in the regulation at §§ 103.25(a)(3) and 103.30(b). The regulation is unchanged on this point.

Section 103.30 Form and content of the complaint.

In response to a commenter, §§ 103.30(a) and 103.55(a) have been amended to delete the requirement that complaints and answers must be attested to before a notary public or a duly authorized representative of the Assistant Secretary. This attestation burden is unnecessary. Section 810(a)(1)(D) requires only that complaints and answers be under oath and affirmation. Under 24 U.S.C. 1746, the oath and affirmation requirement is satisfied if the complainant (or respondent) signs the following statement: "I declare under penalty of perjury that the foregoing is true and correct."

Section 103.42 Amendment of complaint.

Section 103.42 has been revised to clarify that complaints may be reasonably and fairly amended at any time and that the list of circumstances under which complaints may be amended is illustrative only.

Sections 103.45 Service of notice on aggrieved person and 103.50 Notification of respondent; joinder of additional or substitute respondents.

Section 810(a)(1)(B)(i) of the Act requires the Secretary to serve notice upon the aggrieved person acknowledging the filing of a complaint and advising the person of the time limits and choice of forums provided under Title VIII. Section 810(a)(1)(B)(ii) of the Act requires the Secretary to serve a notice on the respondent within 10 days of the filing of the complaint (or within 10 days of the identification of a substitute or additional respondent). This notice must identify the alleged discriminatory housing practice and advise the respondent of the procedural rights and obligations of respondents under Title VIII, and include a copy of the complaint. These sections are implemented at §§ 103.45 and 103.50 respectively.

Commenters emphasized the importance of the notice to aggrieved persons and respondents and suggested various additions to and modifications of the proposed regulations. The suggested changes included the addition of a requirement for the service of copies of Title VIII, applicable regulations and forms, and revisions of the description of the procedural rights and obligations under Title VIII and related laws to provide greater detail.

The regulation at §§ 103.45 and 103.50 describes, in general terms, the notification that will be provided to aggrieved persons and respondents. HUD intends to develop forms consistent with these regulatory provisions that will define with greater detail the procedural rights and obligations of the parties under the complaint processing procedures, and that will describe the additional information that will be provided to assist the parties. While HUD does not believe that it is necessary to detail these provisions in the regulations, HUD will take the comments on these sections into consideration in developing its notification forms.

Section 103.55 Answer to complaint.

One commenter argued that § 103.55 (Answer to complaint) should be revised to state that the respondent is under no obligation to file an answer and that a decision not to answer will have no impact on the respondent's position in the case. This section clearly provides that the filing of an answer is permissive. Since answers will generally expedite complaint processing, the regulations should not include provisions that would discourage their filing.

Subpart C—Referral of Complaints to State and Local Agencies

Section 103.100 Notification and referral to substantially equivalent State or local agencies.

Section 103.100 states the procedures for the notification and referral of complaints to substantially equivalent State and local agencies and provides for the notification of the aggrieved person and the respondent of the referrals, including the notification of the right of the aggrieved person to commence a civil action under section 813 of the Fair Housing Act. A commenter suggested that the notification under this section (and under § 103.115—Notification upon reactivation) also state that a suit may be filed in State court as well as Federal court. The proposed revision has not been made since State and local jurisdictions must provide such notifications to the complainant and the respondent as a requirement of certification (see § 115.3(a)(1) (ii) and (iii).

Section 103.110 Reactivation of referred complaints.

Under § 103.110, HUD will reactivate a referral complaint under three circumstances. Comments regarding each of these circumstances are discussed below.

Consensual reactivation. The complaint may be reactivated when a substantially equivalent State or local agency consents to the reactivation. In response to a comment, this section has been clarified to add that the Assistant Secretary may reactivate a complaint with the consent or at the request of the agency.

Prompt processing. The complaint may be reactivated if the substantially equivalent State or local agency fails to commence proceedings with respect to

the complaint within 30 days of the date that the agency received the notification and referral of the complaint, or the agency commenced proceedings within this 30-day period, but the Assistant Secretary determines that the agency has failed to carry the proceedings forward with reasonable promptness. HUD will not reactivate a complaint under these conditions, however, until the appropriate HUD Regional Office has conferred with the agency to determine the reason for the delay in the processing of the complaint. If the Assistant Secretary believes that the agency will proceed expeditiously following the conference, HUD may leave the complaint with the agency for a reasonable time.

While commenters supported the provision for consultation prior to reactivation, several changes were recommended. Commenters suggested that the regulations should provide for a written notice announcing the time and place for the conference and stating the reasons that the proceeding may be reactivated. Consultation contemplated under this section will be an informal process. In many instances, HUD anticipates that the consultation will be best accomplished through such measures as a telephone, rather than a face-to-face, consultation. To ensure that the procedures to be used are flexible and best suited to the certified agency, the procedures for consultation will be negotiated with each certified agency and incorporated in the memorandum of understanding. The proposed change is not included in the final rule.

In order to prevent arbitrary actions by the regional offices, commenters recommended that HUD establish criteria for determining when an agency has failed to act with reasonable promptness. Specific suggestions included placing an upper limit on the amount of time that HUD may leave a complaint with an agency; and establishing procedures for the identification and time limits for processing of specific types of cases that require a greater processing time (*i.e.*, systemic cases).

The determination that an agency has failed to act with reasonable promptness is one that must be made on a case-by-case basis through consultation with the certified agency. Given the numerous factors that must be considered (e.g., the subject matter, the number of aggrieved persons, the complexity of the issues involved in the complaint, the progress made by the agency since the referral of the case, the workload and resources available to the certified agency, scheduling difficulties between the agency, the aggrieved person and the respondent, etc.), HUD does not believe that it would be worthwhile to set forth the list of all relevant factors that may reflect a determination that an agency has failed to act with reasonable promptness.

Some commenters have argued that HUD's failure to provide greater specificity with regard to the issue of reasonable promptness and the reactivation of complaints is contrary to the goal of the 1988 Amendments to achieve expeditious resolution of complaints. HUD notes, however, that certified agencies must meet various performance standards for initial and continued certification, including limitations on the time for processing of complaints (see § 115.4). HUD believes that these limitations and the provisions for reactivation for failure to act with reasonable promptness are sufficient to serve the purposes of the Act.

A commenter requested regulatory clarification defining what is meant by "commenced proceedings". Because the 1988 Amendments provide for conciliation beginning as early as the filing of the charge, this term, as used in the final rule, could mean the start of investigation or the start of conciliation. Since the initial investigation or conciliation activity to be conducted will vary from agency to agency, HUD has not defined commencement of proceedings in the regulation. This term will be defined in the memorandum of understanding with each agency and will be based on the individual agency's procedures.

Decertification. Complaints may also be reactivated if the Assistant Secretary determines that the agency no longer qualifies for recognition as a substantially equivalent State or local agency and may not accept interim referrals with respect to the alleged discriminatory housing practice. No comments were received on this issue.

Section 103.115 Notification upon reactivation.

Under § 103.115, the Assistant Secretary is required to notify the certified State or local agency, the aggrieved person and the respondent of the reactivation of a complaint. A commenter noted that HUD staff often will notify the parties that they do not need to continue to cooperate with the certified agency after reactivation. The commenter argued that the notification in § 103.115 should clearly indicate that the agency may continue to process the complaint after reactivation and that the parties should continue to cooperate with such efforts.

HUD recognizes the certified agency's responsibility under State and local law to continue processing complaints following reactivation. The final rule has been amended to assure that the parties are aware of these responsibilities.

Subpart D—Investigation Procedures

Procedural steps prior to investigation and conciliation

One commenter, a mortgage banking association, feared that individuals frustrated by the rejection of loan applications for legitimate underwriting reasons will use the fair housing complaint process to appeal their rejection. The commenter urged HUD to provide a screening process to eliminate those complaints that fall outside of the fair housing area. If a complaint, on its face, sets forth an allegation of a discriminatory housing practice, HUD is obligated to accept the complaint and process it under its procedures. HUD cannot, and has not, provided a "screening process" to eliminate such complaints.

Section 103.200 Investigations.

HUD-initiated investigations. Upon the filing of a complaint, the Assistant Secretary is required to initiate an investigation. In addition to investigations initiated by complaints, the 1988 amendments permit HUD to initiate an investigation of housing practices to determine whether a complaint should be filed under Subpart B (see section 810(a)(1)(A)(iii) of the Act). The proposed rule would permit such investigations upon the written direction of the Assistant Secretary.

While many commenters supported the provisions permitting HUD to initiate complaints, they opposed the requirement that these investigations may be initiated only upon the written direction of the Assistant Secretary. Commenters argued that the requirement is impractical, will delay investigations and should be stricken. As an alternative, the commenters suggested that the regulations provide that the Assistant Secretary may delegate authority to the regions to initiate investigations under certain circumstances.

HUD emphasizes that the requirement for prior approval applies only to those investigations that are initiated by HUD. In the absence of a complaint alleging a discriminatory housing practice made by an aggrieved person, HUD believes that the approval of the Assistant Secretary is necessary to ensure that sufficient grounds for investigation exist and to ensure the efficient utilization of

resources. While the text of the rule states that the *Assistant Secretary* will make such approvals, as the Department develops uniform internal standards to govern the initiation of investigations and gains experience with HUD-initiated investigations, the Assistant Secretary will make appropriate delegations of authority for the initiation of investigations to the regional offices. Such delegations of authority can be made by **Federal Register** notice without the necessity of a rulemaking procedure.

Testing during investigations. One commenter argued that section 103.200 should provide that HUD will conduct professional testing or will fund other groups to conduct testing during the investigation stage. In connection with this revision, the commenters urge HUD to establish (with the assistance of housing professionals) the standards for conducting tests, what the tests should measure and the criteria to be used in determining whether discrimination exists.

Testing has been sanctioned by court decisions as an appropriate and essential tool of fair housing enforcement, and HUD will consider evidence developed through testing or auditing by fair housing groups or representatives of an aggrieved person in its investigations. HUD staff, however, does not engage in testing. Funding for private entities conducting projects designed to enforce the Fair Housing Act and substantially equivalent fair housing laws will be permitted under the Fair Housing Initiatives Program (proposed rule published July 7, 1988 (53 FR 25576)).

Section 103.205 Systemic processing.

Section 103.205 provides for the systemic processing of complaints. One commenter objected to the inclusion of this provision. The commenter argued that HUD's processing should be limited to the specific complaint, not other fair housing issues.

Section 810 clearly contemplates the investigation of matters related to, but not specifically alleged in, the filed complaint. (E.g., section 810(g)(2)(B) provides that the charge need not be limited to the facts or grounds alleged in the filed complaint.) The purpose of systemic processing is to provide for the investigation of discriminatory housing practices that are pervasive or institutional in nature and for the processing of complaints that involve complex issues, involve novel questions of fact or law, or affect a large number of persons. HUD believes that the cited revision is inconsistent with the scope of HUD's investigative authority and would undermine HUD's ability to address complex issues. The proposed change has not been made in the final rule.

Section 103.215 Conduct of investigations.

Section 103.215(a) continues HUD's existing practice of seeking the voluntary cooperation of persons to obtain access to information necessary to further the investigation. One commenter argued that this section serves no useful purpose. Much of the information obtained through HUD's investigations is provided through cooperative efforts rather than through procedural discovery techniques. In recognition of the success of these efforts, paragraph (a) is being retained.

Section 103.215(b) states that the Assistant Secretary and the respondent may conduct discovery in aid of the investigation by the same methods and to the same extent that parties may conduct discovery in an administrative hearing under Part 104, except that the Assistant Secretary would have the power to issue subpoenas as described in § 104.590 in support of the investigation or at the request of the respondent. One commenter argued that paragraph (b) does not comport with the statute and appears to unnecessarily complicate discovery. The commenter suggested the substitution of language directing that discovery and subpoenas be issued in the same manner as in civil actions in the United States District Court for the district in which the investigation is taking place.

The reference in the rule to the Part 104 procedures provides uniformity in discovery techniques while assuring compliance with the statutory requirement in section 811, which provide that discovery and subpoenas be issued in the same manner as civil actions in the United States for the district in which the investigation is taking place. (See §§ 104.500(a) and 104.590(a)). The rule is unchanged.

Another commenter argued that since HUD should be neutral with respect to the parties during the investigation, there is no reason to deny the aggrieved person the right to conduct discovery while providing this same right to the respondent. While HUD is neutral with respect to the parties, the parties' positions during the investigation are not equal. The respondent is the focus of an investigation aimed at determining whether he or she has committed a discriminatory housing practice and, thus, must be offered the ability to discover information in its own defense. The complaining party, on the other hand, by filing a complaint rather than pursuing its own civil action under section 813, places the conduct of the investigation in HUD's hands and will not be allowed to conduct separate discovery. HUD notes that the Fair Housing Act does not foreclose a discovery avenue to aggrieved persons who have filed complaints, since the complainant may file a civil action under section 813(a) with regard to the alleged discriminatory housing practice and obtain discovery through the court proceeding.

Subpoenas issued by the Assistant Secretary would require the approval of the General Counsel before issuance. Some commenters argued that only one entity should be involved in the issuance of subpoenas during the investigation. These commenters would delete the references to General Counsel's approval of subpoena issuances. Subpoenas issued by HUD in furtherance of an investigation may be challenged or enforced through judicial proceedings. Since the legal sufficiency of the subpoena will be at issue, it is necessary to ensure that the issuance is justified. Accordingly, the rule continues to provide for review by the General Counsel. A minor clarifying change has been included limiting the General Counsel's review to legal issues.

Section 103.220 Cooperation of Federal, State and local agencies.

Section § 103.220 reflects provisions currently contained in Part 105 which permit the Assistant Secretary, in processing Fair Housing Act complaints, to seek the cooperation and utilize the services of State and local agencies and of other appropriate Federal agencies. Proposed § 103.220 also contained language designed to ensure that other Federal agencies are aware of their responsibility under section 808 (d) and (e) of the Act and under Executive Order No. 12259.

Upon review, HUD has concluded that proposed § 103.220 may generate confusion concerning the agencies' obligations to provide information during the investigation process and their duty to ensure that programs and activities are administered in a manner that will affirmatively further fair housing and their duty to cooperate with the Assistant Secretary in furthering the purposes of the Fair Housing Act, including the conduct of investigations. To clarify these provisions, § 103.220 has been revised to state that the Assistant Secretary, in processing Fair Housing Act complaints, may seek the cooperation and utilize the services of Federal, State or local agencies, including any agency having regulatory or supervisory authority over financial

institutions. Provisions governing other agencies' duties to affirmatively further fair housing and for cooperating in furthering the purposes of the Fair Housing Act have been moved to a new § 103.515 entitled "Actions by other agencies".

One commenter argued that this section does not clearly announce what type of cooperation HUD will generally expect of banking regulators, or what role these agencies will play in providing material for investigations. The commenter also asserted that it is unclear whether material generated by banking regulators or financial institutions in response to regulatory requirements and for purposes unrelated to the proposed rule would, contrary to existing banking policy, become public documents. Another commenter supported the aims of § 103.220 but suggested specific regulatory provisions designed to address the duty of other agencies to cooperate in investigations and procedures to be followed in pursuing discovery from such agencies.

HUD intends to review and upgrade its memoranda of understanding with covered agencies to cover our cooperative understandings concerning the provision of in formation to HUD under the Fair Housing Act, including information to be provided pursuant to investigations. All terms and conditions of HUD access will be addressed in these agreements. Accordingly, it is not necessary to provide more specific regulations in this area.

Section 103.225 Completion of investigation.

Completion of investigation. Section 103.230 states that the investigation will remain open until the reasonable cause determination is made. A commenter argued that the General Counsel, who is charged with making the reasonable cause determination, could remove a case from the Assistant Secretary's control by issuing a determination on reasonable cause before the complaint is fully investigated. This commenter felt that conciliation should be available until the complaint is transferred by the Assistant Secretary to the General Counsel for a reasonable cause determination and the General Counsel has filed a charge or dismissed the complaint. To remedy this problem, § 103.400(c)(1) has been revised to provide that the General Counsel shall make the reasonable cause determination only after the Assistant Secretary forwards the matter for consideration.

Deadline for completion of investigation. Section 810(a)(1)(B)(iv) and (C) provide that HUD must complete investigations within 100 days after the filing of the compliant (or, when a complaint has been referred to a substantially equivalent State or local agency and reactivated, within 100 days after service of the notification of reactivation), unless it is impracticable to do so. If the investigation cannot be completed within this time limit, HUD is required to notify the aggrieved person and the respondent of the reasons for the delay. Section 810(g)(1) requires HUD to make the reasonable cause determination within the same 100-day time period, and to provide notification of the reasons for any delay. These requirements were included in §§ 103.225 and 103.400(c) of the proposed rule.

Several commenters requested deletion of the impracticability exception. The impracticability exception was a recognition by Congress that there may be circumstances where investigations may not be completed, and the reasonable cause determination made, within the prescribed 100-day period. While HUD intends to meet these deadlines whenever it is within its power to do so, it is concerned that the imposition of a strict 100-day deadline will not recognize the need for a lengthier investigation in complaints involving complex issues or recalcitrant respondents, and that respondents could argue for the dismissal of an otherwise meritorious complaint based on the failure to complete an investigation. Since HUD perceives that no valid fair housing-related goal would be served by imposing a strict 100-day deadline in all cases, the impracticability standard has been retained.

Other commenters argued that the regulation must clearly identify the circumstances under which it will be impracticable to complete the investigation or issue a reasonable cause determination within the 100-day period. These commenters suggested that impracticability be defined as extraordinary circumstances in the specific case and that the rule should state that the routine processing of other cases will not be grounds for a finding of impracticability. The range of circumstances that could legitimately cause delay in a case is numerous, and HUD is not prepared to identify all possible circumstances that would make it "impracticable" to take the described actions within the prescribed time period. Moreover, even if HUD were to articulate all such circumstances, it would not preclude the consideration of the demands upon HUD's resources caused by other docketed cases. Such a definition would fail to recognize that even the best-managed case inventory system may not posses sthe excess capacity to respond to extraordinary demands upon resources.

Section 103.230 Final investigative report (FIR).

Requirements governing the contents of the investigative report are codified at § 103.230. Paragraph (a)(1) of this section provides that the investigative report will disclose the names and dates of contacts with witnesses, but will not disclose the names of witnesses that request anonymity. As noted in the rule, however, HUD may be required to disclose the names of such witnesses during the course of an administrative hearing under Part 104 or in a civil action under Title VIII. Commenters argued that the provision for nondisclosure of the identity of witnesses should be eliminated. The questioned provision merely continues HUD's current policy with regard to the disclosure of the identity of witnesses. Contrary to the allegations of the commenters, this policy has not undermined the credibility of HUD's investigations nor has it stifled conciliation efforts. The provision has been retained in the final rule.

One commenter argued that the regulations also should bar the disclosure of personal information about third parties and safeguard information that potentially could endanger the physical safety of the parties or of a third party. While HUD's final investigative report will avoid the inclusion of extraneous information, it is impossible for HUD to bar the disclosure of all information about third parties and to guarantee the individual safety of parties or of a third party. The proposed provision has not been included.

One commenter was concerned that the format for the investigative report may not provide an adequate basis for a reasonable cause determination. The investigative report will not be the only document available in connection with the making of a reasonable cause determination. The actual statements of witnesses and documentary evidence as well as the analysis of the investigation also will be considered. Internal procedures relating to these matters will be developed by HUD. Such procedures are not appropriate for inclusion in this rule.

Commenters urged that the FIR requirements be expanded to include a recommendation by the investigator on the reasonable cause determination and to include the facts and legal basis for the investigator's recommendation. As a

matter of internal policy, HUD anticipates that the views of the investigator with regard to the reasonable cause determination will be communicated to the General Counsel's office. HUD does not believe that it is necessary to incorporate this requirement in the regulation.

As required under section 810(d)(2) of the Act, § 103.230(c) provides that the Assistant Secretary shall make information derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent, upon request, at any time following the completion of the investigation. In response to a commenter, the final rule has been revised to require HUD, following the completion of the investigation, to notify the aggrieved person and the respondent that the FIR is complete and will be provided or upon request. Under most circumstances, the notification will be provided with the charge, where a charge is issued under § 103.405, or with the notice of dismissal under § 104.400(a)(2).

Subpart E—Conciliation Procedures

Section 103.310 Conciliation agreement.

If conciliation is successful, the terms of the settlement are reduced to a written conciliation agreement. Section 810(b)(2) of the Act provides that a conciliation agreement shall be an agreement between the respondent and the complainant, and shall be subject to the approval of the Secretary. Section 103.310(b) incorporates these requirements and states that the Assistant Secretary will indicate HUD approval of the conciliation agreement by signing the agreement.

The final rule makes a minor revision to this provision. Under the proposed rule, if HUD is the complainant, the Assistant Secretary would execute the agreement only if the aggrieved person is satisfied with the relief provided to protect his or her interest. The final rule recognizes that there may be circumstances where HUD may file a complaint that identifies a class of aggrieved persons, rather than specific aggrieved persons. Under such circumstances it would be impossible to determine if all aggrieved persons in the class are satisfied with the relief accorded. Accordingly, the final rule permits the Assistant Secretary to execute the agreement if all aggrieved persons named in the compliant filed by HUD are satisfied with the relief provided to protect their interests.

Section 103.310(b)(2) would preserve the General Counsel's ability to issue a charge under § 103.405, where the aggrieved person and the respondent have executed a conciliation agreement that has not been approved by the Assistant Secretary.

Commenters argued that HUD should not be permitted to commence or continue the investigation once an agreement is reached between the aggrieved party and the respondent. The commenters argued that the retention of this provision would "chill" conciliation agreements between the aggrieved person and the respondent and would serve no purpose since the Assistant Secretary will have right to initiate complaints under the 1988 Amendments. HUD could lose the ability to initiate a new complaint if the time period for the filing of the complaint has passed. Moreover, it would be wasteful of administrative resources to require HUD to file another complaint and to maintain a second case file under these circumstances. The final rule does not adopt the commenter's suggestion.

Section 103.315 Relief sought for aggrieved persons.

Section 103.315 lists the types of relief that may be sought for the aggrieved person during conciliation. Under paragraph (a)(1), monetary relief in the form of damages, including damages caused by humiliation or embarassment and attorneys fees. One commenter argued that monetary relief should be limited to "compensatory" damages. Another commenter argued against the provision of damages for humiliation or embarrassment, stating that such a practice would result in extraordinary and unreasonable damage awards.

HUD has left paragraph (a)(1) unchanged. Damages for humiliation and embarrassment and noncompensatory damages (i.e., punitive and exemplary damages) can be awarded in civil actions brought under Title VIII. Since respondents will seek a full release of all claims as a part of the conciliation, the regulation should permit negotiations that take such factors into account as a part of the settlement. Although monetary damages other than actual damages are usually not provided for in a conciliation agreement, it is HUD's intent that the rule not preclude the possibility of seeking punitive or exemplary damages for an aggrieved person in an appropriate situation.

Paragraph (a)(2) provides for other make-whole relief, including access to the dwelling at issue or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief. This provision has been amended to provide for "other equitable relief, including but not limited to" the listed actions. While one commenter felt that the provision for access to a comparable dwelling was redundant, HUD believes that the inclusion of this provision is appropriate to cover situations where the original dwelling at issue is no longer available.

Commenters argued that the provisions permitting the binding arbitration of disputes arising out of the complaint could be improved by the addition of a description of the rules and procedures that will be used in arbitration. This change has not been made. HUD wishes to keep the arbitration remedy as flexible as possible in order that individual aggrieved persons and respondents will have the opportunity to adopt the procedures that will best suit their circumstances.

Section 103.320 Provisions sought for the public interest.

Section 103.320 lists the types of provisions that may be sought for the vindication of the public interest. Commenters argued that the regulations should announce the standards that HUD will use in determining whether a conciliation agreement will adequately vindicate the public interest. No useful purpose would be served by listing every form of public interest that HUD may protect with conciliation agreement provisions. These provisions are often tailored to the circumstances of particular cases. The suggested change has not been adopted.

One commenter noted that civil penalties may be assessed in the administrative proceeding and the civil action. This commenter urged HUD to add a new provision permitting the seeking of civil penalties of up to $50,000 in conciliation. As noted above, HUD has not precluded the negotiation of damages in lieu of possible court-awarded punitive damages on behalf of the aggrieved person in conciliation, because such agreements are made in return for the full release by the aggrieved person of all claims against the respondent. However, since the public interest is vindicated by ensuring future compliance and by rectifying the effects of past discriminatory housing practices, rather than penalizing the respondent for such practices, civil penalties have not been added under §103.320.

One commenter argued that HUD should be permitted to seek compensation for private fair housing groups that have participated in

mediation or investigation before the complaint is filed. HUD recognizes that private fair housing groups often play a significant role in assisting and referring complaints on a Federal and State level, and in providing initial investigation and mediation assistance that is often useful in handling the complaint after it is filed. However, HUD does not believe that the conciliation agreement is an appropriate device for the recovery of such compensation on behalf of the fair housing group in any case where the group is not an aggrieved person. In other instances, HUD fears that attempts to recover compensation for such groups would be viewed as collusion between HUD and the groups.

Section 103.330 Prohibitions and requirements with respect to disclosure of information obtained during conciliation, and § 103.300(a) Participation as conciliator and investigator.

Under section 810(d), nothing said or done in the course of conciliation may be made public or used as evidence in a subsequent proceeding under Title VIII without the written consent of the persons concerned. Proposed § 103.330(a) implemented this provision with the additional statement that information disclosed during conciliation would not be used in the investigation of the complaint.

Upon reconsideration, HUD has decided to remove the additional statement concerning information disclosed during conciliation. By barring the use of conciliation statements or conduct "in an investigation", the proposed rule imposed greater restraints on the use of such information than are imposed under the statute. The statutory language represents a balance between the need to encourage candor in conciliation discussions and the need for a full development of the facts in the investigation and litigation of the complaint. The proposed language, in striking a different balance, may not conform to the statutory intent.

Although it is fairly obvious that statements made during conciliation might provide useful investigative leads, Congress did not preclude the use of such statements. The real concern of Congress was the effect on conciliation if statements made or conduct exhibited during conciliation were admissible in a later administrative proceeding or civil action.

By barring the investigative use of conciliation statements and conduct, HUD invites both complainants and respondents to argue that the investigation has somehow been "tainted" by information obtained during the conciliation. This would invite wasteful litigation concerning whether HUD conducted its conciliation and investigation activities in accordance with its own regulations and would provide parties with an incentive to insulate themselves from the use of evidence at trial, by disclosing key facts during conciliation.

In the final rule, the prohibition against the use of conciliation information in investigations will be dropped. HUD notes that the use of such information in administrative hearings and civil actions will be governed by Rule 408 of the Federal Rules of Evidence. (See § 104.730) Rule 408 makes inadmissible at trial "evidence of conduct or statements made in compromise negotiations," but "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."

As a related matter, § 103.300(c) limits the participation of officers, employees, and agents of HUD engaged in the investigation of a complaint under Part 103 in the conciliation of the same complaint or in any factually related complaint. While the original purpose of this general limitation was to ensure that information gathered during the conciliation process is not used in the investigation of the complaint, HUD continues to believe that conciliation of individual complaints can be best promoted where the investigation and conciliation functions are kept separate, so § 103.300(c) is being retained despite the adjustments made in § 103.330, discussed above.

Section 103.300(c) continues to recognize that there may be circumstances where a dual role for the HUD employee may be necessary. This section permits the investigator to suspend fact finding and engage in efforts to resolve the complaint by conciliation where the rights of the aggrieved person and the respondent can be protected and the prohibitions with respect to the disclosure of information obtained during conciliation can be observed. HUD emphasizes that such conciliations will generally occur where the investigator, during the course of investigation, is requested by the parties to conciliate and will rarely be initiated by the investigator.

One commenter, concerned that any suspension of fact finding would unduly delay the completion of the investigation, opposed this provision. The suspension of the investigation envisioned under this provision should not delay the investigation appreciably and should not prevent the Department from fulfilling its 100-day deadline for investigation and the reasonable cause determination.

Section 103.330(b) provides an exception to the prohibition against disclosure of conciliation information. This section provides that conciliation agreements will be made public, unless the aggrieved person and the respondent request nondisclosure and the Assistant Secretary determines that disclosure is not required to further the purposes of the Fair Housing Act. One commenter suggested that the provision should note that one of the purposes to be considered in determining whether disclosure should be required is the education of people about their fair housing rights and remedies and to show that meaningful redress can result from reporting possible violations to HUD and utilizing the conciliation process. While HUD agrees that the cited factor is significant in determining whether disclosure of a conciliation agreement will further the purposes of the Fair Housing Act, HUD is required to consider other purposes in making the disclosure determination. The final rule has not been changed to highlight this purpose.

One commenter asked how conciliation agreements would be made public. Where the terms of a conciliation agreement do not otherwise provide, HUD intends to issue a press release setting out the fact of successful conciliation and outlining the major terms of the agreement. The statute also requires "public disclosure" in the case of any complaint where the Secretary has determined that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and has dismissed the complaint. The Department intends to employ press releases for this purpose as well. Where a complaint is dismissed on a finding of no reasonable cause and the respondent specifies that even public disclosure absolving the respondent would be unwelcome, the Department will refrain from issuing a press release. However, HUD interprets the Amendments Act as requiring some form of public disclosure on the occasion of a dismissed complaint, and accordingly the Department's policy will be to disclose this information to the public if a specific request is received.

Section 103.335 Review of compliance with conciliation agreements.

Proposed § 103.335 stated that HUD may, from time to time, review compliance with the terms of any conciliation agreement. Whenever HUD has reasonable cause to believe that a

respondent has breached a conciliation agreement, HUD shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 814(b)(2) of the Act for the enforcement of the terms of the conciliation agreement.

One commenter argued that the language used in this section indicates that review of compliance agreements will be "haphazard and perfunctory." The commenter recommended the deletion of the phrase "from time to time" and would make compliance review mandatory and periodic (at least once a year) whether or not HUD has reasonable cause to believe that a breach has occurred.

Requiring HUD staff to monitor every conciliation agreement on a mandatory and periodic basis is not the most effective used of HUD's limited resources. Compliance reviews under this section will not be performed on a haphazard or perfunctory basis. Rather, compliance reviews will be performed on a random sampling basis, or if HUD has reason to believe that the signatories are not complying with the terms of a particular agreement. The final rule is unchanged.

Subpart F—Issuance of Charge

Section 103.400 Reasonable cause determination.

Reasonable cause standard. Proposed § 103.400(a) provided that if a conciliation agreement has not been executed by the complainant and the respondent and approved by the Assistant Secretary, the General Counsel, within specified time limits, shall determine, based on the totality of the factual circumstances known at the time of the decision, whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. The reasonable cause determination shall be based on all the facts concerning the alleged discriminatory housing practice, provided by the complainant and respondent and otherwise, disclosed during the investigation. In making the reasonable cause determination, the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in federal court.

A number of commenters objected to the reasonable cause standard announced in this section. Some argued that the standard is overly restrictive and may unduly limit the number of charges that will be issued by HUD. Others alleged that the meaning of the proposed standard is unclear and may open the door for subjective decisions and may permit the consideration of irrelevant factors. (*I.e.*, Some commenters suggested that the proposed language would permit HUD to consider any matters that could have a bearing on a decision to bring a lawsuit, including: an assessment of the strength of the suit, the amount of anticipated damages, the government's resources that would be devoted to the proceeding, the availability of witnesses, docket scheduling, and other factors generally bearing on the exercise of prosecutorial discretion). Commenters argued that language of the statute and relevant legislative history limit HUD's assessment to the issue of liability alone.

Contrary to the allegations of the commenters, a fair reading of the regulation clearly demonstrates HUD's intent to limit the reasonable cause assessment to the issue of whether a discriminatory housing practice has occurred or is about to occur. HUD, by repetition in the regulation, expressed its position that the reasonable cause determination is to be based solely on the issue of liability. No less than three passages state this proposition. (*I.e.*, the regulation states that the determination will be "based on the totality of the factual circumstances"; that the reasonable cause determination "shall be based on all facts concerning the alleged discriminatory housing practice"; and "the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of the civil action." While the proposed language would foreclose the consideration of extraneous matters not related to the factual determination of liability, HUD has made an additional modification in the final rule to reflect HUD's intent that the reasonable cause determination is to be based *solely on* the facts determined during investigation.

The source of many commenters' dissatisfaction is the provision that requires the General Counsel to determine whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action. Rather than permitting consideration of the probability of winning the case, this standard is merely intended to require that the charge is well-grounded in the facts and that the conduct that is the subject of the complaint appears to constitute a violation of the Act.

Commenters suggested several alternative standards. These standards are, in some cases, identical to the standard contained in the proposed rule. For example, some commenters proposed that the standard should be whether the information disclosed warrants the initiation of a civil action *or* an administrative proceeding under Part 104. In other cases, the alternative standards are substantially the same as the standard contained in the proposed rule (e.g., whether a reasonable and fair-minded trier of fact could conclude that a discriminatory housing practice has occurred or is about to occur, etc.). Accordingly, the proposed standards have not been incorporated in the final rule.

Other commenters argued that, in addition to the reasonable cause standard, HUD should make certain presumptions in favor of the aggrieved person when making the determination (e.g., to construe the facts in favor of the aggrieved person or to assume that the evidence offered by the aggrieved person is true) or that HUD should reserve all issues of material fact for determination at the hearing or trial. Such presumptions and reservations are inconsistent with HUD's duty to analyze and make a reasoned judgment concerning the alleged discriminatory housing practice and would obviate any need for a HUD investigation, as required by the statute. For this reason, the suggestions are rejected.

Written reasonable cause determination. Commenters argued that all determinations of reasonable cause or lack of reasonable cause must be in writing and set forth in an opinion which states the facts and legal conclusions. The commenters argued that such a requirement would discourage subjective determinations and establish accountability on the part of the fact finder and respect for the administrative process.

HUD has made minor changes to the final rule to clarify that all determinations will be made in writing and will set forth a brief summary of the factual basis of the determination. An extensive factual recitation will be unnecessary, since the complete investigative report will contain this information and will be available to the aggrieved person and the respondent. (The rules already provide that where a finding of reasonable cause is made, the charge will include a short and plain statement of the facts upon which the General Counsel has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur). The notification will not state the legal theory upon which the determination is made since the Department feels that such a statement would encourage needless litigation by

encouraging the participants to mount collateral attacks on the reasonable cause determination.

Appeal of reasonable cause determination. The regulation provides no right to appeal a reasonable cause determination. Commenters argued that such an appeal is necessary to permit review of errors of law or facts, and that failure to provide such an appeal is contrary to standard administrative procedure. Some commenters would limit appeals to determinations of no reasonable cause.

The statute does not contemplate a review of the reasonable cause determination. Section 810(g)(1) requires HUD to make the reasonable cause determination within a 100-day time period from the filing of the complaint and to take specified actions immediately (or promptly) after the determination is made. (The statute directs HUD to "immediately" issue a charge on behalf of the aggrieved person after reasonable cause is found (section 810(g)(2)) and to "promptly dismiss" the complaint and make public disclosure of the dismissal where no reasonable cause is found (section 810(g)(3)).) In light of these directions, HUD believes that it is significant that the Act does not specifically provide for an appeal of the reasonable cause determination, particularly where such procedures are specified within other sections. (See section 812(h), which provides for Secretarial review of the ALJ's initial decision.) Moreover, HUD believes that appeals of the determination of reasonable cause would be contrary to the legislative history of the 1988 Amendments, which supports the expeditious resolution of complaints. The additional review would delay the resolution of proceedings by civil action or administrative hearings under Part 104.

HUD notes that the failure to provide for the review of the reasonable cause determination will not preclude an aggrieved person from filing a civil action under section 813 of the Act. Nor will the dismissal prevent an aggrieved person from refiling a complaint based on newly discovered or previously unavailable information, provided the one-year time limit for the filing of a complaint is met. (In this regard, one commenter argued that the regulations should permit HUD to toll the statutory one-year statute of limitation for filing where a complaint is refiled. This change has not been made since there is no statutory authority for such an action.)

Reasonable cause determination and State and local zoning cases. Under proposed § 103.400(a)(1), if the General Counsel determines that reasonable cause exists, the General Counsel shall immediately issue a charge on behalf of the aggrieved person, unless the matter involves the legality of a State or local zoning or other land use law or ordinance. If such a law or ordinance is involved, HUD is required to refer the matter to the Attorney General for appropriate action under section 814(b)(1) of the Act. One commenter argued that the rule should state that the referral of such a case will not be made until an investigation has been completed and conciliation has been attempted. It is HUD's intention to investigate complaints alleging discriminatory housing practices that involve the legality of a State or local law and to forward its investigation to the Department of Justice. This section has been revised to provide further clarity on this point. See § 103.400(a)(2) of the final rule.

Adoption of a reasonable cause determination made by a certified agency. Commenters argued that the final rule should state that a finding of reasonable cause by a substantially equivalent agency will automatically be adopted by HUD, and require the Secretary to issue a charge. Commenters argued that the failure to include this provision will deny complainants the full protection of the new law during the 40-month period that currently substantially equivalent agencies have to conform their procedures and remedies.

The 1988 Amendments require HUD to make referrals for up to 40 months following the date of enactment to agencies that are certified (including agencies that are certified for interim referrals under Part 115) on the date of enactment. As noted in the preamble to the proposed rule, it is unlikely that such agencies will immediately provide the full range of remedies accorded to complainants under the 1988 Amendments. Given the limited statutory authorization for reactivation provided under section 810(f)(2) of the Act, it does not appear that HUD has unilateral authority to reactivate the complaint to provide the full range of remedies available under the Act absent other circumstances.

Under the limited circumstance where HUD will be able to reactivate and where the State or local agency has issued a reasonable cause determination (the existence of such a determination is highly unlikely until the State or local agency has modified its existing procedures to conform to the 1988 Amendments), HUD cannot automatically adopt the local agency's determination. HUD must ensure that the determination rests on a firm factual basis. While HUD may use the information gathered by such agencies (with appropriate supplementation through a HUD investigation) to make its independent evaluation of the factual circumstances surrounding the alleged discriminatory housing practice, the responsibility for making the reasonable cause determination cannot be delegated in such a manner.

Deadline for reasonable cause determination. Issues regarding 100-day deadline for the reasonable cause determination are discussed above.

Participation of the Assistant Secretary in the reasonable cause determination. Several commenters argued that the regulations should state that the reasonable cause determination will be made in consultation with the Assistant Secretary's office, and with due regard to the recommendations of the investigator. Another commenter feared that the investigation report, without further supporting data, may not be sufficient for the General Counsel to make the reasonable cause determination. The commenter asked whether the General Counsel would have access to the complete file, whether the General Counsel may send the case back for further investigation, and whether the General Counsel would be permitted to conduct his or her own independent investigation.

As noted under the discussion of the investigation report, the General Counsel will provide due deference to the recommendations of the Assistant Secretary and the investigator. There obviously will be communications between the two offices concerning this determination and access to files and additional investigative materials. Since such communications will be a matter of internal administrative procedures at HUD, it is not necessary to set forth the procedures in the regulation.

With regard to the investigation of additional matters, the final rule provides that the investigation will remain open until the reasonable cause determination is made. This provision was intended to permit the General Counsel to request the Assistant Secretary to make a further investigation where the investigative report is insufficient to determine whether reasonable cause exists, and to make direct inquiries to supplement the investigation.

Several commenters asserted that permitting the General Counsel to conduct his or her own investigation would be contrary to the intention of the legislation, would undermine the Assistant Secretary's investigative

function; may needlessly duplicate investigative activity; and would delay the disposition of cases. The General Counsel does not have the resources to engage in extensive fact-finding. Accordingly, where such fact-finding is required, the Assistant Secretary will be requested to conduct further investigation. Whenever there are minor issues capable of expeditious resolution, however, nothing prevents the General Counsel from resolving the issues through direct inquiries. The internal procedures for the conduct of such further inquiries will be worked out through agreements between the Assistant Secretary and the General Counsel.

Section 103.405 Issuance of charge.

Section 103.405 governs the issuance of the charge. Paragraph (a)(5) of this section provides that the charge need not be limited to the facts or grounds that are alleged in the complaint. A commenter argued that HUD should not be able to set forth new facts or new grounds in the charge. The commenter argued that HUD should be required to amend the complaint if new acts or grounds are found. Following the amendment, the respondent and aggrieved person should be given an opportunity to enter a conciliation agreement based upon the additional facts or grounds.

Section 810(g)(2)(B) expressly provides that the charge need not be based on the facts or grounds alleged in the complaint. Where additional grounds are discovered during the processing of the complaint, HUD intends to inform the respondent of the additional grounds and to seek information from the respondent concerning such matters. HUD will not require the amendment of the complaint as long as the record of the investigation clearly indicates that the respondent has been given notice and an opportunity to respond to the new allegations. The final rule at § 103.405(a)(3) has been amended to reflect this policy.

Section 103.410 Election of civil action or provision of administrative proceeding.

Section 103.410 governs the election of a civil action under section 810(o) or the provision of an administrative proceeding under Part 104.

One commenter stated that the rule should clarify whether the agreement of the complainant and the respondent is necessary for Part 104 procedure to apply. If no person makes a timely election to proceed with a civil action under section 810(o) of the Act, Part 104 will apply. The Department has made minor revisions to the regulations to clarify this point.

Paragraph (e) of the proposed rule provided that the General Counsel shall be available for consultation concerning any legal issues raised by the Attorney General regarding how best to proceed in the event that commencement of a civil action would implicate Rule 11 of the Federal Rules of Civil Procedure. Numerous commenters claimed that paragraph (e) is unnecessary, serves no useful purpose, may be used by the Department of Justice (DOJ) to reduce its litigation caseload, is not required by statute, and should be deleted.

Following the reasonable cause determination and an election, the statute provides that the Attorney General shall commence and maintain a civil action not later than 30 days from the election (section 810(o)). While we believe that the need for such consultation will be infrequent, we do not believe that Congress intended to preclude the two Federal agencies from discussing an appropriate method of proceeding in light of new relevant factual information or court decisions. Allowing 20 days for the election, the Attorney General's complaint may be filed as many as 50 days following the issuance of the charge. During that time period, new facts may be discovered or court decisions rendered which demonstrate that there is no reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur. In such circumstances, it would be senseless for the Attorney General to institute a civil action. Under such circumstances, HUD will take such action as is necessary to supplement the investigative report (see section 810(b)(5)(B) which provides that a final investigative report may be amended if additional evidence is later discovered) and, if further evidence to support a finding is not developed, to void the reasonable cause determination *ab initio*. This procedure is designed for the sole purpose of assuring that all civil actions are supportable at the time of filing and, in line with the intention of Congress, to ensure that the Secretary is the official making the determination whether to proceed with a charge or civil action. At the same time, the procedure helps to ensure that the Secretary will have the necessary information to make the required decision.

Some commenters argued that the reference in paragraph (e) to Rule 11 of the Federal Rules of Civil Procedure is unnecessary. As discussed above, the purpose of the DOJ/HUD consultation is to examine new court decisions and newly discovered evidence that are relevant to the reasonable cause determination. While the Rule 11 standard might be implicated if a civil action is filed where a new decision or evidence indicates a lack of a basis for a reasonable cause determination, HUD agrees that the specific reference to this rule of procedure should be excluded from the final rule. The final rule has been revised to emphasize that the General Counsel will be available for "consultation concerning any legal issues raised by the Attorney General as to how best to proceed in the event that a new court decision or newly discovered evidence is regarded as relevant to the reasonable cause determination."

Several commenters argued that DOJ must publish regulations or make public all proposed procedures for handling the civil actions authorized under section 812(o). DOJ's procedures for pursuing such actions are beyond the jurisdiction of the Secretary, and thus not appropriate for addressing in this rule.

Subpart G—Other Actions by the Department

Section 103.500 Prompt judicial action.

Proposed § 103.500(a) provided: "If at any time following the filing of a complaint, the General Counsel concludes that prompt judicial action is necessary to carry out the purposes of Part 103 or Part 104, the General Counsel will request that the Attorney General commence a civil action for appropriate temporary or preliminary relief pending the final disposition of the complaint."

One commenter objected to the language stating that the General Counsel would "request" the Attorney General to commence a civil action. The commenter argued that the language implies that following the request, it is within the Attorney General's discretion to file the civil action. The commenter noted that section 810(e) *requires* the Attorney General promptly to commence action after the Secretary *authorizes* the action. The statute does provide that when the Secretary authorizes the civil action, the Attorney General shall promptly commence and maintain such action and the final rule has been revised to track the statute.

Before making the determination to request such action, the proposed rule stated that the General Counsel would consult with the Assistant Attorney General for the Civil Rights Division. Commenters urged deletion of the consultation requirement. Commenters argued that the provision: (1) Adds time-consuming steps to the process of seeking emergency relief; (2) is not

necessary, since HUD is free to consult with DOJ at any time; (3) will be unnecessary when HUD acquires enforcement experience; and (4) is inconsistent with the statute and with the legislative intent to provide the simplest and fastest method to obtain emergency relief for discrimination victims.

The final rule is unchanged on this point. As noted above, once the general Counsel issues the authorization, the Attorney General is *required* to commence and maintain the action. In light of this mandate, it is crucial that authorized civil actions are justified on both the facts and the law. As noted in the preamble to the proposed rule, prior consultation will ensure that the civil action can be maintained by providing HUD with access to DOJ's extensive experience in seeking relief in different factual situations and in different forums.

Commenters' fears that the consultation requirement will impede the process of obtaining temporary and preliminary relief are unfounded. The consultation envisioned under this section will not be a time-consuming process. Rather, HUD and DOJ plan to consult through informal contacts between representative, of the two agencies. Moreover, HUD expects and intends that the conferences will expedite, rather than delay, proceedings by providing DOJ with important background information in individual proceedings before the issuance of an authorization and by providing DOJ with advance information concerning upcoming litigation. With such information, DOJ should be better prepared to act expeditiously to preserve the aggrieved person's rights when the authorization is issued. To emphasize this point, § 103.500(a) has been revised to provide that the purpose of the DOJ consultation is to ensure the prompt initiation of the civil action.

Section 103.500(b), which implements section 810(e)(2) of the Act, has been revised slightly to more closely reflect the statutory provision.

Section 103.510 Other action by HUD.

Section 103.510 addresses other actions that HUD may take with respect to matters asserted in a complaint. A commenter felt that the proposed rule's list of proceedings that may be initiated under other civil rights authorities was incomplete. The commenter urged the addition of the Age Discrimination Act of 1975 (42 U.S.C. 6101) and Executive Order 12259. The final rule has been amended to add the Age Discrimination Act. The cited executive order addresses HUD's authority to coordinate the fair housing efforts of federal agencies, is not an enforcement authority, and has not been added.

Part 104—Administrative Proceedings Under Section 812 of the Fair Housing Act

Statutory limitations applicable to administrative procedures

In many instances, commenters suggested revisions to the proposed administrative procedures that cannot be adopted because they conflict with statutory requirements contained in the Fair Housing Act. The statutorily impermissible suggestions included:

1. The deletion of the provision contained in § 104.590(e) which states that HUD will pay witness fees and mileage if the party requesting the issuance of the subpoena is unable to pay. Section 811(b) of the Act requires HUD to pay the fees under such circumstances.

2. The increase or decrease of the amount of the ceiling on civil penalties that may be awarded. Section 812(g)(3) provides for civil penalty ceilings ranging from $10,000 to $50,000. These ceilings are reflected in § 104.910(b)(3).

3. The deletion of provisions contained in § 104.940 requiring HUD to pay attorney's fees to the extent provided under the Equal Access to Justice Act (5 U.S.C. 504). Section 812(p) imposes this liability on the United States.

4. The reconciliation of the proposed deadline for a petition for review of the final decision in a United States Court of Appeals (30 days from issuance of decision); and the date that findings of fact and the final decision become conclusive in connection with a petition for enforcement (45 days after the date of issuance of the decision, if no petition for review is filed). These time periods are imposed under sections 812 (i) and (*l*) of the Act.

Subpart A—General Information

Section 104.20 Definitions

Section 104.20 contains the definitions used in Part 104. In addition to the comments on definitions addressed above, a commenter urged HUD to define separately "hearing" and "hearing on the record". While "hearing" is defined and used in Part 104, the phrase "hearing on the record" does not appear in the part. While the commenter noted that a civil action under section 813 is barred after the commencement of "a hearing of the record" by the ALJ (see 813(a)(3)), it is inappropriate to prescribe by HUD regulation the limitations on the jurisdiction of the United States District Court imposed under section 813 of the Act.

Section 104.30 Computation of time.

Section 104.30 governs the computation of time periods. A commenter suggested a clarification in § 104.30(a) to provide that the time computations relate only to filing and serving papers. The section is intended to apply to all computations of time (e.g., deadlines for the commencement of the hearing (§ 104.700); issuance of the initial decision (§ 104.910(d)); and the notification of appropriate governmental entities following the issuance of the final decision (§ 104.935(a)(2)). Accordingly, the proposed change has not been made.

Section 104.40 Service and filing.

Section 104.40 requires the filing of all documents in Washington, DC. One commenter argued that this provision places a burden on the aggrieved person, could have a chilling effect and is contrary to legislative intent to provide relief to persons in outlying areas. This commenter would revise § 104.40(a) to require filing in Washington, DC until the Assistant Secretary designates local addresses for filing. While HUD intends to conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur (§ 104.700), all other administrative functions will be performed at the Office of the Administrative Law Judges in Washington, DC. Since service and filing can be accomplished by mail, HUD does not believe that this requirement will impose an undue burden on persons outside the Washington, DC area.

Subpart B—Administrative Law Judge

Section 104.100 Designation.

Section 104.100 provides that a presiding ALJ for the proceeding shall be appointed by HUD's Chief ALJ. One commenter argued that, consistent with statutory intent for the expeditious handling of complaints, the rules must include procedures for the appointment of the presiding ALJ. HUD believes that the deadlines for the commencement of the hearing are sufficient to ensure the timely appointment of a presiding ALJ and that there is no need to impose a regulatory deadline for appointments by the presiding ALJ.

The commenter also argued that the rules must prescribe the qualifications for ALJ. The qualifications for the appointment of ALJs are fully set forth in 5 U.S.C. 3105, which is specifically

cited at § 104.100. Section 104.100 is unchanged.

Section 104.130 Ex parte communications.

Section 104.130 governs the prohibitions of *ex parte* communications. One commenter argued that the listed sanctions for *ex parte* communications are too harsh, particularly where an aggrieved person is unrepresented by counsel and inadvertently makes an improper contact. To remedy this problem, the commenter would delete the list of sanctions from the regulations. This section places the decision to sanction and the choice of sanctions within the sound discretion of the ALJ. The rule clearly provides that the listed sanctions are illustrative and that the ALJ may provide for other, more appropriate, sanctions.

Section 104.140 Separation of functions.

Under § 104.140, no officer, employee or agent of the Federal government engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding or any factually related proceeding under Part 104 may participate or advise in the decision of the ALJ, except as witness or counsel during the proceedings. One commenter would revise this section to provide that no officer, employee, or agent * * * may participate or advise in the decision of the ALJ, except as a witness or counsel *to a party* during the proceedings. Persons filing *amicus* briefs are not "parties" to the proceedings under § 104.200. The proposed change has not been made since it could have the effect of prohibiting participation by such persons.

Subpart C—Parties

Section 104.200 In general.

Under § 104.200 the parties to the proceedings are HUD, the respondent named in the charge and against whom relief is sought, and any intervenors. In accordance with section 812(c) of the Act, the proposed rule permitted the intervention by any aggrieved person. No other internvention is permitted in the proceedings, although briefs of amicus curiae may be permitted at the discretion of the ALJ (§ 104.200(a) and (c)).

Commenters objected to the proposed rules governing intervention. One commenter noted that the proposed rule would permit any potential complainant to intervene without regard to the relevance of his or her concerns in the case. HUD agrees that the proposed rules governing intervention are too broad and has revised this section to permit any aggrieved person to file a timely request for intervention (see discussion below on the timeliness of petitions for intervention). Intervention shall be permitted where the intervenor is the aggrieved person on whose behalf the charge is issued. Intervention shall also be permitted where the intervenor is an aggrieved person who claims an interest relating to the property or transaction that is the subject matter of the charge and the disposition of the action may, as a practical matter, impair or impede the aggrieved person's ability to protect that interest, unless the aggrieved person's interest is adequately represented by the existing parties. The revised provisions are based on the rules of intervention as of right under Rule 24 of the Federal Rules of Civil Procedure.

The commenters also noted that the rule would not permit non-aggrieved persons to intervene. The statute addresses intervention only by aggrieved persons (see section 812(c)). HUD is reluctant to expand the classes of persons that may be permitted to intervene, particularly in light of the statutory time limitations on the issuance of administrative decisions. HUD notes, however, that other persons may be permitted to submit briefs of amicus curiae under § 104.205(c).

Section 104.210 Representation.

Section 104.210 governs representation of the parties. Under § 104.210(b)(5), parties may be represented by an attorney admitted to practice before a Federal Court or before the highest court in any State. One commenter would permit representation only by attorneys who are admitted to practice before a Federal Court. Attorneys in good standing before State or Federal courts may be sufficiently qualified to represent the parties in a Part 104 proceeding. It is unnecessary to limit the parties' choice of representatives as proposed by the commenter.

Under § 104.210(d). the attorney or other representative must file a written notice of intent before withdrawal from the proceeding. One commenter urged HUD to limit the representative's ability to withdraw. The rule does not prescribe such limitations. To the extent that the commenter fears that withdrawals may be used to delay the proceeding, we note that such dilatory tactics would be prohibited under the standards of conduct (§ 104.220). The commenter suggested that the rule require, at a minimum, service of the written notification of withdrawal on all parties. This service is already required under § 104.40.

One commenter argued that the regulations do not unambiguously provide that complainants may employ private counsel to represent their interests in the administrative hearings, in addition to the representation provided by HUD. The regulations clearly provide that aggrieved persons may intervene as parties (§ 104.200(b)) and that parties may be represented by counsel (§ 104.210(a)(5)). HUD does not believe that further clarification is necessary.

Subpart D—Pleadings and motions

Section 104.410 The charge.

The requirements governing the filing, service and contents of the charge are found at § 104.410. Paragraph (b)(2) of this section refers to "an election * * * to use the administrative procedure." A commenter observed that the administrative procedure will be used if no election is made to have the claim litigated in a civil action and may not be the result of a deliberate election by the parties. The final rule has been revised to clarify this point.

Section 104.430 Requests for intervention.

Within 30 days after the service of the charge, any aggrieved person may file a request for intervention and participate as a party to the proceeding. No other intervention was permitted under the proposed rule. Commenters suggested the revision of this section to permit intervention after the expiration of the 30-day period.

While the 1988 Amendments require the commencement of a hearing and the issuance of an initial decision within specified periods, the statute imposes no absolute deadline for intervention. To ensure that aggrieved persons will not be unnecessarily excluded from a proceeding, the final rule has been amended to permit the filing of a timely request for intervention after the 30-day period. In determining whether intervention will be permitted, the ALJ may consider such factors as: the progress of the litigation when intervention is sought; the delay in seeking intervention and the reasons for the delay; and the prejudice to other parties if intervention is permitted. All requests for intervention submitted within 30 days of the filing of the complaint will be considered to be timely filed.

Section 104.450 Motions.

Section 104.450(b) states that any party may file an answer to a written motion. Further responsive documents are prohibited, unless otherwise ordered by the ALJ. One commenter would clarify further that prohibited responsive documents would not include exhibits, memoranda, or briefs. The Department does not believe that it is necessary to list all types of responsive documents that would be excluded under this rule. The final rule is unchanged.

Subpart E—Discovery

Section 104.500 Discovery

Section 104.500 contains the general provisions governing discovery. Paragraph (d) provides that the frequency and sequence of the discovery methods are not limited, unless otherwise ordered by the ALJ or restricted under Subpart E. One commenter suggested that the final rule require that the ALJ hold an initial pretrial conference addressing discovery issues as a part of the prehearing procedures under Subpart G. At the pretrial conference, the parties would be required to describe the nature and amount of discovery to be undertaken. The discovery plans would be reduced to a written order and all discovery would be completed in accordance with the order. The commenter noted that this procedure is consistent with limitations on discovery imposed in the United States District Courts.

It is not necessary to provide a pretrial discovery conference and order for every proceeding. Where such a procedure is required to expedite the proceeding, however, a pretrial discovery conference may be conducted and a discovery order issued as a part of a prehearing conference under proposed § 104.610. The final rule is unchanged on this point.

Section 104.500(e) provides that all discovery must be completed 15 days before the date scheduled for the hearing. A commenter argued that this date was too close to the hearing. As an alternative, the commenter suggested that the rule provide that all discovery be completed within 80 days of the issuance of the charge.

The 15-day deadline was imposed to ensure that parties' final preparation for hearing will not be interrupted by late-filed discovery requests, and HUD continues to believe that the 15-day time period is a sufficient buffer. The Department notes that the proposed 80-day deadline would not always ensure more uninterrupted time for trial preparation, since hearings may be commenced at any time within 120 days following the issuance of the charge.

Several commenters noted that the proposed rule will not always permit discovery from a non-intervening aggrieved person on whose behalf the complaint was filed and who is the real party in interest. The commenters argued that such persons should be required to comply with discovery requests (and that the results of this discovery should be admissible in the hearing) as if the aggrieved person were a party to the charge.

Because the administrative decision will depend upon the course of dealings between the respondent and the aggrieved person and the extent of damage will depend upon the injury suffered by the aggrieved person, HUD believes that it is appropriate to allow all forms of discovery to be used against nonintervening aggrieved persons. Accordingly, the final rule includes a new § 104.500(f) stating that for the purposes of obtaining discovery from a non-intervening aggrieved person, the term "party" as used in the subpart includes the aggrieved person on whose behalf the charge was issued.

Section 104.510 Depositions.

Section 104.510 govern depositions upon oral examination and written interrogatories. At the request of a commenter, paragraph (d), which explains the procedures and grounds for requesting suspension of a deposition, has been clarified to permit the suspension of a deposition for improper conduct in addition to improper questioning. (For example, a deposition may be suspended if the party makes improper objections or improper instructions to a witness during the deposition.)

Section 104.520 Use of deposition at hearings.

Section 104.520 governs the use of depositions at hearings. One commenter would amend this provision to deny third parties the right to use information contained in depositions. The 1988 Amendments contemplate that the administrative proceeding is a public proceeding. As such, HUD cannot preclude the use of information contained in the record of the proceeding. HUD notes, however, that the discovery of information and the use of discovered information may be limited in accordance with protective orders issued under §§ 104.570 and 104.740.

Section 104.530 Interrogatories.

The proposed rule permitted unlimited use of interrogatories. One commenter suggested that the number of interrogatories that may be served without an ALJ order should be limited to 20 interrogatories. A rule limiting the number of interrogatories is consistent with practice in Federal courts and will force the parties to focus on pertinent issues when drafting interrogatories. HUD believes, however, that a 20-interrogatory limitation would unduly restrict discovery under this section. As revised, § 104.530 permits a party to serve up to 30 interrogatories on any other party without an ALJ order. Where necessary for full and complete discovery, the parties are permitted to serve additional interrogatories with an ALJ order.

Section 104.570 Protective orders.

One commenter argued that the ALJ must narrow discovery to specific matters raised by the complaint. Part 104 contemplates that discovery will be pursued through the voluntary efforts of the parties and that the ALJ will intervene in the process only where it is necessary to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. Where necessary to protect the person or party, the ALJ may issue an appropriate protective order directing that certain irrelevant matters may not be the subject of discovery (see § 104.570(d)).

Section 104.580 Failure to make or cooperate in discovery.

Section 104.580 governs motions to compel discovery and the imposition of sanctions. One commenter requested the deletion of § 104.580(d)(1), which permits an inference to be drawn in favor of a requesting party if another party fails to comply with a discovery order issued by the ALJ. The cited provision provides the ALJ with an effective method of compelling compliance with orders by parties or persons who unjustifiably resist discovery. It is retained in the final rule.

Subpart F—Subpoenas

Section 104.590 Subpoenas.

Section 104.590 provides for the issuance of subpoenas in aid of administrative hearings. Paragraph (f) of the proposed rule addressed motions to quash or limit subpoenas. One commenter argued that all evidence must be allowed into discovery and urged the deletion of this provision. While Part 104 is designed to permit the discovery of any matter, not privileged, that is relevant to the subject matter involved in the proceeding, § 104.590 recognizes that there may be occasions

where a subpoena should be quashed because it is unreasonable and oppressive or for other good cause, or where the subpoena should be conditioned upon the discovering party's advancing the reasonable cost of producing subpoenaed books, papers or documents. The proposed provision is retained.

Subpart G—Prehearing procedures

Subpart G governs prehearing statements (§ 104.600); prehearing conferences (§ 104.610); and settlement negotiations before a settlement judge (§ 104.620). Except for comments addressing the addition of a discovery conference discussed above, no commenters addressed this subpart.

Subpart H—Hearing Procedures

Section 104.720 Waiver of right to appear.

Section 104.720 permits the parties to waive the right to an oral hearing and present the matter for decision on a written record. Commenters urged the revision of this section to prohibit waiver unless non-party aggrieved persons agree to the waiver. Alternatively, the commenters would provide notice of the proposed waiver to non-party aggrieved persons and would permit such persons to intervene within 15 days of the notice.

Those aggrieved persons interested in participating in the proceeding as an intervenor and controlling the procedural conduct of the litigation as a party are permitted to intervene of right (aggrieved persons on whose behalf the charge is issued) or by permission of the ALJ (other aggrieved persons). Where such persons have not filed timely requests for intervention, or where their interest is not sufficient to justify intervention, HUD does not believe that any purpose would be served by a regulation permitting the person the right to control the conduct of selected aspects of the proceeding. Part 104 was drafted with the expectation that the HUD representative, in the absence of intervention by the aggrieved person on whose behalf the charge is issued, will keep that person informed of the course of the proceedings where necessary for the proper disposition of the charge. Therefore, provision for notification to such persons of this procedural step is not mandated by the rules.

Section 104.740 In camera and protective orders.

Section 104.740, which governs in camera inspections and protective orders contains a minor editorial revision suggested by commenters.

Section 104.750 Exhibits.

Section 104.750 provides for the prehearing exchange of exhibits to be offered into evidence. One commenter noted that some parties may attempt to use the requirement for the prehearing exchange of exhibits to prevent the use of rebuttal exhibits that have not been exchanged. At the request of the commenter, HUD has revised this section to exclude unanticipated rebuttal exhibits from the exchange requirement.

Section 104.760 Authenticity.

At the request of a commenter, § 104.760 has been clarified to state that the authenticity of all documents submitted "*and furnished to the parties as required under § 104.750*" as proposed exhibits in advance of the hearing shall be admitted.

Section 104.780 Record of hearing.

Under § 104.780, all oral hearings must be recorded and transcribed by a reporter designated by and under the supervision of the ALJ. One commenter observed that this section requires all hearings to be transcribed and argued that this requirement will be expensive. The commenter recommended that this section be revised to require transcripts only if requested by a party or an aggrieved party, or ordered by the ALJ. HUD believes that the provision of a transcript is necessary for the full and complete record in the case and to ensure the adequate review of the proceeding by the Secretary under § 104.930, and by the courts under section 812(i), and to permit court enforcement of the Administrative order under section 812(j).

Subpart I—Dismissals and Decisions

Section 104.900 Dismissal.

Under § 104.900, the ALJ is required to dismiss the proceeding:

—Where the complainant, the respondent or the aggrieved person on whose behalf the complaint was filed makes a timely election to have the claims asserted in the charge decided in a civil action under section 812(o) of the Act (see §104.900(a)); or

—Where an aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the discriminatory housing practice and the trial of the civil action has commenced. The commencement of a civil action for appropriate temporary or preliminary relief under section 810(e) or proceedings for such relief under section 813 of the Fair Housing Act do not affect administrative proceedings under Part 104. (see § 104.900(b)). At the suggestion of a commenter, this provision has been clarified to provide that the administrative proceeding will not be affected by such proceedings as a hearing on the temporary or preliminary relief or the issuance of a decision or order granting or denying such relief.

One commenter noted that Part 104 procedures are applicable where the respondent and the aggrieved person do not act (*i.e.*, neither the respondent nor the aggrieved person elects the civil remedy). The commenter argued that Part 104 should include a procedure for an ALJ order by default. Even though the aggrieved person and the respondent may choose not to participate actively in a case, HUD's representative will be required to present sufficient evidence to make a *prima facie* case that a discriminatory housing practice has occurred or is about to occur. Accordingly, there are no provisions for default in the regulation.

Section 104.910 Initial decision of administrative law judge.

Under § 104.910, if the ALJ determines that the respondent has engaged, or is about to engage in a discriminatory housing practice, the ALJ is required to issue an initial decision against the respondent and to order appropriate relief including damages; injunctive or other equitable relief; and civil penalties. The following issues were raised regarding relief.

Injunctive or such other equitable relief. Under proposed § 104.910(b)(2) the ALJ may impose injunctive or such other equitable relief as may be appropriate. One commenter argued that the regulations should discuss the types of affirmative relief (e.g., the posting of fair housing posters) that may be ordered by the ALJ. Given the range of affirmative remedial activities that may be accorded to overcome discriminatory housing practices, HUD believes that it would be counterproductive to undertake a listing of all types of such relief under this section.

The proposed rule provides that no order for injunctive or other relief may affect any contract, sale, encumbrance, or lease consummated before the issuance of the initial decision that involves a *bona fide* purchaser, encumbrancer, or tenant without actual knowledge of the charge.

Commenters noted that a considerable amount of the time may elapse between the filing of the complaint and the issuance of the charge, and from the issuance of the charge to the issuance of the initial decision. They argued that the

regulations do not provide a mechanism for providing third parties with notice that a complaint or charge has been filed. They charged that the failure to include such requirements threatens the efficacy of the equitable relief provisions. Commenters asserted that a respondent seeking to avoid the injunctive or other equitable relief will have sufficient time to contract for the sale, encumbrance or lease to another during this period. The commenters suggested the addition of provisions requiring the respondent to give actual notice to such persons. Alternatively, commenters suggested that the rule provide that, simultaneously with the issuance of the charge, the Secretary will exercise the authority under section 810(e) to secure an injunction which preserves the status of all property identified in the charge until final resolution of the charge.

HUD agrees that the proposed rule did not adequately address this issue. To remedy this problem, the final rule requires the respondent to give actual notice to third parties with whom the respondent engages in a contract, sale, encumbrance, or lease involving the property that is the subject of the charge. The copy of the charge would be provided before the respondent and the third party enter into the contract, sale, encumbrance or lease.

Commenters also recommended that the final rule should provide that the failure to give the notice would constitute a separate discriminatory housing practice. HUD does not believe that such actions constitute an actionable discriminatory housing practice. This change has not been made.

Some commenters suggested that the respondent be required to provide the notice to third parties following the issuance of the charge while others would require notice following the filing of the complaint. Section 812(g)(4) provides that no order shall affect the described transactions consummated before the order and involving a third party without actual notice of the *charge*. Accordingly, the notice will be required only after the issuance of the charge. The proposed change is included at §104.410(b)(3).

Civil penalties. Under § 104.910(b)(3), the ALJ may assess a civil penalty against the respondent. The amount of the civil penalty is subject to ceilings of $10,000 to $50,000. The ceiling will depend on the number of previous discriminatory housing practices the respondent has been adjudged to have committed within designated time periods in any administrative hearing or civil action permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State or local governmental agency.

Under the proposed rule, if the ALJ determines that more than one respondent has been engaged or is about to engage in a discriminatory housing practice, the ALJ would be permitted to assess the civil penalty, up to the maximum permitted under the rule, against each respondent. One commenter argued that this provision penalizes the respondent who has not committed a prior act, simply for an association with another respondent that has committed such act. The commenter alleged that such a penalty is unfair. This section was intended to address civil penalties where multiple respondents are involved and to permit the ALJ to assess a civil penalty against each respondent. The section has been revised for clarity.

Section 104.925 Resolution of the charge.

The resolution of the charge prior to the issuance of a final decision by the ALJ is addressed in § 104.925. Commenters argued that the proposed language does not account for the possibility that some, but not all, of the aggrieved persons of whose behalf the charge is issued may agree to resolve the charge. The final rule has been revised to provide for such resolutions.

Section 104.930 Final decision.

Section 104.930 permits the Secretary to review the ALJ's initial decision and issue a final decision. The Secretary may affirm, modify or set aside, in whole or in part, the initial decision, or remand the initial decision for further proceedings. If no final decision is issued by the Secretary within 30 days after the initial decision, the initial decision of the ALJ would become the final decision of the Department.

The proposed rule does not place any time limitation for issuance of the ALJ decision on remand. Commenters claimed that this omission creates the possibility for substantial delay in decisionmaking which is contrary to the congressional goals of assuring expedited processing. The regulation has been revised to state that the ALJ is required to issue the decision on remand within 60 days of the date of issuance of the Secretary's decision, unless it is impracticable to do so. If the ALJ is unable to issue such a decision on remand within this time period (or within any succeeding 60-day period following the initial 60-day period), the ALJ is required to notify all parties and the aggrieved person on whose behalf the charge was filed in writing of the reasons for the delay. This approach is consistent with section 812(g)(2) of the Act. All remanded proceedings will be conducted in accordance with the requirements of Part 104.

Section 812(h) provides that the Secretary may review any finding, conclusion or order issued by the ALJ. In accordance with this section, the final rule has not been revised to include a standard for Secretarial review of the initial decision, as suggested by one commenter.

Section 104.940 Attorney's fees and costs.

Several commenters addressed § 104.940, which provides for the recovery of fees and costs. While some commenters argued that the rules regarding attorney's fees and costs were proper and identical to those governing the Federal courts, others argued that the specificity of this section was unnecessary.

HUD continues to believe that the regulation should provide some regulatory direction concerning the amount of attorney's fees that may be awarded. There appears to be no specific objection to § 104.940(b)(1) which governs the payment of attorney's fees by HUD to the respondent (see section 812(p) which makes the Equal Access to Justice Act applicable to such payments) or to § 104.940(b)(2) which states that intervenors should be liable to the respondent for reasonable attorney's fees only to the extent that the intervenor's participation in the administrative proceeding was frivolous or vexatious, or was for the purposes of harassment. (see *Hughes v. Rowe*, 449 U.S. 5, 11 (1980) and *Christianberg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)).

Numerous commenters raised the issue of the appropriate standard for the recovery of attorney's fees by prevailing intervenors. The Act provides in section 812(p) that the ALJ or the court may allow the prevailing party a reasonable attorney's fee. That statutory direction is applicable to prevailing intervenors. This entitlement to fees is identical to that provided in a private enforcement action under section 813 and an enforcement action by the Attorney General under section 814. The Department believes that such factors as the appropriateness, necessity and effectiveness of any work performed by a prevailing party are among the factors relevant to the factual determination by an ALJ or court as to whether or what amount of attorney's fees are

"reasonable". Similarly, the issue of whether the amount of fees sought by a prevailing party is reasonable given the participiption of federal attorneys is a question of fact to be determined by the ALJ or the court. Accordingly, the rule is unchanged.

Part 106—Fair Housing Administrative Meetings Under Title VIII of the Civil Rights Act of 1968

Part 106 establishes procedures for public meetings or conferences to gather information to assist the Assistant Secretary in achieving the aims of the Fair Housing Act for the promotion and assurance of equal housing opportunity under the Fair Housing Act. No substantive comments were received on the proposed part. It is adopted without change.

Part 109—Fair Housing Advertising

The Fair Housing Advertising Regulations (Part 109) are being revised to reflect the expansion of the classes of persons protected under the Fair Housing Act from discriminatory advertising.

General

The purpose of the HUD Fair Housing Advertising Regulations is to assist all advertising media, advertising agencies and advertisers in complying with the requirements of the Fair Housing Act with respect to advertisements for the sale, rental or financing of housing. These regulations also describe the matters which the Department will consider in evaluating compliance with the Fair Housing Act in connection with the investigation of complaints alleging discrimination in advertising.

Section 804(c) of the Fair Housing Act has been amended to expand the prohibitions or discrimination in advertising for the sale or rental of a dwelling. The amendment added "handicap" and "familial status" to the existing prohibitions of discrimination on the basis of race, color, religion, sex, or national origin.

The Department is revising the Fair Housing Advertising Regulations to reflect the expanded coverage of the Fair Housing Act with respect to discrimination in advertising. Following is a section-by-section description of the changes made in Part 109.

Section 109.5 Policy.

This section describes the statutory provisions on which the Fair Housing Advertising Regulations are based. The two new protected coverages of the amended statute—"handicap" and "familial status"—have been added in two places to the existing list of bases on which discrimination is prohibited. In addition, a reference to appraisal services has been inserted in the list of discriminatory practices specifically made unlawful under the Fair Housing Act. Because of the exemption in section 807(b) of the Fair Housing Act for "housing for older persons", a sentence has been added to § 109.5 to explain that the prohibitions of the act regarding familial status do not apply with respect to such housing.

In addition, references to Title VIII of the Civil Rights Act of 1968 have been changed to the new short title of the statute, the "Fair Housing Act", both in this section and throughout the regulations.

Section 109.10 Purpose.

The Department has made only editorial changes in this section.

Section 109.15 Definitions.

This section contains definitions of the major terms used in Part 109. The Department has added definitions of the terms "handicap" and "familial status" in paragraphs (h) and (i), respectively. These new definitions are the same as the definitions contained in the Fair Housing Act. In addition, the definition of "Secretary" has been eliminated since the term is not used in the regulations, a definition of "General Counsel" has been added, and the definitions of "person" and "discriminatory housing practice" have been revised to reflect statutory changes.

Section 109.16 Scope.

This section explains the use of the criteria contained in Part 109 by the Department with regard to action on complaints alleging discriminatory advertising with respect to advertising media and persons placing advertisements. The Department has made changes in the introductory language of paragraph (a) and in the language of paragraphs (a)(1) and (a)(2) to reflect the changes in complaint processing brought about by the Fair Housing Act amendments. Under the new procedure, the General Counsel will make determinations as to whether there is reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur. Thus, § 109.16 would indicate that the General Counsel will consider the use or the failure to use the criteria in this part in making a determination of reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur.

Section 109.20 Use of words, phrases, symbols, and visual aids.

Several commenters objected to the statement in the first sentence of proposed § 109.20 that the words, phrases, symbols, and forms set forth in this section have been used in advertising to "convey either overt or tacit discriminatory intent" and that therefore their use should be avoided, because that statement appears to focus solely on the intent that may lie behind discriminatory real estate advertising. The Department agrees that the language, which was already contained in § 109.20, could be construed as a limitation on the types of activities considered to constitute unlawful conduct. Since the Department wishes to maintain a neutral position on the issue of whether discriminatory intent is necessary for advertising to be considered violative of the Fair Housing Act, the statement has been revised. In addition, similar revisions have been made in § 109.20(e) and (f). These revisions also make it clear that this regulation does not prohibit the use of any of the words, phrases, symbols or visual aids in this section, but instead is intended to suggest that the use of such words, phrases and symbols can indicate a preference in particular contexts.

The undesignated introductory paragraph in § 109.20 has also been revised to state that the Department will consider whether, in a particular case, there is a need for "further proceedings on" the complaint, rather than a need for "seeking resolution of" the complaint. This change reflects the new complaint processing procedures under the amended act.

In paragraph (a), which provides examples of words descriptive of dwelling, landlord, and tenants which should not be used in advertising, the Department has added the phrase "adult building".

In paragraph (b), which lists examples of words indicative of persons in the protected groups covered by the Fair Housing Act, the Department has added specific provisions on words relating to handicap and familial status. In paragraph (b)(6), the rule provides that nothing in Part 109 restricts the inclusion of information about the availability of accessible housing in advertising of dwellings. In paragraph (b)(7), concerning familial status, the Department has included a statement making it clear that nothing in Part 109 would restrict advertisements of dwellings which are intended and operated for occupancy by older persons

and which constitute "housing for older persons" as defined in section 807(b) of the Fair Housing Act. In addition, paragraph (b)(8) has been revised and the word "exclusive" has been substituted for the words "ghetto" and "disadvantaged".

In paragraphs (c) and (d), the words "handicap" and familial status" have been added to the list of protected groups.

With regard to paragraph (e), one commenter expressed doubt that directions to real estate could imply a discriminatory preference. However, it has been the Department's experience that references to real estate location in terms of landmarks significant with respect to race, national origin or religion may indicate a preference to certain homeseekers or convey a negative implication to others. Accordingly, this paragraph has not been changed.

Section 109.25 Selective use of advertising media or content.

This section indicates examples of how the selective use of advertising media or content can be used exclusively with respect to particular housing developments or sites, with discriminatory results.

In paragraph (c), which concerns selective use of human models when conducting an advertising campaign, the Department has made changes in the last two sentences of the paragraph to provide an example of selective advertising with respect to familial status.

Section 109.30 Fair housing policy and practices.

This section discusses actions that advertisers can take which would be considered as evidence of compliance with the prohibitions against discrimination in advertising under the Fair Housing Act.

The Department has added the words "handicap" and "familial status" where appropriate in paragraphs (a) and (b). In addition, the Department has added language in paragraph (b), concerning use of human models, to indicate that models used in display advertising should represent families with children, when appropriate, as well as both majority and minority groups in the metropolitan area and both sexes.

Two commenters suggested that paragraph (a) be revised to provide that use of the equal housing opportunity logotype, without more, would be sufficient to indicate compliance with the advertising provisions of the Fair Housing Act. However, the use of the logotype (or the equal housing opportunity statement or slogan) is only one indication of compliance, and such use would not preclude the use, in the same advertisement, or words, phrases, symbols, or forms which convey a discriminatory preference or limitation (see § 109.20). Accordingly, suggested change has not been made.

Minor editorial changes have been made in paragraphs (c) and (d) of § 109.30.

Appendix to Part 109

The appendix to Part 109 contains three tables intended to serve as a guide for the use of the Equal Housing Opportunity logotype, statement, slogan, and publisher's notice for advertising. The Department has added the words "handicap" and "familial status" where appropriate in the three tables.

Part 110—Fair Housing Poster

Part 110 sets forth the procedures established by the Secretary of Housing and Urban Development with respect to the display of a fair housing poster by persons subject to sections 804 through 806 of the Fair Housing Act. The Department has amended Part 110 to reflect the changes made by the Fair Housing Amendments Act of 1988. The major changes in the poster regulations are in § 110.25, Description of Posters. The legend of the poster has been revised to add "handicap" and "familial status" to the bases of illegal discriminatory acts. The legend has also been revised to show that discrimination in the appraising of housing is illegal. In addition to the above amendments, editorial modification has been made for clarification purposes and for consistency in terminology.

Part 115—Recognition of Jurisdictions With Substantially Equivalent Laws

Part 115 has been revised to comply with the requirements of the Fair Housing Act. This part: (1) Provides a revised process for certifying agencies as substantially equivalent in place of the recognition process as provided in the current Part 115; (2) defines the requirements for certification with the specificity required by the Act; (3) defines the effect of the Act on agencies recognized on September 12, 1988 as substantially equivalent under current Part 115; (4) requires that in order to become certified, agencies must provide protection against discrimination based on "handicap" and "familial status"; and (5) provides a prohibition against coercion, intimidation and threats.

To obtain certification State and local agencies must administer laws which prohibit all discriminatory housing practices which are prohibited by the Act and must include as protected classes all classes protected by the Act. Discrimination on the basis of handicap is described in the statutory language and only those provisions of section 804 (f) of the Act which clearly do not apply to State or local agencies may be omitted from the law or ordinance the agency administers if certification is to be granted. Further, the remedies available to a certified agency must be substantially equivalent to the remedies available under the Act. Final agency actions must be subject to judicial review and aggrieved persons must have the right of access to a State or local court. The Act also requires that the procedures followed by a certified agency be shown to be substantially equivalent to those created by the Act. Such procedures as: Filing of complaints by the agency; acknowledgment of receipt of complaints and notice of procedural rights and obligations, completion of investigation and investigative report within 100 days and notice of cause for delay; provision for conciliation and a conciliation agreement which shall be made public under certain conditions; were provided as examples of procedural matters which must be included in the law or ordinance administered by a certified agency.

The regulations require that the law or ordinance provide for resolution of a complaint by a body empowered to grant relief substantially equivalent to the relief which may be granted by the Secretary under the Act.

The Department received a number of comments. These comments can be divided into five major categories: (1) Should procedures in Fair Housing laws of States and localities be required to mirror the Fair Housing Act rather than be "substantially equivalent" to the Act; (2) Should an agency be certified which protects less than all of the classes protected by the Act; (3) Should building codes and other laws or ordinances administered by State or local agencies other than the agency administering the fair housing law be considered in determining the adequacy of the law; (4) Should State or local fair housing laws be required to include an exemption from discrimination based on familial status for housing of the elderly; and (5) Should State and local agency enforcement mechanisms be required to be substantially equivalent to the Act. Significant comments in these areas were focused principally on §§ 115.3 and 115.3a of the proposed rule.

It appears that many commenters misunderstood the requirements in § 115.3(e) for a determination that a State or local law "on its face" satisfies the criteria for certification, indicating that they believed the ordinance or law standing alone must meet the criteria. Both the preamble and the proposed rule indicate that a determination as to whether a State or local law "on its face" is adequate, is not limited to an analysis of the literal text of the law but must take into account regulations, directives and rules of procedure of a State or local agency, as well as other relevant matters of State or local law or interpretations by competent authorities. However, in order to avoid any possible confusion as to matters which will be considered as part of a determination of the adequacy of a law "on its face," § 115.3(e) has been clarified by substituting the word "all" for the word "such" in the second sentence thereof.

Procedures for Investigations

Several commenters suggested that time limits, provisions for notices to complainants and respondents and similar procedural criteria are inappropriate, burdensome and may require substantial amendments to current laws or ordinances. Under section 804(f)(3)(A) the Secretary is required to determine that the procedures followed by an agency administering a fair housing law are substantially equivalent to those in the Act. The Department believes the procedural aspects which were contained in the proposed rule are essential to providing adequate procedural protections to persons and that the absence of such protections would substantially weaken a fair housing law. These requirements have been retained in the rule.

A number of commenters objected to the requirement that investigations be commenced within 30 days of the filing of a complaint and that the processing of such complaints be completed within one year of filing. Both the Act and the regulations refer to commencement of proceedings within 30 days of filing. The proposed regulations do not refer to a date for commencement of the investigation, and requiring that the disposition of the complaint be completed within one year of filing of the complaint is reasonable.

Protected Classes

A number of commenters urged that the final rule provide that State and local fair housing laws should be eligible for certification even though they do not include coverage of the new classes of persons protected by the Act, if they meet all other requirements for recognition. Some commenters suggested in the alternative that certification should be permitted based on protections of a certain number of protected classes (e.g. coverage for five or six of the seven protected classes).

The Department believes that the legislative history of the Fair Housing Act supports the position in the proposed regulation that coverage of all protected classes is essential to a substantial equivalency certification.

In connection with the inclusion in section 810(f) of the Act of a provision relating to the grandfathering of substantially equivalent agencies, the House Judiciary Committee Report on the Fair Housing Amendments Act described the process as follows:

> Presently, there are 36 states and 76 local agencies certified by the Secretary as substantially equivalent under existing federal law. Many of these states provide for some degree of administrative enforcement, as well as protecting handicapped persons and families with children. The Committee expects that many states will be able to maintain their substantial equivalency status within the time period provided.
>
> In order to provide a reasonable transition period for states to adjust to the new law, agencies currently certified on the day before the date of enactment will continue to remain certified for 40 months. This allows most jurisdictions sufficient time to conform their laws to the new federal standards so that they may remain certified. The Committee recognizes that some jurisdictions may need additional time because of the infrequency of legislative sessions, and the Secretary may grant an additional 8 months for this purpose. Report p. 35.

Thus, it appears clear that Congress intended to provide grandfathered agencies time to broaden their protections to encompass the new protected classes. For this reason the final regulation retains the requirement that State and local laws provide protection to all the classes of persons protected under the Federal law.

Enforcement Procedures

Comments that the proposed regulations unreasonably require certified agencies to amend their laws to provide relief which they are currently not authorized to grant appear to be objections to the Act rather than to the regulations. The Fair Housing Amendments Act put "teeth" into the fair housing law. It grants the Department authority to take action against those who commit acts made unlawful by the Fair Housing Act. Consequently, those agencies to which the Department must refer complaints must administer laws which provide the State or local agency with the same authority to take action against those who commit unlawful acts.

Some commenters in this area insisted that agencies be required to provide for administrative judges and alternative choices—administrative tribunal or civil court—by either complainant or respondent as well as an independent right to go immediately to civil court. We believe it is sufficient that a certified agency be authorized to obtain relief by whatever procedure its law or ordinance provides as long as those procedures provide rights and protections substantially equivalent to those in the Fair Housing Act. This articulation recognizes that it is possible that agencies will be authorized to provide more effective relief on behalf of aggrieved persons through judicial enforcement mechanisms, which are no more burdensome on complainants, without any administrative enforcement procedure. Under the final rule States and localities are permitted to provide such judicial enforcement mechanisms as an alternative to an administrative enforcement—civil action mechanism such as that in the Fair Housing Act.

Building Codes

Several commenters indicated that incorporating into the certification procedures a requirement that States and localities provide accessibility requirements for new construction which are substantially equivalent to section 804(f) of the Act was onerous and inconsistent with State and local fair housing enforcement procedures. These commenters pointed out that building code ordinances and mechanisms are not part of fair housing enforcement in most areas and that generally, enforcement of requirements is not handled in the same manner as fair housing cases. These commenters suggested that the requirement in § 115.3a(b)(3) be deleted.

The Department is aware that enactment of accessibility requirements will in some cases present problems for States and localities. However, the Department believes that the legislative history of the Act and particularly the discussion of the importance of the involvement of States and localities in the implementation of new construction accessibility requirements in the Statement of Managers in the Senate, 134 Cong. Rec. S10456 (daily ed. Aug. 1, 1988) supports the determination of the Department to require local construction requirements as part of the HUD certification process.

Protection against housing discrimination because of handicap including accessibility requirements has

been made a part of the Fair Housing Act and must be a part of a fair housing act of a State or locality which obtains certification. A certified agency must have authority and responsibility to receive and process complaints of discrimination based on handicap including complaints of violations of the accessibility standards.

Housing for Older Persons

The Fair Housing Act exempts from the familial status provisions certain housing for older persons. This exemption reflects the unique status of housing for older persons described in the House Report on the Fair Housing Amendments Act:

> The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizens in retirement-type communities. The Committee appreciates the interest and expectation these individuals have in living in environments tailored to their specific needs. (Report p. 21).

The Act delineates with specificity the nature of housing for older persons which is exempt from the prohibitions against discrimination because of familial status. In the proposed rule, the department indicated that it intended to require that the State or local law assure that no prohibition based on familial status applies to housing for older persons as a condition for certification. The preamble noted that, while HUD had not previously required States or localities to include in their laws or ordinances any exceptions or exemptions which the Federal law contains, in view of the Congressional concern that the prohibitions against discrimination because of familial status not impinge on housing for older persons, provisions providing for housing for older persons should be required in State or local fair housing laws.

Many commenters objected to the requirement that certified agencies administer a fair housing law which provides the same protections for housing for older persons as those contained in the Fair Housing Act. Some commenters pointed out that as a result of the proposed requirement their fair housing laws would have to be amended to limit existing protections for families with children in order to obtain certification.

While the Department believes that Congress intended to promote housing opportunities to address the needs of older persons, there is nothing in the statute or legislative history to indicate that Congress sought to limit the ability of States and localities to provide additional protections. For this reason, the final rule has been revised to delete the requirement for an exemption for housing for older persons in State or local laws.

However, in order to reflect the congressional interest in the protection of housing opportunities for older persons, the final rule specifically indicates that State and local fair housing laws may include an exemption for housing for older persons. This provision is intended to encourage States and localities to consider the needs of older persons in connection with the development of fair housing laws.

In addition to the above comments some commenters objected to the provision that certified agencies administer a law requiring that conciliation agreements be made public. (Section 115.3(a)(2)(vi)).

The Department is aware that there are strong arguments for and against disclosure of conciliation agreements. However, Congress has chosen to require such disclosure (The Fair Housing Act (Sec. 810(b)(4))). Uniformity of procedures, in this regard, followed by the Department and certified agencies is preferable to dissimilar practices from State to State and locality to locality. Both complainants and respondents will have the knowledge that no matter the location of the discriminatory housing practice resulting in a Title VIII complaint, any conciliation agreement arising out of conciliation engaged in by the Department or any certified agency will be governed by the same disclosure rules.

Finally, in order to provide consistency in connection with State and local enforcement procedures, § 115.3(b)(1)(iv) has been amended to clarify that a certified agency must have authority to seek injunctive or other equitable relief in a court of competent jurisdiction, as an alternative to the stated authority to grant such relief. This change allows the agency an alternative similar to the alternatives provided in § 115.3(b)(1) (iii) and (v).

Part 121—Collection of Data

The Department is recodifying 24 CFR Part 100, entitled "Racial, Sex, and Ethnic Data", as a new Part 121 of Title 24. Part 100 was originally adopted in 1971 under the heading "Racial and Ethnic Data", to enable the Secretary of Housing and Urban Development to obtain information concerning minority-group identification to assist the Secretary in carrying out responsibility for administering the national policies prohibiting discrimination and providing for fair housing. In 1975, in light of the 1974 amendment of Title VIII to prohibit discrimination on the basis of sex, Part 100 was amended to provide for obtaining information on sex, as well as minority-group, identification.

Section 562 of the Housing and Community Development Act of 1987 (Pub. L. 100–242, approved February 5, 1988) requires the Secretary of Housing and Urban Development to collect data on the racial and ethnic characteristics of persons eligible for, assisted, or otherwise benefitting under each community development, housing assistance, and mortgage and loan insurance and guarantee program administered by the Secretary, and to include a summary and evaluation of such data in the Secretary's annual report to the Congress.

Section 808(e)(6) of the Fair Housing Act, 42 U.S.C. 3608(e)(6), as added by section 7(b)(1)(D) of the Fair Housing Amendments Act of 1988, requires the Secretary to collect data on the race, color, religion, sex, national origin, age, handicap and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department, to the extent that such persons and households are within the coverage of the civil rights laws and executive orders referred to in section 808(f) of the Fair Housing Act or specified by the Secretary by publication in the **Federal Register** and to the extent that the Secretary determines the data to be necessary or appropriate.

Since Part 100 is now being used for regulations setting forth the coverage of the Fair Housing Act, the regulations concerning collection of data have been moved to a new Part 121—Collection of Data. The Department proposed a revision of the provisions contained in the old Part 100 to provide a more specific regulatory framework for the Secretary to use in carrying out the new data collection and reporting responsibilities mandated by the legislation described above.

A number of commenters asserted that the Department has had authority for some time to collect the types of data which are needed for reporting to Congress but that it has failed to generate such data. These commenters offered various suggestions for the restructuring of Part 121 to accomplish that purpose.

The Department does not believe that any restructuring of Part 121 is necessary. The language of proposed § 121.2 was drawn largely from that

contained in section 808(e)(6) of the Fair Housing Act, described above, to enable HUD to meet the responsibilities mandated by that legislation. HUD remains committed to that objective and believes that the provisions of Part 121, as proposed, will enable HUD to achieve that purpose.

Accordingly, the Department has adopted Part 121 in this final rule with no changes from the proposed rule.

Legislative review issues

A number of commenters, including members of the Banking Committees of the House and Senate and two leading Senate Judiciary Committee proponents of the Fair Housing Amendments Act, asserted that the Department violated section 7(o) of the Department of HUD Act—HUD's legislative review statute—by failing to supply the Banking Committees with copies of HUD's proposed rule for 15 session days before the rule's publication.

Aside from the substantial constitutional question whether the section 7(o) rule-request process is valid and enforceable against HUD (See *INS* v. *Chadha*, 462 U.S. 910 (1983)), HUD had *no duty* to submit this rule for prepublication review for two reasons, either of which is dispositive:

—the explicit direction contained in the Fair Housing Amendments Act regarding publication of rules for comment, and for effect within 180 days of enactment, coupled with the then-pending adjournment of the Congress, made compliance with section 7(o)(2) impossible (and therefore unnecessary); and

—there was no timely request from either Committee for prepublication review of the rule, as required by section 7(o)(2) of the Department of HUD Act.

Impossibility of compliance with section 7(o). In the proposed rule, the Department compared the specific rule-production requirements set out in the Fair Housing Amendments Act with the legislative review requirements in section 7(o). The Department looked at the 1988 legislative calendar, which called for October 5, 1988 adjournment *sine die*. The Department looked at the September 13, 1988 approval date for the Fair Housing Amendment Act, and concluded that the Congress could not possibly have intended for HUD to adhere to the requirements of both Acts.

If the Department had waited for the opening of the new session to expose its rule to the required 15-session-day review, a *proposed* rule could not have been published before February 6, 1989. (HUD published its proposed rule at its earliest opportunity, after developing it on an accelerated schedule. The Department could not possibly have completed the 15-day prepublication review *before* the Congress adjourned on October 22, 1988, notwithstanding the fact that adjournment was delayed beyond the earlier October 5 projection.)

HUD's long experience with section 7(o) compliance does not comport with the commenters' suggestion that HUD could have followed the dictates of *both* laws—the rapid-pace rulemaking requirements of the Amendments Act, and the leisurely, all-purpose dictates of section 7(o). The requirements of these two statutes could not be in greater conflict, and the Department followed the correct course in choosing the Amendment Act's particularity over section 7(o)'s generality.

Many of the same public commenters who insisted that prepublication review should have been afforded to the Banking Committees under section 7(o) also complained that the Department should have afforded the public a longer period for public comment on its published proposed rule. HUD notes that if both of these requests had been honored the public comment period would have expired approximately one month after the March 12, 1989 effective date of the Amendments Act, and that no rules for implementation of the rights granted by the Fair Housing Amendments Act could have been published for effect until at least June 1989.

Lack of timely request for congressional review. Beyond the question of statutory interpretation, prepublication review under section 7(o) was not required because the Banking Committees failed to make a timely request for such review. The following facts are relevant to this issue:

1. By letter of September 14, 1988, the General Counsel submitted to the Banking Committees of both Houses HUD's semiannual agenda of rules, as required by section 7(o). This agenda, normally submitted in October of each year, was provided to the Committees one month early because adjournment was scheduled for October 5, 1988. (Under section 7(o), the Committees have a period of 15 *session* days to review the agenda and request that particular HUD rules be submitted to the Committees for prepublication review.)

2. In the letter transmitting the semiannual agenda, the General Counsel asked for committee restraint in requesting proposed rules from the agenda, since the effect of any such request made during September would be to delay HUD publication of the requested rules until the following February. The General Counsel also notified the Committees that HUD did not regard certain rules arising out of statutory enactments that contained their own rules-production deadlines as *subject* to the requirements of legislative review. "Notably," the General Counsel's letter continued, "the Fair Housing Amendments Act and the Indian Housing Act contain difficult production deadlines for rulemaking that coincide with congressional recess and adjournment periods. Since it is clearly not possible to honor these deadlines *and* those in the legislative review statute, we intend to focus our efforts on meeting the explicit production deadlines contained in these statutes."

3. The Committees' statutory review period for the submitted agenda expired on September 30, 1988. Neither the House nor the Senate Banking Committee made a timely response to HUD's semiannual agenda submission by that date.

By letter dated October 18, 1988 (and apparently forwarded to HUD six days later), the Secretary received a request from the Chairmen of the House and Senate Banking Committees that HUD "follow the requirements of section 7(o) and provide the proposed Fair Housing Amendments Act rules for review by the Committees before publication." A similar letter was received from Senators Kennedy and Specter of the Senate Judiciary Committee. In deference to these requests, the Banking Committees and Senators Kennedy and Specter were provided copies of the proposed rule shortly before its publication. The Department, however, did *not* delay the rule's publication for 15 session days, or for any other designated period, pending their review.

Public comment period

Section 13 of the 1988 Amendments requires the Department to provide an opportunity for public notice and comment. While HUD's general policy is to afford the public not less than 60 days for the submission of public comments (see 24 CFR 10.1), based on the 180-day production schedule and the requirement that a final rule be effective by March 12, 1989, the Department provided 30 days for public comment on this proposed rule.

The Department agrees with the commenter that the period available for public comment, coupled with the size and scope of the proposed rule, made public response difficult. Despite the abbreviated comment period, however, the rule attracted more than 6,400 timely comments—by far the greatest number in HUD's recent history. Many hundreds

of these comments reflected thoughtful consideration of the rule and the issues it raised, and lengthy analytical comments were received from virtually all major housing industry organizations, civil rights and handicapped rights groups, and other interested organizations. Hundreds of additional comments have been received since the close of the December 7, 1988 public comment period, and all of these have been read to determine whether any novel issues were raised that were not treated in the timely comments. The Department is convinced that the public comment period permitted full exploration of the issues.

Equally important, as a result of providing less time for the receipt of public comments, the Department has been able to issue this final rule in advance of the law's March 12, 1989 effective date. It is vital that persons subject to the law's greatly increased penalties and newly proscribed conduct have as much advance notice as possible concerning the types of conduct made illegal under the amended statute. Issuance of this rule on or near the effective date of the statute would have ill-served housing suppliers subject to the law's requirements and to HUD regulations interpreting those requirements.

As indicated earlier, HUD found it impossible to follow both the regulation-writing requirements specified in the Amendments Act and the more general requirements of section 7(o) of the Department of HUD Act. Nevertheless, publication of this rule in January permits the Department to provide for a waiting period following publication before the final rule takes effect—a procedure that comports with HUD's rule on rules, 24 CFR Part 10, and which meets the requirements of section 7(o)(3) of the Department of HUD Act, which requires 30 session days after publication before HUD final rules may become effective. While HUD does not believe that this rule, with its difficult statutory production schedule, is technically subject to the 30-session-day waiting period required by section 7(o)(3), we nevertheless believe that given the controversial issues involved, it is useful and helpful to provide the Congress with time to consider whether any facet of this rule making calls for a legislative response.

In summary, the Department believes that the public interest was well-served by HUD's early publication of a proposed rule, that the public comments received on that rule were of unusually high quality and were complete in their exploration of legal and policy issues, and that early publication of the final rule—well before its scheduled effectiveness—also serves the public interest and provides the Congress time to assess whether the rule comports fully with congressional intent.

The Department regrets that resource constraints prevented the proposed rule's being made more widely available on tape. However, the Regulations Division of HUD (the Office of the Rules Docket Clerk) received no requests that the tape be made available for the specific use of any person outside the Washington, DC area.

Codification of analysis of regulations

One commenter recommended that the final regulations include, as an appendix, an analysis of the regulations, similar in form to the preamble to the proposed rule.

The Department has attempted to make the guidance provided by its rule text as helpful as possible, and has provided examples of conduct where appropriate to assist in understanding the text. In addition, we have added the analytical guidance contained in the preamble to the final rule as an appendix to the regulation. The preamble will, thus, be codified in the 1989 edition of the Code of Federal Regulations. This will assure the availability of the preamble to interested persons in the future.

Regulatory Impact Analysis

One commenter argued that a preliminary regulatory impact analysis should have been prepared based upon the proposed rule's impact on consumers. The Director of the Office of Management and Budget waived the requirement for the preparation of a preliminary Regulatory Impact Analysis under section 3 of the Executive Order based on a determination that compliance with the requirement for a preliminary Regulatory Impact Analysis may unduly delay the rule and may prohibit the issuance of a final rule effective by March 12, 1989. The proposed rule announced that the final Regulatory Impact Analysis would be prepared before the publication of the final rule.

Commenters argued that the effects of the proposed rule on consumers and the housing industry are significant and complex. Commenters also argued that HUD's finding that the proposed rule would not cause a major increase in costs or prices for consumers is incorrect. A commenter noted that the changing of all-adult communities to family communities will result in major expenditures which will require commensurate increases in rents. Increased costs would include redesign of advertising, brochures, signs, etc., rewriting and reprinting of management documents, increased management and maintenance staff, the addition of playgrounds and play areas for children, higher repair and maintenance expenses because of children, higher potential legal liability and increased insurance rates. One commenter argued that a housing affordability analysis based upon current data should be conducted.

The Department agrees that this rule constitutes a "major rule" as defined in section 1(b) of Executive Order 12291 and has prepared a final Regulatory Impact Analysis as required by the Executive Order. This analysis is available in the Office of HUD's Rules Docket Clerk at the address cited above.

Environment

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implements section 102(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of General Counsel, Rules Docket Clerk, at the address listed above.

Regulatory Flexibility Act

Several commenters objected to HUD's finding that this rule making would not have a significant economic impact on small entities. The commenters argued that the date in the Steinfeld study (cited in the proposed rule) was over ten years old, and the study's assumptions did not reflect common construction practices. Because HUD did not update this data for OMB, neither HUD nor OMB have considered the major increases in costs or prices adversely impacting housing affordability for consumers, a commenter claimed. In contrast to the Steinfeld study, the commenter asserted that 1988 data indicates a 25 percent loss in profitability of garden-style multifamily units alone. The commenter asserted that it could find no basis for the minimal increases in costs contemplated by the Steinfeld study, unless exterior design site planning and construction considerations bearing on density loss were omitted from the calculations. The minimal expenditure of funds envisioned by HUD is therefore seriously flawed and the impact of the rule upon consumers is vastly understated.

In addition to these issues, commenters also felt that the proposed rule did not adequately consider the

fiscal impact on small governmental entities. The commenter stated that there will be an increase in costs to become certified a substantially equivalent, to make required changes, and to handle the increased caseload associated with the addition of handicap and familial status. The commenter noted that this will require additional FHAP funds to permit the increase in staff once local laws are amended.

Other commenters argued that the regulatory flexibility analysis should have considered the economic impact on communities and municapalities planned for senior citizens. (*I.e.*, The design of such homes on small lots with significant common areas and facilities and which have a direct effect on the demand for service from municipalities in which they are located. Such communities also have significantly reduced demand for schools and certain recreational activities). Each of these factors will have an impact on the organization of municipal governments and their budgets and facilities, a commenter asserted.

While all of these comments reflect what may well be realistic difficulties associated with compliance with the requirements of the Fair Housing Amendments Act, and while the economic impact of the statute may in fact be greater than HUD's preliminary analysis indicated, the Department fails to see what latitude exists for affording regulatory relief based upon the fact that some businesses or governmental entities affected by the statute's requirements are "small entities". The purpose of the Regulatory Flexibility Act is to establish, as a principle of regulatory issuance,

> that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. (5 U.S.C. 601 note)

The Department has reviewed the objectives of the Fair Housing Amendments Act and finds that its principal objective is stepped-up law enforcement and the expansion of civil rights. There is no suggestion in the statute that HUD is being provided with discretion to apply the law's requirements differentially, depending upon whether a prospective respondent is a large corporation, or a small entity within the meaning of the Regulatory Flexibility Act. While it is true that future regulation by HUD in such limited areas as compliance reporting or other record-maintenance functions may permit provisions calling for lesser burdens on small entities, the basic prohibitions, compliance procedures, discovery procedures, hearing rights, and other requirements of this final rule are not of a nature that invites regulatory flexibility. To the extent that small entities are subject to the Fair Housing Act's requirements, they are subject as well to the requirements of the rule—to the same extent and in the same manner that larger entities are so subject. Accordingly, HUD's Regulatory Impact Analysis and Regulatory Flexibility Analysis are concerned with the costs of compliance with the law, but having accomplished those analyses, the Department sees its discretion to alter the impact of this rule on small entities as extremely limited by the statute. There are no significant alternatives to the regulatory scheme provided for in the rule that are consistent with the objectives of the Fair Housing Amendment Act.

"Takings" Analysis

A commenter suggested that HUD should conduct a "takings analysis" in accordance with Executive Order 12630 of March 15, 1988, "Governmental Actions and Interference with Constitutionally Protected Property Rights".

A takings analysis involves assessing the economic impact of a proposed policy or action to determine, to the extent possible, what economic or property interests are likely to be affected by the proposed action of government.

The economic impact of this rule on identified property interests, according to many commenters, is expected to be significant, but this fact alone does not end the inquiry. Additionally, in accordance with Guidelines issued by the Attorney General relative to agency analyses under Executive Order 12630, consideration is to be given to:

> . . . Whether the proposed policy or action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action; and
>
> *Whether alternative actions are available that would achieve the underlying lawful governmental objective* and would have a lesser economic impact (Emphasis Added)

As indicated earlier in our discussion of Regulatory Impact and Regulatory Flexibility Act considerations, the Department does not perceive any "alternative actions" available to the rule maker except to follow the expressed intention of the Congress and provide for enforcement of the Fair Housing Amendments Act. Nor does the Department regard the effects of this rule on private property rights as being sufficiently severe as to "effectively deny economically viable use of any distinct legally protected property interest of [a property owner], or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation." (The quoted phrase is part of the Attorney General's advisory to agencies with reference to determinations of policies having "takings" implications.)

Agencies conducting takings analyses are encouraged by the Executive Order and the accompanying Guidelines to strive, to the extent permitted by law, to undertake policies or actions in a way which minimizes their takings implications. This, the Department has done. Compliance with the Fair Housing Amendments Act will, in some circumstances, limit owner discretion concerning admissions policies and will require builders of multifamily housing to comply with additional construction-related criteria associated with accessibility by handicapped persons. There are other aspects of the Amendments Act that will have some economic impact and will thus affect property rights. None of these impacts, in the Department's view, rises to the level of a "taking" within the meaning of the Fifth Amendment of the United States Constitution.

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Sections 100.304(c)(2), 103.30, 115.3(a)(i), 115.5, 115.7 and 115.9 of this proposed rule have been determined by the Department to contain collection of information requirements. Information on these requirements are provided as follows:

TABULATION OF ANNUAL REPORTING BURDEN PROPOSED RULE—FAIR HOUSING AMENDMENTS ACT OF 1988

Description of information collection and section of 24 CFR affected	Number of respondents	Number of responses per respondent	Total annual responses	Hours per response	Total hour
Policy and Procedures—Housing for Persons 55 years and older—§ 100.304(c)(2)	1,231	1	1,231	1	1,231
Housing Discrimination Complaint Forms HD-903 & 903A Spanish Version (2529-0011)—§§ 103.30 & 115.3(a)(1)	8,400	1	8,400	1	8,400
Certification Request Documentation (2529-0025)—§§ 115.5, 115.7 & 115.9	30	1	30	17	510
Total annual burden					10,141

Collections of information conducted or sponsored by HUD during the conduct of an administrative action or investigation against specific individuals or entities after a case file is opened are not covered by 5 CFR Part 1320—Controlling Paperwork Burdens on the Public (see 5 CFR 1320.3(c)). Accordingly, the tabulation above, does not include the information collection hours associated with §§ 104.420, 104.530, 104.540(b)(4), 104.540(c), 104.550(a), 104.550(b), 104.590, 104.600(b), 104.620(b)(2), 104.700(a), 104.720, 104.790(b), 104.910(d), 115.3(a)(ii), (iii) and (iv), and 115.4(b)(2)(i). No burden hours are reported for Part 110 since public disclosure of information originally supplied by the Federal Government to the recipient for the purposes of disclosure is not a collection of information. (See 5 CFR 1230.7(c)(2)). No burden hours are included for § 121.2 because information collection requirements on race, color, religion, sex, national origin, age, handicap, and family characteristics will be imposed under the regulations applicable to the specific HUD program.

Impact on Family

The General Counsel, as the Designated Official under Executive Order No. 12606—The Family, has determined that this rule, if implemented, may have a significant impact on family formation, maintenance and general well-being because the rule provides Federal law enforcement assistance to families confronting housing discrimination based on race, color, religion, national origin, familial status or handicap. However, review under the Order is not required because the statutory mandate leaves little effective discretion in the Department to lessen the family impact. In any event, the purpose of the statute is to have a positive impact on family values by offering a measure of protection to persons confronting illegal discrimination.

Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order No. 12612—Federalism, has determined that the policies contained in this rule would, if implemented, have federalism implications and are subject to review under the Order. Specifically, the amended statute continues to provide for referral to State and local fair housing enforcement agencies. However, in the future the determination of substantial equivalency will depend upon State and local enforcement machinery that matches up with the much-strengthened Federal law. Accordingly, the effect of the amended Fair Housing Act will be to encourage States and localities to amend their laws to match the Federal enforcement machinery, or suffer the eventual loss of recognition as substantially equivalent State or local agencies and possible loss of function if citizens of the jurisdiction do not choose to file complaints with State or local officials. Additionally, jurisdictions losing equivalency status will lose eligibility for grant funds available to co-enforcers of fair housing laws.

While the rule would have federalism impacts, review under the Federalism Executive Order is not required because the implementation of the statute leaves little discretion with HUD to lessen these impacts. HUD's statutory mandate is clear—it must accept complaints nationwide, and refer complaints for processing (after the initial grandfather period) only to jurisdictions with substantially equivalent laws. Moreover, since the statute addresses the Federalism issue by declaring that certain conduct will be illegal and by providing machinery for referral to State and local authority under appropriate circumstances, further study of Federalism implications could not appreciably affect the approach taken in the implementing regulations.

Other matters

This rule was listed in the Department's Semiannual Agenda of Regulations published October 24, 1988 (53 FR 41974, 42605) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program number and title is 14.400 Equal Opportunity in Housing.

List of Subjects

24 CFR Part 14

Equal access to justice, Lawyers, Claims

24 CFR Part 100

Fair housing, Incorporation by reference, Nondiscrimination

24 CFR Part 103

Administrative practice and procedure, Fair housing

24 CFR Part 104

Administrative practice and procedure, Fair housing

24 CFR Part 105

Administrative practice and procedure, Fair housing

24 CFR Part 106

Administrative practice and procedure, Fair housing

24 CFR Part 109

Advertising, Fair housing, Signs and symbols

24 CFR Part 110

Fair housing, Signs and symbols

24 CFR Part 115

Fair housing, Intergovernmental relations.

24 CFR Part 121

Fair housing, statistics, Reporting and Recordkeeping requirements.

Accordingly, Title 24 of the Code of Federal Regulations is amended as follows:

PART 14—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN ADMINISTRATIVE PROCEEDINGS

1. The authority citation for Part 14 is revised to read as follows:

Authority: Sec. 504(c)(1) of the Equal Access to Justice Act (5 U.S.C. 504(c)(1); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In §14.115, the phrase "or" at the end of paragraph (a)(8) is removed, the period at the end of paragraph (a)(9) is removed and in its place the phrase "; or" is added, and new paragraph (a)(10) is added to read as follows:

§ 14.115 Proceedings covered.

(a) * * *

(10) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3600–3620) and 24 CFR Part 104.

* * * * *

3. Part 100 is revised to read as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

Subpart A—General

Sec.
100.1 Authority.
100.5 Scope.
100.10 Exemptions.
100.20 Definitions.

Subpart B—Discriminatory Housing Practices

100.50 Real estate practices prohibited.
100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.
100.65 Discrimination in terms, conditions and privileges and in services and facilities.
100.70 Other prohibited sale and rental conduct.
100.75 Discriminatory advertisements, statements and notices.
100.80 Discriminatory representations on the availability of dwellings.
100.85 Blockbusting.
100.90 Discrimination in the provision of brokerage services.

Subpart C—Discrimination in Residential Real Estate-Related Transactions

100.110 Discriminatory practices in residential real estate-related transactions.
100.115 Residential real estate-related transactions.
100.120 Discrimination in the making of loans and in the provision of other financial assistance.
100.125 Discrimination in the purchasing of loans.
100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.
100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.

Subpart D—Prohibitions Against Discrimination Because of Handicap

100.200 Purpose.
100.201 Definitions.
100.202 General prohibitions against discrimination because of handicap.
100.203 Reasonable modifications of existing premises.
100.204 Reasonable accommodations.
100.205 Design and construction requirements.

Subpart E—Housing for Older Persons

100.300 Purpose.
100.301 Exemption.
100.302 State and Federal elderly housing programs.
100.303 62 or over housing.
100.304 55 or over housing.

Subpart F—Interference, Coercion or Intimidation

100.400 Prohibited interference, coercion or intimidation.

Autority: Title VIII, Civil Rights Act of 1968, 42 U.S.C. 3600–3620; section 7(d), Department of HUD Act, 42 U.S.C. 3535(d).

Subpart A—General

§ 100.1 Authority.

This regulation is issued under the authority of the Secretary of Housing and Urban Development to administer and enforce Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (the Fair Housing Act).

§ 100.5 Scope.

(a) It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

(b) This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions.

(c) Nothing in this part relieves persons participating in a Federal or Federally-assisted program or activity from other requirements applicable to buildings and dwellings.

§ 100.10 Exemptions.

(a) This part does not:

(1) Prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted because of race, color, or national origin;

(2) Prohibit a private club, not in fact open to the public, which, incident to its primary purpose or purposes, provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members;

(3) Limit the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling; or

(4) Prohibit conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802).

(b) Nothing in this part regarding discrimination based on familial status applies with respect to housing for older persons as defined in Subpart E of this part.

(c) Nothing in this part, other than the prohibitions against discriminatory advertising, applies to:

(1) The sale or rental of any single family house by an owner, provided the following conditions are met:

(i) The owner does not own or have any interest in more than three single family houses at any one time.

(ii) The house is sold or rented without the use of a real estate broker, agent or salesperson or the facilities of any person in the business of selling or renting dwellings. If the owner selling the house does not reside in it at the time of the sale or was not the most recent resident of the house prior to such sale, the exemption in this paragraph (c)(1) of this section applies to only one such sale in any 24-month period.

(2) Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his or her residence.

§ 100.20 Definitions.

As used in this part:

"Aggrieved person" includes any person who—

(a) Claims to have been injured by a discriminatory housing practice; or

(b) Believes that such person will be injured by a discriminatory housing practice that is about to occur.

"Broker" or "Agent" includes any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions.

"Department" means the Department of Housing and Urban Development.

"Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of the Fair Housing Act.

"Dwelling" means any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.

"Fair Housing Act" means Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (42 U.S.C. 3600–3620).

"Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(a) A parent or another person having legal custody of such individual or individuals; or

(b) The designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

"Handicap" is defined in § 100.201.

"Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries.

"Person in the business of selling or renting dwellings" means any person who:

(a) Within the preceding twelve months, has participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein;

(b) Within the preceding twelve months, has participated as agent, other than in the sale of his or her own personal residence, in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein; or

(c) Is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

"Secretary" means the Secretary of the Department.

"State" means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

Subpart B—Discriminatory Housing Practices

§ 100.50 Real estate practices prohibited.

(a) This subpart provides the Department's interpretation of conduct that is unlawful housing discrimination under section 804 and section 806 of the Fair Housing Act. In general the prohibited actions are set forth under sections of this subpart which are most applicable to the discriminatory conduct described. However, an action illustrated in one section can constitute a violation under sections in the subpart. For example, the conduct described in § 100.60(b)(3) and (4) would constitute a violation of § 100.65(a) as well as § 100.60(a).

(b) It shall be unlawful to:

(1) Refuse to sell or rent a dwelling after a *bona fide* offer has been made, or to refuse to negotiate for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate in the sale or rental of a dwelling because of handicap.

(2) Discriminate in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with sales or rentals, because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Engage in any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(5) Represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that a dwelling is not available for sale or rental when such dwelling is in fact available.

(6) Engage in blockbusting practices in connection with the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Deny access to or membership or participation in, or to discriminate against any person in his or her access to or membership or participation in, any multiple-listing service, real estate brokers' assocation, or other service organization or facility relating to the business of selling or renting a dwelling or in the terms or conditions or membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin.

(c) The application of the Fair Housing Act with respect to persons with handicaps is discussed in Subpart D of this part.

§ 100.60 Unlawful to sell or rent or to negotiate for the sale or rental.

(a) It shall be unlawful for a person to refuse to sell or rent a dwelling to a person who has made a *bona fide* offer, because of race, color, religion, sex, familial status, or national origin or to refuse to negotiate with a person for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate against any person in the sale or rental of a dwelling because of handicap.

(b) Prohibited actions under this section include, but are not limited to:

(1) Failing to accept or consider a *bona fide* offer because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Refusing to sell or rent a dwelling to, or to negotiate for the sale or rental of a dwelling with, any person because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale or rental approval procedures or other requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Evicting tenants because of their race, color, religion, sex, handicap, familial status, or national origin or because of the race, color, religion, sex, handicap, familial status, or national origin of a tenant's guest.

§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.

(b) Prohibited actions under this section include, but are not limited to:

(1) Using different provisions in leases or contracts of sale, such as those relating to rental charges, security deposits and the terms of a lease and those relating to down payment and closing requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Failing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an an owner, tenant or a person associated with him or her.

(5) Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.

§ 100.70 Other prohibited sale and rental conduct.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.

(b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons.

(c) Prohibited actions under paragraph (a) of this section, which are generally referred to as unlawful steering practices, include, but are not limited to:

(1) Discouraging any person from inspecting, purchasing or renting a dwelling because of race, color, religion, sex, handicap, familial status, or national origin, or because of the race, color, religion, sex, handicap, familial status, or national origin of persons in a community, neighborhood or development.

(2) Discouraging the purchase or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin, by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development.

(3) Communicating to any prospective purchaser that he or she wold not be comfortable or compatible with existing residents of a community, neighborhood or development because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Assigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, handicap, familial status, or national origin.

(d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:

(1) Discharging or taking other adverse action against an employee, broker or agent because he or she refused to participate in a discriminatory housing practice.

(2) Employing codes or other devices to segregate or reject applicants, purchasers or renters, refusing to take or to show listings of dwellings in certain areas because of race, color, religion, sex, handicap, familial status, or national origin, or refusing to deal with certain brokers or agents because they or one or more of their clients are of a particular race, color, religion, sex, handicap, familial status, or national origin.

(3) Denying or delaying the processing of an application made by a purchaser or renter or refusing to approve such a person for occupancy in a cooperative or condominium dwelling because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.75 Discriminatory advertisements, statements and notices.

(a) It shall be unlawful to make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(b) The prohibitions in this section shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling. Written notices and statements include any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling.

(c) Discriminatory notices, statements and advertisements include, but are not limited to:

(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.

(d) 24 CFR Part 109 provides information to assist persons to advertise dwellings in a nondiscriminatory manner and describes the matters the Department will review in evaluating compliance with the Fair Housing Act and in investigating complaints alleging discriminatory housing practices involving advertising.

§ 100.80 Discriminatory representations on the availability of dwellings.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to provide inaccurate or untrue information about the availability of dwellings for sale or rental.

(b) Prohibited actions under this section include, but are not limited to:

(1) Indicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Representing that covenants or other deed, trust or lease provisions which purport to restrict the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin preclude the sale of rental of a dwelling to a person.

(3) Enforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting information, by word or conduct, regarding suitably priced dwellings available for inspection, sale or rental, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Providing false or inaccurate information regarding the availability of a dwelling for sale or rental to any person, including testers, regardless of whether such person is actually seeking housing, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.85 Blockbusting.

(a) It shall be unlawful, for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap.

(b) In establishing a discriminatory housing practice under this section it is not necessary that there was in fact profit as long as profit was a factor for engaging in the blockbusting activity.

(c) Prohibited actions under this section include, but are not limited to:

(1) Engaging, for profit, in conduct (including uninvited solicitations for listings) which conveys to a person that a neighborhood is undergoing or is about to undergo a change in the race, color, religion, sex, handicap, familial status, or national origin of persons residing in it, in order to encourage the person to offer a dwelling for sale or rental.

(2) Encouraging, for profit, any person to sell or rent a dwelling through assertions that the entry or prospective entry of persons of a particular race, color, religion, sex, familial status, or national origin, or with handicaps, can or will result in undesirable consequences for the project, neighborhood or community, such as a lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other services or facilities.

§ 100.90 Discrimination in the provision of brokerage services.

(a) It shall be unlawful to deny any person access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against any person in the terms or conditions of such access, membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Prohibited actions under this section include, but are not limited to:

(1) Setting different fees for access to or membership in a multiple listing service because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Denying or limiting benefits accruing to members in a real estate brokers' organization because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different standards or criteria for membership in a real estate sales or rental organization because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Establishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization or facility relating to the business of selling or renting dwellings, because of race, color, religion, sex, handicap, familial status, or national origin.

Subpart C—Discrimination in Residential Real Estate-Related Transactions

§ 100.110 Discriminatory practices in residential real estate-related transactions.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful housing discrimination under section 805 of the Fair Housing Act.

(b) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.115 Residential real estate-related transactions.

The term residential "real estate-related transactions" means:

(a) The making or purchasing of loans or providing other financial assistance—

(1) For purchasing, constructing, improving, repairing or maintaining a dwelling; or

(2) Secured by residential real estate; or

(b) The selling, brokering or appraising of residential real property.

§ 100.120 Discrimination in the making of loans and in the provision of other financial assistance.

(a) It shall be unlawful for any person or entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available loans or other financial assistance for a dwelling, or which is or is to be secured by a dwelling, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Prohibited practices under this section include, but are not limited to, failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.125 Discrimination in the purchasing of loans.

(a) It shall be unlawful for any person or entity engaged in the purchasing of loans or other debts or securities which support the purchase, construction, improvement, repair or maintenance of a dwelling, or which are secured by residential real estate, to refuse to purchase such loans, debts, or securities, or to impose different terms or conditions for such purchases, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Unlawful conduct under this section includes, but is not limited to:

(1) Purchasing loans or other debts or securities which relate to, or which are secured by dwellings in certain communities or neighborhoods but not in others because of the race, color, religion, sex, handicap, familial status, or national origin of persons in such neighborhoods or communities.

(2) Pooling or packaging loans or other debts or securities which relate to, or which are secured by, dwellings differently because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing or using different terms or conditions on the marketing or sale of securities issued on the basis of loans or other debts or securities which relate to, or which are secured by, dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(c) This section does not prevent consideration, in the purchasing of loans, of factors justified by business necessity, including requirements of Federal law, relating to a transaction's financial security or to protection against default or reduction of the value of the security. Thus, this provision would not preclude considerations employed in normal and prudent transactions, provided that no such factor may in any way relate to race, color, religion, sex, handicap, familial status or national origin.

§ 100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.

(a) It shall be unlawful for any person or entity engaged in the making of loans or in the provision of other financial assistance relating to the purchase, construction, improvement, repair or maintenance of dwellings or which are secured by residential real estate to impose different terms or conditions for the availability of such loans or other financial assistance because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Unlawful conduct under this section includes, but is not limited to:

(1) Using different policies, practices or procedures in evaluating or in determining creditworthiness of any person in connection with the provision of any loan or other financial assistance for a dwelling or for any loan or other financial assistance which is secured by residential real estate because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, duration or other terms for a loan or other financial assistance for a dwelling or which is secured by residential real estate, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.

(a) It shall be unlawful for any person or other entity whose business includes engaging in the selling, brokering or appraising of residential real property to discriminate against any person in making available such services, or in the performance of such services, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) For the purposes of this section, the term appraisal means an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.

(c) Nothing in this section prohibits a person engaged in the business of making or furnishing appraisals of residential real property from taking into consideration factors other than race, color, religion, sex, handicap, familial status, or national origin.

(d) Practices which are unlawful under this section include, but are not limited to, using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.

Subpart D—Prohibition Against Discrimination Because of Handicap

§ 100.200 Purpose.

The purpose of this subpart is to effectuate sections 6 (a) and (b) and 15 of the Fair Housing Amendments Act of 1988.

§ 100.201 Definitions.

As used in this subpart:

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

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

"ANSI A117.1–1986" means the 1986 edition of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018. Copies may be inspected at the Department of Housing and Urban Development, 451 Seventh Street, S.W., Room 10276, Washington, D.C., or at the Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, D.C.

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

"Building entrance on an accessible route" means an accessible entrance to a building that is connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, or to public streets or sidewalks, if available. A building entrance that complies with ANSI A117.1–1986 or a comparable standard complies with the requirements of this paragraph.

"Common use areas" means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms,

recreational areas and passageways among and between buildings.

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

"Covered multifamily dwellings" means buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units.

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

"Entrance" means any access point to a building or portion of a building used by residents for the purpose of entering.

"Exterior" means all areas of the premises outside of an individual dwelling unit.

"First occupancy" means a building that has never before been used for any purpose.

"Ground floor" means a floor of a building with a building entrance on an accessible route. A building may have more than one ground floor.

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

(a) "Physical or mental impairment" includes:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; disgestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

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

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

(d) "Is regarded as having an impairment" means:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

"Interior" means the spaces, parts, components or elements of an individual dwelling unit.

"Modification" means any change to the public or common use areas of a building or any change to a dwelling unit.

"Premises" means the interior or exterior spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of a building.

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

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

§ 100.202 General prohibitions against discrimination because of handicap.

(a) It shall be unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(3) Any person associated with that person.

(b) It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(3) Any person associated with that person.

(c) It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person. However, this paragraph does not prohibit the following inquiries, provided these inquiries are made of all applicants, whether or not they have handicaps:

(1) Inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap;

(3) Inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;

(4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance;

(5) Inquiring whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance.

(d) Nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

§ 100.203 Reasonable modifications of existing premises.

(a) It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable

modifications of existing premises, occupied or to be occupied by a handicapped person, if the proposed modifications may be necessary to afford the handicapped person full enjoyment of the premises of a dwelling. In the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. The landlord may not increase for handicapped persons any customarily required security deposit. However, where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, the landlord may negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations. The interest in any such account shall accrue to the benefit of the tenant.

(b) A landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.

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

Example (1): A tenant with a handicap asks his or her landlord for permission to install grab bars in the bathroom at his or her own expense. It is necessary to reinforce the walls with blocking between studs in order to affix the grab bars. It is unlawful for the landlord to refuse to permit the tenant, at the tenant's own expense, from making the modifications necessary to add the grab bars. However, the landlord may condition permission for the modification on the tenant agreeing to restore the bathroom to the condition that existed before the modification, reasonable wear and tear excepted. It would be reasonable for the landlord to require the tenant to remove the grab bars at the end of the tenancy. The landlord may also reasonably require that the wall to which the grab bars are to be attached be repaired and restored to its original condition, reasonable wear and tear excepted. However, it would be unreasonable for the landlord to require the tenant to remove the blocking, since the reinforced walls will not interfere in any way with the landlord's or the next tenant's use and enjoyment of the premises and may be needed by some future tenant.

Example (2): An applicant for rental housing has a child who uses a wheelchair. The bathroom door in the dwelling unit is too narrow to permit the wheelchair to pass. The applicant asks the landlord for permission to widen the doorway at the applicant's own expense. It is unlawful for the landlord to refuse to permit the applicant to make the modification. Further, the landlord may *not*, in usual circumstances, condition permission for the modification on the applicant paying for the doorway to be narrowed at the end of the lease because a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises.

§ 100.204 Reasonable accommodations.

(a) It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

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

Example (1): A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a "no pets" policy. It is a violation of § 100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a "first come first served" basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of § 100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

§ 100.205 Design and construction requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subpart E—Housing for Older Persons

§100.300 Purpose.

The purpose of this subpart is to effectuate the exemption in the Fair Housing Amendments Act of 1988 that relates to housing for older persons.

§ 100.301 Exemption.

(a) The provisions regarding familial status in this part do not apply to housing which satisfies the requirements of §§ 100.302, 100.303 or § 100.304.

(b) Nothing in this part limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

§ 100.302 State and Federal elderly housing programs.

The provisions regarding familial status in this part shall not apply to housing provided under any Federal or State program that the Secretary determines is specifically designed and operated to assist elderly persons, as defined in the State or Federal program.

§ 100.303 62 or over housing.

(a) The provisions regarding familial status in this part shall not apply to housing intended for, and solely occupied by, persons 62 years of age or older. Housing satisfies the requirements of this section even though:

(1) There are persons residing in such housing on September 13, 1988 who are under 62 years of age, provided that all new occupants are persons 62 years of age or older;

(2) There are unoccupied units, provided that such units are reserved for occupancy by persons 62 years of age or over;

(3) There are units occupied by employees of the housing (and family members residing in the same unit) who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(b) The following examples illustrate the application of paragraph (a) of this section:

Example (1): John and Mary apply for housing at the Vista Heights apartment complex which is an elderly housing complex operated for persons 62 years of age or older. John is 62 years of age. Mary is 59 years of age. If Vista Heights wishes to retain its "62 or over" exemption it must refuse to rent to John and Mary because Mary is under 62 years of age. However, if Vista Heights does rent to John and Mary, it might qualify for the "55 or over" exemption in § 100.304.

Example (2): The Blueberry Hill retirement community has 100 dwelling units. On September 13, 1988, 15 units were vacant and 35 units were occupied with at least one person who is under 62 years of age. The remaining 50 units were occupied by persons who were all 62 years of age or older. Blueberry Hill can qualify for the "62 or over" exemption as long as all units that were occupied after September 13, 1988 are occupied by persons who were 62 years of age or older. The people under 62 in the 35 units previously described need not be required to leave for Blueberry Hill to qualify for the "62 or over" exemption.

§ 100.304 55 or over housing.

(a) The provisions regarding familial status shall not apply to housing intended and operated for occupancy by at least one person 55 years of age or older per unit, *Provided That* the housing satisfies the requirements of § 100.304 (b)(1) *or* (b)(2) *and* the requirements of § 100.304(c).

(b)(1) The housing facility has significant facilities and services specifically designed to meet the physical or social needs of older persons. "Significant facilities and services specifically designed to meet the physical or social needs of older persons" include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care of programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them (the housing facility need not have all of these features to qualify for the exemption under this subparagraph); or

(2) It is not practicable to provide significant facilities and services designed to meet the physical or social needs of older persons *and* the housing facility is necessary to provide important housing opportunities for older persons. In order to satisfy this paragraph (b)(2) of this section the owner or manager of the housing facility must demonstrate through credible and objective evidence that the provision of significant facilities and services designed to meet the physical or social

needs of older persons would result in depriving older persons in the relevant geographic area of needed and desired housing. The following factors, among others, are relevant in meeting the requirements of this paragraph (b)(2) of this section—

(i) Whether the owner or manager of the housing facility has endeavored to provide significant facilities and services designed to meet the physical or social needs of older persons either by the owner or by some other entity. Demonstrating that such services and facilities are expensive to provide is not alone sufficient to demonstrate that the provision of such services is not practicable.

(ii) The amount of rent charged, if the dwellings are rented, or the price of the dwellings, if they are offered for sale.

(iii) The income range of the residents of the housing facility.

(iv) The demand for housing for older persons in the relevant geographic area.

(v) The range of housing choices for older persons within the relevant geographic area.

(vi) The availability of other similarly priced housing for older persons in the relevant geographic area. If similarly priced housing for older persons with significant facilities and services is reasonably available in the relevant geographic area then the housing facility does not meet the requirements of this paragraph (b)(2) of this section.

(vii) The vacancy rate of the housing facility.

(c)(1) At least 80% of the units in the housing facility are occupied by at least one person 55 years of age or older per unit *except that* a newly constructed housing facility for first occupancy after March 12, 1989 need not comply with this paragraph (c)(1) of this section until 25% of the units in the facility are occupied; and

(2) The owner or manager of a housing facility publishes and adheres to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. The following factors, among others, are relevant in determining whether the owner or manager of a housing facility has complied with the requirements of this paragraph (c)(2) of this section:

(i) The manner in which the housing facility is described to prospective residents.

(ii) The nature of any advertising designed to attract prospective residents.

(iii) Age verification procedures.

(iv) Lease provisions.

(v) Written rules and regulations.

(vi) Actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations.

(d) Housing satisfies the requirements of this section even though:

(1) On September 13, 1988, under 80% of the occupied units in the housing facility are occupied by at least one person 55 years of age or older per unit, provided that at least 80% of the units that are occupied by new occupants after September 13, 1988 are occupied by at least one person 55 years of age or older.

(2) There are unoccupied units, provided that at least 80% of such units are reserved for occupancy by at least one person 55 years of age or over.

(3) There are units occupied by employees of the housing (and family members residing in the same unit) who are under 55 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(e) The application of this section may be illustrated by the following examples:

Example 1: A. John and Mary apply for housing at the Valley Heights apartment complex which is a 100 unit housing complex that is operated for persons 55 years of age or older in accordance with all the requirements of this section. John is 56 years of age. Mary is 50 years of age. Eighty (80) units are occupied by at least one person who is 55 years of age or older. Eighteen (18) units are occupied exclusively by persons who are under 55. Among the units occupied by new occupants after September 13, 1988 were 18 units occupied exclusively by persons who are under 55. Two (2) units are vacant. At the time John and Mary apply for housing, Valley Heights qualifies for the "55 or over" exemption because 82% of the occupied units (80/98) at Valley Heights are occupied by at least one person 55 years old or older. If John and Mary are accepted for occupancy, then 81 out of the 99 occupied units (82%) will be occupied by at least one person who is 55 years of age or older and Valley Heights will continue to qualify for the "55 or over" exemption.

B. If only 78 out of the 98 occupied units had been occupied by at least one person 55 years of age or older, Valley Heights would still qualify for the exemption, but could not rent to John or Mary if they were both under 55 without losing the exemption.

Example 2: Green Meadow is a 1,000 unit retirement community that provides significant facilities and services specifically designed to meet the physical or social needs of older persons. On September 13, 1988, Green Meadow published and thereafter adhered to policies and procedures demonstrating an intent to provide housing for persons 55 years of age or older. On September 13, 1988, 100 units were vacant and 300 units were occupied only by people who were under 55 years old. Consequently, on September 13, 1988 67% of the Green Meadow's occupied units (600 out of 900) were occupied by at at least one person 55 years of age or older. Under paragraph (d)(1) of this section, Green Meadow qualifies for the "55 or over" exemption even though, on September 13, 1988, under 80% of the occupied units in the housing facility were occupied by at least one person 55 years of age or older per unit, provided that at least 80% of the units that were occupied after September 13, 1988 are occupied by at least one person 55 years of age or older. Under paragraph (d) of this section, Green Meadow qualifies for the "55 or over" exemption, even though it has unoccupied units, provided that at least 80% of its unoccupied units are reserved for occupancy by at least one person 55 years of age or over.

Example 3: Waterfront Gardens is a 200 unit housing facility to be constructed after March 12, 1989. The owner and manager of Waterfront Gardens intends to operate the new facility in accordance with the requirements of this section. Waterfront Gardens need not comply with the requirement in paragraph (c)(1) of this section that at least 80% of the occupied units be occupied by at least one person 55 years of age or older per unit *until* 50 units (25%) are occupied. When the 50th unit is occupied, then 80% of the 50 occupied units (*i.e.*, 40 units) must be occupied by at least one person who is 55 years of age or older for Waterfront Gardens to qualify for the "55 or over" exemption.

Subpart F—Interference, Coercion or Intimidation

§ 100.400 Prohibited interference, coercion or intimidation.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful under section 818 of the Fair Housing Act.

(b) It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part.

(c) Conduct made unlawful under this section includes, but is not limited to, the following:

(1) Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.

(3) Threatening an employee or agent with dismissal or an adverse employment action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction, because of the race, color, religion, sex, handicap, familial status, or national origin of that person or of any person associated with that person.

(4) Intimidating or threatening any person because that person is engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by this part.

(5) Retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act.

4. Part 103 is added to read as follows:

PART 103—FAIR HOUSING—COMPLAINT PROCESSING

Subpart A—Purpose and Definitions

Sec.
103.1 Purpose and applicability.
103.5 Other civil rights authorities.
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Subpart B—Complaints

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103.40 Date of filing of complaint.
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Subpart C—Referral of Complaints to State and Local Agencies

103.100 Notification and referral to substantially equivalent State or local agencies.
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103.400 Reasonable cause determination.
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103.410 Election of civil action or provision of administrative proceeding.

Subpart G—Prompt Judicial Action

103.500 Prompt judicial action.

Subpart H—Other Action

103.510 Other action by HUD.
103.515 Action by other agencies.

Authority: Title VIII, Civil Rights Act of 1968, 42 U.S.C. 3600–3620; section 7(d), Department of HUD Act, 42 U.S.C. 3535(d).

Subpart A—Purpose and Definitions

§ 103.1 Purpose and applicability.

(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. 3610.

(b) This part applies to:

(1) Complaints alleging discriminatory housing practices because of race, color, religion, sex or national origin; and

(2) Complaints alleging discriminatory housing practices on account of handicap or familial status occurring on or after March 12, 1989.

(c) Part 104 governs the administrative proceedings before an administrative law judge adjudicating charges issued under § 103.405.

(d) The Department will reasonably accommodate persons with disabilities who are participants in complaint processing.

§ 103.5 Other Civil Rights authorities.

In addition to the Fair Housing Act, other civil rights authorities may be applicable in a particular case. Thus, where a person charged with a discriminatory housing practice in a complaint filed under section 810 of the Fair Housing Act is also prohibited from engaging in similar practices under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–5), section 109 of the Housing and Community Development Act of 1974 (42 U.S.C. 5309), Executive Order 11063 of November 20, 1962, on Equal Opportunity in Housing (27 FR 11527–11530, November 24, 1962), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act (42 U.S.C. 6101) or other applicable law, the person may also be subject to action by HUD or other Federal agencies under the rules, regulations, and procedures prescribed under Title VI (24 CFR Parts 1 and 2), section 109 (24 CFR 570.602)), Executive Order 11063 (24 CFR Part 107), section 504 (24 CFR Part 8), or other applicable law.

§ 103.9 Definitions.

As used in this part,

Aggrieved person includes any person who:

(a) Claims to have been injured by a discriminatory housing practice; or

(b) Believes that such person will be injured by a discriminatory housing practice that is about to occur.

Assistant Secretary means the Assistant Secretary for Fair Housing and Equal Opportunity in HUD.

Attorney General means the Attorney General of the United States.

Complainant means the person (including the Assistant Secretary) who files a complaint under this part.

Conciliation means the attempted resolution of issues raised by a complaint, or by the investigation of a complaint, through informal negotiations involving the aggrieved person, the respondent, and the Assistant Secretary.

Conciliation agreement means a written agreement setting forth the resolution of the issues in conciliation.

Discriminatory housing practice means an act that is unlawful under section 804, 805, 806 or 818 of the Fair Housing Act, as described in Part 100.

Dwelling means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, or any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

Fair Housing Act means Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3600–3620.

General Counsel means the General Counsel of HUD.

HUD means the United States Department of Housing and Urban Development.

Person includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustee in cases under Title 11 of the United States Code, receivers and fiduciaries.

Personal service means handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business,

residence or usual place of abode of the person to be served.

Receipt of notice means the day that personal service is completed by handing or delivering a copy of the document to an appropriate person or the date that a document is delivered by certified mail.

Respondent means:

(a) The person or other entity accused in a complaint of a discriminatory housing practice; and

(b) Any other person or entity identified in the course of investigation and notified as required under § 103.50.

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

Substantially equivalent State or local agency means a State or local agency certified by HUD under 24 CFR Part 115 (including agencies certified for interim referrals).

To rent includes to lease, to sublease, to let, and otherwise to grant for consideration the right to occupy premises not owned by the occupant.

Subpart B—Complaints

§ 103.10 Submission of information.

(a) The Assistant Secretary will receive information concerning alleged discriminatory housing practices from any person. Where the information constitutes a complaint within the meaning of the Fair Housing Act and this part and is furnished by an aggrieved person, it will be considered to be filed under § 103.40. Where additional information is required for purposes of perfecting a complaint under the Fair Housing Act, HUD will advise what additional information is needed and will provide appropriate assistance in the filing of the complaint.

(b) HUD may also concurrently initiate compliance reviews under other appropriate civil rights authorities, such as E.O. 11063 on Equal Opportunity in Housing, Title VI of the Civil Rights Act of 1964, section 109 of the Housing and Community Development Act of 1974, section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act (42 U.S.C. 6101). The information may also be made available to any other Federal, State or local agency having an interest in the matter. In making available such information, steps will be taken to protect the confidentiality of any informant or complainant where desired by the informant or complainant.

§ 103.15 Who may file complaints.

Any aggrieved person or the Assistant Secretary may file a complaint no later than one year after an alleged discriminatory housing practice has occurred or terminated. The complaint may be filed with the assistance of an authorized representative of an aggrieved person, including any organization acting on behalf of an aggrieved person.

§ 103.20 Persons against whom complaints may be filed.

(a) A complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage, in a discriminatory housing practice.

(b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

§ 103.25 Where to file complaints.

(a)(1) Aggrieved persons may file complaints in person with, or by mail to: Fair Housing, Department of Housing and Urban Development, Washington DC 20410, or any HUD Office. A list of Regional Offices (with addresses and areas of jurisdiction) and Field Offices (with addresses) is contained in an appendix to this part.

(2) Aggrieved persons may provide information to be contained in a complaint by telephone to any Regional or Field Office of HUD. HUD will reduce information provided by telephone to writing on the prescribed complaint form and send the form to the aggrieved person to be signed and affirmed as provided in § 103.30(a).

(3) Complaints may be filed in person or by mail with any substantially equivalent State or local agency. Complaints filed with a substantially equivalent State or local agency will be considered to be complaints dual filed with the agency under its own law, and with HUD under the Fair Housing Act.

(b) Generally, complaints will be processed through HUD's Regional Administrator having jurisdiction in the State in which the alleged discriminatory housing practice occurred. However, where a complaint has been identified for systemic processing under § 103.205, that complaint may be processed in the Office of the Assistant Secretary in Washington, DC.

§ 103.30 Form and content of complaint.

(a) Each complaint must be in writing and must be signed and affirmed by the aggrieved person filing the complaint or, if the complaint is filed by HUD, by the Assistant Secretary. The signature and affirmation may be made at any time during the investigation. The affirmation shall state: "I declare under penalty of perjury that the foregoing is true and correct."

(b) The Assistant Secretary may require complaints to be made on prescribed forms. Complaint forms will be available in any HUD office or in any substantially equivalent State or local agency. Notwithstanding any requirement for use of a prescribed form, HUD will accept any written statement which substantially sets forth the allegations of a discriminatory housing practice under the Fair Housing Act (including any such statement filed with a substantially equivalent State or local agency) as a Fair Housing Act complaint. Personnel in these offices will provide appropriate assistance in filling out forms and in filing a complaint.

(c) Each complaint must contain substantially the following information:

(1) The name and address of the aggrieved person.

(2) The name and address of the respondent.

(3) A description and the address of the dwelling which is involved, if appropriate.

(4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice.

§ 103.40 Date of filing of complaint.

(a) Except as provided in paragraph (b) of this section, a complaint is filed when it is received by HUD, or dual filed with HUD through a substantially equivalent State or local agency, in a form that reasonably meets the standards of § 103.30.

(b) The Assistant Secretary may determine that a complaint is filed for the purposes of the one-year period for the filing of complaints, upon the submission of written information (including information provided by telephone and reduced to writing by an employee of HUD) identifying the parties and describing generally the alleged discriminatory housing practice.

(c) Where a complaint alleges a discriminatory housing practice that is continuing, as manifested in a number of incidents of such conduct, the complaint will be timely if filed within one year of the last alleged occurrence of that practice.

§ 103.42 Amendment of complaint.

Complaints may be reasonably and fairly amended at any time. Such amendments may include, but are not limited to: amendments to cure technical

defects or omissions, including failure to sign or affirm a complaint, to clarify or amplify the allegations in a complaint, or to join additional or substitute respondents. Except for the purposes of notifying respondents under § 103.50, amended complaints will be considered as having been made as of the original filing date.

§ 103.45 Service of notice on aggrieved person.

Upon the filing of a complaint, the Assistant Secretary will notify, by certified mail or personal service, each aggrieved person on whose behalf the complaint was filed. The notice will:

(a) Acknowledge the filing of the complaint and state the date that the complaint was accepted for filing.

(b) Include a copy of the complaint.

(c) Advise the aggrieved person of the time limits applicable to complaint processing and of the procedural rights and obligations of the aggrieved person under this part and Part 104.

(d) Advise the aggrieved person of his or her right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 104 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(e) Advise the aggrieved person that retaliation against any person because he or she made a complaint or testified, assisted, or participated in an investigation or conciliation under this part or an administrative proceeding under Part 104, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

§ 103.50 Notification of respondent; joinder of additional or substitute respondents.

(a) Within ten days of the filing of a complaint under § 103.40 or the filing of an amended complaint under § 103.42, the Assistant Secretary will serve a notice on each respondent by certified mail or by personal service. A person who is not named as a respondent in a complaint, but who is identified in the course of the investigation under Subpart D of this part as a person who is alleged to be engaged, to have engaged, or to be about to engage in the discriminatory housing practice upon which the complaint is based may be joined as an additional or substitute respondent by service of a notice on the person under this section within ten days of the identification.

(b)(1) The notice will identify the alleged discriminatory housing practice upon which the complaint is based, and include a copy of the complaint.

(2) The notice will state the date that the complaint was accepted for filing.

(3) The notice will advise the respondent of the time limits applicable to complaint processing under this part and of the procedural rights and obligations of the respondent under this part and Part 104, including the opportunity to submit an answer to the complaint within 10 days of the receipt of the notice.

(4) The notice will advise the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 104 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(5) If the person is not named in the complaint, but is being joined as an additional or substitute respondent, the notice will explain the basis for the Assistant Secretary's belief that the joined person is properly joined as a respondent.

(6) The notice will advise the respondent that retaliation against any person because he or she made a complaint or testified, assisted or participated in an investigation or conciliation under this part or an administrative proceeding under Part 104, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

§ 103.55 Answer to complaint.

(a) The respondent may file an answer not later than ten days after receipt of the notice described in § 103.50. The respondent may assert any defense that might be available to a defendent in a court of law. The answer must be signed and affirmed by the respondent. The affirmation must state: "I declare under penalty of perjury that the foregoing is true and correct."

(b) An answer may be reasonably and fairly amended at any time with the consent of the Assistant Secretary.

Subpart C—Referral of Complaints to State and Local Agencies

§ 103.100 Notification and referral to substantially equivalent State or local agencies.

(a) Whenever a complaint alleges a discriminatory housing practice that is within the jurisdiction of a substantially equivalent State or local agency and the agency is certified or may accept interim referrals under 24 CFR Part 115 with regard to the alleged discriminatory housing practice, the Assistant Secretary will notify the agency of the filing of the complaint and refer the complaint to the agency for further processing before HUD takes any action with respect to the complaint. The Assistant Secretary will notify the State or local agency of the referral by certified mail.

(b) The Assistant Secretary will notify the aggrieved person and the respondent, by certified mail or personal service, of the notification and referral under paragraph (a) of this section. The notice will advise the aggrieved person and the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 104 with respect to complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

§ 103.105 Cessation of action on referred complaints.

(a) After a complaint is referred under § 103.100, the Assistant Secretary will take no futher action with respect to the complaint, except as provided in § 103.110.

(b) A referral under § 103.100 does not prohibit the Assistant Secretary from taking appropriate action to review or investigate matters in the complaint that raise issues cognizable under other civil

rights authorities applicable to departmental programs (see § 103.5).

§ 103.110 Reactivation of referred complaints.

The Assistant Secretary may reactivate a complaint referred under § 103.100 for processing by HUD if:

(a) The substantially equivalent State or local agency consents or requests the reactivation;

(b) The Assistant Secretary determines that, with respect to the alleged discriminatory housing practice, the agency no longer qualifies for certification as a substantially equivalent State or local agency and may not accept interim referrals; or

(c) The substantially equivalent State or local agency has failed to commence proceedings with respect to the complaint within 30 days of the date that it received the notification and referral of the complaint; or the agency commenced proceedings within this 30-day period, but the Assistant Secretary determines that the agency has failed to carry the proceedings forward with reasonable promptness. HUD will not reactivate a complaint under this paragraph (c) of this section until the appropriate HUD Regional Office has conferred with the agency to determine the reason for the delay in processing of the complaint. If the Assistant Secretary believes that the agency will proceed expeditiously following the conference, the Assistant Secretary may leave the complaint with the agency for a reasonable time, notwithstanding the expiration of the 30-day period or a previous failure to carry the proceedings forward with reasonable promptness.

§ 103.115 Notification upon reactivation.

(a) Whenever a complaint referred to a State or local fair housing agency under § 103.100 is reactivated under § 103.110, the Assistant Secretary will notify the substantially equivalent State or local agency, the aggrieved person and the respondent of HUD's reactivation. The notification will be made by certified mail or personal service.

(b) The notification to the respondent and the aggrieved person will:

(1) Advise the aggrieved person and the respondent of the time limits applicable to complaint processing and the procedural rights and obligations of the aggrieved person and the respondent under this part and Part 104.

(2) State that HUD will process the complaint under the Fair Housing Act and that the State or local agency to which the complaint was referred may continue to process the complaint under State or local law.

(3) Advise the aggrieved person and the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 104 with respect to a complaint or charge based on the alleged discriminatory housing practice under Part 104. The notices will also state that the time period includes the time during which an action arising from a breach of conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

Subpart D—Investigation Procedures

§ 103.200 Investigations.

(a) Upon the filing of a complaint under § 103.40, the Assistant Secretary will initiate an investigation. The purpose of an investigation are:

(1) To obtain information concerning the events or transactions that relate to the alleged discriminatory housing practice identified in the complaint.

(2) To document policies or practices of the respondent involved in the alleged discriminatory housing practice raised in the complaint.

(3) To develop factual data necessary for the General Counsel to make a determination under § 103.400 whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and to take other actions provided under this part.

(b) Upon the written direction of the Assistant Secretary, HUD may initate an investigation of housing practices to determine whether a complaint should be filed under Subpart B of this part. Such investigations will be conducted in accordance with the procedures described under this subpart.

§ 103.205 Systemic processing.

Where the Assistant Secretary determines that the alleged discriminatory practices contained in a complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or will affect a large number of persons, the Assistant Secretary may identify the complaint for systemic processing. This determination can be based on the face of the complaint or on information gathered in connection with an investigation. Systemic investigations may focus not only on documenting facts involved in the alleged discriminatory housing practice that is the subject of the complaint but also on review of other policies and procedures related to matters under investigation, to make sure that they also comply with the nondiscrimination requirements of the Fair Housing Act.

§ 103.215 Conduct of investigation.

(a) In conducting investigations under this part, the Assistant Secretary will seek the voluntary cooperation of all persons to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take and record testimony or statements of persons reasonably necessary for the furtherance of the investigation.

(b) The Assistant Secretary and the respondent may conduct discovery in aid of the investigation by the same methods and to the same extent that parties may conduct discovery in an administrative proceeding under 24 CFR Part 104, except that the Assistant Secretary shall have the power to issue subpoenas described in 24 CFR 104.590 in support of the investigation or at the request of the respondent. Subpoenas issued by the Assistant Secretary must be approved by the General Counsel as to their legality before issuance.

§ 103.220 Cooperation of Federal, State and local agencies.

The Assistant Secretary, in processing Fair Housing Act complaints, may seek the cooperation and utilize the services of Federal, State or local agencies, including any agency having regulatory or supervisory authority over financial institutions.

§ 103.225 Completion of investigation.

The investigation will remain open until the reasonable cause determination is made under § 103.400, or a conciliation agreement is executed and approved under § 103.310. Unless it is impracticable to do so, the Assistant Secretary will complete the investigation of the alleged discriminatory housing practice within 100 days of the filing of the complaint (or where the Assistant Secretary reactivates the complaint, within 100 days after service of the notice of reactivation under § 103.115). If the Assistant Secretary is unable to complete the investigation within the 100-day period, the Assistant Secretary will notify the aggrieved person and the respondent, by certified mail or personal service, of the reasons for the delay.

§ 103.230 Final investigative report.

(a) At the end of each investigation under this part, the Assistant Secretary will prepare a final investigative report. The investigative report will contain:

(1) The names and dates of contacts with witnesses, except that the report will not disclose the names of witnesses that request anonymity. HUD, however, may be required to disclose the names of such witnesses in the course of an administrative hearing under Part 104 or a civil action under Title VIII of the Fair Housing Act;

(2) A summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(3) A summary description of other pertinent records;

(4) A summary of witness statements; and

(5) Answers to interrogatories.

(b) A final investigative report may be amended at any time, if additional evidence is discovered.

(c) Notwithstanding the prohibitions and requirements with respect to disclosure of information contained in § 103.330, the Assistant Secretary will make information derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent. Following the completion of investigation, the Assistant Secretary shall notify the aggrieved person and the respondent that the final investigation report is complete and will be provided upon request.

Subpart E—Conciliation Procedures

§ 103.300 Conciliation.

(a) During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint.

(b) In conciliating a complaint, HUD will attempt to achieve a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as will assure the elimination of discriminatory housing practices, or the prevention of their occurrence, in the future.

(c) Generally, officers, employees, and agents of HUD engaged in the investigation of a complaint under this part will not participate or advise in the conciliation of the same complaint or in any factually related complaint. Where the rights of the aggrieved party and the respondent can be protected and the prohibitions with respect to the disclosure of information can be observed, the investigator may suspend fact finding and engage in efforts to resolve the complaint by conciliation.

§ 103.310 Conciliation agreement.

(a) The terms of a settlement of a complaint will be reduced to a written conciliation agreement. The conciliation agreement shall seek to protect the interests of the aggrieved person, other persons similarly situated, and the public interest. The types of relief that may be sought for the aggrieved person are described in § 103.315. The provisions that may be sought for the vindication of the public interest are described in § 103.320.

(b)(1) The agreement must be executed by the respondent and the complainant. The agreement is subject to the approval of the Assistant Secretary, who will indicate approval by signing the agreement. The Assistant Secretary will approve an agreement and, if the Assistant Secretary is the complainant, will execute the agreement, only if:

(i) The complainant and the respondent agree to the relief accorded the aggrieved person;

(ii) The provisions of the agreement will adequately vindicate the public interest; and

(iii) If the Assistant Secretary is the complainant, all aggrieved persons named in the complaint are satisfied with the relief provided to protect their interests.

(2) The General Counsel may issue a charge under § 103.405 if the aggrieved person and the respondent have executed a conciliation agreement that has not been approved by the Assistant Secretary.

§ 103.315 Relief sought for aggrieved persons.

(a) The following types of relief may be sought for aggrieved persons in conciliation:

(1) Monetary relief in the form of damages, including damages caused by humiliation or embarrassment, and attorney fees;

(2) Other equitable relief including, but not limited to, access to the dwelling at issue, or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief; or

(3) Injunctive relief appropriate to the elimination of discriminatory housing practices affecting the aggrieved person or other persons.

(b) The conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Arbitration may award appropriate relief as described in paragraph (a) of this section. The aggrieved person and the respondent may, in the conciliation agreement, limit the types of relief that may be awarded under binding arbitration.

§ 103.320 Provisions sought for the public interest.

The following are types of provisions may be sought for the vindication of the public interest:

(a) Elimination of discriminatory housing practices.

(b) Prevention of future discriminatory housing practices.

(c) Remedial affirmative activities to overcome discriminatory housing practices.

(d) Reporting requirements.

(e) Monitoring and enforcement activities.

§ 103.325 Termination of conciliation efforts.

(a) HUD may terminate its efforts to conciliate the complaint if the respondent fails or refuses to confer with HUD; the aggrieved person or the respondent fail to make a good faith effort to resolve any dispute; or HUD finds, for any reason, that voluntary agreement is not likely to result.

(b) Where the aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the alleged discriminatory housing practice, and the trial in the action has commenced, HUD will terminate conciliation unless the court specifically requests assistance from the Assistant Secretary.

§ 103.330 Prohibitions and requirements with respect to disclosure of information obtained during conciliation.

(a) Except as provided in paragraph (b) of this section and § 103.230(c), nothing that is said or done in the course of conciliation under this part may be made public or used as evidence in a subsequent administrative hearing under Part 104 or in civil actions under Title VIII of the Fair Housing Act, without the written consent of the persons concerned.

(b) Conciliation agreements shall be made public, unless the aggrieved person and respondent request nondisclosure and the Assistant Secretary determines that disclosure is not required to further the purposes of the Fair Housing Act. Notwithstanding a determination that disclosure of a conciliation agreement is not required, the Assistant Secretary may publish tabulated descriptions of the results of all conciliation efforts.

§ 103.335 Review of compliance with conciliation agreements.

HUD may, from time to time, review compliance with the terms of any conciliation agreement. Whenever HUD has reasonable cause to believe that a respondent has breached a conciliation agreement, the General Counsel shall refer the matter to the Attorney General with a recommendation for the filing of a civil action under section 814(b)(2) of the Fair Housing Act for the enforcement of the terms of the conciliation agreement.

Subpart F—Issuance of Charge

§ 103.400 Reasonable cause determination.

(a) If a conciliation agreement under § 103.310 has not been executed by the complainant and the respondent, and approved by the Assistant Secretary, the General Counsel, within the time limits set forth in paragraph (c) of this section, shall determine whether, based on the totality of the factual circumstances known at the time of the decision, reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. The reasonable cause determination will be based solely on the facts concerning the alleged discriminatory housing practice, provided by complainant and respondent and otherwise, disclosed during the investigation. In making the reasonable cause determination, the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court.

(1) In all cases not involving the legality of local zoning or land use laws or ordinances:

(i) If the General Counsel determines that reasonable cause exists, the General Counsel will immediately issue a charge under § 103.405 on behalf of the aggrieved person, and shall notify the aggrieved person and the respondent of this determination by certified mail or personal service.

(ii) If the General Counsel determines that no reasonable cause exists, the General Counsel shall: issue a short and plain written statement of the facts upon which the General Counsel has based the no reasonable cause determination; dismiss the complaint; notify the aggrieved person and the respondent of the dismissal (including the written statement of facts) by certified mail or personal service; and make public disclosure of the dismissal. Public disclosure of the dismissal shall be by issuance of a press release, except that the respondent may request that no release be made. Notwithstanding a respondent's request that no press release be issued, the fact of the dismissal, including the names of the parties, shall be public information available on request.

(2) If the General Counsel determines that the matter involves the legality of local zoning or land use laws or ordinances, the General Counsel, in lieu of making a determination regarding reasonable cause, shall refer the investigative materials to the Attorney General for appropriate action under section 814(b)(1) of the Fair Housing Act, and shall notify the aggrieved person and the respondent of this action by certified mail or personal service.

(b) The General Counsel may not issue a charge under paragraph (a) of this section regarding an alleged discriminatory housing practice, if an aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the alleged discriminatory housing practice, and the trial in the action has commenced. If a charge may not be issued because of the commencement of such a trial, the General Counsel will so notify the aggrieved person and the respondent by certified mail or personal service.

(c)(1) The General Counsel shall make the reasonable cause determination after the Assistant Secretary forwards the matter for consideration. The General Counsel shall make a reasonable cause determination within 100 days after filing of the complaint (or where the Assistant Secretary has reactivated a complaint, within 100 days after service of the notice of reactivation under § 103.115), unless it is impracticable to do so.

(2) If the General Counsel is unable to make the determination within the 100-day period specified in paragraph (c)(1) of this section, the Assistant Secretary will notify the aggrieved person and the respondent, by certified mail or personal service, of the reasons for the delay.

§ 103.405 Issuance of charge.

(a) A charge:

(1) Shall consist of a short and plain written statement of the facts upon which the General Counsel has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(2) Shall be based on the final investigative report; and

(3) Need not be limited to facts or grounds that are alleged in the complaint filed under Subpart B of this part. If the charge is based on grounds that are alleged in the complaint, HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

(b) Within three business days after the issuance of the charge, the General Counsel shall:

(1) Obtain a time and place for hearing from the Chief Docket Clerk of the Office of Administrative Law Judges;

(2) File the charge along with the notifications described in § 104.410(b) with the Office of Administrative Law Judges;

(3) Serve the charge and notifications in accordance with 24 CFR 104.40; and

(4) Notify the Assistant Secretary of the filing of the charge.

§ 103.410 Election of civil action or provision of administrative proceeding.

(a) If a charge is issued under § 103.405, a complainant (including the Assistant Secretary, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint is filed may elect, in lieu of an administrative proceeding under 24 CFR Part 104, to have the claims asserted in the charge decided in a civil action under section 812(o) of the Fair Housing Act.

(b) The election must be made not later than 20 says after the receipt of service of the charge, or in the case of the Assistant Secretary, not later than 20 days after service. The notice of the election must be filed with the Chief Docket Clerk in the Office of Administrative Law Judges and served on the General Counsel, the Assistant Secretary, the respondent, and the aggrieved persons on whose behalf the complaint was filed. The notification will be filed and served in accordance with the procedures established under 24 CFR Part 104.

(c) If an election is not made under this section, the General Counsel will maintain an administrative proceeding based on the charge in accordance with the procedures under 24 CFR Part 104.

(d) If an election is made under this section, the General Counsel shall immediately notify and authorize the Attorney General to commence and maintain a civil action seeking relief under section 812(o) of the Fair Housing Act on behalf of the aggrieved person in an appropriate United States District Court. Such notification and authorization shall include transmission of the file in the case, including a copy of the final investigative report and the charge, to the Attorney General.

(e) The General Counsel shall be available for consultation concerning

any legal issues raised by the Attorney General as to how best to proceed in the event that a new court decision or newly discovered evidence is regarded as relevant to the reasonable cause determination.

Subpart G—Prompt Judicial Action

§ 103.500 Prompt judicial action.

(a) If at any time following the filing of a complaint, the General Counsel concludes that prompt judicial action is necessary to carry out the purposes of this part or 24 CFR Part 104, the General Counsel may authorize the Attorney General to commence a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint. To ensure the prompt initiation of the civil action, the General Counsel will consult with the Assistant Attorney General for the Civil Rights Division before making the determination that prompt judicial action is necessary. The commencement of a civil action by the Attorney General under this section will not affect the initiation or continuation of proceedings under this part or administrative proceedings under Part 104.

(b) If the General Counsel has reason to believe that a basis exists for the commencement of proceedings against the respondent under section 814(a) of the Fair Housing Act (Pattern or Practice Cases), proceedings under section 814(c) of the Fair Housing Act (Enforcement of Subpoenas), or proceedings by any governmental licensing or supervisory authorities, the General Counsel shall transmit the information upon which that belief is based to the Attorney General and to other appropriate authorities.

Subpart H—Other Action

§ 103.510 Other action by HUD.

In addition to the actions described in § 103.500, HUD may pursue one or more of the following courses of action:

(a) Refer the matter to the Attorney General for appropriate action (e.g., enforcement of criminal penalties under section 811(c) of the Act).

(b) Take appropriate steps to initiate proceedings leading to the debarment of the respondent under 24 CFR Part 24, or initiate other actions leading to the imposition of administrative sanctions where HUD determines that such actions are necessary to the effective operation and administration of Federal programs or activities.

(c) Take appropriate steps to initiate proceedings under:

(1) 24 CFR Part 1, implementing Title VI of the Civil Rights Act of 1964;

(2) 24 CFR 570.912, implementing section 109 of the Housing and Community Development Act of 1974;

(3) 24 CFR Part 8, implementing section 504 of the Rehabilitation Act of 1973;

(4) 24 CFR Part 107, implementing Executive Order 11063; or

(5) The Age Discrimination Act, 42 U.S.C. 6101.

(d) Inform any other Federal, State or local agency with an interest in the enforcement of respondent's obligations with respect to nondiscrimination in housing.

§ 103.515 Action by other agencies.

In accordance with section 808 (d) and (e) of the Fair Housing Act and Executive Order No. 12259, other Federal agencies, including any agency having regulatory or supervisory authority over financial institutions, are responsible for ensuring that their programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing, and for cooperating with the Assistant Secretary in furthering the purposes of the Fair Housing Act.

5. A new Part 104 is added to read as follows:

PART 104—ADMINISTRATIVE PROCEEDINGS UNDER SECTION 812 OF THE FAIR HOUSING ACT

Subpart A—General information

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104.10 Scope.
104.20 Definitions.
104.30 Time computations.
104.40 Service and filing.

Subpart B—Administrative Law Judge

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104.500 Discovery.
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104.540 Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examinations.
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104.590 Subpoenas.

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104.600 Prehearing statements.
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Subpart H—Hearing procedures

104.700 Date and place of hearing.
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104.730 Evidence.
104.740 In camera and protective orders.
104.750 Exhibits.
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Subpart I—Dismissals and Decisions

104.900 Dismissal.
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Subpart J—Judicial Review and Enforcement of Final Decision

104.950 Judicial Review of Final Decision.
104.955 Enforcement of Final Decision.

Authority: Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3600–3620); section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General Information

§ 104.10 Scope.

(a) *Applicability.* This part contains the rules of practice and procedure established by the Department of Housing and Urban Development for administrative proceedings before an Administrative Law Judge adjudicating the claims asserted in a charge issued under 24 CFR Part 103, where no party—the complainant, the respondent, or an aggrieved party—elects to have the claims decided in a civil action under section 812(o) of the Fair Housing Act.

(b) *General application of rules.* Hearings under this subpart shall be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights of the parties

to obtain a fair hearing and a complete record.

(c) *Conduct of proceedings.* The Department will reasonably accommodate persons with disabilities who are participants in the hearing process or interested members of the general public.

§ 104.20 Definitions.

Aggrieved person includes any person who:

(a) Claims to have been injured by a discriminatory housing practice; or

(b) Believes that such person will be injured by a discriminatory housing practice that is about to occur.

Attorney General means the Attorney General of the United States.

Complainant means the person (including the Assistant Secretary for Fair Housing and Equal Opportunity) who filed the complaint under 24 CFR Part 103.

Complaint means a complaint filed under 24 CFR Part 103.

Charge means the statement of facts issued under 24 CFR 103.405 upon which HUD has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur.

Discriminatory housing practice means an act that is unlawful under section 804, 805, 806 or 818 of the Fair Housing Act.

Fair Housing Act means Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3600–3620.

General Counsel means the General Counsel of HUD.

Hearing means that part of an administrative proceeding that involves the submission of evidence, either by oral presentation or written submission, and includes the submission of briefs and oral arguments on the evidence and applicable law.

HUD means the United States Department of Housing and Urban Development.

Party means a person or agency named or admitted as a party to a proceeding. Party includes an aggrieved person who intervenes under § 104.430.

Person includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers and fiduciaries.

Personal service means handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business, residence or usual place of abode of the person to be served.

Prevailing party has the same meaning as the term has in section 722 of the Revised Statutes of the United States (42 U.S.C. 1988).

Respondent means the person accused in a charge of discriminatory housing practice.

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

§ 104.30 Time computations.

(a) *In general.* In computing time under this part, the time period begins the day following the act, event, or default and includes the last day of the period, unless the last day is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which case the time period includes the next business day. When the prescribed time period is seven days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

(b) *Modification of time periods.* Except for time periods required by statute, the administrative law judge may enlarge or reduce any time period required under this part where necessary to avoid prejudicing the public interest or the rights of the parties.

(c) *Entry of orders.* In computing any time period involving the date of the issuance of an order or decision by an administrative law judge, the date of issuance is the date the order or decision is served by the Chief Docket Clerk.

(d) *Computation of time for delivery by mail.* (1) Documents are not filed until received by the Chief Docket Clerk. However, when documents are filed by mail, three days shall be added to the prescribed time period.

(2) Service is effected at the time of mailing.

(3) When a party has the right or is required to take an action within a prescribed period after the service of a document upon the party, and the document is served by mail, three days shall be added to the prescribed period.

§ 104.40 Service and filing.

(a) *Generally.* Copies of all filed documents shall be served on all parties of record. All filed documents shall clearly designate the docket number, if any, and title of the proceeding. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges, Room 2158, 451 Seventh Street, SW., Washington, DC 20410.

(b) *By parties.* Parties shall file all documents with the Office of Administrative Law Judges with a copy to all other parties of record. Service of documents upon any party may be made by personal service or by mailing a copy to the last known address. When a party is represented by an attorney, service shall be made upon the attorney. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* The Office of Administrative Law Judges shall serve all notices, orders, decisions and all other documents by mail to the last known address.

Subpart B—Administrative Law Judge

§ 104.100 Designation.

Proceedings under this part shall be presided over by an administrative law judge appointed under 5 U.S.C. 3105. The presiding administrative law judge shall be designated by the chief administrative law judge at HUD.

§ 104.110 Authority.

The administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings including, but not limited to, the power:

(a) To conduct hearings in accordance with this part.

(b) To administer oaths and affirmations and examine witnesses.

(c) To issue subpoenas in accordance with § 104.590.

(d) To rule on offers of proof and receive evidence.

(e) To take depositions or have depositions taken when the ends of justice would be served.

(f) To regulate the course of the hearing and the conduct of parties and their counsel.

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties.

(h) To dispose of motions, procedural requests, and similar matters.

(i) To make initial decisions as described under Subpart I of this Part.

(j) To exercise such powers vested in the Secretary as are necessary and appropriate for the purpose of the hearing and conduct of the proceeding.

§ 104.120 Disqualification.

(a) *Disqualification.* If an administrative law judge finds that there is a basis for his or her disqualification in a proceeding, the Administrative law judge shall withdraw from the proceeding. Withdrawal is

accomplished by entering a notice in the record and by providing a copy of the notice to the chief administrative law judge.

(b) *Motion for recusal.* If a party believes that the presiding administrative law judge should be disqualified in a proceeding for any reason, the party may file a motion to recuse with the administrative law judge. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The administrative law judge shall rule on the motion. If the administrative law judge denies the motion, the administrative law judge shall incorporate a written statement of the reasons for the denial in the record.

(c) *Redesignation of administrative law judge.* If an administrative law judge is disqualified, the chief administrative law judge shall designate another administrative law judge to preside over further proceedings.

§ 104.130 Ex Parte communications.

(a) *General.* An ex parte communication is any direct or indirect communication concerning the merits of a pending proceeding, made by a party in the absence of any other party, to the administrative law judge assigned to the proceeding and which was neither on the record nor on reasonable prior notice to all parties. Ex parte communications do not include communications made for the sole purpose of scheduling hearings, requesting extensions of time, or requesting information on the status of cases.

(b) *Prohibition.* Ex parte communications are prohibited.

(c) *Procedure upon receipt.* If the administrative law judge receives an ex parte communication that the administrative law judge knows or has reason to believe is prohibited, the administrative law judge shall promptly place the communication, or a written statement of the substance of the communication, in the record and shall furnish copies to all parties. Unauthorized communications shall not be taken into consideration in deciding any matter in issue. Any party making a prohibited ex parte communication may be subject to sanctions including, but not limited to, exclusion from the proceeding, and adverse ruling on the issue that is the subject of the prohibited communication.

§ 104.140 Separation of functions.

No officer, employee, or agent of the Federal Government engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding shall, in that proceeding or any factually related proceeding under this part, participate or advise in the decision of the administrative law judge, except as a witness or counsel during the proceedings.

Subpart C—Parties

§ 104.200 In general.

(a) *Parties.* Parties to the proceeding include:

(1) HUD. HUD files the charge under 24 CFR 103.405 seeking appropriate relief for an aggrieved party and vindication of the public interest.

(2) Respondent. A respondent is a person named in the charge issued under 24 CFR 103.405 against whom relief is sought.

(3) Intervenors. Any aggrieved person may file a request for intervention under § 104.430. Intervention shall be permitted if the request is timely and;

(i) The intervenor is the aggrieved person on whose behalf the charge is issued; or

(ii) The intervenor is an aggrieved person who claims an interest in the property or transaction that is the subject of the charge and the disposition of the charge may as a practical matter impair or impede the aggrieved person's ability to protect that interest, unless the aggrieved person is adequately represented by the existing parties.

(b) *Rights of parties.* Each party may appear in person, be represented by counsel, examine or cross-examine witnesses, introduce documentary or other relevant evidence into the record, and request the issuance of subpoenas.

(c) *Amicus Curiae.* Briefs of amicus curiae may be permitted at the discretion of the administrative law judge. Such participants are not parties to the proceeding.

§ 104.210 Representation.

(a) *Representation of HUD.* HUD is represented by the General Counsel.

(b) *Representation of other parties.* Other parties may be represented as follows:

(1) Individuals may appear on their own behalf.

(2) A member of a partnership may represent the partnership.

(3) An officer of a corporation, trust or association may represent the corporation, trust or association.

(4) An Officer or employee of any governmental unit, agency or authority may represent that unit, agency or authority.

(5) An attorney admitted to practice before a Federal Court or the highest court in any State. The attorney's representation that he or she is in good standing before any of these courts is sufficient evidence of the attorney's qualifications under this section, unless otherwise ordered by the administrative law judge.

(c) *Notice of appearance.* Each attorney or other representative of a party shall file a notice of appearance. The notice must indicate the party of whose behalf the appearance is made. Any individual acting in a representative capacity may be required by the administrative law judge to demonstrate authority to act in that capacity.

(d) *Withdrawal.* An attorney or other representative of a party must file a written notice of intent before withdrawing from participation in the proceeding.

§ 104.220 Standards of conduct.

(a) *In general.* All persons appearing in proceedings under this part shall act with integrity and an ethical manner.

(b) *Exclusion.* The administrative law judge may exclude parties or their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violations of the prohibitions against ex parte communications. If an attorney is suspended or barred from participation in a proceeding by an administrative law judge, the administrative law judge shall include in the record the reasons for the action. An attorney that is suspended or barred from participation may appeal to the chief administrative law judge. The proceeding will not be delayed or suspended pending disposition on the appeal, except that the administrative law judge shall suspend the proceeding for a reasonable time to enable the party to obtain another attorney.

Subpart D—Pleadings and motions

§ 104.00 In general.

(a) *Form.* Every pleading, motion, brief, or other document shall contain a caption setting forth the title of the proceeding, the docket number assigned by the Office of Administrative Law Judges, and the designation of the type of document (*e.g.*, charge, answer or motion to dismiss).

(b) *Signature.* Every pleading, motion, brief, or other document filed by a party shall be signed by the party, the party's representative, or the attorney representing the party, and must include the signer's address and telephone number. The signature constitutes a

certification that the signer has read the document; that to the best of the signer's knowledge, information and belief there is good ground to support the document; and that it is not interposed for delay.

(c) *Timely filing.* The administrative law judge may refuse to consider any motion or other pleading that is not filed in a timely fashion and in compliance with this part.

§ 104.410 The charge.

(a) *Filing and service.* Within three days after the issuance of a charge under 24 CFR 103.405, the General Counsel shall file the charge with the Chief Docket Clerk in the Office of Administrative Law Judges and serve copies (with the additional information required under paragraph (b) of this section) on the respondent and the aggrieved person on whose behalf the complaint was filed.

(b) *Contents.* The charge shall consist of a short and plain written statement of the facts upon which the General Counsel has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur. The following notifications shall be served with the charge:

(1) The notice shall state that a complainant (including HUD, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint was filed may elect to have the claims asserted in the charge decided in a civil action under section 812(o) of the Act, in lieu of an administrative proceeding under this part. The notice shall state that the election must be made not later than 20 days after the receipt of the service of the charge. Where HUD is the complainant, the Assistant Secretary must make the election not later than 20 days after the service of the charge. The notice shall state that the notification of the election must be served on the Chief Docket Clerk in the Office of Administrative Law Judges, the respondent, the aggrieved party on whose behalf the complaint was filed, the Assistant Secretary and the General Counsel.

(2) The notice shall state that if no person timely elects under paragraph (b)(1) of this section to have the claims asserted in the charge decided in a civil action under section 812(o) of the Act, an administrative proceeding will be conducted. The notice shall state that if an administrative hearing is conducted:

(i) The parties will have an opportunity for a hearing at a date and place specified in the notice.

(ii) The respondent will have an opportunity to file an answer to the charge within 30 days of the date of service of the charge.

(iii) The aggrieved person may participate as a party to the administrative proceeding by filing a timely request for intervention.

(iv) All discovery must be concluded 15 days before the date set for hearing.

(3) The notice shall state that if at any time following the service of the charge on the respondent, the respondent intends to enter into a contract, sale, encumbrance, or lease with any person regarding the property that is the subject of the charge, the respondent must provide a copy of the charge to the person before the respondent and the person enter into the contract, sale, encumbrance or lease.

§ 104.20 Answer to charge.

Within the 30 days after the service of the charge, a respondent contesting material facts alleged in a charge or contending that the respondent is entitled to judgement as a matter of law shall file an answer to the charge. An answer shall include:

(a) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny, each allegation made in the charge. A statement of lack of information shall have the effect of a denial. Any allegation that is not denied shall be deemed to be admitted.

(b) A statement of each affirmative defense and a statement of facts supporting each affirmative defense.

§ 104.30 Request for intervention.

Upon timely application, any aggrieved person may file a request for intervention to participate as a party to the proceeding. Requests for intervention submitted within 30 days after the filing of the charge shall be considered to be timely filed.

§ 104.440 Amendments and supplemental pleadings.

(a) *Amendments*—(1) By right. HUD may amend its charge once as a matter of right prior to filing of the answer.

(2) *By leave.* Upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, the administrative law judge may allow amendments to pleadings upon motion of the party.

(3) *Conformance to the evidence.* When issues not raised by the pleadings are reasonably within the scope of the original charge and have been tried by the express or implied consent of the parties, the issues shall be treated in all respects as if they had been raised in the pleadings and amendments may be made as necessary to make the pleading conform to evidence.

(b) *Supplemental pleadings.* The administrative law judge may, upon reasonable notice, permit supplemental pleadings concerning transactions, occurrences or events that have happened or been discovered since the date of the pleadings and which are relevant to any of the issues involved.

§ 104.450 Motions.

(a) *Motions.* Any application for an order or other request shall be made by a motion which, unless made during an appearance before the administrative law judge, shall be made in writing. Motions or requests made during an appearance before the administrative law judge shall be stated orally and made a part of the transcript. All parties shall be given a reasonable opportunity to respond to written or oral motions or requests.

(b) *Answers to written motions.* Within five days after a written motion is served, any party to the proceeding may file an answer in support of, or in opposition to the motion. Unless otherwise ordered by the administrative law judge, no further responsive documents may be filed.

(c) *Oral argument.* The administrative law judge may order oral argument on any motion.

Subpart E—Discovery

§ 104.500 Discovery.

(a) *In general.* This subpart governs discovery in aid of administrative proceedings under this Part. Except for time periods stated in these rules, to the extent that these rules conflict with discovery procedures in aid of civil actions in the United States District Court for the District in which the investigation of the discriminatory housing practice took place, the rules of the United States District Court apply.

(b) *Scope.* The parties are encouraged to engage in voluntary discovery procedures. Discovery shall be conducted as expeditiously and inexpensively as possible, consistent with the needs of all parties to obtain relevant evidence. Unless otherwise ordered by the administrative law judge, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of documents or persons having knowledge of any discoverable matter. It is not grounds for objection that information sought will not be admissible if the information

sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Methods.* Parties may obtain discovery by one or more of the following methods:

(1) Deposition upon oral examination or written questions.

(2) Written interrogatories.

(3) Requests for the production of documents or other evidence, for inspection and other purposes, and physical and mental examinations.

(4) Requests for admissions.

(d) *Frequency and sequence.* Unless otherwise ordered by the administrative law judge or restricted by this subpart, the frequency or sequence of these methods is not limited.

(e) *Completion of discovery.* All discovery shall be completed 15 days before the date scheduled for hearing.

(f) *Not intervening aggrieved person.* For the purposes of obtaining discovery from a non-intervening aggrieved person, the term "party" as used in this subpart includes the aggrieved person on whose behalf the charge was issued.

§ 104.510 Depositions.

(a) *In general.* Depositions may be taken upon oral examination or upon written interrogatory before any person having the power to administer oaths.

(b) *Notice.* Any party desiring to take the deposition of a witness shall indicate to the witness and to all parties the time and place of the deposition, the name and post office address of the person before whom the deposition is to be taken, the name and address of the witness, and the subject matter of the testimony of the witness. Notice of the taking of a deposition shall be given not less than five days before the deposition is scheduled. The attendance of a witness may be compelled by subpoena under § 104.590.

(c) *Procedure at deposition.* Each witness deposed shall be placed under oath or affirmation, and other parties shall have the right to cross-examine. The questions propounded and all answers and objections made to the propounded questions shall be reduced to writing; read by or to, and subscribed by, the witness; and certified by the person before whom the deposition was taken.

(d) *Objections.* During a deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party, or improper questioning or conduct. Upon the request for suspension, the deposition will be adjourned. The objecting party or deponent must immediately move the administrative law judge for a ruling on the objections. The administrative law judge may then limit the scope or manner of taking the deposition.

(e) *Payment of costs of deposition.* The party requesting the deposition shall bear all costs of the deposition.

§ 104.520 Use of deposition at hearings.

(a) *In general.* At the hearing, any part or all of a deposition, so far as admissible under the Federal Rules of Evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice of the taking of the deposition, in accordance with the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of expert witnesses, may be used by any party for any purpose, unless the administrative law judge rules that such use is unfair or a violation of due process.

(3) The deposition of a party or of anyone who at the time of the taking of the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association that is a party, may be used by any other party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the administrative law judge finds:

(i) That the witness is dead;

(ii) That the witness is out of the United States or more than 100 miles from the place of hearing, unless it appears that the absence of the witness was procured by the party offering the deposition;

(iii) That the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment;

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Whenever exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(5) If a part of a deposition is offered in evidence by a party, any other party may require the party to introduce all of the deposition that is relevant to the part introduced. Any party may introduce any other part of the deposition.

(6) Substitution of parties does not affect the right to use depositions previously taken. If a proceeding has been dismissed and another proceeding involving the same subject matter is later brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former proceeding may be used in the latter proceeding.

(b) *Objections to admissibility.* Except as provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part of a deposition for any reason that would require the exclusion of the evidence if the witness were present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the basis of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless reasonable objection is made at the taking of the deposition.

(3) Objections to the form of written interrogatories are waived unless served in writing upon the party propounding the interrogatories.

§ 104.530 Written interrogatories.

(a) *Written interrogatories to parties.* Any party may serve on any other party written interrogatories to be answered by the party served. If the party served is a public or private corporation, a partnership, an association, or a governmental agency, the interrogatories may be answered by any authorized officer or agent who shall furnish such information as may be available to the party. A party may serve not more than 30 written interrogatories on another party without an order of the administrative law judge.

(b) *Responses to written interrogatories.* Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless the party objects to the interrogatory. If a party objects to an interrogatory, the response shall state the reasons for the objection in lieu of an answer. The answer and objections shall be signed by the person making them, except that objections may be signed by the counsel for the party. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties within 15 days after service of the interrogatories.

§ 104.540 Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examinations.

(a) *In general.* Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on the party's behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served;

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, photographing, testing, or other purposes stated in paragraph (a)(1) of this section; or

(3) Submit to a physical or mental examination by a physician.

(b) *Contents of request.* The request shall:

(1) Set forth the items to be inspected by individual item or by category of items;

(2) Describe each item or category with reasonable particularity;

(3) Specify a reasonable time, place and manner for making the inspection and performing the related acts; and

(4) Specify the time, place, manner, conditions, and scope of the physical or mental examination, and the person or persons who will make the examination. A report of the examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure.

(c) *Response to request.* Within 15 days of the service of the request, the party upon whom the request is served shall serve a written response on the party submitting the request. The response shall state, with regard to each item or category:

(1) That inspection and related activities will be permitted as requested; or

(2) That objection is made to the request in whole or in part. If an objection is made, the response must state the reasons for the objection.

§ 104.550 Admissions.

(a) *Request for admissions.* A party may serve on any other party a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) *Response to request.* (1) Each matter for which an admission is requested is admitted unless, within 15 days after service of the request, the party to whom the request is directed serves on the requesting party:

(i) A written statement specifically denying the relevant matters for which an admission is requested;

(ii) A written statement setting forth in detail why the party cannot truthfully admit or deny the matters; or

(iii) Written objections to the request alleging that the matters are privileged or irrelevant, or that the request is otherwise improper.

(2) The party to whom the request is directed may not give lack of information or knowledge as a reason for failure to admit or deny, unless the party states that it has made a reasonable inquiry and that the information known or readily obtainable is insufficient to enable the party to admit or deny.

(c) *Sufficiency or response.* The party requesting admissions may move for a determination of the sufficiency of the answers or objections. Unless the administrative law judge determines that an objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, the administrative law judge may order either that the matter is admitted or that an amended answer be served.

(d) *Effect of admission.* Any matter admitted under this section is conclusively established unless, upon the motion of a party, the administrative law judge permits the withdrawal or amendment of the admission. Any admission made under this section is made for the purposes of the pending proceeding only, is not an admission by the party for any other purpose, and may not be used against the party in any other proceeding.

(e) *Service of requests.* Each request for admission and each written response must be served on all parties and filed with the Office of administrative law judges.

§ 104.560 Supplementation of responses.

(a) *In general.* A party who responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired after the response was made except:

(1) A party is under a duty to timely supplement responses with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the expert witness is expected to testify, and the substance of the testimony.

(2) A party is under a duty to timely amend a previous response if the party later obtains information upon the basis of which:

(i) The party knows the response was incorrect when made; or

(ii) The party knows the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

(b) *By order or agreement.* A duty to supplement responses may be imposed by order of the administrative law judge or by agreement of the parties.

§ 104.570 Protective orders.

Upon motion of a party or a person from whom discovery is sought or in accordance with § 104.580(c), the administrative law judge may make appropriate orders to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense as a result of the requested discovery request. The order may direct that:

(a) The discovery may not be had;

(b) The discovery may be had only on specified terms and conditions, including a designation of time and place for discovery;

(c) The discovery may be had by a method of discovery other than that selected by the party seeking discovery;

(d) Certain irrelevant matters may not be the subject of discovery, or that the scope of discovery be limited to certain matters;

(e) Discovery may be conducted with no one present other than persons designated by the administrative law judge;

(f) A trade secret or other confidential research, development or commercial information may not be disclosed, or may be disclosed only in a designated way; or

(g) To protect privileged matters, the administrative law judge may take such other action permitted under § 104.740.

§ 104.580 Failure to make or cooperate in discovery.

(a) *Motion to compel discovery.* If a deponent fails to answer a question propounded, or a party upon whom a request is made under §§ 104.530 through 104.550 fails to respond adequately, objects to a request, or fails to permit inspection as requested, the discovering party may move the administrative law judge for an order

compelling a response or an inspection in accordance with the request. The motion shall:

(1) State the nature of the request;

(2) Set forth the response or objection of the party upon whom the request was served;

(3) Present arguments supporting the motion; and

(4) Attach copies of all relevant discovery requests and responses.

(b) *Evasive or incomplete answers.* For the purposes of this section, an evasive or incomplete answer or response will be treated as a failure to answer or respond.

(c) *Administrative law judge ruling.* In ruling on a motion under this section, the administrative law judge may enter an order compelling a response or an inspection in accordance with the request, may issue sanctions under paragraph (d) of this section, or may enter a protective order under § 104.570.

(d) *Sanctions.* If a party fails to comply with an order (including an order for taking a deposition, the production of evidence within the party's control, a request for admission, or the production of witnesses) the administrative law judge may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought;

(3) Permit the requesting party to introduce secondary evidence concerning the information sought;

(4) Strike any appropriate part of the pleadings or other submissions of the party failing to comply with such order; or

(5) Take such other action as may be appropriate.

Subpart F—Subpoenas

§ 104.590 Subpoenas

(a) *In general.* This section governs the issuance of subpoenas in administrative proceedings under this part. Except for time periods stated in these rules, to the extent that this rule conflicts with procedures for the issuance of subpoenas in civil actions in the United States District Court for the District in which the investigation of the discriminatory housing practice took place, the rules of the United States District Court apply.

(b) *Issuance of subpoena.* Upon the written request of a party, the chief administrative law judge or the presiding administrative law judge may issue a subpoena requiring:

(1) The attendance of a witness for the purpose of giving testimony at a deposition;

(2) The attendance of a witness for the purpose of giving testimony at a hearing; and

(3) The production of relevant books, papers, documents or tangible things.

(c) *Time of request.* Requests for subpoenas in aid of discovery must be submitted in time to permit the conclusion of discovery 15 days before the date scheduled for the hearing. If a request for subpoenas of a witness for testimony at a hearing is submitted three days or less before the hearing, the subpoena shall be issued at the discretion of the chief administrative law judge or the presiding administrative law judge, as appropriate.

(d) *Service.* A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service on a person shall be made by delivering a copy of the subpoena to the person and by tendering witness fees and mileage to that person. When the subpoena is issued on behalf of HUD, witness fees and mileage need not be tendered with the subpoena.

(e) *Amount of witness fees and mileage.* A witness summoned by a subpoena issued under this part is entitled to the same witness and mileage fees as a witness in proceedings in United States District Courts. Fees payable to a witness summoned by a subpoena shall be paid by the party requesting the issuance of the subpoena, or where the administrative law judge determines that a party is unable to pay the fees, the fees shall be paid by the Department.

(f) *Motion to quash or limit subpoena.* Upon a motion by the person served with a subpoena or by a party, made within five days of the service of the subpoena (but in any event not less than the time specified in the subpoena for compliance), the administrative law judge may:

(1) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; or

(2) condition denial of the motion upon the advancement, by the party on whose behalf the subpoena was issued, of the reasonable cost of producing subpoenaed books, papers or documents. Where the circumstances require, the administrative law judge may act upon such a motion at any time after a copy of the motion has been served upon the party on whose behalf the subpoena was isssued.

(g) *Failure to comply with subpoena.* If a person fails to comply with a subpoena issued under this section, the party requesting the subpoena may refer the matter to the Attorney General for enforcement in appropriate proceedings under section 814(c) of the Fair Housing Act.

Subpart G—Prehearing Procedures

§ 104.600 Prehearing statements.

(a) *In general.* Before the commencement of the hearing, the administrative law judge may direct parties to file prehearing statements.

(b) *Contents of statement.* The prehearing statement must state the name of the party or parties presenting the statement and, unless otherwise directed by the administrative law judge, briefly set forth the following:

(1) Issues involved in the proceeding.

(2) Facts stipulated by the parties and a statement that the parties have made a good faith effort to stipulate to the greatest extent possible.

(3) Facts in dispute.

(4) Witnesses (together with a summary of the testimony expected) and exhibits to be presented at the hearing.

(5) A brief statement of applicable law.

(6) Conclusions to be drawn.

(7) Estimated time required for presentation of the party's case.

(8) Such other information as may assist in the disposition of the proceeding.

§ 104.610 Prehearing conference.

(a) *In general.* Before the commencement or during the course of the hearing, the administrative law judge may direct the parties to participate in a conference to expedite the hearing.

(b) *Matters considered.* At the conference, the following matters may be considered:

(1) Simplification and clarification of the issues.

(2) Necessary amendments to the pleadings.

(3) Stipulations of fact and of the authenticity, accuracy, and admissibility of documents.

(4) Limitations on the number of witnesses.

(5) Negotiation, compromise, or settlement of issues.

(6) The exchange of proposed exhibits.

(7) Matters of which official notice will be requested.

(8) A schedule for the completion of actions discussed at the conference.

(9) Such other information as may assist in the disposition of the proceeding.

(c) *Conduct of conference.* The conference may be conducted by telephone, correspondence or personal attendance. Conferences, however, shall generally be conducted by a conference call, unless the administrative law judge determines that this method is impracticable. The administrative law judge shall give reasonable notice of the time, place and manner of the conference.

(d) *Record of conference.* Unless otherwise derected by the administrative law judge, the conference will not be stenographically recorded. The administrative law judge will reduce the actions taken at the conference to a written order or, if the conference takes place less than seven days before the beginning of the hearing, may make a statement on the record summarizing the actions taken at the conference.

§ 104.620 Settlement negotiations before a settlement judge.

(a) *Appointment of settlement judge.* The administrative law judge, upon the motion of a party or upon his or her own motion, may request the chief administrative law judge to appoint another administrative law judge to conduct settlement negotiations. The order appointing the settlement judge may confine the scope of settlement negotiations to specified issues. The order shall direct the settlement judge to report to the chief administrative law judge within specified time periods.

(b) *Duties of settlement judge.* (1) The settlement judge shall convene and preside over conferences and settlement negotiations between the parties and assess the practicalities of a potential settlement.

(2) The settlement judge shall report to the chief administrative law judge describing the status of the settlement negotiations, evaluating settlement prospects, and recommending the termination or continuation of the settlement negotiations.

(c) *Termination of settlement negotiations.* Settlement negotiations shall terminate upon the order of the chief administrative law judge issued after consultation with the settlement judge. The conduct of settlement negotiations shall not unduly delay the commencement of the hearing.

Subpart H—Hearing Procedures

§ 104.700 Date and place of hearing.

(a) *Date.* The hearing shall commence not later than 120 days following the issuance of the charge under § 103.405, unless it is impracticable to do so. If the hearing cannot be commenced within this time period, the administrative law judge shall notify in writing all parties, the aggrieved persons on whose behalf the charge was filed, and the Assistant Secretary, of the reasons for the delay.

(b) *Place.* The hearing will be conducted at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

(c) *Notification of time and place for hearing.* The charge issued under 24 CFR 103.405 will specify the time, date and place for the hearing. The administrative law judge may change the time, date or place of the hearing, or may temporarily adjourn or continue a hearing for good cause shown. If such a change is made or the hearing is temporarily adjourned, the administrative law judge shall give the parties at least five days notice of the revised time, date and place for the hearing, unless otherwise agreed by the parties.

§ 104.710 Conduct of hearings.

The hearing shall be conducted in accordance with the Administrative Procedure Act (5 U.S.C. 551–559).

§ 104.720 Waiver of right to appear.

If all parties waive their right to appear before the administrative law judge or to present evidence and arguments, it is not necessary for the administrative law judge to conduct an oral hearing. Such waivers shall be made in writing and filed with the administrative law judge. Where waivers are submitted by all parties, the administrative law judge shall make a record of the relevant written evidence submitted by the parties and pleadings submitted by the parties with respect to the issues in the proceeding. These documents shall constitute the evidence in the proceeding and the decision shall be based upon this evidence. Such hearings shall be deemed to commence on the first day that written evidence may be submitted for the record.

§ 104.730 Evidence.

The Federal Rules of Evidence apply to the presentation of evidence in hearings under this part.

§ 104.740 In camera and protective orders.

The administrative law judge may limit discovery or the introduction of evidence, or may issue such protective or other orders necessary to protect privileged communications. If the administration law judge determines that information in documents containing privileged matters should be made available to a party, the administrative law judge may order the preparation of a summary or extract of the nonprivileged matter contained in the original.

§ 104.750 Exhibits.

(a) *Identification.* All exhibits offered into evidence shall be numbered sequentially and marked with a designation identifying the party offering the exhibit.

(b) *Exchange of exhibits.* One copy of each exhibit offered into evidence must be furnished to each of the parties and to the administrative law judge. If the administrative law judge does not fix a time for the exchange of exhibits, the parties shall exchange copies of exhibits at the earliest practicable time before the commencement of the hearing. Exhibits submitted as rebuttal evidence are not required to be exchanged before the commencement of the hearing if the submission of such evidence could not reasonably be anticipated at that time.

§ 104.760 Authenticity.

The authenticity of all documents furnished to the parties as required under § 104.750 and submitted as proposed exhibits in advance of the hearing shall be admitted unless a party files a written objection to the exhibit before the commencement of the hearing. Upon a clear showing of good cause for failure to file such a written objection, the administrative law judge may permit the party to challenge the authenticity.

§ 104.770 Stipulations.

The parties may stipulate to any pertinent facts by oral agreement at the hearing or by written agreement at any time. Stipulations may be submitted into evidence at any time before the end of the hearing. When received into evidence, the stipulation is binding on the parties.

§ 104.780 Record of hearing.

(a) *Hearing record.* All oral hearings shall be recorded and transcribed by a reporter designated by, and under the supervision of, the administrative law judge. The original transcript shall be a part of the record and shall constitute the sole official transcript. All exhibits introduced as evidence shall be marked for identification and incorporated as a part of the record. Transcripts may be obtained by the parties and by the public from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.

(b) *Corrections.* Corrections to the official transcript will be permitted upon motion of a party. Motions for correction must be submitted within five days of

the receipt of the transcript. Corrections of the official transcript will be permitted only where errors of substance are involved and upon the approval of the administrative law judge.

§ 104.790 Arguments and briefs.

(a) *Arguments.* Following the submission of evidence at an oral hearing, the administrative law judge may hear oral arguments at the hearing. The administrative law judge may limit the time permitted for such arguments to avoid unreasonable delay.

(b) *Submission of written briefs.* The administrative law judge may permit the submission of written briefs following the adjournment of the oral hearing. Written briefs shall be simultaneously filed by all parties and shall be due not later than 30 days following the adjournment of the oral hearing.

§ 104.800 End of hearing.

(a) *Oral hearings.* Where there is an oral hearing, the hearing ends on the day of the adjournment of the oral hearing or, where written briefs are permitted, on the date that the written briefs are due.

(b) *Hearing on written record.* Where the parties have waived an oral hearing, the hearing ends on the date set by the administrative law judge as the final date for the receipt of submissions by the parties.

§ 104.810 Receipt of evidence following hearing.

Following the end of the hearing, no additional evidence may be accepted into the record, except with the permission of the administrative law judge. The administrative law judge may receive additional evidence upon a determination that new and material evidence was not readily available before the end of the hearing, the evidence has been timely submitted, and its acceptance will not unduly prejudice the rights of the parties. However, the administrative law judge shall include in the record any motions for attorney's fees (including supporting documentation), and any approved corrections to the transcripts.

Subpart I—Dismissals and Decisions

§ 104.900 Dismissal.

(a) *Election of judicial determination.* If the complainant, the respondent, or the aggrieved person on whose behalf a complaint was filed makes a timely election to have the claims asserted in the charge decided in a civil action under section 812(o) of the Act, the administrative law judge shall dismiss the administrative proceeding.

(b) *Effect of a civil action on administrative proceeding.* An administrative law judge may not continue an administrative proceeding under this part regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved person under an act of Congress or a State law seeking relief with respect to that discriminatory housing practice. If such a trial is commenced, the administrative law judge shall dismiss the administrative proceeding. The commencement and maintenance of a civil action for appropriate temporary or preliminary relief under section 810(e) or proceedings for such relief under section 813 of the Fair Housing Act does not affect administrative proceedings under this part.

§ 104.910 Initial decision of administrative law judge.

(a) *In general.* Within the time period set forth in paragraph (d) of this section, the administrative law judge shall issue an initial decision including findings of fact and conclusions of law upon each material issue of fact or law presented on the record. The initial decision of the administrative law judge shall be based on the record of the proceeding.

(b) *Finding against respondent.* If the administrative law judge finds that a respondent has engaged, or is about to engage, in a discriminatory housing practice, the administrative law judge shall issue an initial decision against the respondent and order such relief as may be appropriate. The relief may include, but is not limited to, the following:

(1) The administrative law judge may order the respondent to pay damages to the aggrieved person (including damages caused by humiliation and embarrassment).

(2) The administrative law judge may provide for injunctive or such other equitable relief as may be appropriate. No such order may affect any contract, sale, encumbrance or lease consummated before the issuance of the initial decision that involved a bona fide purchaser, encumbrancer or tenant without actual knowledge of the charge issued under § 104.405.

(3) To vindicate the public interest, the administrative law judge may assess a civil penalty against the respondent.

(i) The amount of the civil penalty may not exceed:

(A) $10,000, if the respondent has not been adjudged to have committed any prior discriminatory housing practice in any administrative hearing or civil action permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State or local governmental agency.

(B) $25,000, if the respondent has been adjudged to have committed one other discriminatory housing practice in any administrative hearing or civil action permitted under the Fair Housing Act, or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, and the adjudication was made during the five-year period preceding the date of filing of the charge.

(C) $50,000, if the respondent has been adjudged to have committed two or more discriminatory housing practices in any administrative hearings or civil actions permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, and the adjudications were made during the seven-year period preceding the date of the filing of the charge.

(ii) If the acts constituting the discriminatory housing practice that is the subject of the charge were committed by the same natural person who has previously been adjudged, in any administrative proceeding or civil action, to have committed acts constituting a discriminatory housing practice, the time periods set forth in paragraphs (b)(3)(i) (B) and (C) of this section do not apply.

(iii) In a proceeding involving two or more respondents, the administrative law judge may assess a civil penalty as provided under paragraph (b) of this section against each respondent that the administrative law judge determines has been engaged or is about to engage in a discriminatory housing practice.

(c) *Finding in favor of respondent.* If the administrative law judge finds that a respondent has not engaged, and is not about to engage, in a discriminatory housing practice, the administrative law judge shall make an initial decision dismissing the charge.

(d) *Date of issuance.* The administrative law judge shall issue an initial decision within 60 days after the end of the hearing, unless it is impracticable to do so. If the administrative law judge is unable to issue the initial decision within this time period (or within any succeeding 60-day period following the initial 60-day period), the administrative law judge shall notify in writing all parties, the aggrieved person on whose behalf the charge was filed, and the Assistant Secretary, of the reasons for the delay.

§ 104.920 Service of initial decision.

Simultaneously with the issuance of the initial decision, the administrative law judge shall serve the initial decision on all parties, the aggrieved person on whose behalf the charge was filed, the Assistant Secretary and the Secretary of HUD. The initial decision will include a notice stating that the initial decision will become the final decision of the Department unless the Secretary issues a final decision under § 104.930 within 30 days of the date of issuance of the initial decision.

§ 104.925 Resolution of charge.

At any time before the issuance of a final decision under § 104.930, the parties may submit an agreement resolving the charge. The agreement must be signed by the General Counsel, the respondent, and the aggrieved person upon whose behalf the charge was issued. The administrative law judge shall accept the agreement by issuing an initial decision based on the agreed findings. The submission of an agreement resolving the charge constitutes a waiver of any right to challenge or contest the validity of a decision entered in accordance with the agreement.

§ 104.930 Final decision.

(a) *Issuance of final decision by Secretary.* The Secretary of HUD may review any finding of fact, conclusion of law, or order contained in the initial decision of the administrative law judge and issue a final decision in the proceeding. The Secretary may affirm, modify or set aside, in whole or in part, the initial decision or remand the initial decision for further proceedings. The Secretary shall serve the final decision on all parties no later than 30 days from the date of issuance of the initial decision of the administrative law judge. The final decision shall be served on all parties, the aggrieved person on whose behalf the charge was filed, and the Assistant Secretary.

(b) *No final decision by Secretary.* If the Secretary of HUD does not serve a final decision within the time period described above, the initial decision of the administrative law judge will become the final decision of the Department. For the purposes of this part, such a final decision will be considered to have been issued 30 days following the date of issuance of the initial decision.

(c) *Public disclosure.* HUD shall make public disclosure of each final decision.

(d) *Decisions on remand.* If the Secretary remands the decision for further proceedings, the administrative law judge shall issue an initial decision on remand within 60 days of the date of issuance of the Secretary's decision, unless it is impractical to do so. If the administrative law judge is unable to issue the initial decision within this time period (or within any succeeding 60-day period following the initial 60-day period), the administrative law judge shall notify in writing the parties, the aggrieved person on whose behalf the charge was filed, and the Assistant Secretary, of the reasons for the delay.

§ 104.935 Action upon issuance of a final decision.

(a) *Licensed or regulated businesses.* (1) If a final decision includes a finding that a respondent has engaged or is about to engage in a discriminatory housing practice in the course of a business that is subject to licensing or regulation by a Federal, State or local governmental agency, the Assistant Secretary will notify the governmental agency of the decision by:

(i) Sending copies of the findings of fact, conclusions of law and the final decision to the governmental agency by certified mail; and

(ii) Recommending appropriate disciplinary action to the governmental agency, including, where appropriate, the suspension or revocation of the license of the respondent.

(2) The Assistant Secretary will notify the appropriate governmental agencies within 30 days after the date of issuance of the final decision, unless a petition for judicial review of the final decision as described in § 104.950 has been filed before the issuance of the notification of the agency. If such a petition has been filed, the Assistant Secretary will provide the notification to the governmental agency within 30 days of the date that the final decision is affirmed upon review. If a petition for judicial review is timely filed following the notification of the governmental agency, the Assistant Secretary will promptly notify the governmental agency of the petition and withdraw his or her recommendation.

(b) *Notification to the Attorney General.* If a final decision includes a finding that a respondent has engaged or is about to engage in a discriminatory housing practice and another final decision including such a finding was issued under this part within the five years preceding the date of issuance of the final decision, the General Counsel will notify the Attorney General of the decisions by sending a copy of the final decisions in each administrative proceeding.

§ 104.940 Attorney's fees and costs.

Following the issuance of the final decision under § 104.930, any prevailing party, except HUD, may apply for attorney's fees and costs. The administrative law judge will issue an initial decision awarding or denying such fees and costs. The initial decision will become the final decision of HUD unless the Secretary reviews the initial decision and issues a final decision on fees and costs within 30 days. The recovery of reasonable attorney's fees and costs will be permitted as follows:

(a) If the respondent is the prevailing party:

(1) HUD will be liable for reasonable attorney's fees and costs to the extent provided under the Equal Access to Justice Act (5 U.S.C. 504) and HUD's regulations at 24 CFR Part 14; and

(2) An intervenor will be liable for reasonable attorney's fees and costs only to the extent that the intervenor's participation in the administrative proceeding was frivolous or vexatious, or was for the purpose of harassment.

(b) To the extent that an intervenor is a prevailing party, the respondent will be liable for reasonable attorney's fees unless special circumstances make the recovery of such fees and costs unjust.

Subpart J—Judicial Review and Enforcement of Final Decision

§ 104.950 Judicial review of final decision.

(a) *Petition for review.* Any party adversely affected by a final decision under § 104.930 may file a petition in the appropriate United States Court of Appeals for review of the decision under section 812(i) of the Fair Housing Act. The petition must be filed within 30 days of the date of issuance of the final decision.

(b) *No petition for review.* If no petition for review is filed under paragraph (a) within 45 days from the date of issuance of the final decision, the findings of facts and final decision shall be conclusive in connection with any petition for enforcement described under § 104.955(a) filed thereafter by the General Counsel, and in connection with any petition for enforcement described under § 104.955(b).

§ 104.955 Enforcement of final decision.

(a) *Enforcement by HUD.* Following the issuance of a final decision under § 104.930, the General Counsel may petition the appropriate United States Court of Appeals for the enforcement of the final decision and for appropriate temporary relief or restraining order in accordance with section 812(j) of the Fair Housing Act.

(b) *Enforcement by others.* If before the expiration of 60 days from the date of issuance of the final decision under § 104.930, no petition for review of the final decision described under § 104.950 has been filed, and the General Counsel has not sought enforcement of the final decision as described in paragraph (a) of this section, any person entitled to relief under the final decision may petition the appropriate United States Court of Appeals for the enforcement of the final decision in accordance with section 812(m) of the Fair Housing Act.

PART 105—FAIR HOUSING

6. The appendix to Part 105 is redesignated as the appendix to Part 103 and the remainder of Part 105 is removed.

PART 106—FAIR HOUSING ADMINISTRATIVE MEETINGS UNDER THE FAIR HOUSING ACT

7. The title to Part 106 is revised as set forth above.

8. The authority citation for Part 106 is revised to read as follows:

Authority: Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3600–3620); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

9. Section 106.1 is revised to read as follows:

§ 106.1 Purpose.

The purpose of this part is to establish procedures for public meetings or conferences that may be used to assist the Assistant Secretary in achieving the aims of the Fair Housing Act for the promotion and assurance of equal opportunity in housing with regard to race, color, religion, sex, handicap, familial status, or national origin, and, specifically, to carry out those responsibilities delegated to him or her by the Secretary of Housing and Urban Development under sections 808(e) (1), (2), and (3), and 809 of the Fair Housing Act.

10. Section 106.2 is revised to read as follows:

§ 106.2 Definitions.

As used in this part:

(a) "Assistant Secretary" means the Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and Urban Development.

(b) "Meeting" means a public meeting or conference held under the authority of the Fair Housing Act and this part.

(c) "Fair Housing Act" means Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. 3600–3620.

11. Part 109 is revised to read as follows:

PART 109—FAIR HOUSING ADVERTISING

Sec.

109.5 Policy.
109.10 Purpose.
109.15 Definitions.
109.16 Scope.
109.20 Use of words, phrases, symbols, and visual aids.
109.25 Selective use of advertising media or content.
109.30 Fair housing policy and practices.
Appendix I to Part 109—Fair Housing Advertising.

Authority: Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3600–3620); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 109.5 Policy.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. The provisions of the Fair Housing Act (42 U.S.C. 3600, *et seq.*) make it unlawful to discriminate in the sale, rental, and financing of housing, and in the provision of brokerage and appraisal services, because of race, color, religion, sex, handicap, familial status, or national origin. Section 804(c) of the Fair Housing Act, 42 U.S.C. 3604(c), as amended, makes it unlawful to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination. However, the prohibitions of the act regarding familial status do not apply with respect to "housing for older persons", as defined in section 807(b) of the act.

§ 109.10 Purpose.

The purpose of this part is to assist all advertising media, advertising agencies and all other persons who use advertising to make, print, or publish, or cause to be made, printed, or published, advertisements with respect to the sale, rental, or financing of dwellings which are in compliance with the requirements of the Fair Housing Act. These regulations also describe the matters this Department will review in evaluating compliance with the Fair Housing Act in connection with investigations of complaints alleging discriminatory housing practices involving advertising.

§ 109.15 Definitions.

As used in this part:

(a) "Assistant Secretary" means the Assistant Secretary for Fair Housing and Equal Opportunity.

(b) "General Counsel" means the General Counsel of the Department of Housing and Urban Development.

(c) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(d) "Family" includes a single individual.

(e) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries.

(f) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(g) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of the Fair Housing Act.

(h) "Handicap" means, with respect to a person—

(1) A physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) A record of having such an impairment, or

(3) Being regarded as having such an impairment.

This term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)). For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite.

(i) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) A parent or another person having legal custody of such individual or individuals; or

(2) The designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual

who has not attained the age of 18 years.

§ 109.16 Scope.

(a) *General.* This part describes the matters the Department will review in evaluating compliance with the Fair Housing Act in connection with investigations of complaints alleging discriminatory housing practices involving advertising. Use of these criteria will be considered by the General Counsel in making determinations as to whether there is reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur.

(1) *Advertising media.* This part provides criteria for use by advertising media in determining whether to accept and publish advertising regarding sales or rental transactions. Use of these criteria will be considered by the General Counsel in making determinations as to whether there is reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur.

(2) *Persons placing advertisements.* A failure by persons placing advertisements to use the criteria contained in this part, when found in connection with the investigation of a complaint alleging the making or use of discriminatory advertisements, will be considered by the General Counsel in making a determination of reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur.

(b) *Affirmative advertising efforts.* Nothing in this part shall be construed to restrict advertising efforts designed to attract persons to dwellings who would not ordinarily be expected to apply, when such efforts are pursuant to an affirmative marketing program or undertaken to remedy the effects of prior discrimination in connection with the advertising or marketing of dwellings.

§ 109.20 Use of words, phrases, symbols, and visual aids.

The following words, phrases, symbols, and forms typify those most often used in residential real estate advertising to convey either overt or tacit discriminatory preferences or limitations. In considering a complaint under the Fair Housing Act, the Department will normally consider the use of these and comparable words, phrases, symbols, and forms to indicate a possible violation of the act and to establish a need for further proceedings on the complaint, if it is apparent from the context of the usage that discrimination within the meaning of the act is likely to result.

(a) *Words descriptive of dwelling, landlord, and tenants.* White private home, Colored home, Jewish home, Hispanic residence, adult building.

(b) *Words indicative of race, color, religion, sex, handicap, familial status, or national origin*—(1) *Race*—Negro, Black, Caucasian, Oriental, American Indian.

(2) *Color*—White, Black, Colored.

(3) *Religion*—Protestant, Christian, Catholic, Jew.

(4) *National origin*—Mexican American, Puerto Rican, Philippine, Polish, Hungarian, Irish, Italian, Chicano, African, Hispanic, Chinese, Indian, Latino.

(5) *Sex*—the exclusive use of words in advertisements, including those involving the rental of separate units in a single or multi-family dwelling, stating or tending to imply that the housing being advertised is available to persons of only one sex and not the other, except where the sharing of living areas is involved. Nothing in this part restricts advertisements of dwellings used exclusively for dormitory facilities by educational institutions.

(6) *Handicap*—crippled, blind, deaf, mentally ill, retarded, impaired, handicapped, physically fit. Nothing in this part restricts the inclusion of information about the availability of accessible housing in advertising of dwellings.

(7) *Familial status*—adults, children, singles, mature persons. Nothing in this part restricts advertisements of dwellings which are intended and operated for occupancy by older persons and which constitute "housing for older persons" as defined in Part 100 of this title.

(8) *Catch words*—Words and phrases used in a discriminatory context should be avoided, e.g., "restricted", "exclusive", "private", "integrated", "traditional", "board approval" or "membership approval".

(c) *Symbols or logotypes.* Symbols or logotypes which imply or suggest race, color, religion, sex, handicap, familial status, or national origin.

(d) *Colloquialisms.* Words or phrases used regionally or locally which imply or suggest race, color, religion, sex, handicap, familial status, or national origin.

(e) *Directions to real estate for sale or rent (use of maps or written instructions).* Directions can imply a discriminatory preference, limitation, or exclusion. For example, references to real estate location made in terms of racial or national origin significant landmarks, such as an existing black development (signal to blacks) or an existing development known for its exclusion of minorities (signal to whites). Specific directions which make reference to a racial or national origin significant area may indicate a preference. References to a synagogue, congregation or parish may also indicate a religious preference.

(f) *Area (location) description.* Names of facilities which cater to a particular racial, national origin or religious group, such as country club or private school designations, or names of facilities which are used exclusively by one sex may indicate a preference.

§ 109.25 Selective use of advertising media or content.

The selective use of advertising media or content when particular combinations thereof are used exclusively with respect to various housing developments or sites can lead to discriminatory results and may indicate a violation of the Fair Housing Act. For example, the use of English language media alone or the exclusive use of media catering to the majority population in an area, when, in such area, there are also available non-English language or other minority media, may have discriminatory impact. Similarly, the selective use of human models in advertisements may have discriminatory impact. The following are examples of the selective use of advertisements which may be discriminatory:

(a) *Selective geographic advertisements.* Such selective use may involve the strategic placement of billboards; brochure advertisements distributed within a limited geographic area by hand or in the mail; advertising in particular geographic coverage editions of major metropolitan newspapers or in newspapers of limited circulation which are mainly advertising vehicles for reaching a particular segment of the community; or displays or announcements available only in selected sales offices.

(b) *Selective use of equal opportunity slogan or logo.* When placing advertisements, such selective use may involve placing the equal housing opportunity slogan or logo in advertising reaching some geographic areas, but not others, or with respect to some properties but not others.

(c) *Selective use of human models when conducting an advertising campaign.* Selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a

complementary advertising campaign that is directed at other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others. Similar care must be exercised in advertising in publications or other media directed at one particular sex, or at persons without children. Such selective advertising may involve the use of human models of members of only one sex, or of adults only, in displays, photographs or drawings to indicate preferences for one sex or the other, or for adults to the exclusion of children.

§ 109.30 Fair housing policy and practices.

In the investigation of complaints, the Assistant Secretary will consider the implementation of fair housing policies and practices provided in this section as evidence of compliance with the prohibitions against discrimination in advertising under the Fair Housing Act.

(a) *Use of Equal Housing Opportunity logotype, statement, or slogan.* All advertising of residential real estate for sale, rent, or financing should contain an equal housing opportunity logotype, statement, or slogan as a means of educating the homeseeking public that the property is available to all persons regardless of race, color, religion, sex, handicap, familial status, or national origin. The choice of logotype, statement or slogan will depend on the type of media used (visual or auditory) and, in space advertising, on the size of the advertisement. Table I (see Appendix I) indicates suggested use of the logotype, statement, or slogan and size of logotype. Table II (see Appendix I) contains copies of the suggested Equal Housing Opportunity logotype, statement and slogan.

(b) *Use of human models.* Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

(c) *Coverage of local laws.* Where the Equal Housing Opportunity statement is used, the advertisement may also include a statement regarding the coverage of any local fair housing or human rights ordinance prohibiting discrimination in the sale, rental or financing of dwellings.

(d) *Notification of fair housing policy*—(1) *Employees.* All publishers of advertisements, advertising agencies, and firms engaged in the sale, rental or financing of real estate should provide a printed copy of their nondiscrimination policy to each employee and officer.

(2) *Clients.* All publishers or advertisements and advertising agencies should post a copy of their nondiscrimination policy in a conspicuous location wherever persons place advertising and should have copies available for all firms and persons using their advertising services.

(3) *Publishers' notice.* All publishers should publish at the beginning of the real estate advertising section a notice such as that appearing in Table III (see Appendix I). The notice may include a statement regarding the coverage of any local fair housing or human rights ordinance prohibiting discrimination in the sale, rental or financing of dwellings.

Appendix I to Part 109—Fair Housing Advertising

The following three tables may serve as a guide for the use of the Equal Housing Opportunity logotype, statement, slogan, and publisher's notice for advertising:

Table I

A simple formula can guide the real estate advertiser in using the Equal Housing Opportunity logotype, statement, or slogan.

In all space advertising (advertising in regularly printed media such as newspapers or magazines) the following standards should be used:

Size of advertisement	Size of logotype in inches
½ page or larger	2×2
⅛ page up to ½ page	1×1
4 column inches to ⅛ page	½×½
Less than 4 column inches	(1)

[1] Do not use.

In any other advertisements, if other logotypes are used in the advertisement, then the Equal Housing Opportunity logo should be of a size at least equal to the largest of the other logotypes; if no other logotypes are used, then the type should be bold display face which is clearly visible. Alternatively, when no other logotypes are used, 3 to 5 percent of an advertisement may be devoted to a statement of the equal housing opportunity policy.

In space advertising which is less than 4 column inches (one column 4 inches long or two columns 2 inches long) of a page in size, the Equal Housing Opportunity slogan should be used. Such advertisements may be grouped with other advertisements under a caption which states that the housing is available to all without regard to race, color, religion, sex, handicap, familial status, or national origin.

Table II

Illustrations of Logotype, Statement, and Slogan. Equal Housing Opportunity Logotype:

Equal Housing Opportunity Statement: We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the Nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, handicap, familial status, or national origin.

Equal Housing Opportunity Slogan: "Equal Housing Opportunity."

Table III

Illustration of Media Notice—Publisher's notice: All real estate advertised herein is subject to the Federal Fair Housing Act, which makes it illegal to advertise "any preference, limitation, or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or intention to make any such preference, limitation, or discrimination."

We will not knowingly accept any advertising for real estate which is in violation of the law. All persons are hereby informed that all dwellings advertised are available on an equal opportunity basis.

PART 110—FAIR HOUSING POSTER

12. The authority citation for Part 110 is revised to read as follows:

Authority: Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3600–3620); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

13. Section 110.1 is revised to read as follows:

§ 110.1 Purpose.

The regulations set forth in this part contain the procedures established by the Secretary of Housing and Urban Development with respect to the display of a fair housing poster by persons subject to sections 804 through 806 of the Fair Housing Act, 42 U.S.C. 3604–3606.

14. In § 110.5, paragraphs (b), (e), (g) and (h) are revised to read as follows:

§ 110.5 Definitions.

* * * * *

(b) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of the Act.

* * * * *

(e) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers and fiduciaries.

* * * * *

(g) "Fair housing poster" means the poster prescribed by the Secretary for display by persons subject to sections 804–806 of the Act.

(h) "The Act" means the Fair Housing Act (The Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988), 42 U.S.C. 3600, *et seq.*

* * * * *

15. In § 110.10, paragraph (a) introductory text and paragraph (c) is revised to read as follows:

§ 110.10 Persons subject.

(a) Except to the extent that paragraph (b) of this section applies, all persons subject to section 804 of the Act, Discrimination in the Sale or Rental of Housing and Other Prohibited Practices, shall post and maintain a fair housing poster as follows:

* * * * *

(c) All persons subject to section 805 of the Act, Discrimination In Residential Real Estate-Related Transactions shall post and maintain a fair housing poster at all their places of business which participate in the covered activities.

* * * * *

16. Section 110.15 is revised to read as follows:

§ 110.15 Location of posters.

All fair housing posters shall be prominently displayed so as to be readily apparent to all persons seeking housing accommodations or seeking to engage in residential real estate-related transactions or brokerage services as contemplated by sections 804 through 806 of the Act.

17. In § 110.25, paragraph (a) is revised to read as follows:

§ 110.25 Description of posters

(a) The fair housing poster shall be 11 inches by 14 inches and shall bear the following legend:

EQUAL HOUSING OPPORTUNITY

We do Business in Accordance With the Fair Housing Act

(The Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988)

IT IS ILLEGAL TO DISCRIMINATE AGAINST

ANY PERSON BECAUSE OF RACE, COLOR, RELIGION, SEX, HANDICAP, FAMILIAL STATUS (HAVING ONE OR MORE CHILDREN), OR NATIONAL ORIGIN

- In the sale or rental of housing or residential lots.
- In advertising the sale or rental of housing.
- In the financing of housing.
- In the appraisal of housing.
- In the provision of real estate brokerage services.
- Blockbusting is also illegal.

Anyone who feels he or she has been discriminated against should send a complaint to:

U.S. Department of Housing and Urban Development, Assistant Secretary for Fair Housing and Equal Opportunity, Washington, DC 20410

or

HUD Region or [Area Office stamp]

* * * * *

18. Part 115 is revised to read as follows:

PART 115—CERTIFICATION OF SUBSTANTIALLY EQUIVALENT AGENCIES

Sec.

115.1 Purpose.
115.2 Basis of determination.
115.3 Criteria for adequacy of law.
115.3a Criteria for adequacy of law—discrimination because of handicap.
115.4 Performance standards.
115.5 Request for certification.
115.6 Procedure for certification.
115.7 Denial of certification.
115.8 Withdrawal of certification.
115.9 Conferences.
115.10 Consequences of certification.
115.11 Interim referrals.

Authority: Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3600–3620); sec. 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d)).

§ 115.1 Purpose.

(a) Section 810(f) of the Fair Housing Act, (The Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (the Act)) provides that: whenever a complaint alleges a discriminatory housing practice within the jurisdiction of a State or local public agency that has been certified by the Secretary as substantially equivalent, the Secretary shall refer the complaint to that certified agency before taking any action with respect to the complaint. Except with the consent of the certified agency, the Secretary, after referral is made, shall take no further action with respect to the complaint unless:

(1) The certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of referral;

(2) The certified agency, having commenced proceedings, fails to carry forward proceedings with reasonable promptness; or

(3) The Secretary determines that the certified agency no longer qualifies for certification.

The Secretary has delegated the exercise of functions and duties under section 810(f) of the Act to the Assistant Secretary for Fair Housing and Equal Opportunity (the Assistant Secretary).

(b) The purpose of this part is to set forth:

(1) The basis for agency certification.

(2) The procedure by which a determination to certify is made by the Assistant Secretary.

(3) The basis and procedure for withdrawal of certification.

(4) The consequences of certification.

§ 115.2 Basis of determination.

A determination to certify an agency as substantially equivalent involves a two-phase procedure. The determination requires examination and an affirmative conclusion by the Assistant Secretary on two separate inquiries:

(a) Whether the law, administered by the agency, on its face, provides that:

(1) The substantive rights protected by the agency in the jurisdiction with respect to which certification is to be made;

(2) The procedures followed by the agency;

(3) The remedies available to the agency; and

(4) The availability of judicial review of the agency's actions;

Are Substantially substantively equivalent to those created by and under the act; and

(b) Whether the current practices and past performance of the agency demonstrate that, in operation, the law in fact provides rights and remedies which are substantially equivalent to those provided in the Act.

§ 115.3 Criteria for adequacy of law.

(a) In order for a determination to be made that a State or local fair housing agency administers a law which, on its face, provides rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the law or ordinance must:

(1) Provide for an administrative enforcement body to receive and process complaints and provide that:

(i) Complaints must be in writing;

(ii) Upon the filing of a complaint the agency shall serve notice upon the complainant acknowledging the filing and advising the complainant of the time limits and choice of forums provided under the law;

(iii) Upon the filing of a complaint the agency shall promptly serve notice on the respondent or person charged with the commission of a discriminatory housing practice advising of his or her procedural rights and obligations under the law or ordinance together with a copy of the complaint;

(iv) A respondent may file an answer to a complaint.

(2) Delegate to the administrative enforcement body comprehensive authority, including subpoena power, to investigate the allegations of complaints, and power to conciliate complaint matters, and require that:

(i) The agency commence proceedings with respect to the complaint before the end of the 30th day after receipt of the complaint;

(ii) The agency investigate the allegations of the complaint and complete the investigation in no more than 100 days after receipt of the complaint, unless it is impracticable.

(iii) If the agency is unable to complete the investigation within 100 days it shall notify the complainant and respondent in writing of the reasons for not doing so;

(iv) The agency make final administrative disposition of a complaint within one year of the date of receipt of a complaint, unless it is impracticable to do so. If the agency is unable to do so it shall notify the complaintant and respondent, in writing, of the reasons for not doing so;

(v) Any conciliation agreement arising out of conciliation efforts by the agency shall be an agreement between the respondent and the complainant and shall be subject to the approval of the agency;

(vi) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the agency determines that disclosure is not required to further the purposes of the law or ordinance.

(3) Not place any excessive burdens on the complainant that might discourage the filing of complaints, such as:

(i) A provision that a complaint must be filed within any period of time less than 180 days after an alleged discriminatory housing practice has occurred or terminated;

(ii) Anti-testing provisions;

(iii) Provisions that could subject a complainant to costs, criminal penalties or fees in connection with filing of complaints.

(4) Not contain exemptions that substantially reduce the coverage of housing accommodations as compared to Section 803 of the Act (which provides coverage with respect to all dwellings except, under certain circumstances, single family homes sold or rented by the owner and units in owner-occupied dwellings containing living quarters for no more than four families).

(5) Be sufficiently comprehensive in its prohibitions to be an effective instrument in carrying out and achieving the intent and purposes of the Act, *i.e.*, prohibit the following acts:

(i) Refusal to sell or rent based on discrimination because of race, color, religion, sex, familial status, or national origin;

(ii) Refusal to negotiate for a sale or rental based on discrimination because of race, color, religion, sex, familial status, or national origin;

(iii) Otherwise making unavailable or denying a dwelling based on discrimination because of race, color, religion, sex, familial status, or national origin;

(iv) Discriminating in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, based on discrimination because of race, color, religion, sex, familial status, or national origin;

(v) Advertising in a manner that indicates any preference, limitation, or discrimination because of race, color, religion, sex, familial status, or national origin;

(vi) Falsely representing that a dwelling is not available for inspection, sale, or rental because of discrimination because of race, color, religion, sex, familial status, or national origin;

(vii) Coercion, intimidation, threats, or interference with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other person in the exercise of enjoyment of any right granted or protected by section 803, 804, 805, or 806 of the Act;

(viii) Blockbusting based on representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin;

(ix) Discrimination in residential real estate-related transactions by providing that: It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, familial status, or national origin. Such transactions include:

(A) The making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(B) The selling, brokering, or appraising of residential real property;

(x) Denying a person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service because of race, color, religion, sex, familial status or national origin.

(b) In addition to the factors described in paragraph (a) of this section, the provisions of the State or local law must afford administrative and judicial protection and enforcement of the rights embodied in the law.

(1) The agency must have authority to:

(i) Seek prompt judicial action for appropriate temporary or preliminary relief pending final disposition of a complaint if the agency concludes that such action is necessary to carry out the purposes of the law or ordinance;

(ii) Issue subpoenas;

(iii) Grant actual damages or arrange to have adjudicated in court at agency expense the award of actual damages to an aggrieved person;

(iv) Grant injunctive or other equitable relief, or be specifically authorized to seek such relief in a court of competent jurisdiction.

(v) Assess a civil penalty against the respondent, or arrange to have adjudicated in court at agency expense

the award of punitive damages against the respondent.

(2) Agency actions must be subject to judicial review upon application by any party aggrieved by a final agency order.

(3) Judicial review of a final agency order must be in a court with authority to grant to the petitioner, or to any other party, such temporary relief, restraining order, or other order as the court determines is just and proper; affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and enforce the order to the extent that the order is affirmed or modified.

(c) The requirement that the State or local law prohibit discrimination on the basis of familial status does not require that the State or local law limit the applicability of any reasonable local. State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

(d) The State or local law may assure that no prohibition based on discrimination because of familial status applies to housing for older persons substantially as described in Part 100, Subpart E.

(e) A detemination of the adequancy of a State or local fair housing law "on its face" is intended to focus on the meaning and intent of the text of the law, as distinguished from the effectiveness of its administration. Accordingly, this determination is not limited to an analysis of the literal text of the law but must take into account all relevant maters of State or local law, *e.g.*, regulations, directives and rules of procedure, or interpretations of the fair housing law by competent authorities, as may be necessary.

(f) A law will be held to be not adequate "on its face" if it permits any of the agency's decision making authority to be contracted out or delegated to a non-governmental authority. For the purposes of this paragraph, "decision making authority" shall include:

(1) acceptance of the complaint;

(2) Approval of the concilitation agreement;

(3) Dismissal of a complaint;

(4) Any action specified in Section 115.3(a)(2)(iv) or 115.3(b)(1).

(g) The State or local law must provide for civil enforcement of the law or ordinance by an aggrieved person by the commencement of an action in an appropriate court not less than 1 year after the occurrence or termination of an alleged discriminatory housing practice. The court should be empowered to:

(1) Award the plaintiff actual and punitive damages;

(2) Grant as relief, as it deems appropriate, any temporary or permanent injunction, temporary restraining order or other order;

(3) Allow reasonable attorney's fees and costs.

§ 115.3a Criteria for adequacy of law—discrimination because of handicap.

(a) In addition to the provisions of § 115.3, in order for a determination to be made that a State or local fair housing agency administers a law which, on its face, provides rights and remedies for alleged discriminatory housing practices, based on handicap, that are substantially equivalent to those provided in the Act, the law or ordinance must be sufficiently comprehensive in its prohibitions to be an effective instrument in carrying out and achieving the intent and purposes of the Act, *i.e.*, it must prohibit the following acts:

(1) Advertising in a manner that indicates any preference, limitation, or discrimination because of handicap;

(2) Falsely representing that a dwelling is not available for inspection, sale, or rental based on discrimination because of handicap;

(3) Blockbusting, based on representations regarding the entry or prospective entry into the neighborhood of a person or persons with a particular handicap;

(4) Discrimination in residential real estate-related transactions by providing that: It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms and conditions of such a transaction, because of handicap. Residential and real estate-related transactions include:

(i) The making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(ii) The selling, brokering, or appraising of residential real property;

(5) Denying a person access to, or membership or participation in, multiple listing services, real estate brokers' organizations, or other services because of handicap;

(6) Discrimination in the sale or rental, or otherwise making unavailable or denying, a dwelling to any buyer or renter because of a handicap of that buyer or renter, or of a person residing in or intending to reside in that dwelling after it is sold, rented, or made available, or of any person associated with the buyer or renter;

(7) Discrimination against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with the dwelling, because of a handicap of that person, of a person residing in or intending to reside in the dwelling after it is sold, rented, or made available, or of any person associated with that person.

(b) For purposes of this section, discrimination includes—

(1) A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by the handicapped person, if the modifications may be necessary to afford the handicapped person full enjoyment of the premises, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;

(2) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; or

(3) In connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, a failure to design and construct dwellings in such a manner that—

(i) The dwellings have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site;

(ii) With respect to dwellings with a building entrance on an accessible route—

(A) The public use and common use portions of the dwellings are readily accessible to and usable by handicapped persons;

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

(C) All premises within covered multifamily dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are

usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(c) The law or ordinance administered by the State or local fair housing agency may provide that compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1–1986") suffices to satisfy the requirements of paragraph (b)(3)(ii)(C) of this section.

(d) As used in this section, the term "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

§ 115.4 Performance standards.

(a) The initial and continued certification that a State or local fair housing law provides rights and remedies substantially equivalent to those provided in the Act will be dependent upon an assessment of the current practices and past performance of the appropriate State or local agency charged with administration and enforcement of the law to determine that, in operation, the law is in fact providing substantially equivalent rights and remedies. The performance standards set forth in paragraph (b) of this section will be used in making this assessment.

(b) A State or local agency must:

(1) Engage in comprehensive and thorough investigative activities; and

(2) Commence proceedings with respect to a complaint before the end of the 30th day after the receipt of the complaint, carry forward proceedings with reasonable promptness, and in accordance with the memorandum of understanding described in section 115.6 of this part, make final administrative disposition of a complaint within one year of the date of receipt of the complaint and, within 100 days of receipt of the complaint, complete the following proceedings:

(i) Investigation, including the preparation of a final investigative report containing—

(A) The names and dates of contacts with witnesses;

(B) A summary and dates of correspondence and other contacts with the aggrieved person and the respondent;

(C) A summary description of other pertinent records;

(D) A summary of witness statements; and

(E) Answers to interrogatories.

(ii) Conciliation activity.

(3) Conduct compliance reviews of all settlements, conciliation agreements and orders issued by or entered into to resolve discriminatory housing practices.

(4) Consistently and affirmatively seek and obtain the type of relief designed to prevent recurrences of such practices;

(5) Consistently and affirmatively seek the elimination of all prohibited practices under its fair housing law;

(c) Where the State or local agency has duties and responsibilities in addition to administration of the fair housing law, the Assistant Secretary may consider such matters as the relative priority given to fair housing administration, as compared to such other duties and responsibilities, and the compatibility or potential conflict of fair housing objectives with the agency's other duties and responsibilities.

§ 115.5 Request for certification.

(a) A request for certification under this part may be filed with the Assistant Secretary by the State or local official having principal responsibility for administration of the State or local fair housing law. The request shall be supported by the following materials and information:

(1) The text of the jurisdiction's fair housing law, the law creating and empowering the agency, any regulations and directives issued under the law, and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the jurisdiction's fair housing law.

(2) Organization of the agency responsible for administering and enforcing the law.

(3) Funding and personnel made available to the agency for administration and enforcement of the fair housing law during the current operating year, and not less than the preceding three operating years (or such lesser number during which the law was in effect).

(4) Data demonstrating that the agency's current practices and past performance comply with the performance standards described in § 115.4.

(5) Any additional information which the submitting official may wish to be considered.

(b) The request and supporting materials shall be filed with the Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. A copy of the request and supporting materials will be kept available for public examination and copying at:

(1) The office of the Assistant Secretary, and

(2) the HUD Regional Office in whose jurisdiction the State or local jurisdiction seeking recognition is located, and

(3) the office of the State or local agency charged with administration and enforcement of the State or local law.

§ 115.6 Procedure for certification.

(a) Upon receipt of a request for certification filed under § 115.5, the Assistant Secretary may request further information that he or she considers relevant to the determinations required to be made under this part.

(b) If the Assistant Secretary determines, after application of the criteria set forth in §§ 115.3 and 115.3a, that the State or local fair housing law, on its face, provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in the Act, the Assistant Secretary shall inform the submitting State or local official in writing of that determination. Except under circumstances where the Assistant Secretary determines that interim referrals or other utilization of services under § 115.11 is appropriate, the Assistant Secretary shall publish a notice in the **Federal Register** which advises the public of the determination that the law, on its face, is substantially equivalent, and shall invite interested persons and organizations, during a period of not less than 30 days following publication of the notice, to file written comments relevant to the determination whether the current practices and past performance of the State or local agency charged with administration and enforcement of such law demonstrates that, in operation, the State or local law in fact provides rights and remedies which are substantially equivalent to those provided in the Act. The **Federal Register** notice shall also invite comments on the Department's determination as to the adequacy of the law on its face.

(c) If the Assistant Secretary determines, on the basis of the standards specified in § 115.4 and after considering the materials and information submitted pursuant to § 115.5, additional material obtained under paragraph (a) of this section, and any written comments filed under paragraph (b) of this section, that, in operation, a State or local fair housing law in fact provides rights and remedies which are substantially equivalent to

those provided in the Act, the Assistant Secretary shall offer to enter into a written agreement with the appropriate State or local agency providing for referral of complaints to the agency and for procedures for communication between the agency and HUD that are adequate to permit the Assistant Secretary to monitor the continuing substantial equivalency of the State or local law. The written agreement may, but need not, be incorporated in a Memorandum of Understanding as described in 24 CFR 111.104(a)(2). Upon execution of a satisfactory agreement, the Assistant Secretary shall publish notice of certification under this part in the **Federal Register.**

(d) During the period which begins on September 13, 1988 and ends January 13, 1992, each State or locality recognized as substantially equivalent under 24 CFR Part 115 (including any State or locality which had entered into an agreement for interim referrals under § 115.11, unless the State or locality is subsequently denied recognition under 24 CFR 115.7) for the purposes of the Fair Housing Act before September 13, 1988 shall, for the purposes of this paragraph, be considered certified under this part with respect to those matters for which the agency was previously recognized. If the Secretary determines in an individual case that a State or locality has not been able to meet the certification requirements within this 40-month period because of exceptional circumstances (such as the infrequency of legislative sessions in that jurisdiction), the Secretary may extend the period of temporary certification to no later than September 13, 1992.

(1) No State, locality or agency thereof shall be considered certified under this paragraph for the purpose of processing complaints alleging—

(i) Discrimination based on familial status;

(ii) Discrimination based on handicap; or

(iii) Coercion, intimidation or threats as described in § 115.3(a)(5)(vii).

(2) Certification under this paragraph is not a determination that the administrative or judicial remedies provided by the State or locality is substantially equivalent to those provided by the Act.

(e) Certification of a State or local fair housing agency under this part shall remain in effect until withdrawn under § 115.8.

(f) Not less frequently than annually, the Assistant Secretary will cause to be published in the **Federal Register** a notice which sets forth:

(1) An updated, consolidated list of all certified agencies;

(2) A list of all agencies whose certification under this part has been withdrawn since publication of the previous notice;

(3) A list of agencies with respect to which notice of denial of certification has been published under § 115.7(c) since issuance of the previous notice;

(4) A list of agencies with respect to which a notice for comment has been published under paragraph (b) of this section whose request for certification remains pending;

(5) A list of agencies for which notice of proposed withdrawal of certification has been published under § 115.8(c) whose proposed withdrawal remains pending; and

(6) A list of agencies with which an agreement for interim referrals or other utilization of services has been entered under § 115.11 and remains in effect.

§ 115.7 Denial of certification.

(a) If the Assistant Secretary determines, after application of the criteria set forth in §§ 115.3 and 115.3a, that a State or local fair housing law, on its face, fails to provide rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in the Act, the Assistant Secretary shall inform the submitting State or local official in writing of the reasons for that determination. The Assistant Secretary's advice may include specification of the manner in which the State or local law could be amended in order to provide substantially equivalent rights and remedies. The Assistant Secretary shall extend to the State or local official an opportunity to submit data, views, and arguments in opposition to the Assistant Secretary's determination and to request an opportunity for a conference in accordance with § 115.9. If no submission or request is made, no further action shall be required to be taken by the Assistant Secretary. If the State or local official submits materials but does not request a conference, the Assistant Secretary shall evaluate any arguments in opposition or other materials received from the State or local agency. If, after that evaluation, the Assistant Secretary is still of the opinion that the law, on its face, fails to provide rights and remedies for alleged discriminatory housing practices that are substantially equivalent to the rights and remedies provided in the Act, the Assistant Secretary shall inform the submitting State or local official in writing that certification is denied.

(b) If the Assistant Secretary determines, after considering the materials and information submitted under § 115.5, any additional information obtained under § 115.6(a), an assessment of the current practices and past peformance of the agency in meeting the standards of § 115.4(b), and any written comments received under § 115.6(b), that it has not been demonstrated that, in operation, a State or local fair housing agency in fact provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to those provided in the Act, the Assistant Secretary shall communicate this determination in writing to the State or local agency and shall allow the agency not less than 15 days to submit data, views, and arguments in opposition and to request an opportunity for a conference in accordance with § 115.9. If a request for a conference is not received within the time provided, the Assistant Secretary shall evaluate any arguments in opposition or other materials received from the State or local agency and, if after that evaluation the Assistant Secretary is still of the opinion that certification should be denied, the Assistant Secretary shall inform the submitting State or local official in writing that certification is denied.

(c) Where comment on a request for certification was invited in accordance with § 115.6(b), notice of denial of certification under this section shall be published in the **Federal Register.**

§ 115.8 Withdrawal of certification.

(a) Not less frequently than every 5 years, the Assistant Secretary shall determine whether each agency certified under this part continues to qualify for certification. The Assistant Secretary shall take appropriate action with respect to any agency not so qualifying.

(b) The Assistant Secretary shall periodically review the administration of fair housing laws recognized under this part. If the Assistant Secretary finds, as a result of a periodic review, upon the petition of an interested person or organization, or otherwise, that taken as a whole, the agency's administration of its fair housing law or the law, on its face, no longer meets the requirements of this part, the Assistant Secretary shall propose to withdraw the certification previously granted.

(c) The Assistant Secretary shall propose withdrawal of certification unless review establishes that the current fair housing law administered by the certified agency meets the criteria of § 115.3 and that current practices and past performance of the agency meet the standards of § 115.4.

(d) Before the Assistant Secretary publishes notice of a proposed withdrawal of certification, the Assistant Secretary shall inform the State or local agency in writing of his or her intention to withdraw certification. The communication shall state the reasons for the proposed withdrawal and provide the agency not less than 15 days to submit data, views, and arguments in opposition and to request an opportunity for a conference in accordance with § 115.9.

(e) Notice of a proposed withdrawal shall be published in the **Federal Register**. The notice shall allow the State or local agency and other interested persons and organizations not less than 30 days in which to file written comments on the proposal.

(f) If a request for a conference in accordance with § 115.9 is not received within the time provided, the Assistant Secretary shall evaluate any arguments in opposition or other materials received from the State or local agency and other interested persons or organizations, and if after that evaluation the Assistant Secretary is still of the opinion that certification should be withdrawn, the Assistant Secretary shall withdraw certification and shall publish notice of the withdrawal in the **Federal Register**.

§ 115.9 Conferences.

(a) Whenever an opportunity for a conference is timely requested by a State or local agency in accordance with § 115.7 or § 115.8, the Assistant Secretary shall issue an order designating an officer who shall preside at the conference. The order shall indicate the issues to be resolved and any initial procedural instructions that might be appropriate for a particular conference. It shall fix the date, time and place of the conference. The date shall not be less than 20 days after the date of the order. The date and place shall be subject to change for good cause.

(b) A copy of the order shall be served on the State or local agency and:

(1) In the case of a denial of certification, on any person or organization that files a written comment in accordance with § 115.6(b); or

(2) in the case of a withdrawal of certification, on any person or organization that files a petition in accordance with § 115.8(a) or written comment in accordance with § 115.8(c). The agency and all such persons and organizations shall be considered to be participants in the conference. After service of the order designating the conference officer, and until the officer submits a recommended determination, all communications relating to the subject matter of the conference shall be addressed to that officer.

(c) The conference officer shall have full authority to regulate the course and conduct of the conference. A transcript shall be made of the proceedings at the conference. The transcript and all comments and petitions relating to the proceedings shall be made available for inspection by interested persons.

(d) The conference officer shall prepare proposed findings and a recommended determination, a copy of which shall be served on each participant. Within 20 days after service, any participant may file written exceptions. After the expiration of the period for filing exceptions, the conference officer shall certify the entire record, including the proposed findings and recommended determination, and any exceptions to the findings and recommendations, to the Assistant Secretary, who shall review the record and issue a final determination within 30 days. Where applicable, this determination shall be published in the **Federal Register**.

§ 115.10 Consequences of certification.

(a) Where all alleged violations of the Act contained in a complaint received by the Assistant Secretary appear to constitute violations of a State or local fair housing law administered by an agency that has been certified as substantially equivalent, the complaint shall be referred promptly to the appropriate State or local agency, and no further action shall be taken by the Assistant Secretary with respect to such complaint, except as provided for by the Act, this Part, and by §§ 103.100 through 103.115 or § 105.20 through 105.22 of this chapter.

(b) Notwithstanding paragraph (a) of this section, no complaint based in whole or in part on allegations of discrimination on the basis of familial status or handicap shall be referred to any State, locality or agency thereof whose certification was granted in accordance with § 115.6(d) or section 810(f)(4) of the Act, without regard to whether the fair housing law administered by such certified agency appears to prohibit discrimination based on familial status or handicap.

(c) Notwithstanding paragraph (a) of this section, whenever the Secretary has reason to believe that a complaint shows a basis may exist for the commencement of proceedings against any respondent under section 814(a) of the Act, or for proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which that belief is based to the Attorney General, or to appropriate governmental licensing or supervisory authorities.

§ 115.11 Interim referrals.

If the Assistant Secretary determines after application of the criteria set forth in § 115.3, that a State or local fair housing law on its face provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to those provided in the Act, but that the law has not been in effect, or the appropriate State or local agency in operation, for a sufficient time to permit a demonstration of compliance with the performance standards described in § 115.4, the Assistant Secretary may enter into a written agreement with the State or local agency providing for referral of complaints to the agency on such terms and conditions as the Assistant Secretary shall prescribe, or providing for other utilization of the services of the State or local agency and its employees upon agreed terms, and providing further for procedures for communications between the agency and HUD that are adequate to permit the Assistant Secretary to monitor the agency's administration and enforcement of its law and to assist the Assistant Secretary in making the determination required in § 115.2(b). The agreement may provide for reactivation of referred complaints by the Assistant Secretary without regard to the limitations described in § 115.10. If such an agreement for interim referrals or other utilization of services is entered, the Assistant Secretary may defer final determination under § 115.6 or § 115.7 for a reasonable period determined by the Assistant Secretary to be necessary in order to permit a fair assessment of the agency's performance. In no event shall this period extend more than two years beyond the date of entry into the agreement for interim referrals or other utilization of services. This two-year limitation does not apply to agencies certified in accordance with § 115.6(d). However, an agreement under this section shall not be extended beyond the date of certification under § 115.6 or denial of recognition under § 115.7. Notice of entry into an agreement under this section shall be published in the **Federal Register**.

19. Part 121 is added to read as follows:

PART 121—COLLECTION OF DATA

Sec.
121.1 Purpose.
121.2 Furnishing of data by program participants.

Authority: Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3600–3620); E.O. 11063, 27 FR 11527; sec. 602, Civil Rights Act of 1964 (42 U.S.C. 2000d–1); sec. 562, Housing and Community Development Act of 1987 (42 U.S.C. 3608a); sec. 2, National Housing Act, 12 U.S.C. 1703; sec. 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

§ 121.1 Purpose.

The purpose of this part is to enable the Secretary of Housing and Urban Development to carry out his or her responsibilities under the Fair Housing Act, Executive Order 11063, dated November 20, 1962, Title VI of the Civil Rights Act of 1964, and section 562 of the Housing and Community Development Act of 1987. These authorities prohibit discrimination in housing and in programs receiving financial assistance from the Department of Housing and Urban Development, and they direct the Secretary to administer the Department's housing and urban development programs and activities in a manner affirmatively to further these policies and to collect certain data to assess the extent of compliance with these policies.

§ 121.2 Furnishing of data by program participants.

Participants in the programs administered by the Department shall furnish to the Department such data concerning the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, those programs as the Secretary may determine to be necessary or appropriate to enable him or her to carry out his or her responsibilities under the authorities referred to in § 121.1.

20. The text of the preamble to this rule beginning at the heading "BACKGROUND" and ending before the heading "*Legislative review issues*," is added as Appendix I to Subchapter A of Chapter I as follows:

Appendix I to Subchapter A—Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988 (Published January 19, 1989)

Dated: January 12, 1989.

Samuel R. Pierce, Jr.,

Secretary.

[FR Doc. 89–1211 Filed 1–19–89; 8:45 am]

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Monday
January 23, 1989

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 121, 125, and 135
Minimum Equipment List (MEL) Requirements; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121, 125, and 135

[Docket No. 25780; Notice No. 89-2]

RIN 2120-AC86

Minimum Equipment List (MEL) Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to amend Part 125 and 135 requirements for the use of a Minimum Equipment List (MEL).

The proposed amendment would provide much needed guidance and direction by clarifying the intent of the MEL concept in Part 121. It also proposes to amend the Part 121 requirements for the use of an MEL to make them consistent with the amended Part 125 and 135 MEL requirements. Finally, it provides for the development and use of MEL's for single-engine aircraft operated under Part 135.

DATE: Comments must be received on or before March 24, 1989.

ADDRESSES: Comments on this notice should be mailed in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-204), Docket No. 25780, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked "Docket No. 25780." Comments may be examined in the Rules Docket weekdays, except Federal holidays, between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Marlene G. Livack, Project Development Branch (AFS-240), Air Transportation Division, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone (202) 267-3753.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments and by commenting on the possible environmental, energy, or economic impact of this proposal. The comment should identify the regulatory docket or notice number and be submitted in duplicate to the address above. All comments received, as well as a report summarizing any substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection both before and after the closing date for making comments.

Before taking any final action on the proposal, the Administrator will consider any comment made on or before the closing date for comments. The proposal may be changed in light of comments received.

The FAA will acknowledge receipt of a comment if the commenter submits with the comment a self addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25780." When the comment is received, the postcard will be dated, time stamped, and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this notice of proposed rulemaking by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Requests should identify the docket number of this proposed rule. Persons interested in being placed on a mailing list for future proposed rules should also request a copy of Advisory Circular No. 112A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The airworthiness certification of an aircraft is based upon the requirement that the aircraft conforms to its type certificate and is in a condition for safe operation. Early commercial aircraft had very little equipment redundancy beyond that necessary to meet the existing Civil Aviation Regulations (CAR) basic type certification requirements. Prior to adoption of specific provisions in the CAR operating rules, operation with inoperative equipment was prohibited.

The concept of the Minimum Equipment List (MEL) presently embodied in Part 121 was first developed for air carrier and commercial operators of large aircraft in 1953 (then CAR 40 and 41) when it was recognized that a flight or series of flights might be continued with certain inoperable instruments and equipment under appropriate circumstances. This concept was established following the determination of the Civil Aeronautics Agency (CAA) that strict observance of the requirement to delay or postpone a flight with an inoperative equipment was an undue hardship and that strict compliance was not necessary to maintain the type certification level of safety. In 1956, the CAR's were further updated to outline the circumstances when procedures for limited operations beyond a terminal point with inoperative required equipment might be incorporated and authorized in air carrier manuals.

The air carrier operating rules of the CAR were recodified effective April 1, 1965. Part 121 of the Federal Aviation Regulations (FAR), which replaced CAR 40, 41, and 42, was initiated to regulate the certification and operations of air carriers and commercial operators of large aircraft. The preamble to Part 121 indicates the intent to carry over procedures for operating with inoperative equipment, as they existed in CAR 40 and 41, intact in the recodification and introduced the term "minimum equipment list." To date there have been no substantive amendments to the Part 121 MEL procedures.

Historically, the MEL process has been an effective mechanism to permit continued flight with instruments and equipment inoperative. It allows operational flexibility and a higher degree of schedule reliability while still maintaining the level of safety required by the type certification rules.

Evolutionary improvements in both aircraft design and in safety requirements have provided modern aircraft with the capability for operation over a wide range of environmental conditions. These improvements also have provided improved convenience for both the operator and passengers. Certain installed equipment is required to operate in specific environmental conditions. This equipment is not essential for safe operations provided the kind of operation necessitating the equipment is avoided; for example, certain lights are not essential during daytime operations. Other non-required optional equipment (such as entertainment systems, logo lights, and galley equipment) may be installed for the convenience of the operator or passengers.

The MEL is a practical method of enhancing air carrier dispatch reliability where equipment and accessories not required for type certification are involved. Also, experience has shown that given individual aircraft designs, operation of every system or component may not be necessary when the remaining operative equipment can provide the required level of safety. Section 121.627(c) provides that the Minimum Equipment List and procedures for continuing flight beyond a terminal point with equipment required by § 121.303(d) inoperative may

be included in the certificate holder's manual if the Administrator finds that, in a particular situation, literal compliance with those equipment requirements is not necessary in the interests of safety. Although it would be desirable to maintain the aircraft at all times with installed equipment operative, it is possible under controlled conditions to maintain the required level of safety with specific items of equipment inoperative until repairs are available or feasible.

A Master Minimum Equipment List (MMEL) for a particular aircraft type is developed by the FAA along with the holder of the type certificate for that aircraft. The MMEL is the basis for development of an individual operator's MEL which takes into consideration the operator's particular aircraft equipment configuration and operational conditions. The individual operator's MEL, when approved and authorized by the FAA air carrier certificate holding district office, allows relief from the maintenance and operating rules that require every item of equipment or instrument installed in the aircraft to be operable. The intent of this process is to improve aircraft utilization and thereby provide more covenient and economic air transportation for the public.

On September 16, 1981, the FAA issued Notice of Proposed Rulemaking (NPRM) No. 81-14 (46 FR 52278; October 26, 1981). This notice proposed to consolidate MEL requirements that were contained in Parts 121, 125, and 135 into Part 91. It also proposed regulatory changes to permit the operation of general aviation aircraft (for which an MMEL has not been developed) with certain inoperative instruments and equipment that are not essential for the safe operation of the aircraft through an approved aircraft flight manual or operating limitations statement. Due to concerns and objections expressed by the general aviation community, the FAA decided that the notice needed further changes. Subsequent to the publication of NPRM No. 81-14, the FAA determined that although the rules concerning MEL requirements should be standardized, Parts 121, 125, and 135 should each contain a separate reference to MEL requirements.

The proposed amendment would standardize application of the MEL concept by bringing Part 121 in line with Parts 125 and 135 which contain detailed requirements concerning the MEL. As a result of this standardization, implementation and enforcement of the MEL concept would be more consistent for all operators in air transportation. Additionally, the proposal requires amendment of individual operator's operations specifications to authorize the use of an MEL, if that operator elects to use an MEL. The inclusion of the MEL authorization in the operations specifications eliminates the need for the letter of authorization currently required in Parts 125 and 135.

Discussion of Proposals

Section 121.627(c) contains the only Part 121 reference to MEL. This rule permits an MEL to be included in the certificate holder's manual. This simple statement has fostered numerous questions within the air carrier industry and, therefore, needs to be clarified. The FAA proposes to amend § 121.627 by deleting paragraph (c) and by adding a new § 121.628, which would set forth specific requirements for an MEL. As a result, the current § 121.303(d) will be revised by deleting reference to § 121.627(c) and referring instead to the new § 121.628. The FAA also proposes to amend the language of §§ 135.179 and 125.201 to make them essentially the same as § 121.628. The FAA proposes to eliminate the need for the letter of authorization currently required by §§ 125.201(b)(2) and 135.179(b)(2). Instead, the authorization to operate in accordance with an FAA approved MEL will be contained in the certificate holder's operations specifications. Proposed §§ 121.628(a)(2), 125.201(a)(2), and 135.179(a)(2) would require that an operations specifications authorization be obtained and would also require either that the MEL be carried aboard the aircraft or that the flight crew have access to all information contained in the MEL prior to and during flight.

It is not the FAA's intention to require that the actual MEL be carried aboard the aircraft, although this would be an acceptable means of compliance. The FAA may accept any method which allows the information contained in the MEL to be "directly" accessible to the flightcrew at all times prior to and during flight. This could be accomplished through a state-of-the-art information retrieval system. Furthermore, the FAA does not intend for the pilot to have access by "indirect" means such as conversations and maintenance personnel over the aircraft radio.

These proposals are being made to clarify the extent to which MELs can permit operation with inoperative equipment. Since the purpose of an MEL is to allow an aircraft to be dispatched with certain inoperative equipment, the proposal would reduce ambiguity and, at the same time, standardize and clarify the FARs. Finally, these proposals will standardize the language of Parts 121, 125, and 135 to clarify the intent of the Minimum Equipment List, provide a uniform application of Minimum Equipment List throughout industry, and establish that configurations approved through the proper use of a Minimum Equipment List constitute an approved change to the type design.

The current § 135.179 limits the use of an MEL to multiengine aircraft. Since the rule is silent concerning single-engine aircraft, those aircraft must have all instruments and equipment operative. Strict observance of the requirment to delay or postpone a flight with certain equipment inoperative creates an unnecessary economic burden for operators of single-engine aircraft in air transportation and strict compliance is not necessary to maintain the required level of safety. The proposed changes to Part 135 will allow for the use of an MEL by any civil aircraft, including single-engine aircraft.

With respect to the length of time an aircraft may be operated with inoperative instruments or equipment, it should be noted that the FAA has implemented procedures which categorize items of equipment and place a fixed "time to repair" requirement on items within a category. These procedures are contained in the individual air carrier's operations specifications. The "time to repair" requirement is currently being implemented for air carriers operating under Part 121 although it is anticipated that the same requirements will be effected in the future for Part 125 and 135. Implementation of the "time to repair" requirement is being carried out independently of this rulemaking project.

Regulatory Evaluation Summary

Benefits

The benefits of these proposed rule changes are nonquantifiable because they primarily would reorganize and standardize the MEL provisions of various operating rules to clarify and explain the intent of existing requirements. Further, to the extent that their single-engine aircraft could operate using an MEL, Part 135 operators would benefit from the greater flexibility and efficiency in the utilization of these aircraft that would be allowed under the proposed rules, and their passengers and shippers would avoid unnecessary delays and inconveniences as well. Additionally, the use of operations specifications in lieu of letters of authorization, in the long run, should result in a consolidation of

administrative burdens for both the FAA and the air carriers. This should work to reduce administrative costs. The FAA, however, has no precise basis on which to quantify these benefits, since it cannot predict the extent to which Part 135 operators of single-engine aircraft will elect to use MELs.

Costs

Operators subject to the proposed rule change would not incur any compliance costs because the proposals would only change the format in which MEL authorizations are granted. The substantive provisions of the MEL's for individual operators would continue to be determined by the FAA flight standards field offices having jurisdiction over the particular operators, and policy guidance for specific MEL operating privileges and limitations would continue to be disseminated through nonregulatory channels, such as the Advisory Circular system. The FAA would incur some minor administrative costs in transferring MEL requirements from letters of authorization to operations specifications, but this would be a one-time expense and is in the nature of an ordinary cost of doing business for a regulatory agency. Moreover, the use of operations specifications should, in the long run, tend to ease administrative burdens and reduce costs for both the FAA and the carriers.

International Trade Impact Assessment

The proposed regulations would clarify and standardize existing MEL requirements for various classes of United States operators, and as such, would have no effect on the sale of foreign aviation products or services in the United States, nor would they affect the sale of United States aviation products or services in foreign countries.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. Small entities are independently owned and operated by small businesses and small not-for-profit organizations. The RFA requires agencies to review rules that may have "a significant economic impact on a substantial number of small entities." FAA Order 2100.14A, *Regulatory Flexibility Criteria and Guidance*, establishes threshold cost values and small entity size standards for complying with RFA review requirements in FAA rulemaking actions.

The small entities potentially affected by the proposed rule changes are those Part 121, 125, and 135 operators that own nine or fewer aircraft. However, because these proposals would not impose any compliance costs on affected operators, and would provide relief in the case of Part 135 operators of single-engine aircraft, none of the threshold cost values stipulated in Order 2100.14A are expected to be exceeded by any operator. Therefore, the FAA has determined that these proposals would not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required under the terms of the RFA.

Federalism Implications

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this proposed regulation is not major under Executive Order 12291. In addition, this proposal, if adopted, will not have significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This proposal is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). An initial evaluation of the proposal, including a Regulatory Flexibility Determination and Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under **"FOR FURTHER INFORMATION CONTACT."**

List of Subjects

14 CFR Part 121

Aviation safety, Safety, Air carriers, Airplanes.

14 CFR Part 125

Aircraft, Airworthiness.

14 CFR Part 135

Aviation safety, Air carriers, Safety, Airworthiness Aircraft, Airplanes.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Parts 121, 125, and 135 of the Federal Aviation Regulations (14 CFR Parts 121, 125, and 135) as follows:

PART 121—CERTIFICATION AND OPERATIONS DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS, AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for Part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421, 1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

2. By amending § 121.303 by revising the introductory text of paragraph (d) to read as follows:

§ 121.303 Airplane instruments and equipment.

* * * * *

(d) Except as provided in §§ 121.627(b) and 121.628, no person may take off any airplane unless the following instruments and equipment are in operable condition:

* * * * *

§ 121.627 [Amended]

3. By amending § 121.627 by removing paragraph (c).

4. By adding a new § 121.628 following § 121.627 to read as follows:

§ 121.628 Inoperable instruments and equipment.

(a) No person may take off an airplane with inoperable instruments or equipment installed unless the following conditions are met:

(1) An approved Minimum Equipment List exists for the airplane.

(2) The Flight Standards District Office having certification responsibility has issued the certificate holder operations specifications authorizing operations in accordance with an approved Minimum Equipment List. The approved Minimum Equipment List shall be carried aboard the airplane or the flight crew shall have access at all times prior to and during flight to all of the information contained in the approved Minimum Equipment List. An approved Minimum Equipment List, as authorized by the operations specification, constitutes an approved change to the type design.

(3) The approved Minimum Equipment List must:

(i) Be prepared in accordance with the limitations specified in paragraph (b) of this section.

(ii) Provide for the operation of the airplane with the instruments and equipment in an inoperable condition.

(4) Records identifying the inoperable instruments and equipment must be available to the pilot.

(5) The airplane is operated under all applicable conditions and limitations contained in the Minimum Equipment List and the operations specifications authorizing use of the Minimum Equipment List.

(b) The following instruments and equipment may not be included in the Minimum Equipment List:

(1) Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions.

(2) Instruments and equipment required by an airworthiness directive.

(3) Instruments and equipment required for specific operations by this part.

(c) Notwithstanding paragraphs (b)(1) and (b)(3) of this section, an airplane with inoperable instruments or equipment may be operated under a special flight permit under §§ 21.197 and 21.199 of this chapter.

PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR MORE

5. The authority citation for Part 125 continues to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430 and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

6. By revising § 125.201 to read as follows:

§ 125.201 Inoperable instruments and equipment.

(a) No person may take off an airplane with inoperable instruments or equipment installed unless the following conditions are met:

(1) An approved Minimum Equipment List exists for the airplane.

(2) The Flight Standards District Office having certification responsibility has issued the certificate holder operations specifications authorizing operations in accordance with an approved Minimum Equipment List. The approved Minimum Equipment List shall be carried aboard the airplane or the flight crew shall have access at all times prior to and during flight to all of the information contained in the approved Minimum Equipment List. An approved Minimum Equipment List, as authorized by the operations specification, constitutes an approved change to the type design.

(3) The approved Minimum Equipment List must:

(i) Be prepared in accordance with the limitations specified in paragraph (b) of this section.

(ii) Provide for the operation of the airplane with the instruments and equipment in an inoperable condition.

(4) Records identifying the inoperable instruments and equipment must be available to the pilot.

(5) The airplane is operated under all applicable conditions and limitations contained in the Minimum Equipment List and the operations specifications authorizing use of the Minimum Equipment List.

(b) The following instruments and equipment may not be included in the Minimum Equipment List:

(1) Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions.

(2) Instruments and equipment required by an airworthiness directive.

(3) Instruments and equipment required for specific operations by this part.

(c) Notwithstanding paragraphs (b)(1) and (b)(3) of this section, an airplane with inoperable instruments or equipment may be operated under a special flight permit under §§ 21.197 and 21.199 of this chapter.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

7. The authority citation for Part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421–1431 and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

8. By revising § 135.179 to read as follows:

§ 135.179 Inoperable instruments and equipment for multiengine aircraft.

(a) No person may take off an aircraft with inoperable instruments or equipment installed unless the following conditions are met:

(1) An approved Minimum Equipment List exists for the aircraft.

(2) The Flight Standards District Office having certification responsibility has issued the certificate holder operations specifications authorizing operations in accordance with an approved Minimum Equipment List. The approved Minimum Equipment List shall be carried aboard the aircraft or the flight crew shall have access at all times prior to and during flight to all of the information contained in the approved Minimum Equipment List. An approved Minimum Equipment List, as authorized by the operations specifications, constitutes an approved change to the type design.

(3) The approved Minimum Equipment List must:

(i) Be prepared in accordance with the limitations specified in paragraph (b) of this section.

(ii) Provide for the operation of the aircraft with the instruments and equipment in the inoperable condition.

(4) Records identifying the inoperable instruments and equipment and the information required by paragraph (a)(3)(ii) of this section must be available to the pilot.

(5) The aircraft is operated under all applicable conditions and limitations contained in the Minimum Equipment List and the operations specifications authorizing use of the Minimum Equipment List.

(b) The following instruments and equipment may not be included in the Minimum Equipment List:

(1) Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions.

(2) Instruments and equipment required by an airworthiness directive.

(3) Instruments and equipment required for specific operations by this part.

(c) Notwithstanding paragraphs (b)(1) and (b)(3) of this section, an aircraft with inoperable instruments or equipment may be operated under a special flight permit under §§ 21.197 and 21.199 of this chapter.

Issued in Washington, DC, on January 12, 1989.

Robert L. Goodrich,

Acting Director, Flight Standards Service.

[FR Doc. 89–1171 Filed 1–19–89; 8:45 am]

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federal register

Monday
January 23, 1989

Part V

Department of Agriculture

Forest Service

36 CFR Parts 211, 228, and 261

Oil and Gas Resources; Proposed Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 211, 228, and 261

Oil and Gas Resources

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

SUMMARY: These proposed rules set forth the procedures by which the Forest Service of the U.S. Department of Agriculture would carry out its statutory responsibilities for management of oil and gas leasing and attendant surface disturbing activities conducted on leaseholds on National Forest System lands. In the past, the Forest Service has relied on Bureau of Land Management procedures and regulations. However, the Federal courts have ruled that the Forest Service must promulgate its own procedures and regulations. Additionally, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanded the authority of the Secretary of Agriculture in the management of oil and gas resources on National Forest System lands and directed the Secretary to issue rules on bonding and reclamation standards. The intent of these rules is to satisfy both judicial direction and the new statute; to coordinate Forest Service oil and gas resource management procedures with those of the Bureau of Land Management, and to promote cooperation among the Agency, the oil and gas industry, and other publics interested in the management of oil and gas resources of the National Forest System lands.

DATE: Comments must be received in writing by March 24, 1989.

ADDRESSES: Send written comments to F. Dale Robertson, Chief (2820), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

The public may inspect comments received on these proposed rules in the office of the Director, Minerals and Geology Management Staff, Room 606, 1621 North Kent Street, Arlington, VA, during regular business hours (8 a.m. to 5 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Stanley Kurcaba, Minerals and Geology Management Staff, (703) 235-9715.

SUPPLEMENTARY INFORMATION: The Forest Service of the United States Department of Agriculture and the Bureau of Land Management of the United States Department of the Interior have joint responsibilities for the administration of the Federal oil and gas resources on National Forest System lands. In the past, the Forese Service has relied upon interagency agreements with the Bureau of Land Management to guide Forest Service review of proposed oil and gas leasing and review of proposed surface disturbances caused by oil and gas operations on those leases. However, the Forest Service has received judicial direction to promulgate regulations governing oil and gas leasing on National Forest System lands. The recently enacted Federal Onshore Oil and Gas Leasing Reform Act of 1987 (30 U.S.C. 226 et seq.) also requires the Forest Service to promulgate rules both to implement the new authority that the statute gave to the Secretary of Agriculture over oil and gas leasing and operations and to fufill the statute's mandate that the Secretary of Agriculture develop rules which ensure that adequate bonds are posted for reclamation of surface disturbing operations on a lease.

The Forest Service seeks to facilitate the orderly and environmentally sound development of Federal leasable oil and gas resources of the National Forest System in cooperation with the oil and gas industry and other interested publics. These regulations are designed to achieve that end.

The Secretary of Agriculture is reserving the authority at lease issuance to deny all operations on a leasehold in those circumstances where further environmental analyses beyond those done at the suitability determination indicate such preclusion is appropriate. This reservation of authority is required under such cases as *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988) and *Sierra Club* v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) to allow the agency the flexibility to engage in staged NEPA compliance. To the extent practicable given the changes in the Forest Service's authority over oil and gas leasing and operations made by the Leasing Reform Act, the proposed rule maintains the existing procedures by which the Bureau of Land Management and the Forest Service have been jointly responding to leasing and operating proposals. The primary reason for following the existing procedures to the extent practicable is that they reflect the many legal authorities applicable to oil and gas leasing and operating decisions and they are responsive to current management needs. In addition, agency personnel, the oil and gas industry and other persons interested in the management of National Forest System resources are familiar with existing procedures and requirements. Therefore, maintaining the existing procedures to the extent possible will reduce confusion over Agency roles and operator responsibilities in the leasing and development of Federal oil and gas resources located on National Forest System lands.

Many of the new requirements and procedures that are included in the proposed rule are designed to define the role that the Forest Service will play in the approval of oil and gas leasing and operations because of the expanded authority of the Secretary of Agriculture under the Leasing Reform Act. Other of the new requirements are included to implement the direction in the Leasing Reform Act to the Secretary of Agriculture to issue regulations establishing bonding standards.

The following briefly describes the role that the Forest Service would play under the proposed rule in the issuance of oil and gas leases, the approval of operations on the leaseholds, and the administration of those operations.

The Bureau of Land Management cannot issue leases for Federal oil and gas resources on National Forest System lands without the approval of the Forest Service. Therefore, the Forest Service must develop a process for making decisions as to whether to authorize the Bureau of Land Management to offer National Forest System lands for leasing. First, the Forest Service proposes to identify lands with potential for leasing based on existing oil and gas production, known geologic potential, or industry interest in an area and, in cooperation with the oil and gas industry, the Bureau of Land Management, and interested publics to develop a schedule for reviewing those areas. Then the Forest Service would determine if these lands with leasing potential are legally available for leasing. The Agency would review whether available lands are suitable for exploration and development by considering whether oil and gas development is consistent with the forest land and resource management plan or not precluded by the plan or if the lands could be suitable for leasing if stipulations governing surface uses were added to a lease. The Forest Service and Bureau of Land Management would then evaluate the adequacy of the Forest Plan Environmental Impact Statement or other National Environmental Policy Act documents to determine if additional National Environmental Policy Act analysis and documentation is required. The Forest Service would make a determination of an area's suitability for oil and gas leasing and give public notice of the decision. A suitability determination would be an appealable decision under Forest Service appeals procedures (36 CFR 211.18). The Forest Service would then forward its decision

to the appropriate Bureau of Land Management office.

The Bureau of Land Management would then be able to offer such lands for competitive sale. If there were no bidders for the offering, the lands would then be available for lease by an over-the-counter application process for a period of 2 years.

After the Bureau of Land Management issued a lease, the operator might seek to conduct surface disturbing activities on the lease. In accordance with the Federal Onshore Oil and Gas Leasing Reform Act, the proposed regulations would require an operator to obtain Forest Service approval of a surface use plan of operations before conducting operations. In order to coordinate review of proposed operations by the Forest Service and the Bureau of Land Management and to ease the administrative burden on the public, the proposed rules would direct operators to submit surface use plans of operations involving National Forest System lands to the Bureau of Land Management as part of the operator's Application for a Permit to Drill. The proposed rule specifies the information that the operator would have to include in a surface use plan of operations for a lease on National Forest System lands and encourages the operator to contact the appropriate local Forest Service office for assistance in preparing the proposed plan. Upon receipt of a surface use plan of operations involving operations on National Forest System lands, the Bureau of Land Management would forward that plan to the Forest Service for its review and approval.

Prior to, or in connection with, the submittal of a surface use plan of operations, the operator could request that the Forest Service authorize the Bureau of Land Management to modify or waive a stipulation included in a lease at the direction of the Forest Service. The proposed rule would permit the Forest Service to grant such a request in the circumstances specified after compliance with the National Environmental Policy Act of 1969 and other applicable laws. The Forest Service would give public notice of its decision on a substantial stipulation modification or waiver request in a newspaper of general circulation. The decision would be subject to administrative appeal under the procedures at 36 CFR 211.18.

The Forest Service would review a proposed surface use plan of operations for adequacy using the criteria proposed in the rule. If the plan of operations was adequate as submitted, the Forest Service would approve the plan. If the plan of operations was not adequate, the Forest Service could disapprove the plan or approve the plan subject to operating conditions which would render the plan adequate. As part of the review process, the Forest Service would establish bonding requirements for any plan of operations that would be approved. In accordance with the requirements of the Federal Onshore Oil and Gas Leasing Reform Act, the proposed rules would direct an operator to post a bond in an amount sufficient to ensure reclamation and the restoration of any lands or surface water adversely affected by the operations prior to the commencement of operations.

At the conclusion of the surface use plan of operations review process, the Forest Service would advise the operator and the appropriate Bureau of Land Management office of the decision on a proposed plan and, if appropriate, the bonding requirements for the operations. Public notice of the decision also would be given. The decision would be subject to administrative appeal under the procedures at 36 CFR 211.18.

If the operator completed the operations authorized by the initial surface use plan of operations and desired to conduct further operations, the operator would be required to submit a supplemental plan of operations which would be subject to review and approval in the same manner as an initial plan of operations.

The proposed regulations would require an operator to perform reclamation on the leasehold as the operations were completed. The proposed regulations also provide for the staged release of bonds as reclamation is completed.

Under the proposal, the operator would be required to conduct operations on the leasehold in accordance with the terms of the lease, these regulations and an approved surface use plan of operations. The proposed rule also details the remedies that the Forest Service would have if the operations conducted by the operator were not in compliance with the terms of the lease, these regulations and an approved surface use plan of operations. Initially, the Forest Service would try to obtain the operator's voluntary compliance with the applicable provision. If the operator refused to voluntarily comply, the proposed rules would provide that the Forest Service would issue the operator a notice of noncompliance specifying a deadline for the operator to bring the operations into compliance. The proposed regulations provide that if the operator still failed to come into compliance the Forest Service would take the following actions, as appropriate:

1. If the noncompliance appeared to be material, the Forest Service would initiate a material noncompliance proceeding in accordance with the procedures proposed in the regulations. If the Forest Service official presiding over the proceeding found that the noncompliance was material, the operator and the Bureau of Land Management would be so advised. An operator found to be in material noncompliance would be ineligible to receive further Federal oil and gas leases or assignments until the operations were brought into compliance.

2. If the noncompliance was resulting in an imminent danger to public health or safety or in irreparable resource damage, the Forest Service could suspend the approval of the surface use plan of operations. The proposed rule provides that the suspension would last until the operator brought the operations into compliance.

3. If the noncompliance was resulting in an emergency, the Forest Service could take whatever measures were necessary to abate the emergency. The proposed regulations would require the operator to reimburse the Forest Service for the full cost of such abatement actions.

The proposed rule also advises the operator that the Forest Service could seek criminal penalties for the operator's noncompliance pursuant to 36 CFR Part 261.

In addition to these requirements which would be set forth at 36 CFR Part 228, Subpart E, the proposed rules would make conforming changes in two other existing Forest Service rules—36 CFR 211.18, which governs the Forest Service administrative appeal process; and 36 CFR Part 261, which specifies conduct on the National Forest System which is prohibited and for which criminal penalties may be imposed.

The following diagram illustrates how oil and gas leasing and operations would be administered on National Forest System lands:

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FOREST SERVICE OIL AND GAS LEASING AND OPERATIONS PROCESS

1. Agency IDENTIFIES LANDS WITH POTENTIAL for leasing.
(factors: existing production, known geologic potential, and industry interest in areas)

2. Agency REVIEWS LANDS FOR LEASING SUITABILITY

3. Agency DETERMINES IF LANDS ARE SUITABLE for leasing (i.e., lands are available for leasing, leasing consistent with Forest plan or not precluded by plan, or lands can be suitable for leasing with certain stipulations)

4. Agency/BLM CONDUCTS NEPA ANALYSIS AND DOCUMENTATION
Gives public notice. Decision appealable.

5. BLM HOLDS COMPETITIVE LEASE SALE.

Parcels are sold

Parcels not bought

Available for application for 2 years

application

no application

6. BLM ISSUES LEASE

7. LESSEE SUBMITS APD TO BLM

8. BLM FORWARDS SURFACE USE PLAN TO FOREST SERVICE

9. FS AND BLM CONDUCT NEPA COMPLIANCE AND REQUIRE BONDING

FS APPROVES-------(SUBJECT TO APPEAL)-------FS DISAPPROVES

10. OPERATIONS COMMENCE
(Once the BLM has approved down hole use)

Producer

Dry Hole

11. SUPPLEMENTAL SURFACE USE PLAN OF OPERATIONS

12. NEPA COMPLIANCE AND DECISION PROCESS REPEATED
(SUBJECT TO APPEAL)

WELL DEPLETES

13. OPERATOR COMPLETES RECLAMATION

14. BLM RELEASES BOND

8A

BILLING CODE 3410-11-C

Section-by-Section Analysis of Proposed Rule

The rules governing Forest Service procedures for responding to and managing oil and gas leasing and surface disturbing operations on National Forest System lands would be codified as a new Subpart E of Part 228 of Title 36 of the Code of Federal Regulations. The following section-by-section analysis describes in detail the provisions of the proposed rule.

Section 228.100 Scope and applicability.

This section specifies the scope of Forest Service responsibility in oil and gas leasing and further states that the rules would apply to leases and operations in effect as of the effective date of the rule as well as to new leases issued under the Federal Onshore Oil and Gas Leasing Reform Act of 1987. This section also makes clear that surface uses off a leasehold require authorization by the authorized Forest officer and cites the major existing rules that apply to those uses.

Section 228.101 Definitions.

This section defines special terms used in the proposed rules.

Section 228.102 Determination of lands suitable for leasing.

The Federal Onshore Oil and Gas Leasing Reform Act of 1987 made significant changes in the manner in which Federal oil and gas leasing is conducted. Under the Act, application for leases will no longer be accepted until after lands have been offered for competitive sales. Therefore, in order to offer leases, Federal Agencies must take the initiative to identify lands suitable for leasing and to make those lands available for competitive sale through the Bureau of Land Management. Under the proposed rule, each Forest Supervisor would, within 6 months of the effective date of the rule, identify those areas of the National Forest System in which there is potential for leasing and that have not been previously evaluated and develop a schedule for determining their suitability for oil and gas leasing. The Forest Supervisor, in cooperation with the oil and gas industry and the Bureau of Land Management, would give first priority to those areas having the highest potential for leasing. This would meet the mandate in the *Mountain States Legal Foundation vs Andrus (1980)* decision to require the Forest Service to develop a leasing process and would eliminate needless analyses of areas where no potential for oil and gas leasing exists. Potential lessees would have the opportunity to participate in the process of establishing the priority for reviewing those areas identified as having leasing potential.

When areas are reviewed for their suitability for leasing, this section would require the authorized Forest officer to identify those areas legally available (that is, not withdrawn from leasing), review the Forest land and resource management plan for direction, and identify conditions of occupancy that would be included as lease stipulations. The Forest Service and the Bureau of Land Management would cooperate in meeting the analysis and documentation requirements of the National Environmental Policy Act. This section would require the authorized Forest officer to give written notice to the Bureau of Land Management of the outcome of a suitability determination, which in effect is the notice to consent, or not to consent, to leasing certain lands. The authorized Forest officer would include any stipulations as a condition of leasing derived from the suitability determination. For decisions on suitability for leasing, the Regional Forester is the authorized Forest officer.

Section 228.103 Notice and transmittal of suitability decision.

This section would require public notice in a newspaper of general circulation of the suitability decision and of appeal rights available under 36 CFR 211.18. It should be noted that in addition to this public notice requirement, under existing agency procedures, all who request notice of a suitability decision would receive direct notice. This section also specifies inclusion in all leases to which the Forest Service consents of a standard stipulation that gives the lessee notice that the Secretary of Agriculture retains the authority to preclude all operations on a leasehold in those exceptional circumstances where further environmental analyses indicate such action is appropriate, that lease operations are subject to the regulations of the Secretary of Agriculture and that the operator must submit a surface use plan of operations for Forest Service approval or disapproval. The Secretary of Agriculture is specifically requesting public comments on the effect of this retention of authority and its effect on perceived lease value and compared with lease rights currently specified at 43 CFR 3101.1-2.

Section 228.104 Consideration of request to modify lease terms.

This section would allow an operator to request that the Forest Service modify or waive a stipulation included in a lease at the direction of the Forest Service. The proposed rule would permit the Forest Service to grant such a request in the circumstances specified after compliance with the National Environmental Policy Act of 1969 and other applicable laws. The Forest Service would give notice of its decision on a substantial stipulation modification or waiver request and of appeal rights under the procedures at 36 CFR 211.18 in a newspaper of general circulation.

Section 228.105 Operator's submission of a surface use plan of operations.

The proposed rule would clarify that an operator would submit a surface use plan of operations that would involve the National Forest System through the appropriate Bureau of Land Management office. Having the Bureau of Land Management continue to receive the entire Application for Permit to Drill (APD) package will provide for more efficient administration and less burden to an operator than submitting information separately to two agencies. This section also encourages cooperation between the operator and the Forest Service in preparing a surface use plan of operations prior to formally submitting an APD, thus eliminating potential problems early in the process. This section specifies surface use plan of operations content which is the same information as currently required for lands administered by the Bureau of Land Management.

Section 228.106 Review of a surface use plan of operations.

This section establishes the process by which the Forest Service would review a surface use plan of operations. Under this proposed process, the authorized Forest officer would base the approval of a surface use plan of operations on the terms of the lease, direction in the Forest land and resource management plan in effect at the time the surface use plan of operation is submitted, and information derived from the result of National Environmental Policy Act analyses.

When lands are determined to be suitable for leasing, a lessee can normally expect that future lease operations would be authorized, but the Forest Service must explicitly approve operations under a lease and comply with the National Environmental Policy Act before approving or denying such operations. Past experience demonstrates that most problems can be solved by the Forest Service and the lessee working cooperatively to obtain necessary revisions in the design of a

proposal. However, if the circumstances warrant, the Forest Service will use the authority granted the Secretary of Agriculture by the Leasing Reform Act of 1987 to disapprove proposed operations. In exceptional circumstances, this could mean that no operations would be approved on a leasehold.

This section also gives notice that the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500 through 1508, and Forest Service implementing policies and procedures must be followed as part of the Agency's review of an operating plan.

This section would further require the authorized Forest officer to advise the Bureau of Land Management of the reasons when a proposed surface use plan cannot be processed within 3 days after the conclusion of the 30-day notice period. Finally, this section requires the Forest Service to give public notice of a decision on a surface use plan of operations and appeal rights available under 36 CFR 211.18.

Section 228.107 Surface use requirements.

This section establishes requirements that would apply to oil and gas operations on the National Forest System. The requirements address the design of access facilities, protection of cultural and historic resources, fire prevention and control, maintaining fisheries, wildlife and plant habitat, conduct of reclamation, safety measures, waste disposal, and watershed protection. It is necessary to establish minimum surface use requirements for operations on National Forest System lands in order to carry out the direction in Section (g) of the Leasing Reform Act of 1987 which directs that:

> * * * For National Forest lands, the Secretary of Agriculture, shall regulate all surface disturbing activities conducted pursuant to any lease issued under the Act and shall determine reclamation and other actions as required in the interests of conservation of surface resources.

The surface use requirements of the rule are the same requirements as currently contained in standard stipulations that the Forest Service, until recently, has attached to all lease issuance decisions or recommendations.

Establishment of specific National reclamation standards would not be appropriate because of the diverse land surfaces, vegetation, animal life, soil types, etc., and the uniqueness of many surface disturbances. Therefore, standards for reclamation and mitigation measures to minimize adverse impacts are established for each operation by the Bureau of Land Management and Forest Service personnel during the onsite inspection as part of the review of each Application for Permit to Drill and the accompanying surface use plan of operations. General guidance on reclamation and operating standards is contained in a joint Bureau of Land Management, Forest Service, and Geological Survey publication entitled, "Surface Operating Standards for Oil and Gas Exploration and Development," Second Edition, August 1978.

Section 228.108 Bonds.

This section would establish that bonding is required before surface disturbing activities can be authorized and would require the authorized Forest officer to fix the bond amount at a sum adequate to ensure compliance with 30 U.S.C. 226(g). A bond required by the authorized Forest officer would be held by the Bureau of Land Management. This would provide for more efficient management and less burden on the public. The proposed rule does not establish a fixed bond sum because the extent of reclamation required varies by site and type of operation. The authorized Forest officer is in the best position to determine what is an adequate bond amount based upon on-the-ground site specific review of proposed operations.

Section 228.109 Indemnification.

This section would provide a means of protecting the United States Government from liability as a result of claims, demands, losses, or judgments caused by an operator's use or occupancy. This language is similar to that found in 36 CFR 251.56, terms and conditions for special use permits, and is necessary to adequately regulate occupancy.

Section 228.110 Temporary cessation of operations.

The Agency has experienced a high incidence of operators temporarily ceasing operations without adequate stabilization of the site or protection of resources or public safety. This section addresses this problem by requiring notification to the Forest Service of temporary or seasonal cessation of operations. This notification would allow the authorized Forest officer to work with the lessee in taking appropriate interim measures to protect resources or public safety.

Section 228.111 Compliance and inspection.

Section (g) of the Leasing Reform Act of 1987 (30 U.S.C. 226(g)) provides remedies in situations where operators fail to comply in any material respect with the reclamation, bonding, and other standards established by the Secretary of Agriculture. Because the sanctions of the Act can result in loss of leases, it is important to establish compliance procedures that ensure operators timely notice of noncompliance, opportunity to remedy the violation, and opportunity for a hearing. Sections 228.111 through 228.113 set forth both informal and formal compliance and hearing procedures. Section 228.111 would require the Forest officer to give notice to an operator when that operator is found in noncompliance with an approved surface use plan of operations, with stipulations made part of the lease at the direction of the Forest Service, or with these proposed regulations. Because it is the intent of the Forest Service to resolve problems at the local level if possible, this section is designed to encourage cooperation between the Forest Service and the operator.

This section also notifies the operator of other statutes applicable to their operations.

Section 228.112 Notice of noncompliance.

This section of this proposed rule would establish the formal procedures to be followed if the authorized Forest officer has determined an entity may have failed or refused to comply in any material respect with the reclamation requirements and other applicable standards established under 30 U.S.C. 226(g) of the Federal Onshore Oil and Gas Leasing Reform Act of 1987. The authorized Forest officer would be required to refer noncompliance such as, but not limited to, operating without an approved surface use plan of operations or failure to complete reclamation. The section describes the manner of serving notice and states that the authorized Forest officer shall either refer the matter to a compliance officer for review and/or suspend the surface use plan of operations in the event of imminent dangers to public health or safety and irreparable resource damage. The section also provides for the abatement of such emergencies as irreparable resource damage through actions by the Forest Service and for billing of the operator for costs incurred by the Agency to perform such abatement actions.

Section 228.113 Material noncompliance preceedings.

This section would establish the procedure for review and determination of material noncompliance. The Deputy Chief of the National Forest System would review a noncompliance referral made by the authorized Forest officer and if evidence supports a reasonable belief that an operator has failed to come into compliance with the requisite standards and that noncompliance may be material, the Deputy Chief would initiate the material noncompliance proceedings. The section requires due notice to the operator and specifies the content of the notice, permits an operator to submit argument and allows for an informal hearing at the operator's request or a fact finding conference.

The proposed rule specifies that the compliance officer's decision shall be based on the entire record and prescribes the content of decision letter.

Upon determining that an operator is in material noncompliance, the compliance officer would be required to notify the Secretary of the Interior of his/her findings. This section of the proposed rule would require the Deputy Chief for the National Forest System to maintain and distribute a list of operators in noncompliance to help ensure that pursuant to the 1987 Act, such operators do not receive future leases. Paragraph (g) of this section also provides for petition of the authorized Forest officer to rescind a finding of noncompliance once an entity has come into compliance. Reinstatement of an operator's opportunity to obtain future leases is clearly envisioned by the 1987 Leasing Reform Act and the petitioning process proposed in this section provides a manageable process for achieving reinstatement when an operator has come into compliance.

Section 228.114 Additional notice of decisions.

In compliance with 30 U.S.C. 226(f) of the Leasing Reform Act, this section requires the Forest Service to post notices provided by the Bureau of Land Management of lease sales, requests for modification of lease stipulations, and applications for permit to drill. The section specifies where such notices are to be posted and makes clear that posting notices is in addition to the public notice requirements imposed elsewhere in the rule.

36 CFR 211.18 Appeal of decisions of forest officers.

In addition to the proposed rules at Part 228, Subpart E of Title 36, this rulemaking contains an amendment to the rules governing appeal of decisions of authorized Forest officers. Under this proposed rule, 36 CFR 211.18 would be amended to exempt from those rules, appeal of decisions related to determining lands suitable for leasing made pursuant to 36 CFR 228.102 and related to the issuance of a notice of noncompliance or to material noncompliance proceedings related to oil and gas leasing operations on National Forest System lands pursuant to 36 CFR 228.11 through 228.112. Section 228.113 of the proposed rule would establish separate administrative procedures for material noncompliance decisions. It should be noted that, under this conforming amendment, the general public also could not appeal decisions related to compliance and noncompliance decisions. This exclusion is appropriate since compliance decisions are solely matters affecting the business relationship that exists between the operator and the Forest Service based on the terms of a Federal lease and an approved surface use plan of operations. Those decisions that are appealable are identified in this proposed rulemaking.

36 CFR Part 261 Prohibitions.

Ths rulemaking also contains an amendment to the rules governing occupancy of the National Forest System. Under this proposed rule, 36 CFR Part 261, Subpart A—General Prohibitions, would amend "Operating Plan" to include a surface plan of operations as provided for in 36 CFR Part 228, Subpart E. This is necessary to differentiate between a plan of operations at 36 CFR Part 228, Subpart A.

Regulatory Impact

These proposed rules have been reviewed under the Department of Agriculture procedures and Executive Order 12291, and it has been determined that these regulations are not major rules. This regulation will not have an effect on the economy of $100 million or more and, in and of itself, will not increase major costs to consumers, geographic regions, industry, or Federal, State, and local agencies. These regulations are essentially procedural and represent no change in current requirements on lessees, assignees, or operators and, therefore, it will not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete in foreign markets.

It has also been determined that these proposed rules do not have a significant economic impact on a substantial number of small entities because of its limited scope and application. Therefore, the proposed rules are not subject to review under the Regulations Flexibility Act (5 U.S.C. 60 et seq.).

It should be noted, that while the requirements of the surface use plan of operations proposed in this rule are new requirements by the Department of Agriculture, the requirements are identical to that now required by the Bureau of Land Management, U.S. Department of the Interior, as part of an Application for Permit, to Drill or Sundry Notice and, therefore, will not increase the amount or type of information a lessee would have to submit for operations on National Forest System lands.

The total burden hours on an operator are estimated to be 125 hours annually. These hours are the same as estimated by the Bureau of Land Management in its request for Office of Management and Budget clearance of Forms 3160–3 and 3160–5. These forms were cleared through December 31, 1988, and are assigned clearance numbers 1004–0136 and 1004–0135 respectively. An operator proposing to conduct surface disturbing activities on the National Forest System is required to utilize these existing Bureau of Land Management forms and submit information required in this proposed rule to the appropriate Bureau of Land Management office.

However, because these requirements will not be levied by the Department of Agriculture, a request for approval of these new reporting requirements has been submitted to the Office of Management and Budget pursuant to 5 CFR Part 1320. Those wishing to comment on the proposed information requirements of this rule are encouraged to send their written comments to the Forest Service and to the:

USDA Regulatory Desk Officer, Office of Information and Regulatory Affairs, Attention: Docket Library, Room 3201 NEOB, Washington, DC 20503

Based on both experience and environmental analysis, this proposed rule will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

List of Subjects

36 CFR Part 211

Administrative practice and procedure, Fire prevention, Intergovernmental relations, National forests.

36 CFR Part 228

Administrative practices and procedures, Environmental protection, Mines, National forests, Public lands—Mineral resources, Rights of way, Reporting and recordkeeping, Surety bonds, Wilderness areas.

36 CFR Part 261

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, it is proposed to amend Chapter II of Title 36 of the Code of Federal Regulations as follows:

PART 211—ADMINISTRATION

1. The authority citation for Part 211 would continue to read as follows:

Authority: 30 Stat. 35, as amended, sec. 1, 33 Stat. 628 (16 U.S.C. 551, 472).

Subpart B—Appeal of Decisions Concerning the National Forest System

2. Amend § 211.18 by adding a new paragraph (b)(16) to read as follows:

§ 211.18 Appeal of decisions of Forest officers.

* * * * *

(b) * * *

(16) Decisions made pursuant to 36 CFR Part 228, Subpart E, except as otherwise provided by §§ 228.102(d), 228.104(c) and 228.106(b).

* * * * *

PART 228—MINERALS

1. The authority citation for Part 228 would be revised to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 478, 551); 41 Stat. 437, as amended, sec. 5102(d), 101 Stat. 1330–256 (30 U.S.C. 226); 61 Stat. 914, as amended (30 U.S.C. 352).

2. Add new Subpart E to read as follows:

Subpart E—Oil and Gas Resources

Sec.
228.100 Scope and applicability.
228.101 Definitions.

Leasing

228.102 Determination of lands suitable for leasing.
228.103 Notice and transmittal of suitability decision.
228.104 Consideration of requests to modify lease terms.

Authorization of Occupancy Within a Leasehold

228.105 Operator's submission of surface use plan of operations.
228.106 Review of surface use plan of operations.
228.107 Surface use requirements.
228.108 Bonds.
228.109 Indemnification.

Administration of Operations

228.110 Temporary cessation of operations.
228.111 Compliance and inspection.
228.112 Notice of noncompliance.
228.113 Material noncompliance proceedings.

Notice of Decisions

228.114 Additional notice of decisions.

§ 228.100 Scope and applicability.

(a) *Scope.* This subpart sets forth the rules and procedures by which the Forest Service of the United States Department of Agriculture will carry out its statutory responsibilities in the issuance of oil and gas leases on National Forest System lands, for approval and modification of attendant surface use plans of operations, for monitoring of surface disturbing operations on such leases, and for enforcement of surface use requirements and reclamation standards.

(b) *Applicability.* The rules of this subpart apply to leases on National Forest System lands and to operations that are conducted on Federal oil and gas leases on National Forest System lands as of [*Insert effective date of these rules*].

(c) *Applicability of other rules.* Surface uses, including access, associated with oil and gas prospecting, exploration, development, production, and reclamation activities, that are conducted on National Forest System lands outside a leasehold must be authorized by the Forest Service. Such off-leasehold activities are subject to the regulations set forth elsewhere in 36 CFR Chapter II, including but not limited to the regulations set forth in 36 CFR Parts 251 and 261.

§ 228.101 Definitions.

For the purposes of this subpart, the terms listed in this section have the following meanings:

Assignee. A person to whom a lessee has transferred all or part of the lessee's interest in a Federal oil and gas lease.

Assignment. The transfer of all or part of an interest in a Federal oil and gas lease by a lessee to an assignee.

Authorized Forest officer. The Forest Service employee delegated the authority to perform a duty described in these rules. Generally, a Regional Forester, Forest Supervisor, District Ranger, or Minerals Staff Officer depending on the scope and level of the duty to be performed.

Compliance Officer. The Deputy Chief, or the Associate Deputy Chiefs, National Forest System or the line officer designated to act in the absence of the Duty Chief.

Leasehold. The area described in a Federal oil and gas lease.

National Forest System. All National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and land utilization projects administered under title III of the Bankhead-Jones Tenant Act (7 U.S.C.A. 1010 et seq.), and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system (16 U.S.C. 1609).

Off-leasehold. A term used to characterize activities associated with oil and gas leasing operations that occur on National Forest System lands outside the area described in a Federal oil and gas lease.

Operations. Surface disturbing activities that are conducted on a leasehold on National Forest System lands pursuant to a current approved surface use plan of operations, including but not limited to, exploration, development, production and utilization of oil and gas resources and reclamation of surface resources.

Operator. A person who is conducting operations pursuant to a Federal oil and gas lease. The operator may be a lessee, assignee, or a person conducting operations on behalf of a lessee or assignee.

Person. An individual, partnership, corporation, association or other legal entity.

Surface use plan of operations. A document submitted by an operator as part of an Application for Permit to Drill or a supplement to an approved plan of operations detailing proposed surface occupancy and planned operations pursuant to a Federal oil and gas lease.

Leasing

§ 228.102 Determination of land suitable for leasing.

(a) *Compliance with the National Environmental Policy Act of 1969.* In determining lands suitable for leasing, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500–1508, and Forest Service implementing policies and procedures set forth in Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15. In compliance with the Act, the authorized Forest officer shall take into

consideration the authority granted by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, to subsequently approve or disapprove a surface use plan of operations proposed following issuance of a lease.

(b) *Identification of potential leasing areas.* Within 6 months of the effective date of these rules, Forest Supervisors shall identify those areas of the National Forest System under their jurisdiction that have potential for oil and gas leasing and that have not previously been evaluated for their suitability for oil and gas leasing.

(1) An area shall be considered to have potential for oil and gas leasing if:

(i) There is ongoing oil and gas production in the area;

(ii) The geological environment of the area is known to be favorable for the accumulation of oil and gas resources; or

(iii) There is ongoing industry interest in obtaining oil and gas leases for the area.

(2) After identifying those areas that have potential for oil and gas leasing, each Forest Supervisor shall consult with the oil and gas industry, the Bureau of Land Management, and other interested parties and develop a schedule for reviewing areas not previously evaluated to determine their suitability for oil and gas leasing. In developing this schedule, the Forest Supervisor shall give first priority to reviewing those areas that appear to have the highest potential for leasing. The Forest Supervisor may update the schedule as appropriate.

(c) *Review of lands for leasing suitability.* In reviewing areas identified as having potential for oil and gas leasing, the authorized Forest officer:

(1) Shall identify and exclude from further review the following lands, which are not available for leasing:

(i) Lands withdrawn from mineral leasing by an act of Congress or by an order of the Secretary of the Interior;

(ii) Lands recommended for wilderness allocation by the Secretary of Agriculture;

(iii) Lands designated by statute as wilderness study areas, unless oil and gas leasing is specifically allowed to continue by the statute designating the study area;

(iv) Lands within areas allocated for wilderness or further planning in Executive Communication 1504, Ninety-Sixth Congress (House Document No. 96–119), unless such lands subsequently have been allocated to uses other than wilderness by an approved forest land and resource management plan or have been released to uses other than wilderness by an act of Congress; and

(v) Roadless areas currently undergoing evaluation pursuant to 36 CFR 219.17; and,

(2) Shall review the relevant forest land and resource management plan to identify direction, management prescriptions, and associated standards and guidelines that would be applicable to oil and gas leasing on the area.

(d) *Determination of suitability.* The respective Regional Forester shall determine that an area is suitable for oil and gas leasing and authorizes the Bureau of Land Management to offer oil and gas leasing upon:

(1) A finding that the lands are available for oil and gas leasing,

(2) A finding that oil and gas leasing operations on the area would be consistent with, or would not be precluded by, the applicable forest land and resource management plan, management prescriptions, and associated standards and guidelines in the plan, and

(3) Identification of conditions of surface occupancy and use that would be required as stipulations in leases issued for the area to ensure consistency with law and the forest land and resource management plan for the area.

§ 228.103 Notice and transmittal of suitability decision.

(a) *Public notice.* The authorized Forest officer shall give public notice in a newspaper of general circulation of the outcome of each suitability review conducted pursuant to § 228.102(d). The notice shall further specify that the decision is subject to administrative appeal under the procedures at 36 CFR 211.18.

(b) *Notice to the Bureau of Land Management.* The authorized Forest officer shall promptly notify the appropriate Bureau of Land Management office, in writing, of the decision. The notice shall clearly specify those lands that the Forest Service authorizes the Bureau of Land Management to offer for oil and gas leasing and those stipulations which the Forest Service directs the Bureau of Land Management to include in a lease which may be issued for those lands.

(c) *Standard stipulation.* The following standard stipulation shall be included in oil and gas leases issued for National Forest System lands: "The lessee must comply with the applicable rules and regulations of the Secretary of Agriculture set forth at Title 36, Chapter II, of the Code of Federal Regulations governing use and management of the National Forest System and must submit to the authorized Forest officer a surface use plan of operations for approval or disapproval in accordance with 36 CFR Part 228, Subpart E. The Secretary of Agriculture retains the authority under this lease to preclude all operations on a leasehold where analyses of the environment indicate such action is appropriate."

§ 228.104 Consideration of requests to modify lease terms.

(a) *General.* A person proposing to conduct operations on a lease may request the authorized Forest officer to authorize the Bureau of Land Management to modify or waive a stipulation included in a lease at the direction of the Forest Service except for the standard stipulation as required by § 228.103(c) of this subpart. The person making the request should submit any information which might assist the authorized Forest officer in making a decision.

(b) *Review.* The authorized Forest officer shall review any information submitted in support of the request and any other pertinent information.

(1) As part of the review, the authorized Forest officer shall comply with the National Environmental Policy Act of 1970 (42 U.S.C. 4331 et seq.) and any other applicable laws, and prepare any appropriate environmental documents.

(2) The authorized Forest officer may grant a request to modify or waive a stipulation if:

(i) Modification or waiver of the stipulation is consistent with applicable Federal laws;

(ii) Modification or waiver of the stipulation is consistent with the current forest land and resource management plan if such a plan is in effect;

(iii) The management objectives which led the Forest Service to require the inclusion of the stipulation in the lease can be met without restricting operations in the manner provided for by the stipulation given the present condition of the surface resources or the nature, location, or timing of the proposed operations; or are no longer applicable for the area; and

(iv) Is acceptable to the authorized Forest officer based upon the review of the environmental consequences of the proposed modification.

(c) *Notice of decision.* (1) When the review of a stipulation modification or waiver request has been completed and the authorized Forest officer has reached a decision, the authorized Forest officer shall promptly notify the operator and the appropriate Bureau of Land Management office, in writing, of the decision to grant, with or without additional conditions, or deny the request.

(2) For any decision to modify or waive a lease stipulation that would result in a substantial modification of a lease term, the authorized Forest officer shall give notice in a newspaper of general circulation of the decision. The notice shall specify that the decision is subject to administrative appeal at 36 CFR 211.18.

Authorization of Occupancy Within a Leasehold

§ 228.105 Operator's submission of surface use plan of operations.

(a) *General.* An operator proposing to conduct operations that will cause disturbance of surface resources of National Forest System lands must submit a proposed surface use plan of operations as part of the Application for Permit to Drill to the appropriate Bureau of Land Management office for forwarding to the Forest Service.

(b) *Preparation of plan.* In preparing the surface use plan of operations, the operator is encouraged to contact the local Forest Service office for assistance and to make use of such information as is available from the Forest Service concerning the surface resources and uses, environmental considerations, and local reclamation procedures.

(c) *Content of plan.* The type, size, and intensity of the proposed operations and the sensitivity of the surface resources that will be affected by the proposed operations determine the level of detail and the amount of information which the operator must include in a proposed plan of operations. However, any surface use plan of operations submitted by an operator shall contain maps and plats of a scale no smaller than 1:24,000 and narrative descriptions which provide the following information:

(1) *Access facilities.* The location, size, and type of existing or new access facilities that the operator proposes to use, maintain, improve, or construct in connection with the operations;

(2) *Ancillary facilities.* The location, size, and type of any ancillary facilities (such as airstrips, camps, living facilities, parking areas, reserve and burn pits, and soil material stockpiles) that the operator proposes to use in connection with the operations;

(3) *Drill pad.* The location and design parameters of the drill pad that the operator proposes to construct;

(4) *Production facilities.* To the extent known or anticipated, the location, size, and type of production facilities and lines that the operator anticipates would be installed if the well is successful;

(5) *Reclamation measures.* The measures that the operator proposes to take to reclaim surface resources disturbed in connection with the operations, including information on the configuration of the reshaped topography, drainage system, segregation of spoil materials, surface manipulations, waste disposal, revegetation methods, soil treatments and other practices necessary to reclaim all disturbed areas, including any access roads or portions of drill pads when no longer needed;

(6) *Reclamation timing.* An estimate of the time for commencement and completion of reclamation operations, dependent upon weather conditions and other surface uses of the area;

(7) *Waste disposal.* The methodology that the operator proposes to use for the safe containment and disposal of the waste materials (such as cuttings, garbage, salts, chemicals, sewage, etc.) that will result from drilling the proposed well and the location of the waste containment and disposal facilities that the operator proposes to utilize; and

(8) *Other information.* Any other information that might assist the authorized Forest officer in reviewing the proposed surface use plan of operations.

(d) *Supplemental plan.* The operator must submit a supplemental surface use plan of operations to the Bureau of Land Management for forwarding to the Forest Service whenever the operator proposes to conduct additional surface disturbing operations that are not authorized by a current approved surface use plan of operations. A supplemental plan of operations is subject to the same requirements under this subpart as an initial surface use plan of operations.

§ 228.106 Review of surface use plan of operations.

(a) *Review.* The authorized Forest officer shall review and decide on the adequacy of a surface use plan of operations as promptly as practicable given the nature and scope of the proposed plan.

(1) As part of the review, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500 through 1508, and the Forest Service implementing policies and procedures set forth in Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15.

(2) An adequate surface use plan of operations is one that:

(i) Contains the information specified in § 228.105(c) of this subpart;

(ii) Is consistent with the terms of the lease, including the lease stipulations, and applicable Federal laws;

(iii) Is consistent with the current forest land and resource management plan if such a plan is in effect; and

(iv) Meets or exceeds the surface use requirements of § 228.107 of this subpart.

(v) Is acceptable to the authorized Forest officer based upon the review of the environmental consequences of the proposed operation.

(b) *Decision.* The authorized Forest officer shall make a decision on the approval of a surface use plan of operations as follows:

(1) If the authorized Forest officer will not be able to make a decision on the proposed plan within 3 days after the conclusion of the 30-day notice period provided for by 30 U.S.C. 226(f), the authorized Forest officer shall advise the appropriate Bureau of Land Management office, either in writing or orally with subsequent written confirmation, that additional time will be needed to process the plan. The authorized Forest officer shall explain the reason why additional time is needed and predict the date by which the authorized Forest officer will make a decision on the plan.

(2) When the review of a surface use plan of operations has been completed, the authorized Forest officer shall promptly notify the operator and the appropriate Bureau of Land Management office, in writing, that:

(i) The plan is approved as submitted upon signature of the operator and posting of the required bond with the Bureau of Land Management as specified by the authorized Forest officer (§ 228.108);

(ii) The plan is approved subject to specified operating conditions upon signature of the operator and posting of the required bond with the Bureau of Land Management as specified by the authorized Forest officer (§ 228.108); or

(iii) The plan has been disapproved for the reasons stated.

(c) *Notice of decision.* The authorized Forest officer shall give public notice of the decision on a plan and include in the notice that the decision is subject to appeal under the administrative appeal procedures at 36 CFR 211.18.

(d) *Transmittal of decision.* The authorized Forest officer shall immediately forward a decision on the approval of a surface use plan of operations to the appropriate Bureau of Land office.

(e) *Supplemental plans.* A supplemental surface use plan of operations (§ 228.105(d)) is reviewed in the same manner as an initial surface use plan of operations.

§ 228.107 Surface use requirements.

(a) *General.* The operator shall conduct operations on a leasehold on National Forest System lands to minimize effects on surface resources, to prevent unnecessary or unreasonable surface resource disturbance, and in compliance with the other requirements of this section.

(b) *Notice of operations.* The operator must notify the authorized Forest officer 48 hours prior to commencing operations or resuming operations following their temporary cessation (§ 228.110).

(c) *Access facilities.* The operator shall construct and maintain access facilities to assure adequate drainage and to minimize or prevent damage to surface resources.

(d) *Cultural and historical resources.* The operator shall report findings of cultural and historical resources to the authorized Forest officer immediately and, except as otherwise authorized in an approved surface use plan of operations, protect such resources.

(e) *Fire prevention and control.* To the extent practicable, the operator shall take measures to prevent uncontrolled fires on the area of operation and to suppress uncontrolled fires resulting from the operations.

(f) *Fisheries, wildlife and plant habitat.* The operator shall comply with the requirements of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and its implementing regulations (50 CFR Chapter IV), and, except as otherwise provided in an approved surface use plan of operations, conduct operations in such a manner as to maintain and protect other fisheries, wildlife, and plant habitat.

(g) *Reclamation.* (1) Unless otherwise provided in an approved surface use plan of operations, the operator shall conduct reclamation concurrently with other operations.

(2) Within 1 year of completion of operations on a portion of the area of operation, the operator must reclaim that portion, unless a different period of time is specified in writing by the authorized Forest officer.

(3) The operator must:

(i) Control soil erosion and landslides;

(ii) Control water runoff;

(iii) Remove, or control, solid wastes, toxic substances, and hazardous substances;

(iv) Reshape and revegetate disturbed areas;

(v) Remove structures, improvements, facilities and equipment, unless otherwise authorized; and

(vi) Take such other reclamation measures as specified in the approved surface use plan of operations.

(h) *Safety measures.* (1) The operator must maintain structures, facilities, improvements, and equipment located on the area of operation in a safe and neat manner and in accordance with an approved surface use plan of operations.

(2) The operator must take appropriate measures in accordance with applicable Federal and State laws and regulations to protect the public from hazardous sites or conditions resulting from the operations. Such measures may include, but are not limited to, posting signs, building fences, or otherwise identifying the hazardous site or condition.

(i) *Wastes.* The operator must either remove garbage, refuse, and sewage from National Forest System lands or treat and dispose of that material in such a manner as to minimize or prevent adverse impacts on surface resources. The operator shall treat or dispose of produced water, drilling fluid, and other waste generated by the operations in such a manner as to minimize or prevent adverse impacts on surface resources.

(j) *Watershed protection.* (1) Except as otherwise provided in the approved surface use plan of operations, the operator shall not conduct operations in areas subject to mass soil movement, riparian areas and wetlands.

(2) The operator shall take measures to minimize or prevent erosion and sediment production. Such measures include, but are not limited to, siting structures, facilities, and other improvements to avoid steep slopes and excessive clearing of land.

§ 228.108 Bonds.

(a) *Bond amount.* As part of the review of a proposed surface use plan of operations, the authorized Forest officer shall determine, based upon the costs of reclamation of surface disturbance and other pertinent factors, the bonding requirements for any plan of operations that the authorized Forest officer proposes to approve. Bonds required by the Forest Service are posted with the Bureau of Land Management.

(b) *Calculation.* The authorized Forest officer shall fix the amount of the bond at the sum that is adequate, for the entire period of operations that will be authorized by the plan of operations, to ensure compliance with 30 U.S.C. 226(g), including complete and timely reclamation of the leasehold and the restoration of lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease. An adequate amount is one that is equal to but not greater than the cost of reclaiming surface disturbances.

(c) *Reduction in bond amount after reclamation.* (1) The operator may request the authorized Forest officer to request the Bureau of Land Management to approve a reduction in the amount of an individual lease bond whenever the operator receives a notice that reclamation has been satisfactorily completed on a portion of the area of operation.

(2) The authorized Forest officer receiving the request shall:

(i) Calculate the sum that is sufficient for the remainder of the period of operation authorized by the surface use plan of operations;

(ii) Notify the Bureau of Land Management of the amount that is sufficient for the remainder of operations; and

(iii) If appropriate under the circumstances, recommend a reduction in the amount of the bond.

(d) *Recalculation of bond requirements.* The authorized Forest officer shall recalculate bonding requirements whenever the authorized Forest officer proposes to approve a supplemental plan of operations (§ 228.105(d)).

§ 228.109 Indemnification.

The operator and, if the operator does not hold all of the interest in the applicable lease, all lessees and assignees are jointly and severally liable in accordance with Federal and State laws for indemnifying the United States for:

(a) Injury, loss or damage, including fire suppression costs, which the United States incurs as a result of the operations; and

(b) Payments made by the United States in satisfaction of claims, demands or judgments for an injury, loss or damage, including fire suppression costs, which result from the operations.

Administration of Operations

§ 228.110 Temporary cessation of operations.

(a) *General.* Except as provided in paragraph (b) of this section, immediately upon the temporary cessation of operations for a period of 45 days or more, the operator must file a statement with the authorized Forest officer that verifies the operator's intent to maintain structures, facilities, improvements, and equipment that will remain on the area of operation during the cessation of operations and that specifies the expected date by which operations will be resumed.

(b) *Seasonal shutdowns.* The operator need not file the statement required by paragraph (a) of this section if the

cessation of operations results from seasonally adverse weather conditions and the operator will resume operations promptly upon the conclusion of those adverse weather conditions.

(c) *Interim measures.* The authorized Forest officer may require the operator to take reasonable interim reclamation or erosion control measures to protect surface resources during temporary cessations of operations, including cessations of operations resulting from seasonally adverse weather conditions.

§ 228.111 Compliance and inspection.

(a) *General.* Operations must be conducted in accordance with the lease, including stipulations made part of the lease at the direction of the Forest Service, an approved surface use plan of operations, and the regulations of this subpart.

(b) *Voluntary correction of noncompliance.* When, during an inspection, an authorized Forest officer finds that the operator is not in compliance with a reclamation requirement or other standard in a stipulation included in the lease at the request of the Forest Service, an approved surface use plan of operations or the regulations of this subpart, the authorized Forest officer shall promptly notify the operator on-site or by telephone of the noncompliance and give the operator the opportunity to either correct the noncompliance or, if appropriate, to reach agreement with the authorized Forest officer on an amendment to the approved surface use plan of operations that would remedy the noncompliance. After discussing the noncompliance with the operator, the authorized Forest officer shall establish a deadline for voluntary compliance, advise the operator of the deadline, and make a note to the file of the noncompliance, the applicable deadline, and the date the operator was advised of the deadline. If the operations have not been brought into compliance by the deadline, the authorized Forest officer shall utilize the provisions of § 228.112 of this subpart.

(c) *Completion of reclamation.* The authorized Forest officer shall give prompt written notice to an operator whenever reclamation of a portion of the area affected by surface operations has been satisfactorily completed in accordance with the approved surface use plan of operations and § 228.106 of this subpart. The notice shall describe the portion of the area on which the reclamation has been satisfactorily completed.

(d) *Compliance with other statutes and regulations.* Nothing in this subpart shall be construed to relieve an operator from complying with applicable Federal and State laws or regulations, including, but not limited to:

(1) Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(2) Federal and State water quality standards including the requirements of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.);

(3) Federal and State standards for the use or generation of solid wastes, toxic substances and hazardous substances;

(4) The Endangered Species Act of 1973, 16 U.S.C. 1531 et seq., and its implementing regulations, 50 CFR Chapter IV; and

(5) The Archeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa et seq.) and its implementing regulations 36 CFR Part 296.

(e) *Penalties.* An operator is subject to the prohibitions and attendant penalties of 36 CFR Part 261 if surface disturbing operations are being conducted that are not authorized by an approved surface use plan of operations or those operations violate a term or operating condition of an approved surface use plan of operations.

(f) *Inspection.* Forest Service officers shall periodically inspect the area of operations to determine whether the operation are being conducted in compliance with the regulations in this subpart, the stipulations included in the lease at the direction of the Forest Service, and an approved surface use plan of operations.

§ 228.112 Notice of noncompliance.

(a) *Issuance.* When an operator has not voluntarily corrected an instance of noncompliance with a reclamation requirement or other standard, in a stipulation included in a lease at the direction of the Forest Service, an approved surface use plan of operation, or the regulations in this subpart by the deadline established through the procedures of §228.111(b) of this subpart, the authorized Forest officer shall issue a notice of noncompliance.

(1) *Content.* The notice of noncompliance shall include the following:

(i) Identification of the reclamation requirements or other standard(s) with which the operator is not in compliance;

(ii) Description of the measures which are required to correct the noncompliance;

(iii) Specification of a reasonable period of time within which the noncompliance must be corrected;

(iv) If the noncompliance appears to be material, identification of the possible consequences of continued noncompliance of the requirement(s) or standard(s) as described in 30 U.S.C. 226(g);

(v) If the noncompliance appears to be in violation of the prohibitions set forth in 36 CFR Part 261, identification of the possible consequences of continued noncompliance of the requirement(s) or standard(s) as described in 36 CFR 261.1b; and

(vi) Notification that the authorized Forest officer remains willing and desirous of working cooperatively with the operator to resolve or remedy the noncompliance.

(2) *Extension of deadlines.* The oeprator may request an extension of a deadline specified in a notice of noncompliance if the operator is unable to come into compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance by the deadline because of conditions beyond the operator's control. The authorized Forest officer shall not extend a deadline specified in a notice of noncompliance unless the operator requested an extension and the authorized Forest officer finds that there was a condition beyond the operator's control, that such condition prevented the operator from complying with the notice of noncompliance by the specified deadline, and that the extension will not adversely affect the interests of the United States. Conditions which may be beyond the operator's control include, but are not limited to, closure of an area in accordance with 36 CFR Part 261, Subparts B or C, or inaccessibility of an area of operations due to such conditions as fire, flooding, or snowpack.

(3) *Manner of service.* The authorized Forest officer shall serve a notice of noncompliance or a decision on a request for extension of a deadline specified in a notice upon the operator in person, by certified mail or by telephone. However, if notice is initially provided in person or by telephone, the authorized Forest officer shall send the operator written confirmation of the notice or decision by certified mail.

(b) *Failure to come into compliance.* If the operator fails to come into compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or an approved extension, the authorized Forest officer shall decide whether the noncompliance appears to be material given the reclamation requirements and other standards applicable to the lease established by 30 U.S.C. 226(g) the

regulations in this subpart, the stipulations included in a lease at the direction of the Forest Service, or an approved surface use plan of operations and whether the noncompliance is resulting in an imminent danger to public health or safety, irreparable resource damage or another emergency.

(1) *Referral to compliance officer.* When the operations appear to be in material noncompliance, the authorized Forest officer shall promptly refer the matter to the compliance officer. The referral shall be accompanied by a complete statement of the facts supported by appropriate exhibits. Noncompliance which the authorized Forest officer shall refer includes, but is not limited to, operating without an approved surface use plan of operations, operating under a suspended surface use plan of operations, failing to timely complete reclamation in accordance with an approved surface use plan of operations, failing to maintain an acceptable bond in the amount specified by the authorized Forest officer during the period of operation, failing to timely reimburse the Forest Service for the cost of abating an emergency, and failing to comply with any term included in a lease, stipulation, or approved surface use plan of operations relating to the protection of a threatened or endangered species.

(2) *Suspension of a surface use plan of operations.* When the noncompliance is resulting in an imminent danger to public health or safety or in irreparable resource damage, the authorized Forest officer shall suspend approval of the surface use plan of operations, in whole or in part.

(i) A suspension will remain in effect until the operator comes into compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance.

(ii) The authorized Forest officer shall serve decisions suspending a surface use plan of operations upon the operation in person, by certified mail, or by telephone. However, if notice is initially provided in person or by telephone, the authorized Forest officer shall send the operator written confirmation of the decision by certified mail.

(iii) The authorized Forest officer shall immediately notify the appropriate Bureau of Land Management office of a suspension of an operator's surface use plan of operations.

(3) *Abatement of emergencies.* When the noncompliance is resulting in an emergency, the authorized Forest officer may take action as necessary to abate the emergency. The total cost to the Forest Service of taking actions to abate an emergency becomes an obligation of the operator.

(i) Emergency situations include, but are not limited to, imminent dangers to public health or safety or irreparable resource damage.

(ii) The authorized Forest officer shall promptly serve a bill for such costs upon the operator by certified mail.

§ 228.113 Material noncompliance proceedings.

(a) *Initiation of proceedings.* The compliance officer shall promptly evaluate a referral made by the authorized Forest officer pursuant to § 228.112(b)(1) of this subpart. If the compliance officer agrees that there is adequate evidence to support a reasonable belief that an operator has failed to come into compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or an extension approved by the authorized Forest officer, and that the noncompliance may be material, the compliance officer shall initiate a material noncompliance proceeding.

(1) *Notice of proceedings.* The compliance officer shall inform the operator, and if the operator does not hold all the interest in the lease, all lessees, and assignees of the material noncompliance proceedings by certified mail, return receipt requested.

(2) *Content of notice.* The notice of the material noncompliance proceeding shall include the following:

(i) The specific reclamation requirement(s) or other standard(s) of which the operator may be in material noncompliance;

(ii) A description of the measures that are required to correct the violation;

(iii) A statement that if the compliance officer finds that the operator is in material noncompliance with a reclamation requirement or other standard applicable to the lease, the Secretary of the Interior will not be able to issue new leases or approve new assignments of leases to the operator, any subsidiary or affiliate of the operator, or any person controlled by or under common control with the operator until the compliance officer finds that the operator has come into compliance with such requirement or standard; and

(iv) A recitation of the specific procedures governing the material noncompliance proceeding set forth in paragraphs (b) through (e) of this section.

(b) *Answer.* Within 30 calendar days after receiving the notice of the proceeding, the operator may submit, in person, in writing, or through a representative, an answer containing information and argument in opposition to the proposed material noncompliance finding, including information that raises a genuine dispute over the material facts. In that submission, the operator also may:

(1) Request an informal hearing with the compliance officer; and

(2) Identify pending administrative or judicial appeal(s) which are relevant to the proposed material noncompliance finding and provide information which shows the relevance of such appeal(s).

(c) *Informal hearing.* If the operator requests an informal hearing, it shall be held within 20 calendar days from the date that the compliance officer receives the operator's request.

(1) The compliance officer may postpone the date of the informal hearing if the operator requests a postponement in writing.

(2) At the hearing, the operator, appearing personally or through and attorney or another authorized representative, may informally present and explain evidence and argument in opposition to the proposed material noncompliance finding.

(3) A transcript of the informal hearing shall not be required.

(d) *Additional procedures as to disputed facts.* If the compliance officer finds that the answer raises a genuine dispute over facts essential to the proposed material noncompliance finding, the compliance officer shall so inform the operator by certified mail, return receipt requested. Within 10 days of receiving this notice, the operator may request a fact-finding conference on those disputed facts.

(1) The fact-finding conference shall be scheduled within 20 calendar days from the date the compliance officer receives the operator's request, unless the operator and compliance officer agree otherwise.

(2) At the fact-finding conference, the operator shall have the opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront the person(s) the Forest Service presents.

(3) A transcribed record of the fact-finding conference shall be made, unless the operator and the compliance officer by mutual agreement waive the requirement for a transcript. The transcript will be made available to the operator at cost upon request.

(4) The compliance officer may preside over the fact-finding conference or designate another authorized Forest officer to preside over the fact-finding conference.

(5) Following the fact-finding conference, the authorized Forest officer

who presided over the conference shall promptly prepare written findings of fact based upon the preponderance of the evidence. The compliance officer may reject findings of fact prepared by another authorized Forest officer, in whole or in part, if the compliance officer specifically determines that such findings are arbitrary and capricious or clearly erroneous.

(e) *Dismissal of proceedings.* The compliance officer shall dismiss the material noncompliance proceeding if, before the compliance officer renders a decision pursuant to paragraph (f) of this section, the authorized Forest officer who made the referral finds that the operator has come into compliance with the applicable requirements or standards identified in the notice of proceeding.

(f) *Compliance officer's decision.* The compliance officer shall base the decision on the entire record, which shall consist of the authorized Forest officer's referral and its accompanying statement of facts and exhibits, information and argument that the operator provided in an answer, any information and argument that the operator provided in an informal hearing, and the findings of fact if a fact-finding conference was held.

(1) *Content.* The compliance officer's decision shall state whether the operator has violated the requirement(s) or standard(s) identified in the notice of proceeding and, if so, whether that noncompliance is material given the requirements of 30 U.S.C. 226(g), the stipulations included in the lease at the direction of the Forest Service, the regulations in this subpart or an approved surface use plan of operations. If the compliance officer finds that the operator is in material noncompliance, the decision also shall:

(i) Describe the measures that are required to correct the violation;

(ii) Apprise the operator that Secretary of the Interior is being notified that the operator has been found to be in material noncompliance with a reclamation requirement or other standard applicable to the lease; and

(iii) State that the decision is the final administrative determination of the Department of Agriculture.

(2) *Service.* The compliance officer shall serve the decision upon the operator and, if the operator does not hold all of the interest in the applicable lease, upon all lessees and assignees by certified mail, return receipt requested. If the operator is found to be in material noncompliance, the compliance officer also shall immediately send a copy of the decision to the appropriate Bureau of Land Management office.

(g) *Petition for withdrawal of finding.* If an operator who has been found to be in material noncompliance under the provisions of this section believes that the operations have subsequently come into compliance with the applicable, requirement(s) or standard(s) identified in the compliance officer's decision, the operator may submit a written petition requesting that the material noncompliance finding be withdrawn. The petition shall be submitted to the authorized Forest officer who issued the operator the notice of noncompliance under § 228.112(a) of this subpart and shall include information or exhibits which shows that the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision.

(1) *Response to petition.* Within 30 calendar days after receiving the operator's petition for withdrawal, the authorized Forest officer shall submit a written statement to the compliance officer as to whether the authorized Forest officer agrees that the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision. If the authorized Forest officer disagrees with the operator, the written statement shall be accompanied by a complete statement of the facts supported by appropriate exhibits.

(2) *Additional procedures as to disputed material facts.* If the compliance officer finds that the authorized Forest officer's response raises a genuine dispute over facts material to the decision as to whether the operator has come into compliance with their requirement(s) or standard(s) identified in the compliance officer's decision, the compliance officer shall so notify the operator and authorized Forest officer by certified mail, return receipt requested. The notice shall also advise the operator that the fact finding procedures specified in paragraph (d) of this section apply to the compliance officer's deicision on the petition for withdrawal.

(3) *Complaince officer's decision.* The compliance officer shall base the decision on the petition on the entire record, which shall consist of the operator's petition for withdrawal and its accompanying exhibits, the authorized Forest officer's response to the petition and, if applicable, its accompanying statement of facts and exhibits, and if a fact-finding conference was held, the findings of fact. The compliance officer shall serve the decision on the operator by certified mail.

(i) If the compliance officer finds that the operator remains in violation of requirement(s) or standard(s) identified in the decision finding that the operator was in material noncompliance, the decision on the petition for withdrawal shall identify such requirement(s) or standard(s) and describe the measures that are required to correct the violation(s).

(ii) If the compliance officer finds that the operator has subsequently come into compliance with standard(s) identified in the compliance officer's decision that the operator is in material noncompliance, the compliance officer also shall immediately send a copy of the decision on the petition for withdrawal to the appropriate Bureau of Land Management office.

(h) *List of operators found to be in material noncompliance.* The Deputy Chief, National Forest System, shall compile and maintain a list of operators who have been found to be in material noncompliance with reclamation requirements and other standards as provided in 30 U.S.C. 226(g), the regulations in this subpart, a stipulation included in a lease at the direction of the Forest Service, or an approved surface use plan of operations, for a lease on National Forest System lands to which such standards apply. This list shall be made available to Regional Foresters, Forest Supervisors, and upon request, members of the public.

Notice of Decisions

§ 228.114 Additional notice of decisions.

(a) The authorized Forest officer shall promptly post notices provided by the Bureau of Land Management of:

(1) Competitive lease sales which the Bureau plans to conduct that include National Forest System lands;

(2) Substantial modifications in the terms of a lease which the Bureau proposes to make for leases on National Forest System lands; and

(3) Applications for permits to drill which the Bureau has received for leaseholds located on National Forest System lands.

(b) The notice shall be posted at the offices of the affected Forest Supervisor and District Ranger in a prominent location readily accessible to the public.

(c) The authorized Forest officer shall keep a record of the date(s) the notice was posted in the offices of the affected Forest Supervisor and District Ranger.

(d) The posting of notices required by this section are in addition to the requirements for public notice of decisions provided in § 228.104(c) (Notice of decision). and § 228.106 (Review of surface use plan of operations) of this subpart.

PART 261—PROHIBITIONS

1. The authority citation for Part 261 would continue to read as follows:

Authority: 16 U.S.C. 551; 16 U.S.C. 472; 7 U.S.C. 1011(f); 16 U S.C. 1246(i); 16 U.S.C. 1133(c)-(d)(1).

Subpart A—General Prohibitions

2. Amend § 261.2 by adding a new definition to read as follows:

§ 261.2 Definitions.

"Operating plan" means a plan of operations as provided for in 36 CFR Part 228, Subpart A, and a surface use plan of operations as provided for in 36 CFR Part 228, Subpart E.

Date: January 13, 1989.

Richard E. Lyng,

Secretary of Agriculture.

[FR Doc. 89-1252 Filed 1-19-89; 8:45 am]

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Monday
January 23, 1989

Part VI

Department of Agriculture

Forest Service

36 CFR Parts 211, 217, 228, 251 and 292
Appeal of Decisions Concerning the National Forest System; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 211, 217, 228, 251 and 292

Appeal of Decisions Concerning the National Forest System

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises Departmental policies and procedures by which individuals or groups may appeal decisions made by Forest Service officials concerning the management of the National Forest System. The Forest Service is replacing its current administrative appeal regulation at 36 CFR 211.18 with two distinct processes for obtaining administrative review of decisions. One rule, 36 CFR Part 251, Subpart C, is limited to appeal of decisions regarding written instruments authorizing occupancy and use of National Forest System lands, except contracts subject to the Contracts Disputes Act, and is available to certain applicants for and holders of such authorizations. The second rule, 36 CFR Part 217, offers any citizen or organization a process for obtaining review of decisions relating to land and resource management plans, projects, and activities. The changes result from a comprehensive review of the current rule as required by Departmental Regulation 1512-1, consideration of suggestions received during that review from appellants and Forest Service officials, analysis of public comment, and consideration of suggestions from other government officials on the proposed rule as published in the **Federal Register** of May 16, 1988 (53 FR 17310). The intended effect of the rule is to simplify the appeal process and to provide appeal procedures that are commensurate with the nature and type of decision being disputed.

EFFECTIVE DATE: February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Kathryn C. Hauser, Program Analyst, National Forest System, Forest Service, U.S. Department of Agriculture, 202-382-9346.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service, USDA, is responsible for managing 191 million acres of National Forest, National Grassland, and other land known collectively as the National Forest System.The Chief of the Forest Service, through a line organization of Regional Foresters, Forest Supervisors, and District Rangers, manages the surface resources, and, in some instances, the subsurface resources, of these lands.

The Department provides a process by which individuals or groups may appeal National Forest System management decisions, currently set forth at 36 CFR 211.18. During the period Fiscal Years 83 to 85 the Forest Service received an average of 535 appeals per year, of which 235 reached the office of the Chief for review. In FY 88, 1,609 appeals were received of which 508 were directed to the Chief. Most of the latter, 306 in number, were appeals relating to the approval of Forest level land and resource management plans prepared under the provisions of the National Forest Management Act of 1976 (NFMA), and its implementing regulation at 36 CFR Part 219. Relatively few initial decisions of the Chief are appealed to the Secretary, only 10 during FY 88. Review officials are guided in the appeal process by 36 CFR 211.18, and by Forest Service policy and procedures as set forth in the Forest Service Manual (FSM 1570) and accompanying Handbook (FSH 1509.12).

Introduction

There is no statutory requirement that the Forest Service provide a grievance or appeal procedure. Rather, at its own discretion and initiative, the agency, since 1906, has provided some kind of process by which permittees and the general public could challenge forest officer decisions. In fact, until the enactment of several environmental statutes in the 1960's and 70's, the appeal process was about the only formal mechanism the public could utilize to influence agency decisionmaking. Appeal procedures were first codified in 1936 (1 CFR Part 1092, August 15, 1936). During the intervening half century, the Forest Service has periodically revised the appeal regulations responding to changing law and policy, and to its own experiences under the procedures existing at the time. During this period, the rules have shifted alternatively back and forth from informal to formal in nature, and from wholly internal administrative review to review and adjudication by independent boards.

Since 1965 the appeal regulation has been revised three times, the latest in 1982 after the agency conducted a major review of the then current regulation (36 CFR 211.19 promulgated in 1977) to comply with Executive Order (EO) 12044, the first EO to require review of existing regulations on a 5-year cycle. The result was a revised appeal procedure at 36 CFR 211.18 (48 FR 13425, March 31, 1983), the current rule.

The Forest Service announced its decision to review the current appeal regulation in the Semi-Annual Regulatory Agenda published April 27, 1987 (52 FR 14144). On May 20, 1987, the agency issued a press release announcing the impending review, and informed the public that their comments would be solicited. Subsequently, on June 11, 1987, a **Federal Register** notice (52 FR 22348) was published seeking public input about how well the current appeal process meets public needs, is likely to do so in the future, and what people like and dislike about the process. Additionally, the Forest Service issued 928 letters inviting public comment, and conducted 106 interviews with various line and staff officers throughout the agency.

The review revealed that the appeals process has served the agency and the public with varying degrees of success for many years. However, the process as it has evolved during the last few years is not the simple, quick, informal process that the agency originally intended it to be. Instead, it has become a significant generator of paperwork and a time-consuming, procedurally onerous, and costly effort, trading off resources and energies that otherwise might be directed to substantive on-the-ground resource management needs. Based on these findings, the Forest Service concluded that the appeals process needed adjustment to better serve the public and the agency. Accordingly, the agency published proposed rules revising the appeal procedure in the **Federal Register** of May 16, 1988 (53 FR 17310).

Analysis of Public Comment

In addition to publishing the proposed rules in the **Federal Register**, the Forest Service mailed 21,426 letters to known interested parties inviting comment on the rule. Also, agency personnel conducted 193 briefings for groups around the country. In response to these efforts, the Forest Service received 921 letters postmarked on or before the July 15 end-of-comment period, and more than 100 late responses, all of which were considered. Eighteen different types of respondents, as shown below, provided input:

Respondent	Number of Letters
Federal agencies, excluding FS	5
State agencies	16
City/Municipal government	4
Federal elected officials	4
State elected officials	3
County elected officials	6
City elected officials	1
Indian tribal councils	2

Respondent	Number of Letters
Professional societies	1
Conservation/environmental/ preservation organizations	127
Civic groups	4
Businesses/business groups	23
Timber industry organizations	55
Associations and unions	41
Riding and hiking interests	5
Hunting and sports groups	4
Other organizations	6
Individuals and families	614
Total timely respondents	921
Total untimely respondents	104
Total	1025

Many letters seemed campaign inspired, using similar or identical language to identify and describe respondents' respective interests or concerns, frequently referring to or referencing other respondents' statements and including them as enclosures. While there was a great deal of common information noticeable in these letters, much of this shared information was erroneous or misleading. The result was considerable comment based on misunderstanding, an indication some respondents were not well apprised about the rule itself or the preamble which presented the rationale behind the proposals. However, many of the comments received were well-informed, constructive, and well-written.

Comments substantially focused on the informal decision review process proposed for 36 CFR Part 217. These comments centered on 11 major areas of concern, constituting more than three-quarters of the total comment. These areas were: purpose and scope, notice of decision, appealable/nonappealable decisions, levels of review, filing procedures/time extensions, responsive statements, stays, open/closed communications, intervention, oral presentations, and filing fees.

After the public comment period closed, and prior to the drafting of this final rule, the Subcommittee on Family Farms, Forests and Energy, of the House Committee on Agriculture, held an oversight hearing on the proposed rule. In addition, the staff of the Senate Committee on Agriculture, Nutrition, and Forestry requested a briefing. The suggestions that arose from the hearing and briefing, along with the public comment received on the proposed rule, whether timely or late, were reviewed and have been fully considered in preparation of these final rules.

Responses received are available for review at the office of the Staff Assistant for Operations, National Forest System, Forest Service, USDA, Room 4211, South Agriculture Building, 14th and Independence Avenues SW., Washington, DC 20013, telephone (202) 382-9349.

General comments

As proposed, two separate processes would be created, geared to the type of decision at issue. One process, to be codified at 36 CFR Part 251, provides for appealing decisions when the appeal is a legally-based grievance arising from a past action that may be affected by the current and disputed decision. This appeal process would afford instrument holders or applicants a degree of process appropriate to the specific nature of their legal, business-type, relationship with the agency.

The second appeal process, to be codified at 36 CFR Part 217, involves decisions made during the planning and decisionmaking process and documented according to the National Environmental Policy Act (NEPA) and National Forest Management Act (NEMA) implementing instructions. It affords interested individuals and organizations who do not have a business-type relationship with the agency one more opportunity, following and in addition to their input during the planning process, to seek agency oversight and reconsideration at a higher level. It emphasizes public participation features currently found in planning and decisionmaking for future actions.

In addition to comments on specific sections of the proposed rules, many respondents expressed concern that: (1) Rights of appeal to which the public is legally entitled are being curtailed; and (2) the public is being divided into two classes, with some of the public relegated to second class status, with attendant diminution of legal rights.

In the first instance, many respondents believed any agency appeal regulation must afford the procedural rights of due process guaranteed by the Fifth Amendment of the Constitution that are required when property rights are affected. Other respondents believed that the appeal regulation must contain all the features of a formal Administrative Procedure Act (APA) process, including a formalized hearing procedure, an impartial judge, and provision for building a record. Some also believed that the appeal regulation is a right specifically provided by statute. There was support expressed for "streamlining" the process, but not to the extent of eliminating features considered to constitute due process (such as responsive statements and consequent replies, intervention, and oral presentations).

In the second instance, respondents' concerns about the rules creating two unequal classes of appellants centered on the perceived reduction of input opportunities for those using 36 CFR Part 217 procedures, although some respondents also felt that 36 CFR Part 251 eliminated input opportunities as well. Those who do not have a legal relationship with the Forest Service do not see the legal relationship as an adequate basis for modifying the kind of "access to process" necessary for review of management decisions.

Response: Respondents who urged that the APA must be followed failed to grasp the distinction between the types of due process intended by that Act. When an appeal procedure is mandated by statute, then specific, formalized elements of due process detailed in the APA must be applied. When an appeal procedure is not mandated by statute, but rather provided voluntarily by an agency, as this one is, then only the broad principles of the APA apply. In other words, the procedures made available by the APA for notice and opportunity to be heard must be applied fairly. Any process voluntarily deemed as "due" must then be followed by the agency which institutes it.

The procedures being adopted are based on the type of decision that has been made, and the type of relationship that exists between parties to the decision and the agency. The rules are not based on a concept that a certain class or party should have more or less access to a process for having a decision reviewed. This fundamental concept on which the two rules are based was thoroughly discussed in the supplementary information to the proposed rule, and is not presented again in this response (53 FR 17310). See Comment and Response under § 217.1 for further discussion.

Comment: The proposed rule provoked considerable general comment, largely critical, on the relationship between the Forest Service and the public. The public's concerns in this area can be described in three categories: (1) Those indicating that the proposed changes limit public input in the decision-making process; (2) arguments that public involvement prior to the decision should not preclude a readily available means to protest the decision; and (3) those reflecting a feeling that the Forest Service was operating in bad faith.

Comments from those expressing concern that the Forest Service was limiting public input were often phrased to indicate that the public sees the appeals process as one facet of public

involvement. There are a substantial number of people who feel that by tightening the appeals rules, the Forest Service is trying to close a legitimate avenue of involvement.

The second group of respondents see appeals as a separate category from other kinds of public involvement, but feel that public involvement prior to decision making is not a basis to preclude redress through appeal. Several argued that, had public involvement been operating as envisioned under the National Environmental Policy Act (NEPA) and NFMA, the flood of planning-related appeals that have been so slow to resolve would never have occurred.

The third group of respondents reacted to the proposed changes more broadly in terms of trust. Comments in this category expressed distrust of the agency's decisionmaking. Some of these respondents described the agency as corrupt, deserving suspicion, hypocritical, or biased toward the timber industry.

Response: We agree that the appeals process can be viewed as a facet or type of public involvement, but appeals are a very limited means of public involvement compared to the public's opportunity to provide input in the predecisional stages. Not all the public is involved through an appeal to influence the disputed decisions; only appellants and intervenors are. The rest of the public very seldom become involved after an appeal is filed.

The Forest Service does not seek through the revised procedures to limit public involvement in decisionmaking. To the contrary, the rules emphasize public involvement prior to a decision being made, and provisions are incorporated into the rules that create explicit opportunities for conflict resolution before a decision is implemented and while a decision is being reviewed. Additionally, the final rule at 36 CFR Part 217 restores intervention as a procedural process users have been accustomed to in the past.

Nevertheless, we believe that public participation and involvement in planning and decisionmaking is more effective prior to making the actual decision than afterwards, if for no other reason than more people participate. However, public involvement prior to making a decision should not limit access to a decision review process, and we had no intent to do so. Having a decision review process is actually an incentive for the agency to commit to public involvement prior to making decisions.

The "trust" and "bad faith" comments are legitimate, if troubling, expressions of public concern. In releasing the proposed rules, the Forest Service went on record to say that the agency sincerely wants to make better decisions and involve the public more effectively and to improve its performance in handling appeals. The agency has every intention of doing this and hopes that all its constituent publics will monitor our performance and thus help the agency earn public trust.

The above three categories of comment are also responded to in the discussion of specific sections of 36 CFR Part 217, since many respondents brought up similar concerns and targeted them at specific sections.

Oral Presentations

The proposed rules at Part 217 would eliminate the oral presentation procedure, but it emphasizes the authority of the Deciding and Reviewing Officers to discuss issues with requesters and others, and to hold meetings. Currently, appeallants and intervenors must request an oral presentation when they file their notice of appeal/request for intervention; if granted, it is usually held after the record is received by the Reviewing Officer.

Comments: A few respondents supported the elimination of oral presentations, but those who did gave no reasons for their support, they simply listed a number of features that they favored.

Those who opposed the proposed change described the advantages of oral presentations, including the following: Communicates in a way that is impossible to achieve on paper; clarifies issues and positions; permits "give and take" between the parties; helps verify the sincerity of each party's beliefs; gets at the "heart" of the appeal; enchances dialogue leading to resolution of disagreements; permits viewing physical evidence; and reduces angry feelings triggered by reading the impersonal documents.

Several comments noted the dual standard which allows oral presentations under Part 251, but not under Part 217.

Some respondents said that the lack of oral presentations will lead to more litigation because fewer appeals will be settled to appellants' satisfaction. Others feared that flawed decisions would result from eliminating communications with appellants such as responsive statements and oral presentations afford. And, one respondent was disappointed with the apparent lack of "openness" signaled by the rule; while another feared that the change signifies the elimination of all public involvement meetings.

One claimed the oral presentation is "less time consuming" than extracting information "from the review file."

Response: Opportunities for and references to more openness, direct contact between Deciding Officers and participants, and resolution of issues during a review abound in the proposal and are explained in the preamble discussion.

While the formal feature of oral presentations permitted under the current rule would be eliminated under Part 217, the proposed process features and promotes options for informal meetings and discussions. In addition, the final rule includes a new provision that any of the parties may request such meetings at any time during the appeal. The benefits of what is called an "oral presentation" under the current rule still accrue to everyone involved. Consequently, the final rule regarding oral presentations, remains as proposed.

Filing Fees

For the reasons stated in the supplementary information to the proposed rule (53 FR 17314), a requirement for filing fees was not included in the proposed rules. However, public comment was solicited on the possibility of imposing filing fees, because the fee idea as a requisite part of the appeals process is a recurring one. The increased number of appeals filed during the past year or two leads many observers to believe that the administrative appeals process provided under 36 CFR 211.18 is being abused by groups and individuals to disrupt resource programs, especially timber sale and harvest in some areas of the country. In response, many groups and individuals have proposed that a significant filing fee be imposed to cover the cost of processing an appeal, a strategy designed to prevent "frivolous" appeals.

Comments: Public comment on the filing fee idea was 3 to 1 opposed. Most respondents felt that imposing fees of any sort would be counter to the historical objectives of the Department and the Forest Service in providing the public an open, informal administrative appeals process. Additionally, they thought that it would be costly to taxpayers, and only result in further complicating the appeals process. A few respondents questioned whether the agency has statutory authority to require a fee as a condition of filing an appeal if the objective is to recover costs. Others felt that fees, whether to recover costs

or a modest filing charge, would discriminate against parties not able to afford the charges, and thus give rise to some sort of waiver policy. Some respondents cited beliefs that filing fees should be unnecessary, given the thrust of the revised rules to make better decisions earlier so that sufficient time is available for appeal review without holding activities such as timber sales and subsequent harvests in abeyance. Supporters of filing fees generally cited a need for a mechanism to combat, from their perspective, the "frivolous" appeals that delay resource activities, particularly the sale and harvest of timber from many National Forest areas. Other respondents also suggested that a bond be required where an economic hardship on a third party would be created by a decision to stay implementation of a project or activity.

Response: Public comment about imposing filing fees can be divided into two areas of concern, one dealing with policy considerations, the other with legal authorities. The following discussion examines the implications of these concerns and serves as the basis for the decision not to include filing fees as a requisite part of the administrative appeal processes established in this final rulemaking.

1. *Possible impact on NEPA procedures.* The Forest Service administrative appeal regulation is closely linked to fulfillment of public notice and opportunity to comment requirements of the NEPA implementing regulations (40 CFR 1506.10). Under the NEPA regulations, the Forest Service has been permitted to issue decision documents along with the environmental disclosure documents because the administrative appeal procedure gives the public opportunity to challenge a decision. The likelihood that filing fees could discourage use of the appeal process calls to question whether the Forest Service could continue to issue environmental disclosure and decision documents simultaneously.

2. *Impact of substantial fees.* Historically, the Forest Service has invited and encouraged public use of the administrative appeal process, consciously and successfully developing a public expectation that it may freely gain access to decisionmakers through the appeals process. The process has served well, albeit slowly at times, as a policy review mechanism to test and adjust agency direction. Substantial fees would operate to discourage appeals; as a result, the policy review mechanism would lose effectiveness with any decline in use of the process.

In defending agency action, government counsel often argue in litigation that plaintiffs must first exhaust their administrative remedies. Imposing substantial fees could lead to more direct filings in Federal District Courts, thus depriving the agency of opportunity to review and document its decision (through administrative appeal proceedings to show rational decisionmaking) prior to litigation. Imposing a substantial fee would also likely promote requests for a fee waiver procedure process (similar to Freedom of Information Act (FOIA) situations) and further complicate the administrative appeal process.

High fees also would tend to discriminate against individuals rather than organizations. While any nominal fee would discourage appeals by individuals who file non-specific appeals on numerous projects, imposing fees only for the purpose of limiting appeals affects all potential appellants without regard to subject matter or merit. As a matter of policy, other alternatives to limit the negative effects of appeals could be more effective, as for example, simplified processing, faster reviews, as well as improved public involvement prior to the decision.

3. *Inconsistency of fees with simpler, streamlined review process.* Initiating substantial fees would seem inconsistent with amending the existing appeal process for simplicity. The proposed regulation, 36 CFR Part 217, modifies existing administrative appeal features appellants have come to rely on or view as "due process protections." If the agency imposes substantial fees, appellants will expect more "due process" protections, such as right to confront and interrogate witnesses, right to several levels of appeal, right to responsive statements, etc.

Once an appellant has invested a substantial filing fee, settlement for less than complete relief may be less likely, and the tendency to litigate an adverse and costly appeal decision will likely increase.

4. *Statutory authority for fees.* There is no specific statutory authority for the Forest Service to require a fee as a condition for filing an appeal. However, the Independent Offices Appropriation Act, as revised (31 U.S.C. 9701 (1986)) might be considered authority for a reasonable fee. Under this Act, such charge is to be fair and based on the cost to the government, the value of the service, public policy or interest served, and other relevant facts. The agency has invited the public to utilize the appeals process, so it may be questionable whether its use by the public is a "service" to the public as contemplated by the Act.

A fee of $1,000, as proposed by some respondents, would probably exceed the scope of the Act, and would be far beyond fees imposed upon private parties by Federal District Courts ($120), U.S. Claims Court ($60), and Federal Circuit Courts ($100). Federal court fees are not based on costs of service, but on separate statutory authority to collect fees. However, these courts may award damages, costs, and attorney fees in favor of successful parties. It would appear that specific statutory authority for filing fees is needed so that substantial, high fees could be insulated from serious judicial scrutiny.

Other formal administrative bodies within the Department of Agriculture, such as the Agriculture Board of Contract Appeals, and the Judicial Office which holds all formal APA hearings for the Department, impose no filing fees or require bonds. Neither are fees imposed in the "protest" procedure for certain decisions involving land and resource management plans of the Bureau of Land Management, Department of the Interior. Moreover, limiting fees to only certain types of activity, such as timber sale and related harvest activity, might be deemed arbitrary and capricious.

5. *Fees based on cost recovery vs. minimum filing fee.* The Forest Service appeals workload nearly doubled from 874 cases in FY 87 to 1,609 cases in FY 88. No cost breakdown is available for 1988, but for the previous 2 years, direct costs to process appeals during those years averaged $5,304,952, or about $5,424 per case. Facing this situation, fees based on cost recovery would place the administrative appeal process beyond the reach of most individuals and small organizations, and thus undermine the basis for having an appeal process. A fee collection program involving a nominal fee for administrative appeals, based on other experiences in fee collection activities elsewhere in the agency, would cost about $35 per appeal. For 1988, this would have amounted to only $56,315. The administrative burden of collecting fees would not be worth the small amount collected. Therefore, for the reasons set forth, the final rule does not include provisions for fee collection in either 36 CFR Part 217 or 251.

Specific comments

The following summarizes the major comments and suggestions received on the proposed revision of 36 CFR Part 217, and the Department's response to these comments. Although reviewers were asked to key their comments to specific sections, the majority did not

respond in this manner. Also, many comments embodied multiple sections. Where this is the case, our response to the public comment similarly embodies multiple sections. Many respondents pointed out that the proposed rule was hard to follow. Thus, the final rule has been rearranged to more closely follow the steps in the process and many of the headings have been retitled to better describe their contents. However, the publics' comments and our responses are keyed to the section numbers and headings of the proposed rule document.

Section 217.1 Purpose and scope.

This section stipulated that this is an informal review process and is tied to the NEPA process. Only decisions documented as a consequence of agency compliance with NEPA procedures are reviewable under this rule. The proposed rule emphasized public participation and dispute resolution, and deemphasized process and procedures.

Comments: Some respondents thought that making two rules out of the current one rule was unfair because due process aspects retained in 36 CFR Part 251 are not provided for in 36 CFR Part 217. These respondents felt that they are just as entitled to due process in Part 217 as are permit holders under Part 251. They also commented that decisions under 36 CFR Part 251, specifically timber and mining activities, affect more than just the permit holder and should be appealable by other interested and affected parties.

Response: Some misinformation persists concerning what would be reviewable under Part 217 versus what would be appealable under Part 251. Decisions concerning mining activities authorized by appropriate written instruments are not confined exclusively to Part 251 as some respondents thought. If such activities involve environmental analysis and documentation prior to a decision to issue or modify an authorization, review of the decision would be available under 36 CFR Part 217. As is currently the case, disputes between the Forest Service and a timber purchaser arising from administration of a timber sale contract will continue to be administered under 7 CFR Part 24, the Contract Disputes Act.

Those respondents who feel they have the same rights to due process as holders of written instruments issued by the Forest Service need to understand better the fundamental basis on which the two-rule process was developed and proposed. Elements of due process are incorporated in the Part 251 regulations because of the legal and business relationship involved between the holder of the written instrument and the Forest Service. As noted in the preamble to the proposed rule, this relationship does not exist between the Forest Service and individuals and groups who disagree with a resource allocation or management decision. Therefore, it is not believed necessary to provide the same degree of due process as provided in Part 251 for appealing a management decision under Part 217. Moreover, the publics who wish to dispute a management decision under Part 217 do not have a legal right to administrative appeal. They do have a legal right to timely notice of a decision, but access to an appeals process and the right to be heard in a prompt, objective review of the decision are provided at the administrative discretion of the Forest Service.

This Department does not believe it is in the best interests of National Forest System management or public policy to disrupt or delay management activities over long periods of time. It is in the public's interest to have a timely mechanism for reviewing decisions and either abandoning the management action or proceeding to implementation.

Therefore, the final rule retains two separate rules, emphasizes the multiple opportunities prior to review of a decision for the public to influence decisionmaking, and points out the role of constructive dialogue between participants during the review. However, in recognition of the public comment, some elements of due process in 36 CFR Part 251 have been incorporated into the final rule at 36 CFR Part 217. These are intervention and additional stay procedures. These are discussed under §§ 217.4 and 217.12 of this preamble.

Section 217.2 Applicability and effective date.

This section would allow for the continuance of appeals that have already been filed under the current rules at 36 CFR 211.16, 211.18, 228.14, and 292.15. No comments were received on this section. Therefore, this section is retained as proposed but it is recoded as § 217.19.

Section 217.3 Definitions and terminology.

This section provided definitions for the terms used in the rule.

Comments: The only comment received on this section was from seven respondents who objected to the words "request" and "requester," stating it was confusing and appeared to set up a class distinction.

Response: It was not the intent of this rule to set up a class distinction. The intent in using the words "request" and "requester" was to make a distinction between the more formal procedures in 36 CFR Part 251 and the simpler review process of Part 217. However, because respondents found these words confusing, the final rule restores the currently utilized terms of "appeal," "appellant," and "intervenor." This section has been modified to reflect this change and conforming amendments are made elsewhere in the rule for consistency throughout the rule. This section is recoded in the final rule as § 217.2.

Section 217.4 Eligible participants.

The proposed rule established a review process accessible to a virtually unlimited range of interests. The only limitation was that Federal entities, as well as Forest Service employees, would be excluded from participation in this review process.

Under the current rule, anyone can request to intervene at any time during the process. The proposed rule eliminated intervention as a formal process but provided for accepting written comments into the review file from any interested person or organization.

Comments: The respondents to this section represented two points of view. One concerned exempting Federal organizations and Forest Service employees from using this rule. These respondents pointed to the possible need for Federal organizations to have access to this review process as an alternative to existing issue-resolution mechanisms that might prove unproductive in occasional instances. Some respondents also believed that a Forest Service employee who has a private property interest in land impacted by a management decision should be able to request a review under this rule.

The other view concerned intervention. The majority of these respondents felt they have a "right" to intervene as they have been accustomed to under 36 CFR 211.18. Consequently, they want that "right" retained. However, some respondents added the recommendation that time delays to permit intervention should not be permitted.

Response: Means for resolving disagreements between Federal agencies concerning proposed major Federal actions that might cause unsatisfactory environmental effects are available through the Council on Environmental Quality (CEQ) (40 CFR Part 1504). Moreover, Federal agencies have informal mechanisms through their agency heads to bring their concerns to

the attention of the Forest Service. No purpose would be served by providing agencies an additional administrative process to challenge decisions. Therefore, the final rule retains the exclusion.

Forest Service employees having a private property interest in land subject to impact from a management decision would have access to appeal under 36 CFR Part 251. Therefore, the final rule retains the exclusion of employees from challenges to management decisions.

In the proposed rule, the Forest Service viewed intervention as a structured process for involvement when rights have to be protected, e.g., rights of parties that may be injured by an appeal decision. However, injury was not the focus of proposed 36 CFR Part 217. Rather, it was designed to review information developed through National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) planning activities and attendant public participation. The intent of 36 CFR Part 217 was to provide an optional final step, through appeal, in this decisionmaking process to review the kind and quality of information in the environmental documentation, including the decision itself. If that information is inadequate for a Reviewing Officer to substantiate the decision, the decision would likely not stand on review. The agency welcomes all forms of information germane to the decision and its supporting documentation. But, formal intervention as practiced under the current appeal rule and retained under the proposed rule for Part 251 was not considered appropriate to this information assessment step, anymore than it is considered suitable as a structured mechanism during the earlier steps in the planning and decisionmaking process. The agency continues to believe that providing all the "formal" embellishments of intervention is unnecessary and counterproductive to achieving the initial goals of offering a separate, less formal process for review of management decisions.

However, having considered the public comment which strongly favored retention of intervention, the final rule provides for a simpler form of intervention than does the current rule or in Part 251. Under the final rules at Part 217, intervention will be granted if requested within the time period provided, intervenors can provide comments on issues raised in the notice of appeal, have the right to receive and comment on additional information requested by the Reviewing Officer, and can participate in resolution meetings. Unlike the current appeal rules, intervenors under Part 217 cannot intervene at any time, request a stay, or continue an appeal if the appellants withdraw an appeal. The agency believes that this form of intervention both meets the concerns of those who were concerned about the loss of stature in and access to the appeals process and still contributes achieving an unarrayed, less formal review procedure, a major objective of this rulemaking process. A new section coded § 217.14 and titled "Intervention" addresses this change. Because intervention will be permitted, there is no need to provide for written comments by other individuals. Therefore, the provision has been deleted in the final rule. In addition, in the final rule, the section entitled "Eligible participants" is recoded and retitled § 217.6 Participants.

Section 217.5 Obtaining notice of decision.

The proposed rule required notice only through publishing a legal notice in a newspaper of general circulation in the area affected by the decision, and notice of certain other decisions in the **Federal Register**. The review period would begin with the date of publication.

Comments: A common perception by respondents was that notice in the **Federal Register** or a newspaper would replace the current practice of mailing a Decision Notice or Record of Decision to interested and affected persons. Respondents felt that anyone who had expressed interest in the decision should be notified in writing. Respondents mentioned the drawbacks of **Federal Register** notification, such as being time-consuming, not readily available to the general public, and expensive. Problems associated with newspaper notification included: The definition of general distribution; local people do not usually subscribe to regional papers; people outside the circulation area of a local newspaper would not have ready access to the notice; delays in notice because local rural newspapers are often weekly; Forests are often served by several newspapers.

Response: Motives for specifying legal notices were misinterpreted as trying to maintain secrecy, attempting to rush implementation of controversial projects, and reducing the ability of the general public to appeal decisions. The legal notice requirement was intended to be an *addition* to the notice requirements specified by the Council on Environmental Quality (CEQ) at 40 CFR 1506.6. And, the date of the published notice was intended to signify the start of the review period.

Because of this misunderstanding, this section has been rewritten to include common practice currently observed by the agency, applied to all decisions appealed under this rule. The rule also requries that **Federal Register** notice will be given on decisions that are considered to have effects of National concern, and appealable decisions made by the Chief. The requirement for legal notice has been made discretionary because it presented more problems than solutions. The appeal period will start on the day following when the decision document is signed and dated, as is currently the practice. Additionally, the final rule specifies that the decision will be mailed promptly so that those wishing to utilize the process will have the maximum time available to them.

This section has been retitled Giving notice of decisions subject to appeal.

Section 217.6 Decisions subject to review and Section 217.7 Decisions not subject to review.

Part 217 proposed a review process applicable to all decisions arising from a NEPA evaluation, and documented in a Record of Decision, Decision Notice, or Decision Memo. It excluded all other decisions plus a list of exclusions similar to the current rule. Further, the proposal excluded catastrophic events from review when the Chief or Regional Forester believes it critical to move quickly with rehabilitation or salvage and publishes an exclusion to this effect in the **Federal Register**.

Comments: The majority of the comments dealt with these two sections as one subject; thus, we are responding in a similar manner.

Some respondents suggested that a proposed action should be appealable only on the basis that it is inconsistent with the Forest plan, thus narrowing the scope of review. Other respondents wanted a broader definition of what should be availlable for decision review They saw the narrowing of the process as restricting citizen oversight of decisions affecting National Forest management because administrative, policy, and procedural decisions are not covered by this review process. There was some concern voiced regarding which regulation (36 CFR Part 217 or 36 CFR Part 251) would apply for certain decisions and whether the Forest Service or the requester/appellant would make the choice.

Many respondents said decisions on catastrophic events should not be excluded from review. They said the Forest Service would abuse the

definition and slip in other things besides these natural events.

Response: Currently, appeal of rehabilitation activity decisions are covered by an interim rule at 36 CFR 211.16. Folding the broad provisions of this rule into the final rule eliminates a separate rule, but it retains the opportunity for the public to request review of decisions concerning rehabilitation activities unless the Chief or the Regional Forester, because of severity and time lines, makes a decision to exclude them, and publishes a notice to this effect in the **Federal Register.**

The notion for narrowing the scope of review to only whether a proposed action is in conformance with the Forest plan has a defect. First, some sort of review would be needed to determine whether the disputed action conformed to the Forest plan. We expect most actions would. What's critically important is: Does the decision to undertake the disputed action meet NEPA requirements? The action might conform to the plan but not NEPA. Therefore, the proposed action should not proceed until it is in compliance with both the Forest plan and NEPA. Thus, the final rule does not narrow the scope of review.

Policy-type administrative decisions were not included in the review process because they determine how the agency is to approach a task or situation. These policy decisions seldom require documentation of environmental impacts. Under the current rule, policy or procedural decisions have constituted only a miniscule proportion of appeals received. Other administrative avenues are open to the public to influence decisionmaking of this kind, and to request reconsideration, which would be more efficient than utilizing the appeal process. For example, many Forest Service policies and procedures are published in the Federal Register for comment. Additionally, notice of such comment opportunities is mailed to interested and affected persons and often also announced through press releases.

There was never any intent that the Forest Service would choose which rule would be applicable to a particular decision. The choice is up to the appellant to make. Each new rule, 36 CFR Part 217 and 36 CFR Part 251, clearly defines which kind of decision is covered by which rule.

The final rule retains the proposed inclusions and exclusions, but the sections are recoded and retitled § 217.3 Decisions subject to appeal and § 217.4 Decisions not subject to appeal.

Section 217.8 Levels of review available.

Under the proposed rule change, a second level of review was a discretionary decision by the Reviewing Officer at that level.

Comments: Many respondents objected to the concept of a one-level review process because: they felt it was designed for agency expediency at the individual's expense; it vested an inappropriate amount of power in one person; it did nothing to encourage or promote negotiated settlements; and it would lead to cursory and superficial review. And, while reducing the number of appeals, respondents saw the one level review as increasing the potential for more litigation.

The major concerns about the one-level review centered on District Ranger decisions. Respondents focused on the Forest Supervisor as final reviewing officer, doubting that the review could be objective because the project or activity (action) being appealed was in keeping with goals established by the Forest Supervisor and may have been undertaken with advice and supervision from the Supervisor's level.

The second area of concern over the one-level review process centered on concerns that the current second level was a vehicle to make upper levels of the Forest Service aware of local issues which have possible regional or national implications. Many respondents felt that the second review was also a chance to be heard by those who had a broader perspective of Forest Service policy and national issues; that it was a chance for the Chief to clarify policy to the field; and it was seen as a chance to make national organizations aware of local concerns.

Many found the idea of discretionary review unsatisfactory for a variety of reasons. There was concern that without specified decision criteria there would not be a fair way to determine if a second level was needed. Several respondents stated they felt they should automatically receive a second review. And some respondents stated that public controversy should be a reason for second review.

Considerable concern was expressed that the 15-day period to exercise discretion was insufficient, and that the 30-day second level review period would not permit adequate consideration, thereby causing the lower decision to stand by default.

Response: Although there were numerous comments on the need for two levels, the one-level review with discretionary review at the second level best fits the intent of the rule. It simplifies the process, improves the potential to process appeals in a timely manner, yet retains the option for a second review. Inherent in the process is the requirement for full and proper use of the NEPA process. The NEPA process requires Federal agencies to involve the public early and continuously throughout the decisionmaking process; thus a fair and open hearing on issues related to a decision are available. Lastly, the intent of the rule is dispute resolution by establishing stronger ties between the initial decisionmaker and the public, all in the overall interest of making better National Forest management decisions.

The public perceived the relationship between the Forest Supervisor and the District Ranger as being so close as to prevent an objective review of Ranger decisions by Forest Supervisors. Even though 82 percent of the District Ranger decisions currently appealed are resolved without a second level appeal, the final rule provides for a two-level appeal process for decisions made at the District Ranger level. However, second level review of a Ranger decision by the Regional Forester will not be automatic. It will have to be requested, and the review will be based solely on the existing record without additional submissions. The second level appeal decision will not receive further review.

In the final rule, a new paragraph (d) was added to clarify that Forest Supervisor's dismissal decisions are subject only to discretionary review, not to a second level appeal.

This section is recoded as § 217.7. The provisions detailing how discretionary review will work have been moved to a new section, § 217.17 Discretionary review, bringing into one place all references to discretionary review. In the proposed rule, these references were found in §§ 217.8, 217.13, 217.14, and 217.15. For response to additional comments on discretionary review see the discussion under § 217.15 Review decision.

Section 217.9 Filing procedures and timeliness; Section 217.10 Extension of time; Section 217.11 Content of a request for review.

The proposed rule eliminated the discretionary extension of time for filing a Statement of Reasons, while maintaining extension options for all Forest Service deadlines, except at the discretionary review level. The proposal required that the Statement of Reasons material be filed with the Request for Review. And, it included very specific direction on what must be included.

Comments: Public responses tended to link these three sections together. Many respondents felt that preparation of an appeal, including the complete statement of reasons, in the allotted 45 days could not be accomplished, and recommended provisions for extensions. Some claimed that the Forest Service was biased against individuals and volunteer organizations which would be working nights and weekends to provide the analysis, and be less likely to meet the 45-day limit than organizations which have paid staff. Several pointed out that extensions are needed in order to request and obtain needed data from the Forest Service. Others mentioned that, although they had been involved in the development of major projects, the Environmental Impact Statement preferred alternatives often change between draft and final, and that an entirely new review and analysis opportunity is therefore needed. Many pointed out that the proposed rules allow the Forest Service to grant itself extensions, and felt this was unfair, since the agency holds all the information and should be the best prepared to meet timeliness. Respondents mentioned that Forest Service failures to meet timelines under the current process are causing significant project delays and that the proposed rule perpetuates this situation.

Response: While this rule emphasizes dispute resolution, it is not intended to take the place of early and continuous public participation in the agency's NEPA-based planning and decisionmaking process. If the public is concerned about National Forest management matters, it has a responsibility to work with responsible officials in the development of various environmental documents prior to decisions being made that are subject to appeal under this rule. The final rule retains the 45-day filing period, with no extension permitted, for those appealing a decision on a project or activity. However, taking into consideration the public comment, the final rule has been modified to provide a 90-day filing period for those appealing a decision on a land and resource management plan approval, significant amendment, or revision, or on programmatic decisions documented in a Record of Decision. It should be noted that the longer appeal period does not change the effective date of the decision.

Additionally, the final rule has been modified to limit when the Forest Service can grant itself time extensions. Reviewing Officers will be permitted to extend the time of the review period only to request, acquire, and evaluate information needed to clarify issues, or to hold meetings to resolve issues.

Responding to public concerns that the new rule just perpetuates current Forest Service practice of not following timelines, and recognizing as an agency that internal management must be improved, a new paragraph has been added to clearly delineate how long the process should take.

For clarity, and because all these changes deal with how the appeal process will work, § § 217.9 and 217.10 have been combined. These sections are recoded § 217.8 and retitled Appeal process sequence. Section 217.11 is recoded § 217.9 Content of a notice of appeal. Proposed paragraph (b)(7) would have required appellants to state whether they had participated in predecisional activities. This paragraph has been dropped from the final rule because of the confusion it caused. Even though knowing whether or not an appellant has participated in predecisional matters is desirable, whether or not a participant was involved in predecisional matters was not intended to be a basis for dismissal. However, this was how the public interpreted the requirement.

To assist the public in understanding the timeframes and sequence of steps under the new rule, a flow chart of the process is set out at the end of this document as Appendix A; however it will not appear in the Code of Federal Regulations.

Section 217.12 Requests to delay implementation of a decision.

Proposed Part 217 did not permit delaying implementation of a Forest plan, but provided for an automatic delay of implementation of projects or activities scheduled during pendency of the review, upon request, so that a meaningful review on the merits would be preserved. The delay decisions were not subject to further discretionary review.

Comments: Most of the comments received concerned five major themes, characterized as follows: (1) All parties concerned should be notified of a delay request and the decision to grant or deny the request; (2) "urgent and compelling need" should be defined, preferably with examples; (3) requests to delay implementation should be granted automatically *except* under extraordinary circumstances; (4) requests to delay should be granted *only* under extraordinary circumstances; and, (5) there is a need for clear and comprehensive guidelines (standards) for granting a delay request. Many respondents pointed to a dual standard because in 36 CFR Part 251 the appellant has to justify the request for stay while under 36 CFR Part 217 the government is required to justify not granting a delay request.

Several respondents wanted the denial of a delay request to be appealable. Lastly, many respondents thought that the proposed provision which excludes delay of Forest plan implementation meant that subsequent projects would not be subject to delay, and that this was unacceptable. And, some respondents disagreed with quoted language from the preamble, "* * * there are not actions in a forest plan per se that would be immediately implementable and thus there are no actions to be stayed."

Response: In retrospect, the language should have stated, "* * * there are *seldom* any actions in a forest plan per se that would be * * * immediately implementable, and thus there are no actions to be stayed * * *". If a site specific project or activity is authorized in the forest plan, and which meets NEPA requirements, a delay should be considered if implementation would moot the review. Thus, the final language of the rule has been modified to make such projects or activities within a plan subject to delay if appellants so ask.

It has always been the practice of the agency to notify all parties concerned about stay decisions (referred to in the proposed rule as delay of implementation requests). This will not change with new rules.

The automatic stay device in the proposed rule was viewed as a way to preserve a meaningful review and simultaneously avoid forcing a requester to Court to obtain a restraining order. But in response to the dual standard concerns for granting stays voiced by respondents, the final rule provides that stay requests will not be automatically granted but will be considered and that stay requests must include specific reasons why the delay is needed. It is on this basis that the Reviewing Officer will either grant or deny a stay. Accordingly, the "urgent and compelling" standard is no longer necessary and has been deleted.

Additionally, the term "implementation" in proposed paragraph (a) has been changed to read "approval." It was the intent of this paragraph to preclude stays of plan approvals, but to consider staying activities undertaken to implement the plan, which as a consequence might moot a review if prematurely implemented. This change clarifies this intent.

For consistency with providing two levels of review on District Ranger decisions, the final rule provides for discretionary review of a Forest Supervisor's decision on a stay request. And, consistent with other language changes for clarity and understanding, the final rule has been modified to use the term "stay."

This section is recoded § 217.10 and retitled Stays.

217.13 Review file.

The proposal defined what consitutes the review file and specified how much time the Deciding Officer would have to assemble the relevant decision documents and pertinent records and transmit them to the Reviewing Officer. In contrast to the current rule, the Deciding Officer would not be required to prepare a Responsive Statement. Instead, the proposal allowed the Deciding Officer to respond briefly to issues raised in the request for review when transmitting the file to the Reviewing Officer.

Comments: Respondents voiced their concerns about the elimination of the Responsive Statement. The most frequent comments pertained to the value of the Responsive Statement and the reply thereto in "clarifying" the issues and in "justifying" the decision to proceed with an action. The Responsive Statement is seen by many as a way to foster dialogue about the rationale for the decision, the meaning of special terminology or technical matters, and the intent of the proposed activity. Many said that the current requirement to prepare a Responsive Statement helps ensure that the Deciding Officer understands an appellant's position.

Additionally, some respondents pointed out that the responsive statement had been eliminated in name only. Because the Deciding Officer would be allowed briefly to respond to issues in the transmittal letter, the letter would be, in fact, a Responsive Statement, and the appellant is given no opportunity to review or respond.

Response: Under the current rule, Responsive Statements are being used to carry the burden of discussion and justifying a project, plan, or activity. The intent of 36 CFR Part 217 is to focus on the environmental documentation and decision document completed as a consequence of the planning and decisionmaking process, and made available to those participating in the decisionmaking process, and to others prior to an appeal being filed. If the decision document does not "justify" the decision to proceed with an action, or explain the rationale for the decision, it is inadequate. A Responsive Statement is not necessary for a Reviewing Officer to make this determination. The purpose of eliminating the Responsive Statement is twofold: To expedite processing of an appeal and to ensure that NEPA-based decisions are adequately documented. The result should be better decision documents that reflect environmental disclosures and explain management action rationale. For these reasons, the final rule does not reinstate the requirement of a Responsive Statement. To prevent transmittal letters from becoming de facto Responsive Statements, the final rule deletes the provision allowing the Deciding Officer to respond to issues raised in the request for review, but retains the requirement that the Deciding Officer identify where in the documentation appellant's issues are addressed. The transmittal letter wil be made available to appellants and intervenors.

Other modifications to this section include giving Deciding Officers 30 days to transmit the record, instead of the proposed 21 days. This is because the rule has been modified to eliminate time extensions for this purpose, which under the current rule have nearly always been granted if requested. Lastly, taking into account other changes, the final rule states that the record closes either when the Deciding Officer forwards the record or when intervenors' comments are received, which ever is the latter.

This section is recoded and retitled § 217.15 Appeal record.

Section 217.14 Authority of reviewing officer in conduct of a review.

Part 217, as proposed, authorized the Reviewing Officer to establish whatever procedures are necessary to ensure orderly and expeditious conduct of a review. This section retained the provision of the current rule at 36 CFR 211.18 allowing a Reviewing Officer to consolidate reviews of the same decision or similar decisions involving common issues of fact or law. In keeping with the informal nature of the proposed review process, the Reviewing Officer has the authority to discuss issues related to the review with requesters, the Deciding Officer, or those who submit comments.

Comments: Part 217, as proposed, would permit free and open communication between parties with no requirement that these communications be documented or shared. Because of this, respondents raised the question of "*ex parte*" communications in which the Reviewing Officer is influenced by these discussions and the requester is not informed about them. Most respondents stated that the public had a right to know. The comments frequently used strong language to characterize this feature, such as unfair, undemocratic, prejudicial, secrecy, "back room deals," hiding information, etc. A few comments reflected a fear that internal documents would be immune to public review and that public participation would be discouraged.

One respondent suggested that, for purposes of issuing one decision, consolidation of appeals filed pursuant to Part 251 and reviews requested pursuant to Part 217 should be permitted, provided, of course, that both involve the same initial decision.

Response: This section has been modified to make it clear that any information sought by or otherwise utilized by the Reviewing Officer must be documented and shared among and between appellants and intervenors with opportunity afforded for comment. However, communications among or between the Deciding Officer, appellants, or intervenors do not have to be documented and made part of the record. Consolidation of review of appeals filed under Parts 217 and 251 which involve the same decision is not permitted, but the rules make clear that issuing only one decision may be appropriate.

In addition, as discussed under § 217.10, Reviewing Officers will be permitted to extend the time of the review period only to request, acquire, and evaluate information needed to clarify issues, or to hold meetings to resolve issues.

This section is recoded as § 217.13 and retitled, "Reviewing officer authority." Additionally, that portion dealing with discretionary review has been removed from this section and incorporated in § 217.17 Discretionary review.

217.15 Review decision.

The proposal established timelines for review decisions, 30 days for project decisions and 90 days for LRMP's, and stipulated that if no decision is made within 30 days once a decision is accepted for discretionary review, the lower level decision stands.

Comments: Several respondents felt it was unfair to allow the Forest Service twice the time to issue a decision on an appeal of a Forest plan decision (90 days) than is allowed for an appellant to read and review the plan, gather data, and prepare the request (45 days).

As discussed in § 217.8, many respondents found the idea of discretionary review unsatisfactory, voicing concerns that the timeframes would force a hurried review, because the 15-day period was insufficient to

exercise discretion, and the 30-day second level review period was too short. These respondents believed that the appellants would be punished by Forest Service procrastination or choosing to ignore the appeal, as the lower level decision would stand if timelines were not met.

Response: The 90-day timeframe for a Reviewing Officer to render a decision on an appeal of a Forest plan decision is retained in the final rule. As discussed under proposed § 217.9, the time available to prepare and file an appeal of a Forest plan has been modified. Thus, appellants of Forest plan decisions will have the same amount of time to prepare their appeal as the Reviewing Officer has to render a decision.

In response to comments that criteria are needed to guide a second level Reviewing Officer when deciding whether or not to review a lower level appeal decision, the final rule has been modified in § 217.16 to explain circumstances under which a Reviewing Officer might elect to exercise discretionary review of a lower decision. For example, a Reviewing Officer would consider such factors as controversy and litigation potential.

While the 15-day period provided for deciding whether to conduct a discretionary review of the lower level appeal or dismissal decision is unacceptable to some respondents, it is 5 days more than currently provided at the Chief's level. Thus, it is retained in the final rule. However, a provision has been added to the final rule stating that if the Reviewing Officer sends for the record at this point, the 15-day time period is suspended. The Deciding Officer has 5 days to send it forward. Upon receipt, the higher level Reviewing Officer will have 15 days to decide whether to conduct a discretionary review. It should be noted that the agency recognizes that it must improve its internal management of the process itself. This will require strengthening management controls, including those to be instituted by the Forest Service to assure that the discretionary review process works effectively and as it was intended. These will be issued as amendments to Forest Service Manual 1571 and Forest Service Handbook 1509.12 as direction to Forest Service personnel. Finally, the paragraph on discretionary review has been moved to a new section, § 217.17 Discretionary review.

The agency agrees with those respondents who expressed concern about appellants being punished by Forest Service procrastination. Therefore, the provision for automatically terminating the discretionary review after 30 days has been deleted and a statement releasing appellants from the administrative process has been added in the final rule. This section is recoded as § 217.16 and retitled "Decision."

217.16 Dismissal without review and decision.

The proposal specified the circumstances which would allow the dismissal of a review request without review.

Comments: Provision for dismissal without review was of considerable concern. Some respondents felt that the reasons for dismissal in the proposed rule were not clearly defined and that they would be interpreted subjectively, or used by the Forest Service to abuse the process. Several respondents suggested that the reasons for dismissal should be documented and that the decision to dismiss should be subject to discretionary review.

Response: The Forest Service agrees. As is the current practice, the agency will require a Reviewing Officer to document the reasons for dismissal in a decision letter. The omission of language to this effect in the proposed rule was an oversight. The final rule has been amended to direct the Reviewing Officer to provide written notice of a dismissal including an explanation of why the appeal is dismissed. And, on the basis of fairness and objectivity of review, the final rule has been modified to provide discretionary review of dismissal decisions. The final language cross-references new paragraph § 217.7(d) for clarification.

We believe the rule clearly defines the circumstances under which an appeal will be dismissed, and no modification is required.

This section is recoded § 217.11 and retitled "Dismissal without review."

Section 217.17 Resolution of issues during review.

The proposal made explicit the ability of the Deciding Officer to negotiate with those challenging a decision through the review process, and for Reviewing Officer to extend time for doing so. The proposed rule also provided that Deciding Officers could withdraw their initial decisions.

Comments: Some respondents were skeptical about and others opposed to the concept of seeking issue resolution after an appeal had been filed. They were concerned about compromising professional integrity and causing long delays in projects. Others were concerned that the Forest Service would use the resolution process to suspend action on an appeal, while allowing Forest plan direction to be implemented.

Most of the comments received supported the idea of a negotiated settlement, and offered additional suggestions. One respondent felt that the proposal would be strengthened by adding from 36 CFR Part 251 the mandatory "invitation to meet" language now required in decision letters to instrument holders. Several respondents were worried that the extension of deadlines would be abused, and unreasonable delays would occur. Suggestions included adding a definite time period to accomplish the negotiations; stipulating that the requester, Deciding Officer, Reviewing Officer, and other affected parties must agree to any extensions.

Additional concerns were expressed about communications during negotiations. Several respondents suggested that all affected parties be invited to participate in the negotiations. Because in the past some respondents had experienced a reluctance from the Forest Service to negotiate, several suggested that appellants, or even Reviewing Officers, should be able to request a negotiation session, not just the Deciding Officer.

Response: The Forest Service considered including the "invitation to meet" language from proposed 36 CFR Part 251 in proposed 36 CFR Part 217. However, it was not included because who might appeal is not known at the time a decision is recorded. Instead, the idea behind the "invitation to meet" proposed in 36 CFR Part 251 is embodied in this section and gives the Deciding Officer encouragement to meet with appellants and intervenors during the process to resolve issues. However, we agree that extensions of time to permit negotiations to occur should not be open ended. The final rule requires the Reviewing Officer to establish a reasonable duration. To require all parties to agree to any extensions is impractical, and in many cases an unlikely prospect. Some participants may be willing to work out solutions, and this prospect is more important than requiring all parties to agree to extensions. Therefore, this condition is not included in the final rule. The agency concurs with those respondents expressing concern about overcoming a reluctance to negotiate. There are some Forest Service officers who prefer a more structured appeals process rather than an informal negotiation process. Therefore, the final rule language is modified to allow Deciding Officers, Reviewing Officers, appellants, and intervenors to request meetings to

resolve issues. However, to preserve a Reviewing Officer's independence and objectivity should settlement not occur, the final rule provides that even though the Reviewing Officer may request that a meeting be held, Reviewing Officers may not participate in negotiations with appellants and/or intervenors, a limitation which overcomes problems associated with *ex parte* communications.

This section is recoded § 217.12, and retitled "Resolution of issues."

Section 217.18 Policy in event of judicial proceedings.

This section in the proposed rule created no new policy; it merely articulated longstanding practice consistent with judicial precedent favoring completion of the administrative process prior to court involvement.

Comments: The comments on this issue were few but emphatic. Respondents criticized the proposed language in other parts of the rule that would limit the kind of information included in the record or available to parties to the appeal, i.e., undocumented conversations or other information not shared with parties to the appeal. Absent an equitable procedure for sharing information, an inadequate administrative record is the result. Therefore, exhaustion of the administrative procedures in 36 CFR Part 217 should not be required of appellants as a prerequisite to direct access to court, because a court would not limit itself to an inadequate administrative record. Respondents also expressed concern that the Forest Service could frustrate appellants' access to court by delaying decisionmaking through manipulating extensions of time.

Response: As discussed in § 217.14, the final rule has been modified to make it clear that it is the information sought by the Reviewing Officer that must be documented and shared with all participants with opportunity for comment provided. The Forest Service believes that this clarification in the final rule resolves the concern. Therefore, this section is retained. However, it has been modified to permit the Chief to waive the policy on a case-by-case basis.

General Comment on Proposed Rule 36 CFR Part 251

Much less comment was received about this rule than the proposal for 36 CFR Part 217. However, the comment generally centered around the same major concerns expressed about 36 CFR Part 217, and most of it appeared to be from individuals and organizations who would not be eligible to utilize this rule.

The following summarizes the major comments and suggestions received on the proposed revision of 36 CFR Part 251, Subpart C, and the Department's response to these comments. Many respondents felt that the proposed rule was hard to follow. Thus, the final rule has been rearranged to more closely follow the steps in the process, and the headings have been retitled to better describe their contents. However, comments are keyed to the section numbers and headings of the proposed rule document.

Section 251.80 Purpose and scope.

The proposed rule asserted that it established a fair and deliberate process for appealing and reviewing written decisions arising from the issuance, approval, and administration of written instruments that authorize the occupancy and use of National Forest System land.

Comments: Those commenting on this section focused on the unfairness of two rules. They said it was inconsistent with the tenets of due process as well as unworkable. They also voiced concerns because it does not provide for an impartial judge. Others were concerned because they already feel they are in a weak bargaining position with the Forest Service and that this rule will make it worse.

Response: The agency disagrees that this rule is inconsistent with the tenets of due process. In fact, this rule is a structured, grievance-oriented rule that provides the elements of due process that are fundamental to resolving issues that arise from a business or legal relationship between the Forest Service and an appellant. It is quite similar in this respect to the current rule, 36 CFR 211.18. As pointed out in the discussion of Options Considered in the proposed rule document, the agency considered an independent board or impartial judge. However, this idea was rejected because such a formalized process may intensify adversarial relationships with the agency. Such a relationship is counter to the Forest Service commitment and desire to increase communication and cooperation with the public. In addition, the independent board or judge approach to appeal administration would tend to erode the agency's statutory authority to administer its programs and to supervise, correct, or redirect its operations. Therefore, the final rule remains an internal administrative appeal procedure.

The final rule retains this section, as proposed.

Section 251.81 Applicability and effective date.

This section would allow for the continuance of appeals related to written instruments that have already been brought under the current rule: 36 CFR 211.18, 36 CFR 228.14, or 36 CFR 292.15. No comments were received. The final rule retains this section as proposed; however, it is recoded as § 251.102.

Section 251.82 Definitions and terminology.

This section defines the terms used in this subpart. No comments were received. The final rule retains this section as proposed, however, it is recoded as § 251.81.

Section 251.83 Parties eligible to participate.

The rule proposed three types of parties eligible to participate: (1) Appellants—that is a holder of a written instrument or authorization or an applicant who is applying for an authorization in response to a solicitation by the Forest Service; (2) intervenors—other applicants for the same authorization, or holders of similar authorizations who have a direct interest that could be directly impacted by the appeal decision; and (3) the Deciding Officer.

Comments: There were many comments voiced about eligibility. Some respondents said it was too narrow as to who was eligible because it didn't apply to all applicants, and that it prevents adjacent landowners from appealing issuance of permits for activities which would have a negative environmental impact on their lands. Some respondents believed that States should have an opportunity to appeal or intervene. Others suggested allowing groups to intervene who supported either the permittee or appellant or those who would be affected by the appeal decision.

Response: The limitations on who can appeal and intervene are essential to this rule, because it is designed only to resolve issues arising from a decision to issue or approve, to deny issuance or approval, or to administer an existing authorization. These persons have a business or legal relationship with the Forest Service by virtue of the application for or the holding of a written instrument, and because of that relationship must have a procedure for bringing and resolving grievances.

Those who object to the use of the lands or resources to be covered by the issuance of an authorization can request review of the basic decision under 36

CFR Part 217 if this basic decision involves documentation required by agency planning and environmental analysis procedures. In addition, the initial allocation decision made through Forest level planning is reviewable under 36 CFR Part 217.

Therefore, this section has been retained in its entirety and is recoded § 251.86 and retitled Parties.

Section 251.84 Appealable decisions.

This section of the proposed rule lists the written decisions arising from specific types of permitted uses of National Forest System lands that can be appealed. The decisions vary from approval of grazing of livestock to approvals of special use permits. The approval of plans of mining operations pursuant to 36 CFR Part 228 and 36 CFR 292.17 and 292.18 would be added to the list of appealable decisions, ending previous separate processes. It also gives instructions for how notice of decisions appealable under this rule will be given.

Comments: Comments on this section generally dealt with specific questions on different types of decisions and whether or not they were appealable under this rule. For instance, Memorandums of Understanding (MOU), purchases of forest lands under 16 U.S.C. 521c–521i; decisions not to proceed with exchanges and disapproval of surface use plans. Other comments included questions about which rule would govern if a permit action triggered a NEPA review, and why notices of decision were sent only to applicants or holders and not to other National Forest users. One respondent suggested making the list of instruments non-inclusive so that future ones could be included.

Response: If the decision on a MOU is recorded through NEPA procedures, the decision is appealable under the procedures outlined in 36 CFR Part 217. However, later action under the MOU would be appealable by the holder of a permit under 36 CFR Part 251.

Section 251.86 of the proposed rule speaks to those situations where a decision could be appealed under both rules. An appellant eligible to appeal under either rule must choose which review process will be used and forfeits all right to use the other process.

Decisions covered under 16 U.S.C. 521c–521i usually entail NEPA compliance and, therefore, would be appealable under 36 CFR Part 217. We agree that decisions not to proceed with an exchange or disapproval of a surface use plan should also be listed. We also agree with the suggestion that the list be non-inclusive. The final rule language has been revised to include both of these items.

Because the matter under appeal is between the Forest Service and the holder of a permit or an applicant for a permit, extensive public notice requirements are not necessary unless the action involved NEPA, in which case the notice requirements of 36 CFR Part 217 must be met. A new section is added to the final rule, § 251.84 Obtaining notice, and the language about notice in proposed § 251.84 has been incorporated in this new section. The final rule clarifies that prompt notice is required. Also, this section is recoded § 251.82.

Section 251.85 Decisions not appealable under this subpart.

This section excludes from appeal the same decisions that are currently excluded under 36 CFR 211.18. In addition, it updates the list to reflect the enforcement of Uniform Rules for Protection of Archaeological Resources at 36 CFR Part 296, orders related to 36 CFR Part 261, decisions related to rehabilitation of National Forest System lands resulting from natural catastrophes if a Regional Forester or the Chief gives notice in the **Federal Register**, and decisions covered by 36 CFR Part 217.

Comments: Comments on this section generally addressed the exclusion of decisions related to rehabilitation for National Forest System lands resulting from natural catastrophes. Some respondents expressed the opinion that it is unnecessary to list these as exclusions since the Regional Forester or Chief would exclude them via **Federal Register** notice. Other respondents said the rule (§ 251.85(k)) was unclear concerning which NEPA decisions were appealable and which were excluded.

Response: The agency expects most decisions resulting from natural catastrophes will not be excluded except under extraordinary circumstances. In any event, a decision to exclude does not excuse the Regional Forester or Chief from NEPA compliance on the rehabilitation decision. A holder of a written instrument or an applicant could appeal under 36 CFR Part 251 or 36 CFR Part 217 depending on how the decision affects them. Therefore, it is appropriate to have the rehabilitation exclusion proviso in this section, and the final rule retains it.

Paragraph (k) refers to intermediate decisions. This exclusion continues current practice. Only the final decision, as documented in a Record of Decision, Decision Notice, or Decision Memo is appealable under 36 CFR Part 217, except as provided for at 36 CFR 251.86. The final rule retains this exclusion.

This section is recoded as § 251.83, and retitled Decisions not appealable.

Section 251.86 Election of appropriate review procedure.

This section covers those instances when a decision might be appealable under this rule as well as reviewable under Part 217. It requires the appellant to choose the appropriate review process, and further advises that an appellant thereby forfeits all right to use the other process for that decision.

Comments: Respondents on this section questioned the likelihood of the same decision being appealable and reviewable under both rules. They voiced the opinion that it just complicates the process and doubted its usefulness. Others suggested permitting participation under 36 CFR Part 217 even if an appellant has elected appeal under 36 CFR Part 251.

Response: It is possible that a decision could be made that is both appealable under this rule and reviewable under 36 CFR Part 217, but it should be a fairly rare circumstance. Therefore, this procedure is necessary. The choice of formal or informal review should be the applicant's or instrument holder's choice to make, not the Forest Service's choice. However, the final rule now includes a provision for appellants under this rule to participate in a review being conducted under 36 CFR 217.6(b).

The final rule retains this section but recodes it as § 251.85, retitled "Election of appeal process."

Section 251.87 Levels of review available.

The proposed rule change offers one level of appeal but makes the second level of review at the discretion of that officer.

Comments: Many respondents objected to the concept of a one-level appeal process in this rule for the same reasons outlined in the section discussing the public comment received on 36 CFR Part 217. Therefore, the discussion is not repeated here.

Response: Similarly, and consistent with the final rule at 36 CFR Part 217, the final rule provides for a two-level appeal process for decisions made at the District Ranger level. However, second level appeal of a Ranger Decision by the Regional Forester will not be automatic. The appellant will have to request it; the review will be based solely on the existing record without any additional submissions; and, the second level decision will not receive further review.

Also consistent with the changes at 36 CFR Part 217, dismissal decisions will be subject to discretionary review. A

new paragraph (d) was added in the final rule to clarify this change.

The provisions detailing how discretionary review will work has been moved to a new section, § 251.100 Discretionary review, bringing into one place all references to discretionary review. In the proposed rule, these references were found in §§ 251.87, 251.89, 251.94, 251.97, 251.98, and 251.99. The comments on discretionary review are further responded to under § 251.99 Appeal decision.

Section 251.88 Filing procedures and timeliness.

The procedures of this section are different from the current rule in two notable ways. One, under the proposed rule, an appellant would file an appeal with the Reviewing Officer instead of the Deciding Officer. Second, the filing period which would end 45 days from the date of the written decision, is not extendable, and timeliness decisions are not subject to appeal.

Comments: Comments received on this section questioned the appeal period beginning on the date the decision is signed. They felt it should begin after the appellant receives the decision. They went on to say that the agency should use Certified Mail to establish this date and to establish timely filing by the appellant. Other respondents questioned whether it was the postmark or receipt at the designated office that established timely filing.

Some respondents perceived that the filing period had been shortened and asserted that the possibility for time extensions must be included along with extending the 20-day period appellants have to reply to the Responsive Statement.

Response: The only date the Forest Service can control is the date of the decision. It would be extremely confusing for everyone concerned to have differing dates should there be multiple appeals. Furthermore, the proposed language follows current practice. Using Certified Mail to establish the date does not guarantee the party will receive it in a timely manner, and, therefore, the appeal period might never begin for that party. Current practice by the Forest Service is to send appeal related correspondence via certified mail within a day of the decision. The proposed rule does not preclude Forest officers from continuing this practice. The agency cannot require appellants to use certified mail. As in current practice, timely filing will be ascertained by the postmarked date if the documents are mailed, or delivery date if others means are used.

The proposed rule language provided for the same length of time to file a first level appeal as the current appeal rule.

The discussion that follows on § 251.89 addresses the concerns voiced on time extensions.

This section is retitled "Filing procedures." A flow chart of the process will be set out at the end of this document as Appendix B, but it will not appear in the Code of Federal Regulations.

Section 251.89 Extension of time.

This section would give a Reviewing Officer the discretion to extend all time lines expressed in the rule except the time to file a notice of appeal and for discretionary reviews of appeal decisions.

Comments: The only comment received on this section urged that instead of granting time extensions, both parties be placed on a rigid time table. It was suggested that if the appellant fails to meet any of the time lines, the Forest Service decision should stand; and if the Forest Service fails to meet any of the time lines, the appellant should prevail and the decision be changed to reflect the relief requested in the appellant's notice of appeal.

Response: The agency believes there are instances involving written instrument authorizations when extenuating cirumstances prevail and extending the time lines is necessary and appropriate. Therefore, the final rule retains the language from the proposal. It is retitled "Time extensions."

Section 251.90 Notice of appeal content.

The proposed rule made clear that the appellant bears the burden of proof in their notice of appeal as to why a decision should be changed. It included a detailed list of information to be provided by the appellant.

Comments: Those commenting on this section focused on three areas of concern. First, the fact that the Statement of Reasons must accompany the Notice of Appeal and the time provided was insufficient to prepare all this information; second, that there is no provision for correcting deficiencies; and last, there is no provision for notifying Deciding Officers about receipt of an appeal so their preparation of the Responsive Statement can begin.

Response: The agency believes that the time provided is adequate. Most matters involving written instrument will be relatively straight forward and will not require additional time. The rules, as proposed, did not prohibit correcting deficiencies or augmenting initial submissions with additional submissions. As is the current practice, however, if additional information is submitted for the record, it must be shared with all parties in a timely manner that will allow them time for comment prior to the record closing.

The proposed rule did require simultaneous filing of an appeal with the Deciding Officer in § 251.89. This triggers the Deciding Officer's preparation of the Responsive Statement.

The final rule retains the proposed language; however, it is retitled "Content of notice of appeal."

Section 251.91 Responsive statement.

The proposed rule retains the features of the current rule with regard to responsive statements. A Deciding Officer must prepare the Responsive Statement within 30 days and send to the appellant a statement responding to the facts, or issues of law or regulation alleged by an appellant. A copy must also be sent to any intervenors. All parties have 20 days to reply to the Responsive Statement.

Comments: Those comments addressing this section were concerned with two areas. First, that only permittees received a copy of the responsive statement and not the public. Second, that the 20-day time period to comment on the responsive statement is tied to the postmarked date of the responsive statement rather than the day it is received.

Response: It is fundamental to this rule that parties to the appeal be apprised of information submitted to the record and provided an opportunity to reply to the information. Because the public is not a party to the appeal, they are not entitled to receive a copy of the responsive statement. This is consistent with the current rule.

The only date the Forest Service can control is the date it is mailed. It is not practicable to use the receipt date. Therefore, the final rule retains the proposed language. However, it is recoded and retitled, § 251.94 Responsive statement.

Section 251.92 Implementation and request for stay of implementation.

The proposed rule allowed implementation of a decision under appeal unless a stay is requested and granted. This section incorporates most of the content requirements of the existing rule for requesting a stay.

Comments: There were two differing opinions expressed on this section. Some respondents felt that it should be deleted altogether because most stay

requests are frivolous and used as a delay tactic. The other respondents voiced the opinion that stays should be granted automatically.

Response: Decisions appealable under this rule involve holders and certain applicants who enjoy a business or legal relationship with the Forest Service. This provision is needed to ensure that the appeal is not mooted by implementation of the decision prior to review of the disputed decision. The agency does not believe that most stay requests filed pursuant to the current rule are frivolous. By their very nature, a stay is a delaying mechanism. However, as noted above, it is a necessary one.

The final rule retains the language as proposed but combines this section with §§ 251.93 and 251.94. The combined sections are recoded and retitled as § 251.91 Stays.

Section 251.93 Ruling on stay requests.

This section, as proposed, permits the Reviewing Officer to deny a stay if the decision appealed is not scheduled to take effect during pendency of the appeal. The section also requires the Reviewing Officer to rule on stay requests within 10 calendar days from receipt, and also lists the criteria a Reviewing Officer shall consider in ruling on stay requests. And, as is the current practice, the proposed rule required the Reviewing Officer to issue a written decision and specified the content of the decision letter, depending on the decision.

Comments: The only comment on this section voiced concern that the language in paragraph (b) could expose the Forest Service to charges of being arbitrary. Without elaborating, the contention appears to be based on respondent's view that § 251.93(b) gives blanket authority for denial, while § 251.92 requires appellants to justify a stay request.

Response: The agency has reviewed the proposed language and does not agree that paragraph (b) could be considered arbitrary. It is a signal to appellants to utilize the stay procedures judiciously and not to clog the process with meaningless requests. As discussed in the preamble to the proposed rule, the purpose of a stay is to delay implementation of a decision under appeal if harmful effects to the appellant could occur during pendency of the appeal. It makes no sense to process paperwork for decisions that will not take effect until after the appeal decision is rendered. Thus, the final rule modifies the provision for denial of a stay where implementation is not imminent to say that the Reviewing Officer will not accept such requests. And, for consistency with providing two levels of review on District Ranger decisions, the final rule provides for discretionary review of a Forest Supervisor's decision on a stay request.

The final rule combines this section with §§ 251.92 and 251.94. The combined section is retitled "Stays" and coded as § 251.91.

Section 251.94 Duration of and changes to stay decisions.

The proposed language establishes that stays will remain in effect during the 15-day period for determining discretionary review. Further, a Reviewing Officer may change a stay decision at any time that circumstances support a change. Petitions to change will also be accepted. Stay decisions or changes thereto are not appealable. No comments on this section were received. The final rule retains the language as proposed but incorporates it in § 251.91 Stays.

Section 251.95 Intervention.

Under the proposed rule, intervention would be limited to applicants for or holders of a written instrument of the same or a similar type that is the subject of or affected by the appeal, and have an interest that could be directly affected by an appeal decision. Intervenors would not be able to continue an appeal if the appellant withdraws the appeal.

Comments: Two areas of concern were surfaced from those commenting on this section. Many respondents believed that the proposal was too limiting as to who could intervene. Some believed that anyone with an immediate interest or affected by the decision should be allowed to intervene. Other respondents said the proposal prevented organizations from intervening on behalf of holders.

The other area of concern was continuance of an appeal. Respondents believed that they have the right to continue an appeal even if the appellant withdraws.

Response: The proposed rule is limited, by virtue of a written instrument, to those persons who have a business or legal relationship with the Forest Service that is established by the instrument. It is, therefore, appropriate and necessary to limit the basis for intervention in an appeal under the proposed rule to parties who have a similar relationship that could be affected by the disputed decision. In many instances, the decision to grant or to deny a particular use of lands or resources under a written instrument may be preceded by environmental analysis and documented pursuant to agency planning and decision making procedures (36 CFR Part 219 and 40 CFR Parts 1500 through 1508 and associated implementing regulations). Consequently, the general public has opportunity at this point to appeal under 36 CFR Part 217.

Since an intervenor would not be a party to an appeal unless an appellant had appealed, it is only logical that there is no further standing for an intervenor to carry on an appeal mooted by withdrawal. Intervenors are defined as those having an interest that could be directly affected by the decision on the appeal. If there is no appeal decision because the appeal is withdrawn, there is no effect on the intervenor.

Therefore, the final rule retains the language proposed. The section is recoded § 251.96.

Section 251.96 Oral presentations.

The proposed rule established the purpose of the oral presentation and that they can be held either in person or by phone. A request for an oral presentation that accompanies a notice of appeal would be granted automatically; requests received later would also be considered but the decision to grant the request would be discretionary. Decisions on oral presentation requests would not be appealable.

Appellant and intervenors must bear any expense in attending an oral presentation. And, the presentation may be open to public attendance, but to participation, at the Reviewing Officer's discretion.

Comments: Respondents on this section voiced a concern that parties must bear any expense of participation. Some suggested that the oral presentation should take place as close to the site involved as possible while others suggested making oral presentations discretionary.

Respondents also found unacceptable the option for public attendance at the oral presentation.

Response: While the agency is sympathetic, the Government cannot assume costs for either conference calls or transportation associated with an oral presentation, except on its own behalf. Neither is the Forest Service required to arrange an oral presentation at a location or in a manner that is disadvantageous to the Government. Moreover, the proposal is consistent with current practice.

Practice under the current rule usually limits attendance to the parties involved in the appeal; however, members of the general public sometimes request, and receive, permission to attend at the

discretion of the Reviewing Officer. The proposal incorporated this policy. Because the appeal process is an open process, this provision is retained in the final rule. The remainder of this section is also retained without change in the final rule; however, the section is recoded § 251.97.

Section 251.97 Authority of reviewing officer in conduct of appeal.

This section would authorize the Reviewing Officer to establish whatever procedures are necessary to ensure an orderly, expeditious, and fair conduct of an appeal. Such procedural matters would not be subject to appeal and further review. The proposal retains the current provision allowing a Reviewing Office to consolidate appeals. The proposed rule also makes clear that the Reviewing Officer may ask for additional information from any party to an appeal, but all parties must be notified of the request and receive copies of any information supplied. This section stipulates that an appeal of a Chief's initial decision conducted by the Secretary would be subject to the same rules and procedures applicable to all other first level appeals. This section also addresses procedures applicable to conduct of discretionary reviews.

Comments: Respondents commented on two segments of this section: consolidation, and acquiring additional information. Most respondents commenting on consolidation were concerned with having no recourse to opposing consolidation. One respondent suggested that this section provide for consolidation of appeals/reviews proceeding simultaneously under Parts 251 and 217. Others suggested that appellants should also be able to request consolidation.

Some respondents suggested that any additional information sought by the Reviewing Officer should be limited to information existing at the time of the initial decision. Other respondents commented that if adequate documentation did not exist for the original decision when it was made, the decision should be canceled rather than seeking additional information. Some respondents also expressed confusion about requirements for sharing acquired information.

Response: As is the practice currently, appellants may register their opposition to consolidation. Experience shows consolidation of multiple appeals of the same or similar decision is a useful procedure to simplify paperwork. And, the proposed language follows a longstanding practice currently permitted by the present rule. Appellants are seldom in a position to know when consolidation is appropriate. However, incorporating the results of a separate review of the same decision under Part 217 and an appeal under Part 251 into one decision is a good idea. As discussed in the corresponding section of Part 217, the final rule has been modified to permit this at the discretion of the Reviewing Officer.

The provision for acquiring additional information does not imply that the Reviewing Officer could seek information that was not available to the Deciding Officer when the decision was made. The final rule clarifies that additional information sought by the Reviewing Officer is solely for clarifying issues.

This section is recoded as § 251.95 and retitled "Authority of Reviewing Officer." Additionally, the portions discussing discretionary review have been incorporated into a new section devoted exclusively to discretionary review at § 251.100.

Section 251.98 Appeal record.

This section defines what constitutes the appeal record at both the first level and discretionary level of review. Additionally, this section prohibits reopening the record at the discretionary level except when the Secretary reviews an initial decision of the Chief.

Comments: The respondents to this section questioned whether the record would be available and all actions documented.

Response: The proposed rule language makes clear that the appeal record is open to the public throughout the appeal. Further, it details what the record should contain.

The final rule retains the language as proposed. However, the paragraph discussing discretionary review is moved to the new separate § 251.100.

Section 251.99 Appeal decision.

The proposed rule provided information to the Reviewing Officer on the nature of the decision to be rendered and continued the 30-day timeframe from closure of the record for rendering a decision on the appeal. This section also set a 30-day period for rendering a decision if discretionary review is exercised.

Comments: Respondents to this section expressed concern about discretionary review. Some respondents believe that it gives the reviewer an easy way out and is not responsive to public concerns. Further, some respondents objected to decisions being made on whether or not to exercise discretionary review without explanation being provided to parties.

Some respondents suggested that an extension clause be added to extend the 30-day discretionary review period by 15 days on a priority basis. Other respondents suggested that appellants be given an opportunity to waive the discretionary review.

There were also some respondents who objected to decisions on the merits being made without being given an answer. A few respondents objected to the Forest Service being able to grant itself additional time to render the decision.

Response: The agency would not expect a Reviewing Officer to escape review by letting time expire. As discussed in Part 217, while the 15-day period provided for deciding whether to conduct a discretionary review of the lower level appeal or dismissal decision is unacceptable to some respondents, it is 5 days more than currently provided at the Chief's level. Thus, it is retained in the final rule. However, a provision has been added to the final rule stating that if the Reviewing Officer sends for the record at this point, the 15-day time period is suspended. The Deciding Officer has 5 days to send it forward. Upon receipt, the higher level Reviewing Officer will have 15 days to decide whether to conduct a discretionary review. It should be noted that the agency recognizes that it must improve its internal management of the process itself. This will require strengthening management controls, including those to be instituted by the Forest Service to assure that the discretionary review process works effectively and as it was intended. These will be issued as amendments to Forest Service Manual 1571 and Forest Service Handbook 1509.12 as direction to Forest Service personnel. While the suggestion for waiver of the discretionary review by the appellant has merit, it increases the paperwork involved. Requesting waiver is not prohibited, so appellants have this option should they wish to use it. If, under the current rule the Secretary chooses not to exercise discretionary review, no explanation of this decision is required or given. The final rule continues this practice, but appellants will be notified. This paragraph of this section has been moved and incorporated in the new section devoted to discretionary review.

Consistent with changes in Part 217, the provision for automatically terminating the discretionary review after 30 days has been deleted and a statement releasing appellants from the administrative process has been added in the final rule. The final rule also includes general criteria for the

Reviewing Officer to consider when contemplating discretionary review. For example, controversy surrounding the decision and potential for litigation.

The agency noted that the proposed rule is confusing about what constitutes "issuing" an appeal decision. Therefore, the final rule clarifies this point and stipulates that it will be mailed.

As explained under § 251.89, the agency believes there are instances involving written instrument authorizations when time extensions are necessary. For example, when a permittee must assemble records that are not readily available. Moreover, the provision for requesting a time extension does apply to both the agency and the appellant. Therefore, the final rule retains this provision.

The remaining sections on dismissal (§ 251.100), resolution of issues (§ 251.101), and judicial proceedings (§ 251.102), did not receive specific comments. However, for consistency with the final rule at 36 CFR 217.11, and in response to comment on the proposal at 36 CFR 217.16, the provision on dismissal is modified to provide that dismissal decisions are subject to discretionary review at the next higher administrative level, is cross-referenced to new paragraph § 251.87(d), and is recoded § 251.92 in the final rule. Resolution of issues is recoded at § 251.93, and Policy in event of judicial proceedings is recoded at § 251.101 and modified similar to § 217.17 to permit the exhaustion policy to be waived by the Chief.

Full attention has been given to the comments received in preparing these final regulations. Therefore, the agency is adopting as a final rule, 36 CFR Part 251, Subpart C and 36 CFR Part 217, with the changes discussed in this preamble and with the necessary conforming amendments to Parts 211 and 228 which are adopted without change from the proposed rule. In addition, the final rule contains a conforming amendment to the rules in Part 292, Subpart C, to make clear that appeals of decisions related to the standards for use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area are subject to the final rules at 36 CFR Part 251.

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12291 on Federal Regulations. It has been determined that this is not a major rule. The rule will not have an effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets.

Moreover, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

Based on both experience and environmental analysis, this final rule would not have a significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and therefore imposes no paperwork burden on the public.

Lists of Subjects

36 CFR Part 211

Administrative practice and procedure, National forests.

36 CFR Part 228

Environmental protection, Mines, National forests, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—right-of-way, Reporting and recordkeeping requirements, Water resources.

36 CFR Part 292

Recreation and recreation uses.

Therefore, for the reasons set forth above, Title 36 of the Code of Federal Regulations is amended as follows:

PART 211—ADMINISTRATION [AMENDED]

1. The authority citation for Part 211 would continue to read as follows:

Authority: 30 Stat. 35, as amended, sec. 1, 33 Stat. 628 (16 U.S.C. 551, 472).

Subpart B—Appeal of Decisions Concerning the National Forest System [Amended]

2. Add a new paragraph (o) to § 211.16 to read as follows:

§ 211.16 Appeal of resource recovery and rehabilitation decisions resulting from natural catastrophes.

* * * * *

(o) *Applicability and effective date.* The procedures of this section shall not apply to any appeal received after February 22, 1989.

3. Amend paragraph (s) of § 211.18 by adding a sentence to the end of the paragraph as follows:

§ 211.18 Appeal of decisions of forest officers.

* * * * *

(s) * * * The procedures of this section shall not apply to any request to appeal filed after February 22, 1989.

4. Add a new Part 217 to read as follows:

PART 217—REQUESTING REVIEW OF NATIONAL FOREST PLANS AND PROJECT DECISIONS

Sec.
217.1 Purpose and scope.
217.2 Definitions.
217.3 Decisions subject to appeal.
217.4 Decisions not subject to appeal.
217.5 Giving notice of decisions subject to appeal.
217.6 Participants.
217.7 Levels of appeal.
217.8 Appeal process sequence.
217.9 Content of a notice of appeal.
217.10 Stays.
217.11 Dismissal without review.
217.12 Resolution of issues.
217.13 Reviewing officer authority.
217.14 Intervention.
217.15 Appeal record.
217.16 Decision.
217.17 Discretionary review.
217.18 Policy in event of judicial proceedings.
217.19 Applicability and effective date.

Authority: 16 U.S.C. 551, 472.

§ 217.1 Purpose and scope.

(a) This subpart provides a process by which a person or organization interested in the management of the National Forest System may obtain review of an intended action by a higher level official. These rules establish who may appeal planned actions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply.

(b) The process established in this part constitutes the final administrative opportunity for the public to influence National Forest System decisionmaking prior to implementation of various

decisions. The rules of this subpart complement, but do not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA), and the associated implementing regulations and procedures in 40 CFR Parts 1500 through 1508, 36 CFR Parts 216 and 219, Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15. The rules do not provide an adjudication, grievance-oriented process. Rather, they provide an expeditious, objective review of NEPA derived decisions by an official at the next administrative level.

§ 217.2 Definitions.

For the purposes of this part—

"Appellant" is the term used to refer to a person or organization (or an authorized agent or representative acting on their behalf) filing a notice of appeal under this part.

"Deciding Officer" means the Forest Service line officer who has the delegated authority and responsibility to make the decision being questioned under these rules.

"Decision document" means a written document that a Deciding Officer signs to execute a decision subject to review under this part. Specifically a Record of Decision, a Decision Notice, or Decision Memo.

"Decision documentation" refers to the decision document and all relevant environmental and other analysis documentation on which the Deciding Officer based a decision that is at issue under the rules of this part. Decision documentation includes, but is not limited to, a project file for proposed actions categorically excluded from documentation in an environmental assessment or environmental impact statement, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

"Decision Memo" is a concise memorandum to the files signed by a Deciding Officer recording a decision to take or implement an action that has been categorically excluded from documentation in either an environmental assessment or environmental impact statement (40 CFR 1508.4).

"Decision Notice" means the written document signed by a Deciding Officer when the decision ws preceded by preparation of an environmental assessment (40 CFR 1508.9).

"Decision review" or "review" is the term used to refer to the process provided in this part by which a higher level officer reviews a decision of a subordinate officer in response to a notice of appeal.

"Forest Service line officer". The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

"Intervenor" is an individual who, or organization that, is interested in or potentially affected by a decision under appeal pursuant to this part, who has made a timely request to intervene in that appeal.

"Notice of appeal" is the written document filed with a Reviewing Officer by one who objects to a decision covered by this part and who requests review by the next higher line officer.

"Participants" include appellants, intervenors, the Deciding Officer, and the Reviewing Officer.

"Record of Decision" is the document signed by a Deciding Officer recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2).

"Reviewing Officer" is the line officer one administrative level higher than the Deciding Officer or, in the case of a discretionary review, one level higher than the line officer who issued a first-level appeal decision.

§ 217.3 Decisions subject to appeal.

(a) Except as provided in § 217.4 of this part, written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of the National Environmental Policy Act and the National Forest Management Act, and the implementing regulations, policies, and procedures are subject to appeal under this part.

(1) Only decisions documented in a Decision Memo, Decision Notice, or a Record of Decision are subject to appeal under this part. Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act or National Forest Management Act processes made prior to release of final plans, guides, and other environmental documents are not appealable until issuance of decision documents.

(2) Forestry research and State and private forestry programs and activity decisions are subject to appeal under this part, if a specific decision is documented pursuant to paragraph (a)(1) of this section, and would be carried out directly on National Forest System lands.

(b) Decisions subject to appeal under this part include, but are not limited to:

(1) Approval, amendment, and revision of a forest land and resource management plan prepared pursuant to 36 CFR Part 219.

(2) Approval, and amendment of a regional guide for forest planning prepared pursuant to 36 CFR 219.8.

(3) Other projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

(c) Decisions on any of the matters listed in this section made by an authorized subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer to whom the subordinate employee reports.

§ 217.4 Decisions not subject to appeal.

(a) The following decisions are not subject to appeal under this part:

(1) Decisions appealable to the Agriculture Board of Contract Appeals, U.S. Department of Agriculture, under 7 CFR Part 24.

(2) Decisions involving Freeedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(3) Decisions for which the jurisdiction of another Government agency or the Comptroller General supercedes that of the Department of Agriculture.

(4) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to other entities having final authority to implement the recommendation in question.

(5) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117, Administration of Cooperative or Federal Sustained Yield Units; 7 CFR 21.104, Eligibility for

Relocation Payment or Amount; and 4 CFR Part 21, Bid Protests.

(6) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(7) Decisions concerning contracts under the Federal Property and Administration Services Act of 1949, as amended.

(8) Decisions covered by the Contract Disputes Act.

(9) Decisions involving Agency personnel matters.

(10) Decisions where relief sought is reformation of a contract or award of monetary damages.

(11) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice in the **Federal Register** that good cause exists to exempt such decisions from review under this part.

(12) Decisions embodied in rulemaking promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or in policies and procedures issued in the Forest Service Manual and handbooks (36 CFR Parts 200 and 216).

(13) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or to issue order or violations of prohibitions and orders under 36 CFR Part 261.

(14) Decisions solely affecting the business relationship between the Forest Service and applicants for or holders of written instruments regarding occupancy and use of National Forest System lands except as provided for at 36 CFR 251.82.

(b) In addition to decisions excluded from appeal by paragraph (a) of this section, the Forest Service shall not accept any notice of appeal on subsequent implementing actions that result from the initial decision subject to review under this part as defined at § 217.3(b)(3). For example, an initial decision to offer a timber sale is appealable under this part; subsequent actions to advertise or award that sale are not appealable under this part. A subsequent implementing decision that is documented in a new decision document would be subject to appeal under this part.

§ 217.5 Giving notice of decisions subject to appeal.

(a) For decisions subject to appeal under this part, Deciding Officers shall promptly mail the appropriate decision document (§ 217.3(a)(1)) to those who, in writing, have requested it, and to those who are known to have participated in the decisionmaking process.

(b) In addition to the notice required by paragraph (a) of this section, the Deciding Officer shall promptly publish a notice in the **Federal Register** about decisions that are considered to have effects of national concern, including those types of decisions of national concern made by the Chief that are subject to review under this part.

(c) Responsible officials may provide other forms of notice, including legal notice in newspapers of general circulation, as provided for in 40 CFR 1506.6, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.

§ 217.6 Participants.

(a) Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this part and request a review by the Forest Service line officer at the next administrative level.

(b) An intervenor as defined in § 217.2 of the subpart.

§ 217.7 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the notice of appeal is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a notice of appeal, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 217.17 of this part.

(b) *Decisions made by Forest Supervisors and Regional Foresters.* Only one level of administrative review is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available review are as follows:

(1) If the decision is made by a Forest Supervisor, the notice of appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) *Decisions made by the District Ranger.* Two levels of appeal are available for written decisions by the District Ranger.

(1) The initial appeal is filed with the Forest Supervisor.

(2) The notice of appeal for a second level of review must be filed with the Regional Forester within 15 days of the Forest Supervisor's appeal decision. Upon receiving the appeal, the Regional Forester shall promptly request the first level appeal record from the Forest Supervisor. The review shall be conducted on the existing file and no additional information shall be added to the file.

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to discretionary review (§ 217.17) by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.

(2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review (§ 217.17) by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review, except as provided for in paragraph (e)(3) of this section.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(3) A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to discretionary review by a higher level officer under the subpart.

§ 217.8 Appeal process sequence.

(a) *Filing procedures.* To appeal a decision under this part, a person or organization must:

(1) File a written notice of appeal in accordance with the provisions of § 217.9 of this part with the next higher line officer.

(2) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(3) File the notice of appeal within 45 days of the date of the decision for project decisions documented in a Decision Memo, Decision Notice, or Record of Decision (§ 217.3).

(4) File the notice of appeal within 90 days of the date of the decision for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decision documented in a Record of Decision.

(b) *Computation of time periods.* (1) The day after the decision date is the first day of the time period for filing. All other time periods applicable to this part are tied to the filing of a notice of appeal and begin on the first day following that filing.

(2) All time periods in this rule are to be computed using calendar days. Saturdays, Sundays, and Federal holidays are included in computing the time period for filing a notice of appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is extended to the end of the next Federal working day.

(c) *Evidence of timely filing.* It is the responsibility of the appellant to file the notice on or before the last day of the filing period. In the event of question, a legible postmark will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timely filing of the appeal. As provided for in § 217.11, notices of appeal that are late shall be dismissed.

(d) *Time extensions.* (1) The 45-day/90-day filing periods for a notice of appeal are not extendable.

(2) Time extensions are not permitted except as provided in §§ 217.12, 217.13, and 217.17 of this subpart.

(e) *Appeal decision.* Unless time has been extended as provided for in §§ 217.12 and 217.13, the Reviewing Officer shall not exceed the following time periods for rendering an appeal decision:

(1) An appeal of a project decision, not more than 100 days from the date the notice of appeal was filed.

(2) An appeal of a land and resource management plan approval, significant amendment, or revision, or on a programmatic decision documented in a Record of Decision, not more than 160 days from the date the notice of appeal was filed.

(3) A second-level appeal of a District Ranger's decision, not more than 30 days from the date the first-level appeal record was received.

(4) In the event of multiple appeals of the same decision, the appeal decision date shall be calculated from the filing date of the last notice of appeal.

§ 217.9 Content of a notice of appeal.

(a) It is the responsibility of those who appeal a decision under this part to provide a Reviewing Officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed.

(b) At a minimum, a written notice of appeal filed with the Reviewing Officer must:

(1) List the name, address, and telephone number of the appellant;

(2) Identify the decision about which the requester objects;

(3) Identify the document in which the decision is contained by title and subject, date of the decision, and name and title of the Deciding Officer.

(4) Identify specifically that portion of the decision or decision document to which the requester objects;

(5) State the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy; and

(6) Identify the specific change(s) in the decision that the appellant seeks.

§ 217.10 Stays.

(a) Requests to stay the approval of land and resource management plans prepared pursuant to 36 CFR Part 219 shall not be granted. However, requests to stay implementation of a project or activity included in such a plan will be considered as provided for in paragraph (b) of this section.

(b) Where a project or activity would be implemented before an appeal decision could be issued, the Reviewing Officer shall consider written requests to stay implementation of that decision pending completion of the review.

(c) To request a stay of implementation, an appellant must—

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), intervenor(s), and to the Deciding Officer; and

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped; and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) The Reviewing Officer shall rule on stay requests within 10 days of receipt of a request.

(e) In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(f) A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to the appellant(s), intervenor(s), and the Deciding Officer.

(g) A decision may be implemented during a review unless the Reviewing Officer has granted a stay.

(h) A Reviewing Officer's decision on a request to stay implementation of a project or activity is not subject to discretionary review at the next administrative level, except when the Reviewing Officer is the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

§ 217.11 Dismissal without review.

(a) A Reviewing Officer shall dismiss an appeal and close the appeal record without decision on the merits when:

(1) The notice is not filed within the time specified in § 217.8 of this part;

(2) The requested relief or change cannot be granted under law, fact, or regulation existing when the decision was made.

(3) The notice of appeal fails to meet the minimum requirements of § 217.9 of this part to such an extent that the Reviewing Officer lacks adequate information on which to base a decision;

(4) The decision at issue is being appealed under another administrative proceeding;

(5) The decision is excluded from appeal pursuant to § 217.4 of this part;

(6) The appellant(s) withdraws the appeal; or

(7) The Deciding Officer withdraws the appealed decision.

(b) The Reviewing Officer shall give written notice of a dismissal to all

participants that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in § 217.7(d) of this part.

§ 217.12 Resolution of issues.

(a) When a decision is appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. Reviewing Officers may, on their own initiative, request the Deciding Officer to meet the participants to discuss the appeal and explore opportunities to resolve the issues. However, Reviewing Officers may not participate in such discussions. Reviewing Officers may at the request of the Deciding Officer's, or on their own initiative, extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

(b) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all participants to the appeal will be notified that the case is dismissed. A Deciding Officer's subsequent decision to reissue or modify the withdrawn decision constitutes a new decision and is subject to appeal under this part.

§ 217.13 Reviewing officer authority.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such determinations and procedural instructions as appropriate to ensure orderly and expeditious conduct of the appeal process as long as they are in accordance with all the applicable rules and procedures of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) In case of multiple appeals of a decision, the Reviewing Officer may prescribe special procedures as necessary to conduct the review.

(3) All participants shall receive notice of any procedural instructions or decisions governing conduct of an appeal.

(4) Procedural instructions and decisions are not subject to review by higher level officers.

(b) *Consolidation of multiple appeals.* (1) The Reviewing Officer shall determine whether to issue one appeal decision or separate decisions in cases involving multiple notices of appeal under this part, or if the same decision is also under appeal pursuant to 36 CFR Part 251. In the event of a consolidated decision, the Reviewing Officer shall give advance notice to all who have appealed the decision.

(2) Decisions to consolidate an appeal decision are not subject to review by higher level officers.

(c) *Requests for information.* At any time during the appeal process, the Reviewing Officer at the levels specified in § 217.7 (a) and (b) of this part may extend the time periods for review to request additional information from an appellant, intervenor, or the Deciding Officer. Such requests shall be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all participants of such requests and provide them opportunity to comment on the information obtained.

(d) *Conduct of review of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 217.7(a)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this part.

§ 217.14 Intervention.

(a) For a period not to exceed 20 days following the filing of a first level notice of appeal, the Reviewing Officer shall accept requests to intervene in the appeal from any interested or potentially affected person or organization. Requests to intervene in an appeal at the second level (§ 217.7(c)) or during the discretionary review (§ 217.7(e)) shall not be accepted.

(b) Upon receiving such a request, the Reviewing Officer shall promptly acknowledge the request, in writing, and mail the Notice of Appeal to the intervenor.

(c) The Reviewing Officer shall accept into the appeal record written comments about the appeal from an intervenor for a period not to exceed 30 days following acknowledgement of the intervention request (§ 217.14(b)).

(d) Intervenors must concurrently furnish copies of all submissions to the appellant. Failure to provide copies may result in removal of a submission from the appeal record.

(e) An intervenor cannot continue an appeal if the appeal is dismissed (§ 217.11).

§ 217.15 Appeal record.

(a) Upon receipt of a copy of the notice of appeal, the Deciding Officer shall assemble the relevant decision documentation (§ 217.2) and pertinent records, and transmit them to the Reviewing Officer within 30 days.

(b) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate where the documentation addresses the issues raised in the notice of appeal. The Deciding Officer shall provide a copy of the transmittal letter to the appellant(s) and intervenor(s).

(c) The review of decisions appealed under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct the review consists of the notice of appeal, any written comments submitted by intervenors, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any appeal related correspondence, including additional information requested by the Reviewing Officer pursuant to § 217.13 of this part.

(d) It is the responsibility of the Reviewing Officer to maintain in one location a file of documents related to the decision and appeal.

(e) *Closing the record.* (1) In appeals involving intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor or at the end of the 30-day period for providing comments, whichever is the latter date, unless time has been extended as provided for in §§ 217.12 and 217.13.

(2) In appeals without intervenors, the appeal record shall close upon receipt of the decision documentation from the Deciding Officer, unless time has been extended as provided for in §§ 217.12 and 217.13.

(f) The appeal record is open to public inspection at any time during the review.

§ 217.16 Decision.

(a) The Reviewing Officer shall not issue a decision prior to the record closing (§ 217.15(e)).

(b) The Reviewing Officer's decision shall, in whole or in part, affirm or reverse the original decision. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer.

(c) An appeal decision must be consistent with applicable law, regulations, and orders.

(d) The Reviewing Officer shall send a copy of the decision to all participants and to others upon request.

(e) Unless a higher level officer exercises the discretion to review a Reviewing Officer's decision as

provided at § 217.7(e), or the Reviewing Officer is a Forest Supervisor, the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and that decision is not subject to further review under this part.

§ 217.17 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.

(b) Within one day following the date of a Forest Supervisor's stay decision (§ 217.10(f)), a dismissal decision (§ 217.11) or an appeal decision (§ 217.16) rendered by a Reviewing Officer, that officer shall forward a copy of the appeal decision and the decision documents (§ 217.2) upon which the appeal is predicated to the next higher officer.

(c) When a stay of implementation is in effect, it shall remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§ 217.17(d)), or until the end of the 15-day period provided for a second level appeal of a District Ranger's decision (§ 217.7(c)). If the higher level officer decides to review the Reviewing Officer's decision or a second level appeal is filed, the stay will remain in effect until a decision is issued (§ 217.17(f)), or until the end of the 30-day review period provided in §217.17(g), whichever is less.

(d) The higher level officer shall have 15 days from date of receipt to decide whether or not to review a lower level appeal decision, and may request and use the appeal record in deciding whether or not to review the decision, including decisions to dismiss. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the 15-day period or the additional 5-day period following receipt of the record, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. All participants shall be notified by the discretionary level whether or not the decision will be reviewed.

(e) Where an official exercises the discretion in § 217.7 (d) or (e) of this subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer who appeal decision is being reviewed.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to participants that the lower level decision will be reviewed, and shall send a copy of the review decision to all participants.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, the participants shall be notified by the discretionary level.

§ 217.18 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part. This position may be waived upon a written finding by the Chief.

§ 217.19 Applicability and effective date.

(a) The appeal procedures established in this part apply to all notices of appeal filed after February 22, 1989.

(b) Notices of appeal filed under 36 CFR 211.16, 36 CFR 211.18, 36 CFR 228.14, and 36 CFR 292.15 prior to February 22, 1989 remain subject to those procedures.

PART 228—MINERALS [AMENDED]

5. The authority citation for Part 228 continues to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 55), and 94 Stat. 2400.

Subpart A—Locatable Minerals [Amended]

6. Revise § 228.14 to read as follows:

§ 228.14 Appeals

Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

PART 251—LAND USES [AMENDED]

7. Add a new Subpart C to read as follows:

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

Sec.
251.80 Purpose and scope.
251.81 Definitions and terminology.
251.82 Appealable decisions.
251.83 Decisions not appealable.
251.84 Obtaining notice.
251.85 Election of appeal process.
251.86 Parties.
251.87 Levels of appeal.
251.88 Filing procedures.
251.89 Time extensions.
251.90 Content of notice of appeal.
251.91 Stays.
251.92 Dismissal.
251.93 Resolution of issues.
251.94 Responsive statement.
251.95 Authority of Reviewing Officer.
251.96 Intervention.
251.97 Oral presentation.
251.98 Appeal record.
251.99 Appeal decision.
251.100 Discretionary review.
251.101 Policy in event of judicial proceedings.
251.102 Applicability and effective date.

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Land

Authority: 16 U.S.C. 472,551.

§ 251.80 Purpose and scope.

(a) This subpart provides a process by which those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System lands, may appeal a written decision by an authorized Forest Service line officer with regard to issuance, approval, or administration of the written instrument. The rules in the subpart establish who may appeal under these rules, the kinds of decisions that can and cannot be appealed, the responsibilities of parties to the appeal, and the various procedures and timeframes that will govern the conduct of appeals under this subpart.

(b) The rules in this subpart seek to offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands.

§ 251.81 Definitions and terminology.

For the purposes of this subpart, the following terms are defined:

Appeal. A request to a higher ranking officer for relief from a written decision filed under this subpart by an applicant

for or a holder of a written instrument issued or approved by a Forest Service line officer.

Appeal decision. The written decision rendered by the Reviewing Officer on an appeal for relief under this subpart. The use of this term is limited to the final decision of a Reviewing Officer and does not refer to a stay decision or to any other determinations or procedural orders made on the conduct of an appeal (§ 251.99).

Appeal record. The documents submitted to the Reviewing Officer by an appellant, intervenor, or Deciding Officer (§ 251.98).

Appellant. An eligible applicant for or holder of a written instrument issued for the occupancy and use of National Forest System land (or their authorized agent or representative) who files an appeal pursuant to the provisions of this subpart (§ 251.86).

Deciding officer. The Forest Service line officer who makes a decision related to issuance, approval, or administration of an authorization to occupany and use National Forest System lands that is appealed under this subpart.

Decisions regarding a written instrument or authorization to occupy and use National Forest System lands. A broad, all inclusive phrase used throughout this subpart to connote the full range of actions and decisions a forest officer takes to issue written instruments, or to manage authorized uses of National Forest System lands, including, but not limited to, enforcement of terms and conditions, and suspension, cancellation, and/or termination of an authorization.

Forest System line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

Intervenor. An individual who, or organization that, is an applicant for or holder of the written instrument, or a similar instrument, issued by the Forest Service that is the subject of an appeal, and who has an interest that could be affected by an appeal, and who has made a timely request to intervene in that appeal, and who has been granted intervenor status by the Reviewing Officer (§ 251.96).

Issuance of a written instrument of authorization. Applies both to decisions to grant and to deny a written instrument or authorization.

Notice of appeal. The document prepared and filed by an appellant to dispute a decision subject to review under this subpart (§ 251.90).

Oral presentation. An informal meeting (in person or by telephone) at which an appellant, intervenor, and/or Deciding Officer may present information related to an appeal to the Reviewing Officer (§ 251.97).

Parties to an appeal. The appellant(s), intervenor(s), and the Deciding Officer.

Responsive statement. A written document prepared by a Deciding Officer that responds to the notice of appeal record by an appellant (§ 251.94).

Reviewing Officer. The officer at the next administrative level above that of the Deciding Officer who conducts appeal proceedings, makes all necessary rulings regarding conduct of an appeal, and issues the appeal decision.

Written instrument or authorization. Any of those kinds of documents listed in § 251.82 of this subpart issued or approved by the Forest Service authorizing an individual, organization or other entity to occupy and use National Forest System lands and resources.

§ 251.82 Appealable decisions.

(a) The rules of this subpart govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, including but not limited to:

(1) Permits for ingress and egress to intermingled and adjacent private lands across National Forest System lands, 36 CFR 212.8 and 212.10.

(2) Permits and occupancy agreements on National Grasslands and other lands administered under the provisions of Title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(3) Grazing and livestock use permits issued under 36 CFR Part 222, Subpart A.

(4) Mining plans of operating under 36 CFR Part 228, Subpart A.

(5) Mining operating plans for the Sawtooth National Recreation Area issued under 36 CFR 292.17 and 292.18.

(6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, Subpart C.

(7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR Part 251, Subpart A.

(8) Special use authorizations issued under 36 CFR Part 251, Subpart B, except, as provided in § 251.60(g), for suspension or termination of easements issued pursuant to 36 CFR 251.53(e) and (e)(1).

(9) Land exchange agreements under 36 CFR 254.11 and decisions to proceed/not proceed with land exchanges.

(10) Permits for uses in Wilderness Areas issued under 36 CFR 293.3.

(11) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act 1979 and 36 CFR Part 296.

(12) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

(13) Decisions to object, or not to object to the issuance of minerals leases.

(14) Decisions related to the standards for the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area pursuant to 36 CFR Part 292, Subpart C.

(b) Written decisions on any of the matters of the type listed in paragraph (a) of this section issued by a Forest Service staff officer with delegated authority to act for a Forest Service line officer are considered to be decisions of the line officer.

§ 251.83 Decisions not appealable.

The following decisions are not appealable under this subpart:

(a) Decisions appealable to the Agriculture Board of Contract Appeals, USDA, under 7 CFR Part 24.

(b) Decisions involving Freedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(c) Decisions for which the jurisdiction of another Government agency, the Comptroller General, or a court to hear and settle disputes supersedes that of the Department of Agriculture.

(d) Recommendations of Forest Service line officers to higher ranking Forest Service line officers or to other entities having final authority to implement the recommendation in question.

(e) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117 (Administration of Cooperative for Federal Sustained Yield Units); 7 CFR 21.104 (Eligibility for Recreation Payment of Amount); and 4 CFR Part 21 (Bid Protests).

(f) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(g) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.

(h) Decisions covered by the Contract Disputes Act.

(i) Decisions involving Agency personnel matters.

(j) Decisions where relief sought is reformation of a contract or award of monetary damages.

(k) Decisions made during the preliminary planning process pursuant to 36 CFR Part 219 and 40 CFR Parts 1500–1508 that precede decisions to implement the proposed action.

(l) Decisions related to National Forest land and resource management plans and projects only reviewable under 36 CFR Part 217.

(m) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice that good cause exists to exempt such decisions from appeal under this subpart.

(n) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or for violations of prohibitions and orders under 36 CFR Part 261.

(o) Reaffirmation of prior decisions to terminate a special use authorization.

§ 251.84 Obtaining notice.

A Deciding Officer shall promptly give written notice of decisions subject to appeal under this subpart to applicants and holders defined in § 251.86 of this subpart and to any holder of like instruments who has made a written request to be notified of a specific decision. The notice shall include a statement of the Deciding Officer's willingness to meet with applicants or holders to hear and discuss any concerns or issues related to the decision (§ 251.93). The notice shall also specify the name of the officer to whom an appeal of the decision may be filed, the address, and the deadline for filing an appeal.

§ 251.85 Election of appeal process.

(a) No decision can be appealed by the same person under both this subpart and Part 217 of this chapter.

(b) Should a decision be reviewable under this subpart as well as Part 217 of this chapter, a party who qualifies to bring an appeal under this subpart can elect which process to use for obtaining review of a decision, but in so doing, the appellant thereby forfeits all right to appeal the same decision under the other review process. However, a holder who waives the right to appeal under the provisions of 36 CFR Part 217 may intervene pursuant to 36 CFR 217.6(b).

§ 251.86 Parties.

Only the following may participate in the appeals process provided under this subpart:

(a) An applicant who, in response to a prospectus or written solicitation or other notice by the Forest Service, files a formal written request for a written authorization to occupy and use National Forest System land covered under § 251.82 of this subpart and

(1) Was denied the authorization, or

(2) Was offered an authorization subject to terms and conditions that the applicant finds unreasonable or impracticable.

(b) The signatory(ies) or holder(s) of a written authorization to occupy and use National Forest System land covered under § 251.82 of this subpart who seeks relief from a written decision related to that authorization.

(c) An intervenor as defined in § 251.81 of this subpart.

(d) The Deciding Officer who made the decision being appealed under this subpart.

§ 251.87 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the appeal is to the Secretary of Agriculture. Review by the Secretary is discretionary. Within 15 calendar days of receipt of a timely notice of appeal, the Secretary shall determine whether or not to review the decision. If the Secretary has not decided whether or not to review the decision by the expiration of the 15-day period, the appellant shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 251.100 of this part.

(b) *Decisions made By Forest Supervisors and Regional Foresters.* Only one level of appeal is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available appeal are as follows:

(1) If the decision is made by a Forest Supervisor, the appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the appeal is filed with the Chief of the Forest Service.

(c) *Decisions made by the District Ranger.* Two levels of appeal are available for written decisions by District Rangers.

(1) The appeal for initial review is filed with the Forest Supervisor.

(2) The appeal for a second level of review is filed with the Regional Forester within 15 days of the first level appeal decision. Upon receiving such a request, the Regional Forester shall promptly request the first level file from the Forest Supervisor. The review shall be conducted on the existing record and no additional information shall be added to the file.

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 251.92) are subject only to discretionary review by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.

(2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer is the Regional Forester, the Chief of the Forest Service has discretion to review.

(2) If the Reviewing Officer is Chief, the Secretary of Agriculture has discretion to review.

(3) A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to further review by a higher level officer under this subpart.

§ 251.88 Filing procedures.

(a) *Filing procedures.* In order to appeal a decision under this subpart, an appellant must:

(1) File a notice of appeal in accordance with § 251.90 of this subpart with the next higher line officer as identified in § 251.87.

(2) File the notice of appeal within 45 days of the date on the notice of the written decision being appealed (§ 251.84); and

(3) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(b) *Evidence of timely filing.* It is the responsibility of those filing an appeal

to file the notice of appeal by the end of the filing period. In the event of questions, legible postmarks will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timeliness of the notice of appeal. Untimely submissions are subject to dismissal as provided for in § 251.92(2).

(c) *Computation of time period for filing.* (1) The time period for filing a notice of appeal of a decision under this subpart begins on the first day after the Deciding Officer's written notice of the decision. All other time periods applicable to this subpart also will be computed to begin on the first day following an event or action related to the appeal.

(2) Time periods applicable to this subpart are computed using calendar days. Saturdays, Sundays, or Federal holidays are included in computing the time allowed for filing an appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday the filing time is extended to the end of the next Federal working day.

§ 251.89 Time extensions.

(a) *Filing of notice of appeal.* Time for filing a notice of appeal is not extendable.

(b) *All other time periods.* Appellants, Intervenors, Deciding Officers, and Reviewing Officers shall meet the time periods specified in the rules of this subpart, unless a Reviewing Officer has extended the time as provided in this paragraph. Except as noted in paragraph (a) of this section, the Reviewing Officer may extend all other time periods under this subpart.

(1) For appeals of initial written decisions by the Chief, a Regional Forester, or a Forest Supervisor, a Reviewing Officer, where good cause exists, may grant a written request for extension of time to file a responsive statement or replies thereto. The Reviewing Officer shall rule on requests for extensions within 10 days of receipt of the request and shall provide written notice of the extension ruling to all parties to the appeal.

(2) Except for discretionary reviews of appeal decisions as provided in § 251.87(d) of this subpart, a Reviewing Officer may extend the time period for issuance of the appeal decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed issues, as provided in § 251.93 of this subpart.

§ 251.90 Content of notice of appeal.

(a) It is the responsibility of an appellant to provide a Reviewing Officer sufficient narrative evidence and argument to show why a decision by a lower level officer should be reserved or changed.

(b) An appellant must include the following information in a notice of appeal:

(1) The appellant's name, mailing address, and daytime telephone number;

(2) The title or type of written instrument involved, the date of application for or issuance of the written instrument, and the name of the responsible Forest Service Officer;

(3) A brief description and the date of the written decision being appealed;

(4) A statement of how the appellant is adversely affected by the decision being appealed;

(5) A statement of the facts of the dispute and the issue(s) raised by the appeal;

(6) Specific reference to any law, regulation, or policy that the appellant believes to be violated and that the appellant believes to be violated and the reason for such an allegation;

(7) A statement as to whether and how the appellant has tried to resolve the issue(s) being appealed with the Deciding Officer, the date of any discussion, and the outcome of that meeting or contact; and

(8) A statement of the relief the appellant seeks.

(c) An appellant may also include in the notice of appeal a request for oral presentation (§ 251.97) or a request for stay of implementation of the decision pending on the appeal (§ 251.93).

§ 251.91 Stays.

(a) A decision may be implemented during an appeal unless the Reviewing Officer grants a stay.

(b) An appellant or intervenor may request a stay of a decision at any time while an appeal is pending, if the harmful effects alleged pursuant to paragraph (c)(3) of this section would occur during pendency of the appeal. The Reviewing Officer shall not accept any request to stay implementation of a decision that is not scheduled to begin during pendency of the appeal.

(c) To request a stay of decision, an appellant or intervenor must—

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), to intervenor(s), and to the Deciding Officer.

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped, and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) A Deciding Officer and other parties to an appeal may provide the Reviewing Officer with a written response to a stay request. A copy of any response must be sent to all parties to the appeal.

(e) *Timeframe.* The Reviewing Officer must rule on a stay request no later than 10 calendar days from receipt.

(f) *Criteria to consider.* In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section including the validity of any claim of adverse effect on the requester;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(g) *Notice of decision on a stay request.* A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to all parties to the appeal.

(h) *Duration.* A stay shall remain in effect for the 15-day period for determining discretionary review (§ 251.100), unless changed by the Reviewing Officer in accordance with paragraph (i) of this section.

(i) *Change in a stay.* A Reviewing Officer may change a stay decision in accordance with any terms established in the stay decision itself or at any time during pendency of an appeal that circumstances support a change of stay. In making any changes to a stay decision, the Reviewing Officer must issue a written notice to all parties to the appeal explaining the reason for

making the changes and setting forth any terms or conditions that apply to the change.

(j) *Petitions to change a stay.* An appellant or intervenor may petition a Reviewing Officer to change or lift a stay at any time during the pendency of a stay. Such petitions must be in writing, must explain how circumstances have changed since the stay was imposed, and must state why the change in the stay is being requested. The petitioner must send a copy of the petition to all parties to the appeal.

(k) *Appeal of stay decision or changes in stay.* A Reviewing Officer's decision to grant, deny, lift, or otherwise change a stay is not subject to further appeal and review, except when the first-level Reviewing Officer was the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

§ 251.92 Dismissal.

(a) The Reviewing Officer shall dismiss an appeal and close the record without a decision on the merits when:

(1) The appellant is not eligible to appeal a decision under this subpart.

(2) Appellant's notice of appeal is not filed within the required time period, or the notice of appeal fails to meet the minimum requirements of § 251.90 of this subpart to such an extent that the Reviewing Officer lacks adequate information on which to base a decision.

(3) In cases where there is only one appellant, the appellant withdraws the appeal.

(4) The requested relief cannot be granted under existing law, fact, or regulation.

(5) The decision is excluded from appeal under this subpart (§ 251.83).

(6) The Deciding Officer has withdrawn the decision under appeal.

(7) A request for review of the same decision has been filed by the same person under Part 217 of this Chapter.

(b) The Reviewing Officer shall give written notice of dismissal that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal is subject to discretionary review at the next highest administrative level as provided for in § 251.87(d).

§ 251.93 Resolution of issues.

(a) Authorized Forest Service officers shall, to the extent practicable and consistent with the public interest, consult and meet in person, or by phone, with holders of written instruments prior to issuing written decisions related to administration of a written authorization. The purpose of such meetings is to discuss any issues or concerns related to the authorized use and to reach a common understanding and agreement where possible prior to issuance of a written decision.

(b) When decisions are appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

(c) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all parties to the appeal and the Reviewing Officer must receive written notice.

§ 251.94 Responsive statement.

(a) *Content.* A responsive statement contains the Deciding Officer's response to the specific facts or issues of law or regulation and the requested relief set forth by the appellant in the notice of appeal.

(b) *Timeframe.* Unless the Reviewing Officer has granted an extension or dismissed the appeal, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal.

(c) *Replies.* Within 20 days of the postmarked date of the responsive statement, the appellant(s) and any intervenor(s) may file a written reply to the responsive statement with the Reviewing Officer. Appellants and intervenors must send a copy of any reply to a responsive statement to all parties to the appeal, including the Deciding Officer.

§ 251.95 Authority of reviewing officer.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such procedural orders as deemed appropriate to ensure orderly, expeditious, and fair conduct of an appeal providing they are consistent with other provisions of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) All parties to an appeal shall receive notice of any orders or decisions on the conduct of the appeal.

(3) Orders and determinations governing the conduct of an appeal are not subject to appeal and further review.

(b) *Consolidation of appeals.* A Reviewing Officer may consolidate multiple appeals of the same decision, or of similar decisions involving common issues of fact or law and issue one appeal decision. Similarly, a Reviewing Officer may issue one decision in cases involving separate reviews filed pursuant to 36 CFR Part 217 and under this part when the decision at issue is the same decision. In such case, the Reviewing Officer shall give notice to all parties to multiple appeals.

(1) A decision to consolidate appeals is not subject to appeal and further review.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may prepare one responsive statement to multiple appeals.

(c) *Requests for additional information.* Except in discretionary reviews conducted pursuant to § 251.100 of this subpart, the Reviewing Officer may ask any party to an appeal for additional information as deemed necessary to decide the appeal. Such requests will be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all parties of the request for information, provide it to all parties, give opportunity to comment, and extend time periods if necessary to allow for submission of the information.

(d) *Conduct of appeals of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 251.87(a)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this subpart.

§ 251.96 Intervention.

(a) A request to intervene in an appeal may be made at any time prior to the closing of the appeal record (§ 251.98) at the first level of appeal (§ 251.87). Requests to intervene in an appeal at the discretionary review level (§ 251.87(d)) shall be denied.

(b) To request intervention in a first-level appeal under this subpart, a party, at a minimum, must:

(1) Submit a written petition to intervene to the Reviewing Officer,

(2) Be, as defined at § 251.81 of this subpart, an applicant for or party to a written instrument issued by the Forest Service that is the subject of or affected by the appeal, and have an interest that could be directly affected by a decision on the appeal, and

(3) Show, in the request for intervention, how the decision on the appeal would directly affect petitioner's interests.

(c) The Reviewing Officer determines whether a party requesting intervention meets the requirements of paragraph (a) of this section. In granting intervention, the Reviewing Officer must give notice to all other parties to the appeal.

(d) A granting or denial of intervention is not subject to appeal to a higher level.

(e) Appellants and intervenors must concurrently furnish copies of all submissions to each other as well as the Deciding Officer. Failure to provide each other copies may result in removal of a submission from the appeal record. At the discretion of the Reviewing Officer, appellants may be given additional time to review and comment on initial submissions by intervenors.

(f) An intervenor cannot continue an appeal if the appellant withdraws the appeal.

§ 251.97 Oral presentation.

(a) *Purpose.* An oral presentation provides an additional opportunity for an appellant, and other parties to an appeal, to present their viewpoints to the Reviewing Officer. The purpose is to restate, emphasize, and/or clarify information related to an appeal. Oral presentations are to be conducted in an informal manner and shall not be subject to formal rules of procedure such as those applicable to judicial proceedings.

(b) *Requests.* Only an appellant may request and be granted an oral presentation. An appellant may request an oral presentation at any time prior to closing of the appeal record (§ 251.98). A Reviewing Officer shall automatically grant an oral presentation if the appellant requested the presentation as part of the notice of appeal.

(c) *Participation.* At the discretion of the Reviewing Officer, oral presentations may be open to public attendance, but participation is limited to parties to the appeal. The Reviewing Officer shall advise all parties to the appeal, including the Deciding Officer, of the place, time, and date of the oral presentation, and how the oral presentation will be conducted. All parties to an appeal shall be invited to participate. Appellants and intervenors must bear any expense involved in making an oral presentation in person or by telephone.

(d) *Limitation.* Oral presentations shall be held only at the first level of appeal (§ 251.87(b)).

§ 251.98 Appeal record.

(a) The following rules apply only to the appeal record for appeals at the first level (§ 251.87 (a), (b)):

(1) It is the responsibility of the Reviewing Officer to maintain in one location the documents related to the appeal.

(2) The record consists of the documents filed with the Reviewing Officer including, but not limited to, the notice of appeal, responsive statement, replies to submissions by various parties to the appeal, orders and determinations made on the conduct of the appeal, and correspondence.

(3) The Reviewing Officer has discretion to remove from the record documents that were not sent to all parties to an appeal.

(4) Unless the Reviewing Officer has ordered otherwise, the appeal record closes with the expiration of the time period for filing of the reply(ies) to the responsive statement, or at the conclusion of an oral presentation, if there is one. The Reviewing Officer shall notify all parties to an appeal of the closure of the record.

(5) The appeal record is open to public inspection.

§ 251.99 Appeal decision.

(a) The Reviewing Officer shall base the appeal decision on the appeal record and laws, regulations, orders, policies and procedures in effect at the time the decision was made.

(b) The Reviewing Officer shall affirm or reverse the original decision whole or in part and include the reason(s) for the decision. The Reviewing Officer may also include in the appeal decision instructions for further action by the Deciding Officer.

(c) At the first level of appeal, the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is closed.

(d) At the second level of appeal provided in § 251.87(c), the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is received from the first level Reviewing Officer.

(e) The Reviewing Officer shall send a copy of all appeal decisions to all participants.

(f) Unless the next higher officer exercises the discretion to review an appeal decision as provided in §§ 251.87(e) and 251.100 of this subpart, the appeal decision is the final administrative decision of the Department of Agriculture and is not subject to further review under this subpart or Part 217 of this chapter.

§ 251.100 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, and whether the appeal decision is precedential in nature or establishes new policy.

(b) Within one day following the date of a dismissal (§ 251.92) or an appeal decision (§ 251.99) is signed by a Reviewing Officer, the Reviewing Officer shall forward a copy of the appeal decision and the initial decision upon which the appeal is predicated to the next higher officer.

(c) The next higher level officer shall have 15 calendar days from date of receipt to decide whether or not to review an appeal decision and may call for or use the appeal record in deciding whether or not to review the appeal decision. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the discretionary review period, appellants shall be notified that the appeal decision of the Reviewing Officer stands as the final administrative review decision of the Department of Agriculture.

(d) When an official exercises the discretion in § 251.87(d) or § 251.87(e) of this subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer whose appeal decision is being reviewed.

(e) When an official exercises discretion to review an appeal decision, a Reviewing Officer may extend a stay, in whole or in part, during pendency of the discretionary review.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to an appellant that the lower level decision will be reviewed.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, appellants, intervenors, and the lower level Reviewing Officer shall be notified.

(h) The Reviewing Officer shall provide a copy of the decision to all

appellants, intervenors, the Deciding Officer, and the lower level Reviewing Officer.

§ 251.101 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of and relief from a decision appealable under this subpart is premature and inappropriate, unless the appellant has first sought to resolve the dispute by invoking and exhausting the procedures of this subpart. This position may be waived only upon a written finding by the Chief.

§ 251.102 Applicability and effective date.

(a) Except where applicants or holders elect the decision review procedures of Part 217 of this Chapter, all appeals of decisions by applicants or holders arising from the issuance, approval, and administration of written instruments authorizing occupancy and use of National Forest System lands as defined at § 251.82 of this subpart shall be subject to the provisions of this subpart as of February 22, 1989.

(b) Appeals of the type covered by this subpart and filed prior to February 22, 1989, shall continue to be conducted under the provisions of 36 CFR 211.18.

PART 292—NATIONAL RECREATION AREAS [AMENDED]

Subpart C—Sawtooth National Recreation Area—Private Lands [Amended]

8. The authority citation for Part 292, Subpart C continues to read as follows:

Authority: Sec. 4(a), Act of Aug. 22, 1972 (86 Stat. 613).

§ 292.15 [Amended]

9. Revise § 292.15(*l*) to read as follows:

* * * * *

(*l*) *Appeals.* Any landowner who is adversely affected by a decision of the Area Ranger under these regulations may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

Date: January 12, 1989.

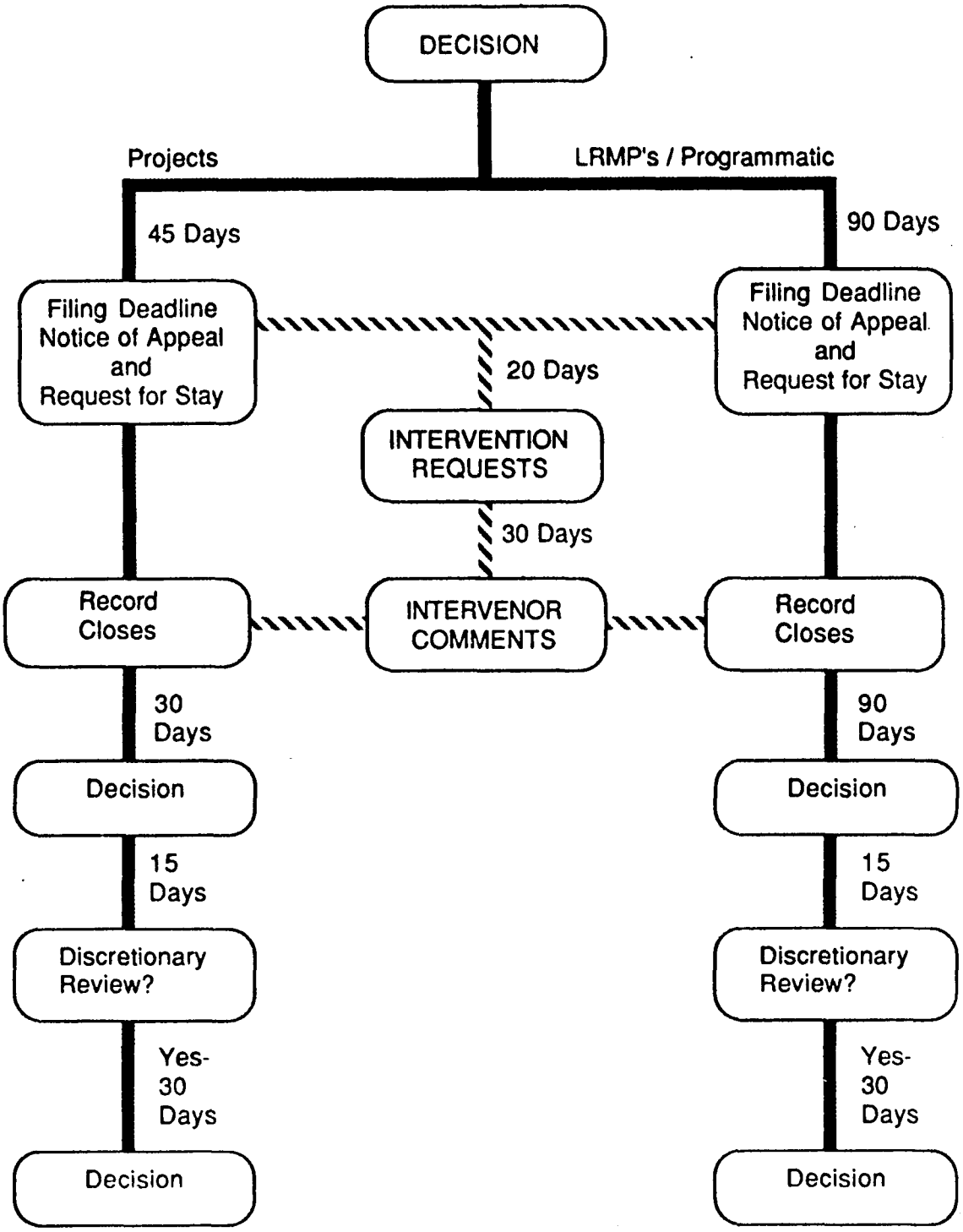
Richard E. Lyng,

Secretary.

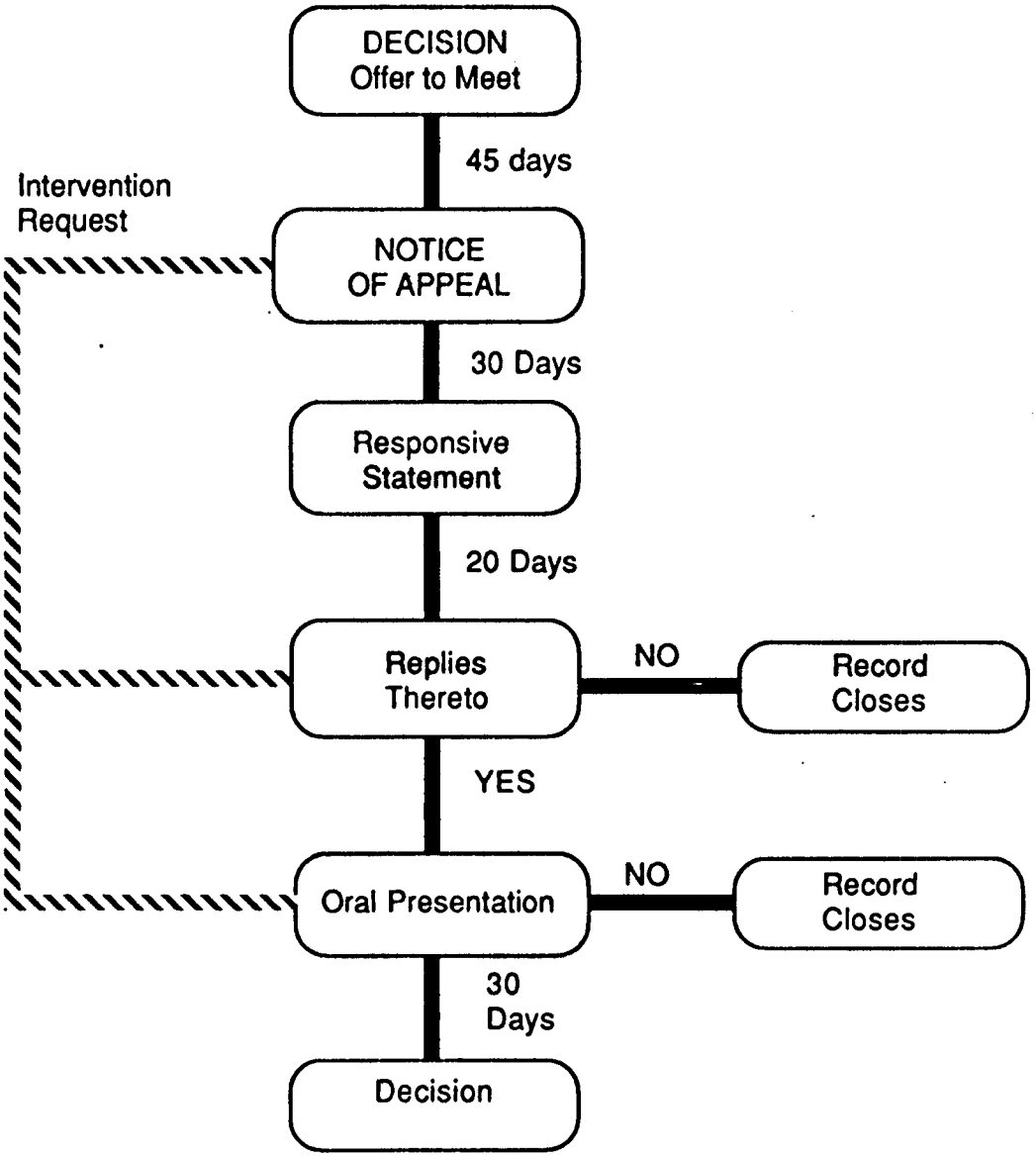
Editorial note: These appendices will not appear in the Code of Federal Regulations.

BILLING CODE 3410-11-M

Appendix A - 36 CFR 217



Appendix B - 36 CFR 251



[FR Doc. 89-1222 Filed 1-19-89; 8:45 am]

BILLING CODE 3410-11-C

federal register

Monday
January 23, 1989

Part VII

Department of the Interior

Minerals Management Service

Outer Continental Shelf Operations in the Central Gulf of Mexico; Notices

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf Central Gulf of Mexico; Notice of Leasing Systems, Sale 118

Section 8(a)(8) (43 U.S.C. 1337(a)(8)) of the Outer Continental Shelf Lands Act (OCSLA) requires that, at least 30 days before any lease sale, a Notice be submitted to the Congress and published in the **Federal Register.**

1. identifying the bidding systems to be used and the reasons for such use; and

2. designating the tracts to be offered under each bidding system and the reasons for such designation.

This Notice is published pursuant to these requirements.

1. *Bidding systems to be used.* In the Outer Continental Shelf (OCS) Sale 118, blocks will be offered under the following two bidding systems as authorized by section 8(a)(1) (43 U.S.C. 1337(a)(1)): (a) bonus bidding with a fixed 16⅔-percent royalty on all unleased blocks in less than 400 meters of water; and (b) bonus bidding with a fixed 12½-percent royalty on all remaining unleased blocks.

a. *Bonus Bidding with a 16⅔-Percent Royalty.* This system is authorized by section (8)(a)(1)(A) of the OCSLA. This system has been used extensively since the passage of the OCSLA in 1953 and imposes greater risks on the lessee than systems with higher contingency payments but may yield more rewards if a commercial field is discovered. The relatively high front-end bonus payments may encourage rapid exploration.

b. *Bonus Bidding with a 12½-Percent Royalty.* This system is authorized by section (8)(a)(1)(A) of the OCSLA. It has been chosen for certain deeper water blocks proposed for the Central Gulf of Mexico (Sale 118) because these blocks are expected to require substantially higher exploration, development, and production costs, as well as longer times before initial production, in comparison to shallow water blocks. Department of the Interior analyses indicate that the minimum economically developable discovery on a block in such high-cost areas under a 12½-percent royalty system would be less than for the same blocks under a 16⅔-percent royalty system. As a result, more blocks may be explored and developed. In addition, the lower royalty rate system is expected to encourage more rapid production and higher economic profits. It is not anticipated, however, that the larger cash bonus bid associated with a lower royalty rate will significantly reduce competition, since the higher costs for exploration and development are the primary constraints to competition.

2. *Designation of Blocks.* The selection of blocks to be offered under the two systems was based on the following factors:

a. Lease terms on adjacent, previously leased blocks were considered to enhance orderly development of each field.

b. Blocks in deep water were selected for the 12½-percent royalty system based on the favorable performance of this system in these high-cost areas as evidenced in our analyses.

The specific blocks to be offered under each system are shown on Map 2 entitled "Central Gulf of Mexico Lease Sale 118—Final, Bidding Systems and Bidding Units." This map is available from the Minerals Management Service, Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

Robert E. Kallman

Director, Minerals Management Service.

Approved: January 13, 1989.

James E. Cason

Deputy Assistant Secretary—Land and Minerals Management.

[FR Doc. 89–1339 Filed 1–19–89; 8:45 am]

BILLING CODE 4310-MR-M

UNITED STATES
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Outer Continental Shelf
Central Gulf of Mexico
Oil and Gas Lease Sale 118

1. Authority. This Notice is published pursuant to the Outer Continental Shelf (OCS) Lands Act (43 U.S.C. 1331-1356, (1982)), as amended by the OCS Lands Act 1985 Amendments (100 Stat. 147), and the regulations issued thereunder (30 CFR Part 256).

2. Filing of Bids. Sealed bids will be received by the Regional Director (RD), Gulf of Mexico Region, Minerals Management Service (MMS), 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123-2394. Bids may be delivered in person to that address during normal business hours (8 a.m. to 4 p.m., Central Standard Time (c.s.t.)) until the Bid Submission Deadline at 10 a.m., Tuesday, March 14, 1989. All times cited in this Notice refer to c.s.t. Bids will not be accepted the day of Bid Opening, Wednesday, March 15, 1989. Bids received by the RD later than the time and date specified above will be returned unopened to the bidders. Bids may not be modified unless written modification is received by the RD prior to 10 a.m., Tuesday, March 14, 1989. Bids may not be withdrawn unless written withdrawal is received by the RD prior to 8:30 a.m., Wednesday, March 15, 1989. Bid Opening Time will be 9 a.m., Wednesday, March 15, 1989, at the Marriott Hotel, 555 Canal Street, New Orleans, Louisiana. All bids must be submitted and will be considered in accordance with applicable regulations including 30 CFR Part 256. The list of restricted joint bidders which applies to this sale appeared in the Federal Register at 53 FR 41249, published on October 20, 1988.

3. Method of Bidding. A separate bid in a sealed envelope labeled "Sealed Bid for Oil and Gas Lease Sale 118, (insert map number, map name, and block number(s)), not to be opened until 9 a.m., Wednesday, March 15, 1989," must be submitted for each block or prescribed bidding unit bid upon. The company qualification number should also appear on the envelope. For example, a label would read as follows: "Sealed Bid for Oil and Gas Lease Sale 118, NG 16-1, Atwater Valley, Block 701, not to be opened until 9 a.m., Wednesday, March 15, 1989, Overthrust Inc. #1093." For those blocks which must be bid upon as a bidding unit (see paragraph 12), it is recommended that all numbers of blocks comprising the bidding unit appear on the sealed envelope. A suggested bid form appears in 30 CFR Part 256, Appendix A. In addition, the total amount bid must be in whole dollar amounts (no cents). Bidders must submit with each bid one-fifth of the cash bonus, in cash or by cashier's check, bank draft, or certified check, payable to the order of the U.S. Department of the Interior--Minerals Management Service. The company qualification number should also appear on the check or draft together with bid block identification. No bid for less than all of the unleased portions of a block or bidding unit, as referenced in paragraph 12, will be considered. Bidders are advised to use the description "All the Unleased Federal Portions" for those blocks having only aliquot portions currently available for leasing.

All documents must be executed in conformance with signatory authorizations on file. Partnerships also need to submit or have on file in the Gulf of Mexico regional office a list of signatories authorized to bind the partnership. Bidders submitting joint bids must state on the bid form the proportionate interest of each participating bidder, in percent to a maximum of five decimal places after the decimal point; e.g., 33.33333 percent. Other documents may be required of bidders under 30 CFR 256.46. Bidders are warned against violation of 18 U.S.C. 1860, prohibiting unlawful combination or intimidation of bidders.

4. Bidding Systems. All bids submitted at this sale must provide for a cash bonus in the amount of $25 or more per acre or fraction thereof. All leases awarded will provide for a yearly rental payment of $3 per acre or fraction thereof. All leases will provide for a minimum royalty of $3 per acre or fraction thereof. The bidding systems to be employed for this sale apply to blocks or bidding units as shown on Map 2 (see paragraph 12). The following bidding systems will be used:

(a) Bonus Bidding with a 12 1/2-Percent Royalty. Bids on the blocks and bidding units offered under this system must be submitted on a cash bonus basis with a fixed royalty of 12 1/2 percent.

(b) Bonus Bidding with a 16 2/3-Percent Royalty. Bids on the blocks and bidding units offered under this system must be submitted on a cash bonus basis with a fixed royalty of 16 2/3 percent.

5. Equal Opportunity. Each bidder must have submitted by the Bid Submission Deadline stated in paragraph 2, the certification required by 41 CFR 60-1.7(b) and Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, on the Compliance Report Certification Form, Form MMS-2033 (June 1985), and the Affirmative Action Representation Form, Form MMS-2032 (June 1985). See paragraph 14(e).

6. Bid Opening. Bid opening will begin at the Bid Opening Time stated in paragraph 2. The opening of the bids is for the sole purpose of publicly announcing bids received, and no bids will be accepted or rejected at that time. If the Department is prohibited for any reason from opening any bid before midnight on the day of Bid Opening, that bid will be returned unopened to the bidder as soon thereafter as possible.

7. Deposit of Payment. Any cash, cashier's checks, certified checks, or bank drafts submitted with a bid may be deposited by the Government in an interest-bearing account in the U.S. Treasury during the period the bids are being considered. Such a deposit does not constitute and shall not be construed as acceptance of any bid on behalf of the United States.

8. Withdrawal of Blocks. The United States reserves the right to withdraw any block from this sale prior to issuance of a written acceptance of a bid for the block.

9. Acceptance, Rejection, or Return of Bids. The United States reserves the right to reject any and all bids. In any case, no bid will be accepted, and no lease for any block or bidding unit will be awarded to any bidder, unless:

(a) the bidder has complied with all requirements of this Notice and applicable regulations;

(b) the bid is the highest valid bid; and

(c) the amount of the bid has been determined to be adequate by the authorized officer.

No bonus bid will be considered for acceptance unless it provides for a cash bonus of $25 or more per acre or fraction thereof. Any bid submitted which does not conform to the requirements of this Notice, the OCS Lands Act, as amended, and other applicable regulations may be returned to the person submitting that bid by the RD and not considered for acceptance.

10. Successful Bidders. Each person who has submitted a bid accepted by the authorized officer will be required to execute copies of the lease, pay the balance of the cash bonus bid together with the first year's annual rental, as specified below, and satisfy the bonding requirements of 30 CFR 256, Subpart I. Successful bidders are required to submit the balance of the bonus and the first year's annual rental payment, for each lease issued, by electronic funds transfer in accordance with the requirements of 30 CFR 218.155.

11. Leasing Maps and Official Protraction Diagrams. Blocks or bidding units offered for lease may be located on the following Leasing Maps or Official Protraction Diagrams which may be

purchased from the Gulf of Mexico regional office (see paragraph 14(a)):

(a) Outer Continental Shelf Leasing Maps--Louisiana Nos. 1 through 12. This is a set of 27 maps which sells for $28. (Revised and New Maps have recently been issued.)

(b) Outer Continental Shelf Official Protraction Diagrams:

NH 15-12	Ewing Bank	(revised December 2, 1976).
NH 16-4	Mobile	(revised November 8, 1988).
NH 16-7	Viosca Knoll	(revised December 2, 1976).
NH 16-10	Mississippi Canyon	(revised December 2, 1976).
NG 15-3	Green Canyon	(revised December 2, 1976).
NG 15-6	Walker Ridge	(revised December 2, 1976).
NG 15-9	(No Name)	(approved March 3, 1987).
NG 16-1	Atwater Valley	(revised November 10, 1983).
NG 16-4	Lund	(revised August 22, 1986).
NG 16-7	(No Name)	(approved March 3, 1987).

These sell for $2 each.

12. Description of the Areas Offered for Bids.

(a) Acreages of blocks are shown on Leasing Maps and Official Protraction Diagrams. Some of these blocks, however, may be partially leased, or transected by administrative lines such as the Federal/State jurisdictional line. In these cases, the following supplemental documents to this Notice are available from the Gulf of Mexico regional office (see paragraph 14(a)).

(1) Central Gulf of Mexico Lease Sale 118 - Final. Unleased Split Blocks.

(2) Central Gulf of Mexico Lease Sale 118 - Final. Unleased Acreage of Blocks with Aliquots Under Lease.

(b) References to Maps 1, 2, and 3 in this Notice refer to the following maps which are available on request from the Gulf of Mexico regional office.

Map 1 entitled "Central Gulf of Mexico Lease Sale 118 - Final. Stipulations, Lease Terms, and Warning Areas."

Map 2 entitled "Central Gulf of Mexico Lease Sale 118 - Final. Bidding Systems and Bidding Units," refers largely to Royalty Rates and Bidding Units.

Map 3 entitled "Central Gulf of Mexico Lease Sale 118 - Final. Detailed Maps of Biologically Sensitive Areas," pertains to areas referenced in Stipulation No. 2.

(c) In several instances, two or more blocks have been joined together into bidding units totaling less than 5,760 acres. Any bid submitted for a bidding unit having two or more blocks must be for all of the unleased Federal acreage within all of the blocks in that bidding unit. The list of those bidding units with their total acreages appears on Map 2.

(d) The areas offered for leasing include all those blocks shown on the OCS Leasing Maps and Official Protraction Diagrams listed in paragraph 11, except for those blocks or partial blocks described on pages 7 through 20 of this Notice.

(e) The proposed Notice for this sale, issued in September 1988, listed all Federal acreage under lease at that time. Subsequent lease expirations and relinquishments by lessees, however, have resulted in the availability of a number of such previously leased blocks for bidding in this sale. For the convenience of potential bidders, these newly available blocks are listed on page 6 of this Notice.

Sale 118 Update List

The following blocks have become available for leasing since publication of the proposed Notice of Sale 118. This list is being furnished for your convenience.

West Cameron

57
278

West Cameron, West Addition

389

West Cameron, South Addition

501
535
659

East Cameron

2
99
100
102

Vermilion

88
241
242

Vermilion, South

270
395

South Marsh Island, South

206

Eugene Island

54
72
81
98
253 (E½; E½NW¼; NW¼ NW¼; E½ SW¼ NW¼; SW¼)

Eugene Island, South

290

Ship Shoal

70

Ship Shoal, South

352
368

South Timbalier

182

South Timbalier, South

280
297
298
316

Grand Isle, South

106

West Delta

39

West Delta, South

149

South Pass

55

South Pass, South East

88

Main Pass

57 (S½)

Main Pass, South East

199
232
261
271
276
281
286
287

Mobile

910
912
913

Viosca Knoll

654
694
782
822
823
899

Ewing Bank

909
910
932
933
937
938
953
957

Mississippi Canyon

110
240
241
316
490

Green Canyon

15
103
146

(1) Descriptions of blocks listed represent all Federal acreage leased unless otherwise noted.

Sabine Pass

3
9
10
11
12
13

West Cameron

17
18 (SW¼)
20
21 (SW¼SW¼)
22
23
24
26
28 (N½; N½N½S½)
34
35
39
40
41
42
43
44 (NW¼NW¼; Portion seaward of 8g Line)
45
47
48
49
53
55
56 (N½)
58
60
61
62
64
65

West Cameron (continued)

66
67
68 (S½)
69 (N½)
71
72
73
76
77
81
91
92
94
95
98
100
101
102
103
105
106
107
108
109
110
111
115
116
117
118
129
130
131
132
133
137
139
141
142
143
144
145
146
149
150

West Cameron (continued)

165
166
167
168
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193
194
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212
215
216
217
220
222
224
225
226
227
228

West Cameron (continued)

229
231
236
237
238
239
240
244
247
248
249
251
252
253
254
264
265
266
277
279
280
281

West Cameron, West Addition

157
161
163
287
288
289
290
291
292
293
294
295
296
300

West Cameron, West Addition (continued)

302
303
304
311
312
313
314
315
317
318
328
329
331
332
333
343
345
346
352
358
359
360
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367
368
369
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379
382
391
395
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397
398
401
402
405
409
412
413
414

West Cameron, West Addition (continued)

415
420
421
425
426
427
428
433
436
437
438
442
443

West Cameron, S. Addition

445
447
452
455
456
457
458
459
461
463
468
472
477
478
480
485
487
488
491
493
494
498
499
504
507 (N½)

West Cameron, S. Addition (continued)

509
510
516
518
522
523
524
527
530
531
532
533
534
536
537
538
539
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541
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West Cameron, S. Addition (continued)

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580
581
584
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623
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629
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633
637
638
639
642

West Cameron, S. Addition (continued)

643
644
645
646
648
650
652
653
654
656
658
660
661
663

East Cameron

8
9
11 (Portion landward of 8g line)
13
14 (Portion landward of 8g line)
15
16
17
22
23
24
25
26
32
33
34
38
39 (Portion seaward of 8g line)

East Cameron (continued)

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41
42
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44
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East Cameron (continued)

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151
158
160 (E½)
166
167
169
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185
188
189
192
193
194-
(E½E½SE¼)
195 (S½)
196
197

East Cameron (continued)

199
204 (N½N½)
205
206
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E. Cameron, S. Addition

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East Cameron, S. Addition (continued)

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East Cameron, S. Addition (continued)

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East Cameron, S. Addition (continued)

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Vermilion

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34
35
36 (E½NE¼)
38
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43
45
46 (N½)
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Vermilion (continued)

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96
97
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102
103
104 (SE¼; N½; E½SW¼; E½ W½SW¼)
105
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Vermilion (continued)

158
159
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176
178
179 (NE¼NE¼; E½SE¼NE¼; NE¼NE¼SE¼)
186
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202
203
207
214
215
216
217 (SW¼; W½W½SE¼)
218 (E½SE¼; E½NW¼SE¼; NE¼SW¼SE¼)
221
223
225
226
228
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236

Vermilion (continued)

237
238
245
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Vermilion, S. Addition

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Vermilion, S. Addition (continued)

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Vermilion, S. Addition (continued)

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S. Marsh Island, North Addition

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215
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219
220-
(Landward of lease 0310 stip. line)

South Marsh Island, N. Addition (continued)

221-
(Landward of lease 0310 stip. line)
222
223
224
225
226
227
228
229
230-
(Landward of lease 0310 stip. line)
231
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South Marsh Island, N. Addition (continued)

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S. Marsh Island

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South Marsh Island, (continued)

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S. Marsh Island, S.Addition

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South Marsh Island, S. Addition (continued)

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South Marsh Island, S. Addition (continued)

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Eugene Island

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Eugene Island (continued)

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89
90
93 (E½)
94
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107
108
109
113A
116 (E½)
119
120
125
126
128
128A
129
129A
133
135
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Eugene Island (continued)

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211
212
214-
(W½W½E½; W½)
215
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Eugene Island (continued)

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251
252
253-
(W½SW¼NW¼)
254 (S½)
255 (S½)
256
257
258
259
260 (SE¼)
261
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Eugene Island, S. Addition

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Eugene Island, S. Addition (continued)

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Eugene Island, S. Addition (continued)

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Eugene Island, S. Addition (continued)

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Ship Shoal

11
12
13
14 (S½S½)
15
16
25-
(Seaward of Zone 2)
26
27
28
29
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31
32
33
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37
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51
52
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57
58
59
62-
(Landward of 8g Line)
63
64 (W½)
65
66
67

Ship Shoal (continued)

68
69
71 (W½)
72
73
77
78
80
84
86
87 (N½)
89
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91
92
93
94 (S½SE¼)
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Ship Shoal (continued)

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Ship Shoal (continued)

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Ship Shoal, S. Addition

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Ship Shoal, S. Addition (continued)

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291-
(N½; SE¼)
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Ship Shoal, S. Addition (continued)

357
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364

South Timbalier

18
21
22
23
24
26
27 (N½; N½SW¼)
28
29
30
33 (Portion seaward of 8g Line)
34
35
36
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South Timbalier (continued)

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South Timbalier (continued)

170
171
172
173
175
176
177
184
185
186
188 (NW¼)
189
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South Timbalier, S. Addition

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212
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South Timbalier, S. Addition (continued)

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South Timbalier, S. Addition (continued)

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South Pelto

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11
12 (W½)
13
15
16
17
18
19 (W½)
20
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23
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Bay Marchand

2
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Grand Isle

16
17
18
19
20
21
22
23
26
29 (N½)
30 (Portion in Zone 2)
32
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48
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51
52
53 (W½)
54
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76
79

Grand Isle (continued)

82-
(NW¼; S½)
83
85

Grand Isle, South Addition

86
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102
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110
116
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West Delta

16
17
18
19
20
21-
(S½N½S½; S½S½)
22 (E½)
23
24
27
28
29
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West Delta (continued)

31
32
33
34 (N½)
35
36
38
40
41
42
43
44
45
46
50
57(SW¼SW¼)
58
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61
62
63
67
68 (S½)
69
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71
72
73
74
75
76
78
79
80 (N½; N½S½; SW¼SW¼)
85
86
87(S½)
89
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92
93

West Delta (continued)

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West Delta S. Addition

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South Pass

6
17 (Seaward of the 4th Supp.Decree to 1ft. swd. of 3rd Supp. Decree)
27
28
31
32
33
35
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38
42
43
45
46
47
48
49
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51
52
53
54
56 (Seaward of line 3mi. swd.of 3rd Supp.Decree)
57
58
59
60
61

South Pass, South & East Addition

62
63
64
65
66 (Seaward of 1965 Decree Line)
67
69
70
74
75
76 (Portion landward of 8g Line)
77
78
80
81
82
83
86
87
89
93
94
96

Main Pass

6
7-
(N½; N½S½, in Zone 2)
18 (S½)
19
20
27
29
30
37
38
39

Main Pass (continued)

40
41
42
43
44
56
57 (N½)
58 (N½)
59
64
65
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69
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71
72
73
74
77
78
89
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91
92
93-
(Seaward of the 8g Line)
94
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111
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Main Pass (continued)

113
114
116
117
120
122
124
125
126
127 (N½)
128
129
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142
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148
151
152 (Seaward of 1965 Decree Line)
153

Main Pass, South & East Addition

157
158
159
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163

Main Pass, South & East Addition (continued)	Main Pass, South & East Addition (continued)	Main Pass, South & East Addition (continued)	Mobile	Mobile (continued)	Viosca Knoll (continued)
164	251	312	778	947	28
165	252	313	779	948	31
167	253	314	821	949	32
171	254	315	822	950	33
175	255		823	951	34
177	257		824	952	35
181	258	Breton Sound	827	953	36
182	259		828	955	37
185	260	41	829	956	38
186	263	42	830	957	65
187	264	53-	857	958	67
188	265	(W½ Portion	858	959	68
189	266	Seaward of	860	960	69
190	267	75 Decree	861	961	70
194	270	Line)	862	962	74
197	273	54	863	990	75
198	275	55	864	991	76
200	277	56	865	992	77
202	278		866	993	80
203	279	Chandeleur	867	994	82
206	280		868	995	110
207	283	14	869	996	111
208	284	15	870	997	115
209	288	17	871	998	116
213	289	18	872	999	117
214	290	22	873	1000	118
215	291	23	874	1001	119
216	293	24	901	1002	120
217	296	25	902	1003	123
221	297	28	903	1004	124
225	298	29	904	1005	126
226	299	30	905	1006	156
227	300	31	906		159
229	301	33	907		161
233	303	34	908		162
235	304		909		167
236	305	Chandeleur	911		168
237	306	E. Addition	914		169
240	309		915	Viosca Knoll	203
241	310	38	916		204
243	311	40	917	22	207
244		41	918	24	208
245		42	945	25	209
		43	946	26	210
				27	211

Viosca Knoll (continued)	Viosca Knoll (continued)	Viosca Knoll (continued)	Ewing Bank (continued)	Mississippi Canyon	Mississippi Canyon (continued)
213	869	1000	879	20	163
252	870	1001	903	21	167
253	871	1002	904	27	173
254	872	1003	907	28	192
255	873		908	29	193
256	898		912	30	194
257	900		913	34	195
294	901		914	35	201
299	908		915	39	208
300	909		916	40	209
301	910		944	63	211
389	911	Ewing Bank	945	66	217
434	912		946	67	235
692	913	305	947	72	236
693	914	306	948	78	237
695	915	438	954	79	238
696	916	482	958	84	239
698	917	746	959	85	243
735	940	781	960	103	252
736	941	782	964	104	253
737	942	783	966	108	267
738	944	785	967	109	268
739	951	786	975	115	279
740	952	787	976	116	280
778	953	824	977	117	281
779	954	825	978	118	282
780	955	826	980	119	284
781	956	827	988	123	285
783	957	828	989	127	286
784	958	829	990	128	287
817	959	830	991	147	291
818	961	831	995	148	292
821	962	832	996	149	296
824	983	867	997	150	300
825	984	869	998	151	302
826	989	870	999	152	305
827	990	871	1000	153	311
828	993	872	1001	154	312
862	995	873	1002	157	317
865	996	874	1009	159	320
866	997	875	1010	160	321
867	999	876	1011	161	322
868		878		162	323

Mississippi Canyon (continued)	Mississippi Canyon (continued)	Mississippi Canyon (continued)	Mississippi Canyon (continued)	Mississippi Canyon (continued)	Mississippi Canyon (continued)
324	431	532	622	720	807
325	436	533	627	721	808
328	437	536	631	724	809
329	441	538	632	725	810
330	443	539	633	728	830
331	444	542	634	730	831
335	445	543	635	731	832
338	451	545	636	732	837
339	454	546	637	734	838
340	455	547	638	738	840
346	456	551	639	739	841
348	459	553	642	752	842
353	460	554	643	753	843
354	461	555	647	755	844
355	474	561	656	756	847
356	475	562	657	757	848
360	476	563	661	758	849
361	480	564	664	760	850
364	481	566	665	762	851
365	485	568	666	763	852
371	486	579	673	764	853
372	487	580	674	768	854
378	488	582	675	769	865
382	489	583	676	772	868
383	498	584	677	773	875
384	499	589	678	774	876
385	501	590	679	775	881
386	502	591	680	776	884
392	503	592	686	777	885
397	504	593	687	778	888
398	505	594	688	785	890
399	506	595	692	786	891
400	507	596	694	787	892
401	508	597	695	788	893
407	509	600	698	793	894
410	517	601	705	794	895
411	518	603	708	795	896
412	519	605	709	796	897
415	520	606	710	797	898
416	521	607	711	798	899
426	522	608	713	799	908
427	524	612	714	801	909
428	530	613	717	802	911
429	531	620	718	804	912
430		621	719	806	925

Mississippi Canyon (continued)	Green Canyon (continued)	Green Canyon (continued)	Green Canyon (continued)	Green Canyon (continued)	Green Canyon (continued)
928	18	81	162	256	446
929	19	82	163	257	448
931	20	92	165	258	459
932	21	93	166	271	460
933	22	94	167	272	470
934	25	95	168	285	471
935	26	96	172	286	472
936	27	97	173	287	473
937	28	98	183	288	475
938	29	106	184	290	505
939	30	107	185	294	506
940	31	108	186	295	508
941	32	109	188	296	509
942	34	110	198	297	510
952	35	113	199	298	513
953	36	114	200	301	514
955	38	115	202	304	515
956	40	116	204	305	516
969	41	117	205	313	517
971	45	118	206	320	543
972	46	120	207	325	544
973	48	121	208	326	545
975	49	122	209	329	546
976	50	123	210	330	552
978	51	133	212	333	554
979	52	134	213	334	556
980	53	136	224	340	557
981	54	140	225	342	558
982	55	141	227	354	559
985	58	142	228	355	567
986	61	143	230	369	568
999	64	144	232	372	587
1000	65	145	233	377	588
1007	66	147	234	385	589
1008	69	149	243	386	590
	70	150	245	393	600
	72	152	246	398	601
Green Canyon	73	153	247	403	602
	74	154	248	404	603
5	75	155	249	415	604
6	76	156	250	416	605
7	78	158	251	428	606
9	79	160	252	429	631
10	80	161	253	430	632
			254	431	646

Green Canyon (continued)	Atwater Valley	Atwater Valley (continued)	Atwater Valley (continued)	Atwater Valley (continued)
647	1	257	391	622
648	3	258	397	623
649	5	261	401	666
650	7	266	405	667
651	8	267	406	
690	17	284	407	
691	18	289	408	Walker Ridge
692	19	290	413	
693	47	291	414	120
699	50	299	415	121
700	51	300	425	164
734	52	310	426	205
735	62	311	427	206
736	79	327	428	207
737	84	332	429	249
742	85	333	430	250
743	89	334	431	251
764	91	335	433	425
765	92	336	434	426
766	93	339	435	469
778	106	340	444	470
808	118	341	445	678
810	119	343	446	723
825	121	344	450	724
826	122	345	451	766
850	123	346	452	767
851	127	353	453	768
852	128	362	455	811
853	133	363	456	
854	134	370	457	
863	135	371	458	
864	136	375	471	
870	137	376	472	
871	162	377	478	
872	163	378	479	
873	165	379	480	
915	177	380	488	
955	178	381	489	
958	179	382	490	
999	209	383	496	
1001	210	384	573	
	217	387	574	
	253	388	575	
	254	389	617	
	256	390	618	

(ii) Although currently unleased and shown on the OCS Official Protraction Diagram, Mobile NH 16-4 (First Issued October 1972 and recently revised November 8, 1988), no bids will be accepted at this sale on the following blocks:

Mobile -- Blocks 765 through 767
809 through 811
853 through 855
897 through 899

13. Lease Terms and Stipulations.

(a) Leases resulting from this sale will have initial terms as shown on Map 1 and will be on Form MMS-2005 (March 1986). Copies of the lease form are available from the Gulf of Mexico regional office (see paragraph 14(a)).

(b) The applicability of the stipulations which follow is as shown on Map 1 and Map 3 and as supplemented by references in this Notice.

Stipulation No. 1--Protection of Archaeological Resources.

(This stipulation will apply to all blocks offered for lease in this sale.)

(a) "Archaeological resource" means any prehistoric or historic district, site, building, structure, or object (including shipwrecks); such term includes artifacts, records, and remains which are related to such a district, site, building, structure, or object. (16 U.S.C. 470w(5), National Historic Preservation Act, as amended.) "Operations" means any drilling, mining, or construction or placement of any structure for exploration, development, or production of the lease.

(b) If the Regional Director (RD) believes an archaeological resource may exist in the lease area, the RD will notify the lessee in writing. The lessee shall then comply with subparagraphs (1) through (3).

(1) Prior to commencing any operations, the lessee shall prepare a report, as specified by the RD, to determine the potential existence of any archaeological resource that may be affected by operations. The report, prepared by an archaeologist and a geophysicist, shall be based on an assessment of data from remote-sensing surveys and of other pertinent archaeological and environmental information. The lessee shall submit this report to the RD for review.

(2) If the evidence suggests that an archaeological resource may be present, the lessee shall either:

(i) Locate the site of any operation so as not to adversely affect the area where the archaeological resource may be; or

(ii) Establish to the satisfaction of the RD that an archaeological resource does not exist or will not be adversely affected by operations. This shall be done by further archaeological investigation, conducted by an archaeologist and a geophysicist, using survey equipment and techniques deemed necessary by the RD. A report on the investigation shall be submitted to the RD for review.

(3) If the RD determines that an archaeological resource is likely to be present in the lease area and may be adversely affected by operations, the RD will notify the lessee immediately. The lessee shall take no action that may adversely affect the archaeological resource until the RD has told the lessee how to protect it.

(c) If the lessee discovers any archaeological resource while conducting operations on the lease area, the lessee shall report the discovery immediately to the RD. The lessee shall make every reasonable effort to preserve the archaeological resource until the RD has told the lessee how to protect it.

Stipulation No. 2--Topographic Features.

(This stipulation will be included in leases located in the areas so indicated on Maps 1 and 3 described in paragraph 12.)

The banks which cause this stipulation to be applied to blocks of the Central Gulf are:

Bank Name	No Activity Zone Defined by Isobath (meters)	Bank Name	No Activity Zone Defined by Isobath (meters)
McGrail Bank	85	Jakkula Bank	85
Bouma Bank	85	Sweet Bank/1	85
Rezak Bank	85	Bright Bank	85
Sidner Bank	85	Geyer Bank/3	85
Rankin Bank	85	MacNeil Bank/3	82
Sackett Bank/2	85	Alderdice Bank	80
Ewing Bank	85	Fishnet Bank/2	76
Diaphus Bank/2	85	29 Fathom Bank	64
Parker Bank	85	Sonnier Bank	55

1/Only paragraph (a) of the stipulation applies.
2/Only paragraphs (a) and (b) apply.
3/Western Gulf of Mexico bank with a portion of its "3-Mile Zone" in the Central Gulf of Mexico.

(a) No activity including structures, drilling rigs, pipelines, or anchoring will be allowed within the listed isobath ("No Activity Zone" as shown on Map 3) of the banks as listed above.

(b) Operations within the area shown as "1,000-Meter Zone" on Map 3 shall be restricted by shunting all drill cuttings and drilling fluids to the bottom through a downpipe that terminates an appropriate distance but no more than 10 meters from the bottom.

(c) Operations within the area shown as "1-Mile Zone" on Map 3 shall be restricted by shunting all drill cuttings and drilling fluids to the bottom through a downpipe that terminates an appropriate distance but no more than 10 meters from the bottom. (Where there is a "1-Mile Zone" designated, the "1,000-Meter Zone" in paragraph (b) is not designated.)

(d) Operations within the area shown as "3-Mile Zone" on Map 3 shall be restricted by shunting all drill cuttings and drilling fluids from development operations to the bottom through a downpipe that terminates an appropriate distance but no more than 10 meters from the bottom.

Stipulation No. 3--Live Bottoms.

(To be included only on leases in the following blocks: Main Pass Area, South and East Addition, Blocks 219-226, 244-266, 276-288; Viosca Knoll, Blocks 521, 522, 564, 565, 566, 609, 610, 654, 692-698.)

For the purpose of this stipulation, "live bottom areas" are defined as seagrass communities; or those areas which contain biological assemblages consisting of such sessile invertebrates as sea fans, sea whips, hydroids, anemones, ascidians, sponges, bryozoans, or corals living upon and attached to naturally occurring hard or rocky formations with rough, broken, or smooth topography; or areas whose lithotope favors the accumulation of turtles, fishes, and other fauna.

Prior to any drilling activities or the construction or placement of any structure for exploration or development on this lease, including, but not limited to, anchoring, well drilling, and pipeline and platform placement, the lessee will submit to the Regional Director (RD) a live bottom survey report containing a bathymetry map prepared utilizing remote sensing techniques. The bathymetry map shall be prepared for the purpose of determining the presence or absence of live bottoms which could be impacted by the proposed activity. This map shall encompass such an area of the seafloor where surface disturbing activities, including anchoring, may occur.

If it is determined that the live bottoms might be adversely impacted by the proposed activity, the RD will require the lessee to undertake any measure deemed economically, environmentally, and technically feasible to protect the pinnacle area. These measures may include, but are not limited to, the following:

(a) the relocation of operations; and

(b) the monitoring to assess the impact of the activity on the live bottoms.

Stipulation No. 4--Military Areas.

(This stipulation will be included in leases located within the Warning Areas and Eglin Water Test Areas 1 and 3, as shown on Map 1 described in paragraph 12.)

(a) Hold and Save Harmless

Whether compensation for such damage or injury might be due under a theory of strict or absolute liability or otherwise, the lessee assumes all risks of damage or injury to persons or property, which occur in, on, or above the Outer Continental Shelf (OCS) to any persons or to any property of any person or persons who are agents, employees, or invitees of the lessee, its agents, or independent contractors or subcontractors doing business with the lessee in connection with any activities being performed by the lessee in, on, or above the OCS, if such injury or damage to such person or property occurs by reason of the activities of any agency of the U.S. Government, its contractors or subcontractors, or any of their officers, agents or employees, being conducted as a part of, or in connection with, the programs and activities of the command headquarters listed in the following table.

Notwithstanding any limitation of the lessee's liability in section 14 of the lease, the lessee assumes this risk whether such injury or damage is caused in whole or in part by any act or omission, regardless of negligence or fault, of the United States, its contractors or subcontractors, or any of its officers, agents, or employees. The lessee further agrees to indemnify and hold and save harmless the United States against all claims for loss, damage, or injury sustained by the lessee, or to indemnify and hold and save harmless the United States against all claims for loss, damage, or injury sustained by the agents, employees, or invitees of the lessee, its agents, or any independent contractors or subcontractors doing business with the lessee in connection with the programs and activities of the aforementioned military installation, whether the same be caused in whole or in part by the negligence or fault of the United States, its contractors or subcontractors, or any of its officers, agents, or employees and whether such claims might be sustained under a theory of strict or absolute liability or otherwise.

(b) Electromagnetic Emissions

The lessee agrees to control its own electromagnetic emissions and those of its agents, employees, invitees, and independent contractors or subcontractors emanating from individual designated defense warning areas in accordance with requirements specified by the commander of the command headquarters listed in the following table to the degree necessary to prevent damage to, or unacceptable interference with, Department of Defense flight, testing or operational activities, conducted within individual designated warning areas. Necessary monitoring control, and coordination with the lessee, its agents, employees, invitees, and independent contractors or subcontractors, will be effected by the commander of the appropriate onshore military installation conducting operations in the particular warning area; provided, however, that control of such electromagnetic emissions shall in no instance prohibit all manner of electromagnetic communication during any period of time between a lessee, its agents, employees, invitees, and independent contractors or subcontractors and onshore facilities.

(c) Operational

The lessee when operating, or causing to be operated on its behalf, boat or aircraft traffic in the individual designated warning areas shall enter into an agreement with the commander of the individual command headquarters listed in the following table upon utilizing an individual designated warning area prior to commencing such traffic. Such an agreement will provide for positive control of boats and aircraft operating in the warning areas at all times.

Warning Areas' Command Headquarters

Warning Areas	Command Headquarters
W-155 (For Agreement)	Chief, Naval Air Training Naval Air Station ATTN: Lieutenant Commander Armitage or Major Danuser Corpus Christi, Texas 78419-5100 Telephone: (512) 939-3927/3902
W-155 (For Operational Control)	Fleet Area Control & Surveillance Facility (FACSFAC) Naval Air Station ATTN: Chief Lyon Pensacola, Florida 32508 Telephone: (904) 452-2735/4671

W-92	Naval Air Station Air Operations Department Air Traffic Division/Code 52 ATTN: Chief Skerret New Orleans, Louisiana 70146-5000 Telephone: (504) 393-3100/3208/3106
W-453	159th Tactical Fighter Group (ANG) NAS NOLA ATTN: Colonel Jack Boh or Captain Eric McDonald New Orleans, Louisiana 0143 Telephone: (504) 393-3376/3377
Eglin Water Test Areas 1 and 3	Commander Armament Division 3246th Test Wing/CA ATTN: Aubrey Freeman Eglin AFB, Florida 32542 Telephone: (904) 882-3614

14. Information to Lessees.

(a) Supplemental Documents. For copies of the various documents identified as available from the Gulf of Mexico regional office, prospective bidders should contact the Public Information Unit, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123-2394, either in writing or by telephone at (504) 736-2519. For additional information, contact the Regional Supervisor for Leasing and Environment at that address or by telephone at (504) 736-2755.

(b) Navigation Safety. Operations on some of the blocks offered for lease may be restricted by designation of fairways, precautionary zones, anchorages, safety zones, or traffic separation schemes established by the U.S. Coast Guard pursuant to the Ports and Waterways Safety Act (33 U.S.C. 1221 et seq.), as amended. Corps of Engineers permits are required for construction of any artificial islands, installations, and other devices permanently or temporarily attached to the seabed located on the OCS in accordance with section 4(e) of the OCS Lands Act, as amended.

(c) Offshore Pipelines. Bidders are advised that the Department of the Interior and the Department of Transportation have entered into a Memorandum of Understanding, dated May 6, 1976, concerning the design, installation, operation, and maintenance of offshore pipelines. Bidders should consult both Departments for regulations applicable to offshore pipelines.

(d) 8-Year Leases. Bidders are advised that any lease issued for a term of 8 years will be cancelled after 5 years, following notice pursuant to the OCS Lands Act, as amended, if within the initial 5-year period of the lease, the drilling of an exploratory well has not been initiated, or if initiated, the well has not been drilled in conformance with the approved exploration plan criteria, or if there is not a suspension of operations in effect. See 30 CFR 256.37.

(e) Affirmative Action. Revision of Department of Labor regulations on affirmative action requirements for Government contractors (including lessees) has been deferred, pending review of those regulations (see Federal Register of August 25, 1981, at 46 FR 42865 and 42968). Should changes become effective at any time before the issuance of leases resulting from this sale, section 18 of the lease form (Form MMS-2005, March 1986) would be deleted from leases resulting from this sale. In addition, existing stocks of the affirmative action forms described in paragraph 5 of this Notice contain language that would be superseded by the revised regulations at 41 CFR 60-1.5(a)(1) and 60-1.7(a)(1). Submission of Form MMS-2032 (June 1985) and Form MMS-2033 (June 1985) will not invalidate an otherwise acceptable bid, and the revised regulations' requirements will be deemed to be part of the existing affirmative action forms.

(f) Ordnance Disposal Areas. Bidders are cautioned as to the existence of two inactive ordnance disposal areas in the Mississippi Canyon area, shown on map 1, described in paragraph 12 of this Notice. These areas were used to dispose of ordnance of unknown composition and quantity. Water depths range from approximately 750 to 1,525 meters. Bottom sediments in both areas are generally soft, consisting of silty clays. Exploration and development activities in these areas require precautions commensurate with the potential hazards.

The U.S. Air Force has released an indeterminable amount of unexploded ordnance throughout Eglin Water Test Areas 1 and 3. The exact location of the unexploded ordnance is unknown, and lessees are advised that all lease blocks included in this sale within these water test areas should be considered potentially hazardous to drilling and platform and pipeline placement.

15. New Regulatory Provisions. Bidders are advised of new MMS operating regulations, "Oil and Gas and Sulphur Operations in the Outer Continental Shelf, 30 CFR Parts 250 and 256," which were published April 1, 1988, in the Federal Register at 53 FR 10595.

This information is provided to bidders since any leases issued as a result of this sale will be subject to the April 1, 1988, regulations.

Director, Minerals Management Service

Robert E. Kallman

Approved:

Assistant Secretary - Land and Minerals Management

James E. Cason

1/13/89

Date

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Part VIII

Environmental Protection Agency

40 CFR Part 302

Designation of Extremely Hazardous Substances as CERCLA Hazardous Substances; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 302

[FRL-3364-1]

Designation of Extremely Hazardous Substances as CERCLA Hazardous Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to designate 232 extremely hazardous substances (EHSs) listed pursuant to Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. Although 134 substances listed as EHSs under SARA Title III are already CERCLA hazardous substances, there are 232 that are not. Currently, only releases of those EHSs that are also CERCLA hazardous substances are required to be reported to the National Response Center (NRC) under section 103 of CERCLA. With today's proposed rulemaking, EPA intends to reduce potential confusion concerning the different SARA Title III and CERCLA requirements by ensuring consistent procedures for reporting releases of all EHSs. In addition, today's proposal would facilitate the expedited determination of the need for a Federal response to such releases.

DATES: Comments must be submitted on or before March 24, 1989.

ADDRESSES:

Comments: Comments should be submitted in triplicate to: Emergency Response Division, Superfund Docket Clerk, Attention: Docket Number 102 RQ-232EHS, Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Docket: Copies of materials relevant to this rulemaking are contained in Room LG-100 at the above address. The docket is available for inspection between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Federal holidays. Appointments to review the docket can be made by calling 1-202/382-3046. As provided in 40 CFR Part 2, a reasonable fee (the first 50 pages are free and each additional page costs $.20) may be charged for copying services.

Release Notification: The toll-free telephone number of the National Response Center is 1-800/424-8802; in the Washington, DC metropolitan area, the number is 1-202/426-2675.

FOR FURTHER INFORMATION CONTACT: Ms. Gerain H. Perry, Response Standards and Criteria Branch, Emergency Response Division (OS-210), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; or the RCRA/Superfund Hotline at 1-800/424-9346; in the Washington, DC metropolitan area at 1-202/382-3000.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Introduction
A. Statutory Authority
B. Background of this Rulemaking
II. Rationale for Designation of Extremely Hazardous Substances as CERCLA Hazardous Substances
A. SARA Title III
B. Criteria for Designation of Extremely Hazardous Substances
C. Simplification of Reporting Requirements
III. Consequences of Designation
A. Notification Under CERCLA
B. Penalties Under CERCLA
C. Notification and Penalties Under SARA Title III
D. Liability
E. Other Consequences
F. Public Health and Welfare and Environmental Benefits
IV. Differences in SARA Title III and CERCLA Notification Requirements Following Designation
A. Substances Covered
B. Facilities Covered
C. Releases Covered
V. Regulatory Analyses
A. Executive Order No. 12291
B. Regulatory Flexibility Act
C. Paperwork Reduction Act

I. Introduction

A. Statutory Authority

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510), 42 U.S.C. 9601 et seq. (CERCLA or the Act), as amended, establishes broad Federal authority to respond to releases or threats of releases of hazardous substances from vessels and facilities. The term "hazardous substance" is defined in section 101(14) of CERCLA chiefly by reference to other environmental statutes. Currently, there are 719 CERCLA hazardous substances. The Administrator of the U.S. Environmental Protection Agency (EPA or the Agency) is authorized under CERCLA section 102(a) to promulgate regulations designating as a hazardous substance any substance which, when released into the environment, may present substantial danger to public health or welfare or the environment. Designation as a CERCLA hazardous substance indicates a level of concern about a given substance sufficient to require a report to the National Response Center (NRC) in the event of a release in an amount equal to or greater than the reportable quantity (RQ) for that substance.

Section 102(b) of the Act establishes RQs for releases of hazardous substances at one pound, except those substances for which RQs were established pursuant to section 311(b)(4) of the Clean Water Act (CWA). Section 102(a) of CERCLA authorizes EPA to adjust all of these RQs by regulation.

B. Background of This Rulemaking

On May 25, 1983, EPA proposes a rule (48 FR 23552) to clarify procedures for reporting releases of CERCLA hazardous substances, to list "hazardous substances" defined under section 101(14) of CERCLA, and to adjust RQs for 387 of the then 696 CERCLA hazardous substances.[1] The preamble to the proposed rule contained a detailed discussion of the CERCLA notification provisions (including the persons required to notify the NRC of a release, the hazardous substances for which notification is required, the types of releases subject to the notification requirements, and the exemptions from these requirements), the methodology and criteria used to adjust the RQ levels, and the RQ adjustments proposed under section 102 of CERCLA and under section 311 of the CWA.

The Agency promulgated final RQ adjustments for 340 hazardous substances in an April 4, 1985 final rule (50 FR 13456) and for an additional 102 hazardous substances in a September 29, 1986 final rule (51 FR 34534). In a Notice of Proposed Rulemaking (NPRM) published on March 16, 1987 (52 FR 8140), EPA proposed RQ adjustments for 273 hazardous substances. The March 16, 1987 **Federal Register** also contained an NPRM in which EPA proposed RQ adjustments for radionuclides. In an NPRM published on March 2, 1988 (53

[1] Since the May 25, 1983 proposed rule, 25 additional substances have been added and two substances have been deleted from the CERCLA list, bringing the total number of CERCLA hazardous substances to 719. The 25 substances added to the list are: waste stream F024 (49 FR 5308); coke oven emissions (49 FR 36560); waste streams F020, F021, F022, F023, F026, F027, and F028 (50 FR 1978); waste streams K111, K112, K113, K114, K115, and K116, o-toluidine, and p-toluidine (50 FR 42936); waste streams K117, K118, and K136 (51 FR 5327); 2-ethoxyethanol (51 FR 6537); and waste streams K123, K124, K125, and K126 (51 FR 37725). The two substances deleted from the list are iron dextran (53 FR 43878) and strontium sulfide (53 FR 43881). Finally, based on a September 13, 1988 final rule (53 FR 35412), waste streams K064, K065, K066, K088, K090, and K091 will be added to the CERCLA list effective March 13, 1989.

FR 6762), EPA reproposed RQ adjustments for lead metal and four lead compounds, and proposed to delist ammonium thiosulfate as a CERCLA hazardous substance. In addition, the Agency published an April 19, 1988 NPRM on reduced reporting requirements for continuous releases (53 FR 12868) and a July 19, 1988 NPRM to clarify the exemption from CERCLA reporting and liability requirements for federally permitted releases.

Pursuant to Title III of the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99–499) (SARA), EPA has published a list of extremely hazardous substances (EHSs) for purposes of emergency planning. Today EPA is proposing to designate as CERCLA hazardous substances, those 232 SARA Title III EHSs not currently on the list of 719 hazardous substances. This proposed rule would amend Table 302.4 of 40 CFR 302.4, by adding the names and Chemical Abstracts Service Registry Numbers of the EHSs proposed to be designated under CERCLA section 102. In addition, if the list of EHSs is revised in the future pursuant to SARA Title III to include additional substances, EPA intends to designate concurrently any non-CERCLA EHSs as CERCLA hazardous substances.

Today's proposed rule does not include RQ adjustments for the 232 substances proposed to be designated as hazardous under CERCLA section 102. EPA intends to move expeditiously to adjust the RQs for the substances being proposed for designation. After the effective date of the final rule designating these substances as CERCLA hazardous substances and until the RQs for the substances are adjusted, however, the RQs for the substances will be set at one pound pursuant to section 102(b) of CERCLA.

II. Rationale for Designation of Extremely Hazardous Substances as CERCLA Hazardous Substances

A. SARA Title III

Although most SARA provisions amend CERCLA, Title III of SARA is a free-standing statute separate from SARA's amendments to CERCLA, titled "The Emergency Planning and Community Right-to-Know Act of 1986." Title III establishes both a framework for emergency planning at the State and local level and extensive reporting requirements for stored or released hazardous chemicals to allow the public access to information on hazardous chemicals in local communities.

Section 302 of SARA required the EPA Administrator to publish a list of EHSs for purposes of emergency planning (51 FR 41570, November 17, 1986). The statute specified that the list be identical to the list published in November 1985 by the Administrator in Appendix A of the "Chemical Emergency Preparedness Program Interim Guidance." Along with the list of EHSs, EPA also published a threshold planning quantity (an amount which, if present at a facility, subjects that facility to the emergency planning requirements of SARA sections 302 and 303) for each substance and a State and local release reporting trigger, which was either the RQ established under CERCLA regulations or one pound, as required by SARA section 304. A revised list of 406 EHSs and threshold planning quantities was promulgated on April 22, 1987 (52 FR 13378) and is codified in 40 CFR Part 355. In two separate **Federal Register** notices, published on December 17, 1987 (52 FR 48072, 48083) and February 25, 1988 (53 FR 5574), EPA delisted 40 EHSs from 40 CFR Part 355 that were found to not meet the acute toxicity listing criteria.

Section 304 of SARA establishes State and local emergency notification requirements for releases of both EHSs and CERCLA hazardous substances. Generally, releases are subject to these notification requirements if they would be reportable under CERCLA section 103(a) and if they are from a facility that produces, uses, or stores a hazardous chemical. The term "hazardous chemical" is defined in regulations implementing the Occupational Safety and Health Act of 1970 (29 CFR 1910.1200(c)) and section 311 of SARA. Releases that only result in on-site exposure are exempted from SARA section 304 notification requirements.

As provided in 40 CFR Part 355, the notice required by section 304 of SARA is to be given by the owner or operator of a facility (by such means as telephone, radio, or in person) immediately after the release of an RQ or more of a CERCLA hazardous substance or one pound or more of a non-CERCLA EHS. Notice is to be given to both the community emergency coordinator for each local emergency planning committee for any area likely to be affected by the release and to the State commission of any State likely to be affected by the release. Notice requirements for transportation-related releases are satisfied by dialing 911 or, in the absence of a 911 emergency number, calling the telephone operator and providing the release information. SARA section 304(b)(2) and 40 CFR 355.40(b) further outline the requirements for an emergency notification.

B. Criteria for Designation of Extremely Hazardous Substances

Although many of the 366 substances on EPA's list of EHSs are already CERCLA hazardous substances, 232 substances were not. The Agency noted on March 16, 1987 (52 FR 8140, 8142) and April 22, 1987 (52 FR 13378, 13392) that it would propose to designate, under section 102(a), EHSs that are not presently CERCLA hazardous substances. Based on the potentially harmful characteristics of the substances, EPA believes that these EHSs meet the statutory criterion for designation under section 102(a) of CERCLA. Section 102(a) authorizes EPA to designate as hazardous substances those substances which, "when released in the environment may present substantial danger to the public health or welfare or the environment." In determining which substances were of the most immediate concern to communities for emergency planning purposes, Congress adopted the list of acutely toxic chemicals developed under the Chemical Emergency Preparedness Program. The Agency believes that the list of EHSs identifies "substances which could cause serious irreversible health effects from accidental releases" (51 FR 41570, 41571, November 17, 1986). Although the EHS list is not an exhaustive compilation of all of these substances, it does present substances "most likely to induce serious acute reactions following short term exposure" (51 FR 41570, 41573).

In identifying EHSs, EPA used available acute toxicity data derived from experiments with animals, as reported in the scientific literature, to infer potential for acute effects in humans. A chemical was identified as a potential acute human toxicant if animal test data in any mammalian species were identified with a value less than or equal to that stated for the median lethal concentration (LC_{50}) or median lethal dose (LD_{50}) criteria for any one of three exposure routes. EHSs have LC_{50} values of less than or equal to 0.5 milligrams per liter of air, dermal LD_{50} values of less than or equal to 50 milligrams per kilogram of body weight, or oral LD_{50} values of less than or equal to 25 milligrams per kilogram of body weight. The specific values chosen are recognized by the scientific community as indicating a high potential for acute toxicity (November 17, 1986, 51 FR 41570, 41573). Some additional substances meeting less stringent acute toxicity criteria, but also representing health concerns due to considerations

including high production, have also been included on the list of EHSs.

The addition of non-CERCLA EHSs to the list of CERCLA hazardous substances is appropriate because the increased likelihood for prevention of, or rapid response to, releases of EHSs will contribute to the protection of human health. As discussed in Section III.F. of today's preamble, facilities subject to Federal notification and liability requirements for releases of hazardous substances may be encouraged to take steps to reduce the occurrence of releases and to clean up releases that do occur. In some cases, the requirement for reporting to the NRC will also trigger timely action by Federal, State, or local response authorities.

Under the provisions of SARA section 302, any future additions to the list of EHSs must take into account the toxicity, reactivity, volatility, dispersability, combustibility, or flammability of the substances. "Toxicity" includes short- or long-term health effects from short-term exposure. EPA believes that such substances will meet the CERCLA section 102(a) criterion for designation as CERCLA hazardous substances. The Agency plans, therefore, to coordinate future rulemakings to designate those substances as hazardous under CERCLA simultaneously with their addition to the list of EHSs. If substances are to be delisted from the EHS list and if these substances are CERCLA hazardous substances solely because they are on the EHS list, the Agency will coordinate rulemakings to delist the substances under CERCLA simultaneously with their removal from the EHS list. Subsequently, if the Agency determines on a case-by-case basis that any of the substances meet the criterion for designation as CERCLA hazardous substances, those substances will be once again designated under the authority of CERCLA section 102.

C. Simplification of Reporting Requirements

By designating non-CERCLA EHSs as CERCLA hazardous substances, the reporting requirements for these substances will be simplified. The release of any EHS or CERCLA hazardous substance will generally be subject to the same State and local reporting requirements. Until the designation of non-CERCLA EHSs as CERCLA hazardous substances, however, releases of any CERCLA hazardous substance will be required to be reported to the NRC in addition to being reported to State and local officials, while releases of non-CERCLA EHSs will be required to be reported only to State and local officials. This difference in notification requirements may create confusion for the typical facility owner or operator who needs to determine whether, how, and to whom to report releases of CERCLA hazardous substances or EHSs. After designation of non-CERCLA EHSs as CERCLA hazardous substances, releases that require State and local reporting will also require Federal reporting. In addition, if all EHSs are designated as CERCLA hazardous substances, certain releases of EHSs exempted from reporting under Title III, such as releases from vessels, will be reported to the NRC, who will notify the appropriate On-Scene Coordinator (OSC). Notification will then be conveyed to appropriate State officials. In this manner, reponse authorities will be notified of releases that would otherwise not be required to be reported.

By eliminating the category of EHSs that do not require CERCLA notice, the Agency's proposed action will promote consistency between Federal and State and local requirements. SARA section 304 already establishes State and local reporting requirements for these EHSs, and, therefore, designation will impose no additional State and local reporting burden. Although EPA envisions that most releases of these substances will be responded to by States and localities, designation will ensure that most releases of EHSs that may require a response are also reported to the NRC. Designation of non-CERCLA EHSs under CERCLA may result in some increased administrative and cost burden to the CERCLA regulated community and the Federal government associated with submitting and processing reports to the NRC. The potential benefit to public health and the environment from appropriate notice of releases of these substances is, EPA believes, sufficient to warrant this increase in reporting burden.

III. Consequences of Designation

This section contains a summary of CERCLA section 103 notification requirements and the penalties associated with failing to notify the NRC of a release of an RQ or more of a CERCLA hazardous substance. In addition, Sections III.D. and III.E. provide a description of the liability provisions of CERCLA and other consequences of designation, including requirements imposed by other statutes. Finally, the public health and welfare and environmental benefits resulting from designation are discussed in Section III.F.

A. Notification Under CERCLA

CERCLA section 103 requires that releases of hazardous substances that equal or exceed their RQs be reported immediately to the NRC by the person in charge of a vessel or facility from which the release occurred unless the release is federally permitted or otherwise exempted.[2] A major purpose of the section 103 notification requirement is to alert the appropriate government officials to releases of hazardous substances that may require a Federal response action to protect public health and welfare and the environment. Under section 104 of CERCLA, the Federal government may response whenever there is a release or a substantial threat of a release of a hazardous substance into the environment. Response activities are to be taken, to the extent practicable, in accordance with the National Contingency Plan (40 CFR Part 300), which was originally developed under the CWA and which has been revised to reflect the responsibilities and authority created by CERCLA.

Upon designation of the 232 non-CERCLA EHSs as CERCLA hazardous substances, releases of EHSs will be required to be reported to the NRC when they occur in amounts equal to or greater than their RQ. Until such time as the RQs of these 232 EHSs are adjusted, releases of these substances that equal or exceed one pound must be reported to the NRC (CERCLA section 102(b)). Currently, releases of one pound or more of these substances must be reported to State and local officials under section 304 of SARA.

EPA emphasizes that a hazardous substance release notification is merely a trigger for informing the government of a release so that appropriate Federal personnel can evaluate what, if any, Federal action should be taken. Federal personnel evaluate all reported releases, but do not necessarily initiate a removal or remedial action in response to all reported releases. The RQ of a hazardous substance does not represent a determination that releases of that particular quantity are actually harmful to public health or welfare or the environment. Thus, government personnel assess each reported release on a case-by-case basis to determine what, if any, Federal response action

[2] A release into the environment of a substance that is not listed as a CERCLA hazardous substance, but which rapidly forms a CERCLA hazardous substance upon release, is subject to the notification requirements of section 103. If the amount of the CERCLA hazardous substance formed as such a reaction product equals or exceeds the RQ for that substance, the release must be reported to the NRC.

should be taken. In their assessment, response officials consider such factors as location of the release, its proximity to drinking water supplies or other valuable resources, the likelihood of exposure or injury to nearby populations, and response actions taken to responsible parties, States, or localities. In certain limited situations, when direct reporting to the NRC is not practicable, the person in charge may report to the Coast Guard- or EPA-predesignated OSC for the geographic area where the release occurs. Such reports shall be promptly relayed to the NRC. If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made immediately to the nearest Coast Guard unit, provided that the person in charge notifies the NRC as soon as possible (40 CFR Part 300 and 33 CFR Part 153).

B. Penalties Under CERCLA

Section 103(b) of CERCLA authorizes penalties, including criminal sanctions, for persons in charge of vessels or facilities who fail to report releases of harzardous substances that equal or exceed RQs. Thus, upon designation of EHSs as CERCLA harzardous substances, a person in charge who fails to report a release of an EHS that equals or exceeds its RQ would be subject to the penalty provisions of section 103(b). Section 103(b) of CERCLA was amended by SARA to increase the maximum penalties and years of imprisonment beyond those previously permissible. Any person with knowledge of a reportable release, who fails to report the release immediately pursuant to section 103(b), or who submits any information that he or she knows to be false or misleading, shall, upon conviction, be fined in accordance with the applicable provisions of Title, 18, United States Code, or imprisoned for not more than three years (or not more than five years for second and subsequent convictions), or both. Notifications received under section 103(b) or information obtained by exploitation of such notifications cannot be used against any reporting person in any criminal case, except a prosecution for perjury or for giving a false statement.

Section 109 of CERCLA also provides for a two-tiered system of administrative penalties for violations, of CERCLA section 103(a) or (b), enforceable through civil proceedings. Class I penalties may not exceed $25,000 per violation. Class II penalties are assessed according to section 554 of the Administrative Procedure Act (which requires an opportunity for a hearing on the record) and may not exceed $25,000 per day of a continuing violation ($75,000 per day for subsequent violations). EPA may also seek to have penalties judicially assessed by bringing an action in the appropriate U.S. district court. Such judicially assessed penalties have the same statutory ceilings as Class II administrative penalties (see CERCLA section 109(c)). In addition, the EPA Deputy Assistant Administrator for Criminal Enforcement is authorized under CERCLA section 109(d) to exercise his discretion in awarding up to $10,000 to any individual who provides information leading to the arrest and conviction of a person for failure to give required notice of a release (53 FR 16086). CERCLA section 310 authorizes citizen suits by any person (including a State or municipality) to enforce CERCLA requirements; thus, after designation of EHSs as CERCLA hazardous substances, State and local governments will have an additional enforcement tool that may be used against parties who fail to report releases of EHSs.

C. Notification and Penalties Under SARA Title III

In addition to the reporting requirements established by CERCLA, SARA section 304 requires reporting to State and local officials for certain releases of CERCLA hazardous substances and EHSs. SARA section 325(b) authorizes civil, administrative, and criminal penalties for violations of section 304. SARA section 326 authorizes citizen suits to obtain injunctive relief and to seek civil penalties for certain violations of section 304, specifically, failure to submit a followup emergency notice under section 304(c). The SARA section 304 notification requirements are outlined in Section II of this preamble. These requirements and the penalties under SARA Title III already apply to releases of the EHSs proposed for designation as CERCLA hazardous substances. Thus, designation of Non-CERCLA EHSs as CERCLA hazardous substances will have no additional State and local reporting consequences.

D. Liability

Section 107 of CERCLA establishes liability for response costs and natural resource damages caused by releases of hazardous substances. Upon designation as CERCLA hazardous substances, the 232 non-CERCLA EHSs will be subject to the CERCLA section 107 provisions. Unless specifically exempted under CERCLA, a party responsible for a release of a CERCLA hazardous substance is liable for the costs associated with responding to that release and for any natural resource damages caused by the release, even if the release is not subject to the notification requirements of sections 103 (a) and (b). Similarly, proper reporting of a release in accordance with sections 103 (a) and (b) does not preclude liability for cleanup costs. The fact that a release of a hazardous substance is properly reported or that it is not subject to the notification requirements of sections 103 (a) and (b) will not preclude EPA or other government agencies from taking response actions under section 104, seeking reimbursement from responsible parties under section 107, or pursuing an enforcement action against responsible parties under section 106. As a result of the designation of non-CERCLA EHSs as CERCLA hazardous substances, EPA or a State will be able to recover costs from responsible parties for cleanups of releases of previously non-CERCLA EHSs. This will help to protect and preserve the Hazardous Substances Superfund, as well as State resources.

E. Other Consequences

Several other consequences follow when a substance is designated as a hazardous substance under CERCLA section 102(a). Section 108(a) establishes financial responsibility requirements for vessels carrying hazardous substances. CERCLA hazardous substances, other than RCRA hazardous wastes, are subject to requirements for underground storage tanks under RCRA Subtitle I. Finally, section 306(a) of CERCLA requires that CERCLA hazardous substances be listed and regulated as "hazardous materials" under the Hazardous Materials Transportation Act (49 U.S.C. 1801).

F. Public Health and Welfare and Environmental Benefits

Designating non-CERCLA EHSs as CERCLA hazardous substances furthers CERCLA's primary goal of protecting public health and welfare and the environment. Public health benefits under CERCLA include the avoidance or minimization of fatalities or injuries resulting from exposure to CERCLA hazardous substances. Public welfare benefits include the reduction or avoidance of damage to buildings, personal property, agriculture, and recreational and aesthetically valuable resources. Environmental benefits include the prevention or reduction of surface water and ground water contamination, fish kills, wildlife losses, and other types of damage to natural resources.

These public health and welfare and environmental benefits may be realized by: (1) preventing releases of CERCLA hazardous substances; and (2) mitigating the effects of any releases of these substances that do occur. The ways in which the achievement of these two objectives is furthered by the designation of EHSs as CERCLA hazardous substances are discussed below.

Designation of non-CERCLA EHSs as CERCLA hazardous substances provides several incentives for prevention of releases. These incentives include: (1) Civil penalties under CERCLA section 109 for failure to report hazardous substance releases under CERCLA; (2) criminal penalties under section 103 of CERCLA for failure to report CERCLA hazardous substance releases, and for submitting false or misleading information in reports of releases; and (3) the liability of potentially responsible parties under section 107 of CERCLA for the costs of responding to CERCLA hazardous substance releases or threats of releases and for attendant damage to natural resources. These provisions of CERCLA may cause members of the regulated community to reduce the use of a hazardous substance, or to eliminate its use entirely (possibly by using a substitute that is not a CERCLA hazardous substance).

Moreover, even if the substance is used, because of the increased Federal oversight and awareness, its designation as a hazardous substance under CERCLA may cause it to be used with greater precautions to avoid or minimize releases. These precautions may include increased training and supervision of plant personnel handling the hazardous substance, more frequent and careful inspections, and better maintenance of plant equipment. In addition, personnel and equipment on motor vehicles, aircraft, rail cars, and vessels would likely be subject to similar enhanced measures.

Designation of an EHS as a CERCLA hazardous substance may help mitigate the effects of releases that do occur. Response capabilities vary from locality to locality; some local response authorities (e.g., volunteer fire departments) may not have the resources or expertise to respond to a release of an EHS quickly and appropriately. Designation of an EHS as a hazardous substance under CERCLA and the resulting Federal notification requirements under sections 102 and 103 of CERCLA will make Federal resources available to State and local response officials more quickly, thereby decreasing potential threats to public health and welfare and the environment. In addition, Federal government personnel, through administering the CERCLA notification program, have gained substantial knowledge of the dangers associated with releases of particular hazardous substances as well as the advisability of implementing certain cleanup measures. State and local authorities can improve the effectiveness of response efforts by using this Federal expertise. The Federal government may provide assistance not only in stopping a release, containing it, and cleaning it up, but also in evacuations and any other measures that may be necessary to protect potentially threatened populations.

Besides these direct forms of assistance, the Federal government may provide indirect assistance in the form of on-site and off-site monitoring or the supervision of response activities. For example, Federal officials can assess the appropriateness of cleanups conducted by the parties that are potentially responsible for a release.

Reporting releases of all EHSs, as well as other CERCLA hazardous substances, to the NRC fulfills an additional goal of developing a comprehensive national data base, the analysis of which will help the Agency prevent, as well as prepare for and respond to, future releases. The Accidental Release Information Program uses the release reporting provided to the NRC to trigger a report from specific chemical facilities that meet certain criteria. Under section 104(e) of CERCLA, this program requires a facility that experiences certain releases to evaluate its chemical safety response and to report to the Agency. The knowledge gained by the Agency from these evaluations is used in implementing its chemical accident prevention program. Without a comprehensive reporting system for key chemicals of concern, such as the EHSs, there would be substantial gaps in reporting and in understanding the causes and cures of chemical accidents. This will hinder the effectiveness of the Agency's prevention program.

IV. Differences in SARA Title III and CERCLA Notification Requirements Following Designation

A. Substances Covered

The Federal reporting requirements contained in CERCLA section 103 apply to substances that have been defined as CERCLA hazardous substances either by reference to other environmental statutes or by designation under CERCLA section 102(a). The State and local reporting requirements contained in SARA section 304 apply to EHSs defined under SARA Title III and to CERCLA hazardous substances. As a result of designating non-CERCLA EHSs as CERCLA hazardous substances, releases of EHSs that must be reported to State and local officials under SARA Title III would also require Federal reporting under CERCLA. Further, any release of an EHS in an amount that equals or exceeds its RQ would require Federal reporting pursuant to CERCLA whether or not it would also need to be reported to State and local officials.

B. Facilities Covered

Although both CERCLA section 103 and SARA section 304 apply to releases from facilities, the facilities covered are not identical. Thus, despite the designation of 232 EHSs as CERCLA hazardous substances in this rulemaking, the requirements for reporting releases of those substances to the NRC may differ somewhat from the requirements for reporting to State and local officials. Both the CERCLA section 101(9) and the SARA section 329(4) definitions of "facility" are broad, but they are slightly different. In addition, CERCLA section 103 requires the reporting of releases from vessels as well as facilities, whereas SARA Title III does not require reporting from vessels.

Many releases that must be reported under section 103 of CERCLA will not be required to be reported under SARA section 304, because section 304 of SARA only applies to releases from facilities that produce, use, or store, a "hazardous chemical." [3] For example, in the case of a research laboratory where all hazardous chemicals are "under the direct supervision of a technically qualified individual," the release of an EHS or CERCLA hazardous substance

[3] A "hazardous chemical" is defined by SARA section 311(e) as having the same meaning as in OSHA regulations (29 CFR 1910.1200(c)) "* * * except that such term does not include the following:

(1) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.

(2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.

(3) Any substance to the extent it is used for personal, family or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public.

(4) Any substance to the extent it is used in a research laboratory or hospital or other medical facility under the direct supervision of a technically qualified individual.

(5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer."

would not require State and local reporting. This is because the Title III definition of hazardous chemical does not include substances used under these circumstances. Similarly, the release of an EHS or CERCLA hazardous substance from an industrial facility where all hazardous chemicals are "present in the same form and concentration" as a consumer product, would also be exempt from State and local reporting, again because the Title III definition of hazardous chemical does not include substances present in the same form and concentration as consumer products. With the designation of EHSs as CERCLA hazardous substances, however, releases of an RQ of an EHS under these circumstances would require Federal reporting, which could result in a Federal response if deemed necessary.

C. Releases Covered

SARA section 304(a)(4) exempts from SARA section 304 reporting requirements any release that "results in exposure to persons solely within the site or sites on which a facility is located." In contrast, under EPA's interpretation of the phrase "into the environment" in the CERCLA section 101(22) definition of "release," a release is exempt from CERCLA reporting requirements only if it remains wholly contained within a building or structure (50 FR 13456). Thus, a release of an RQ or more that did not remain wholly contained within a building or structure but resulted in exposure solely on-site, would have to be reported to Federal officials but not to State or local officials. Upon designation of non-CERCLA EHSs as CERCLA hazardous substances, a release of an RQ or more of any EHS that leaves a building or structure but remains on-site, will be reportable to Federal officials. Although reporting to State and local officials is not required until the release moves off-site, EPA encourages such reporting when a risk of such movement is perceived, in order to increase the opportunity for a timely response.

Application of the CERCLA "petroleum exclusion," will also result in differences in reporting under CERCLA and SARA Title III. Under this exclusion, petroleum is excluded from the CERCLA section 101(14) definition of "hazardous substance." Because petroleum is exempted generally from CERCLA notification and liability requirements and because no such exclusion exists under SARA Title III, EHSs present in petroleum are subject to SARA section 304 reporting requirements (52 FR 13385). EPA interprets the petroleum exclusion under CERCLA to apply to crude oil and refined petroleum fractions, including listed or designated hazardous substances that are indigenous in these petroleum products. The petroleum exclusion also includes substances normally mixed with or added to crude oil or crude oil fractions during the refining process.[4] Under the Agency's interpretation of the CERCLA and SARA Title III provisions, the release of a petroleum fraction, for example, which contains an RQ or more of an EHS, would be exempt from Federal, but not State and local, reporting.[5] If, on the other hand, the release only contained an RQ or more of a CERCLA hazardous substance that was not an EHS, then the release would be exempt from State and local reporting, as well as from Federal reporting. The effect of this difference has been minimized with the recent delisting from the EHS list of three chemicals that are naturally occurring in petroleum products. Future adjustment to RQs for any remaining chemicals in petroleum may reduce the effect of this difference even further.

V. Regulatory Analyses

A. Executive Order No. 12291

Executive Order (E.O.) 12291 requires that regulations be classified as major or non-major for purposes of review by the Office of Management and Budget (OMB). According to E.O. 12291, major rules are regulations that are likely to result in:

(1) An annual effect on the economy of $100 million or more; or

(2) A major increase in costs of prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

An economic analysis performed by the Agency, available for inspection in Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, shows that today's proposed rule is non-major, because the rule will result in costs of approximately $3.3 million annually. Of this amount, an estimated $0.9 million will be incurred by the regulated community (the remainder to be incurred by government). Once RQ adjustments are promulgated for the newly designated CERCLA hazardous substances, these costs will decline significantly. These estimated costs reflect only those effects of designation that are readily quantifiable in dollars. The costs do not include the dollar value of human health and welfare and environmental effects, which are inherently difficult to measure and are not included because of serious information constraints. This proposed rule has been submitted to OMB for review, as required by E.O. 12291.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires that a Regulatory Flexibility Analysis be performed for all rules that are likely to have a "significant impact on a substantial number of small entities." To determine whether a Regulatory Flexibility Analysis is necessary for today's proposed rule, a preliminary analysis was conducted. (See the "Economic Impact Analysis of Designating SARA Title III Extremely Hazardous Substances Pursuant to Section 102(a) of CERCLA," November 1988, available for inspection in Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.)

This preliminary analysis suggests that designation of EHSs as CERCLA hazardous substances will have minimal financial impacts on small businesses, and today's proposed rule is not expected to have a significant impact on a substantial number of small entities. Therefore, the Administrator of EPA certifies that no Regulatory Flexibility Analysis is necessary.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paper Reduction Act, 44 U.S.C. 3501 et seq. An Information Collection Request document has been prepared by EPA (ICR No. 1491) and a copy may be obtained from Carl Koch, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, or by calling 1-202/382-2739.

The public reporting burden for this collection of information is estimated to vary from 3 to 6 hours per response, with an average of 3.1 hours per response, including time for reviewing

[4] Memorandum from Francis S. Blake, EPA General Counsel, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, (July 31, 1987) discussing the Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2).

[5] Releases of oil that cause a sheen on the surface of waters of the U.S., however, are required to be reported to the NRC under section 311 of the Clean Water Act (see 40 CFR Part 110). When it is deemed appropriate, response action is taken by Federal or State authorities.

instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Part 302

Air pollution control, Chemicals, Hazardous chemicals, Hazardous materials, Hazardous materials transportation, Hazardous substances, Hazardous wastes, Intergovernmental relations, Natural resources, Pesticides and pests, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control.

Dated: January 12, 1989.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, it is proposed to amend Title 40 of the Code of Federal Regulations as follows:

PART 302—DESIGNATION, REPORTABLE QUANTITIES AND NOTIFICATION

1. The authority citation for Part 302 continues to read as follows:

Authority: 42 U.S.C. 9602; 33 U.S.C. 1321 and 1361.

2. Section 302.4 is amended by adding the following entries to Table 302.4 and to its Appendix A as set forth below. The note preceding Table 302.4 is revised to read as follows:

§ 302.4 Designation of Hazardous Substances.

* * * * *

Note.—The numbers under the column headed "CASRN" are the Chemical Abstracts Service Registry Numbers for each hazardous substance. Other names by which each hazardous substance is identified in other statutes and their implementing regulations are provided in the "Regulatory Synonyms" column. The "Statutory RQ" column lists the RQs for hazardous substances established by section 102 of CERCLA. The "Statutory Code" column indicates the statutory source for hazardous substances defined in section 101(14) of CERCLA or designated under section 102 of CERCLA: "1" indicates that the statutory source is section 311(b)(4) of the Clean Water Act, "2" indicates that the source is section 307(a) of the Clean Water Act, "3" indicates that the source is section 112 of the Clean Air Act, "4" indicates that the source is RCRA section 3001, and "5a" indicates that the source is SARA section 302. The "RCRA Waste Number" column provides the waste identification numbers assigned to various substances by RCRA regulations. The column headed "Category" lists the code letters "X", "A", "B", "C", and "D", which are associated with reported quantities of 1, 10, 100, 1000, and 5000 pounds, respectively. The "Pounds (kg)" column provides the reportable quantity for each hazardous substance in pounds and kilograms.

TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES

[Note.—All comments/notes are located at the end of this table]

Hazardous substance	CASRN	Regulatory synonyms	Statutory			Proposed RQ	
			RQ	Code †	RCRA waste number	Category	Pounds (Kg)
Bis(chloromethyl) ketone	534076		1	5a			1# (0.454)
Bitoscanate	4044659		1	5a			1# (0.454)
Boron trichloride	10294345		1	5a			1# (0.454)
Boron trifluoride	7637072		1	5a			1# (0.454)
Boron trifluoride compound with methyl ether (1:1)	353424		1	5a			1# (0.454)
Bromadiolone	28772567		1	5a			1# (0.454)
Bromine	7726956		1	5a			1# (0.454)
Cadmium oxide	1306190		1	5a			1# (0.454)
Cadmium stearate	2223930		1	5a			1# (0.454)
Cantharidin	56257		1	5a			1# (0.454)
Carbachol chloride	51832		1	5a			1# (0.454)
Carbamic acid, methyl-, O-(((2,4-dimethyl-1,3-dithiolan-2-yl)methylene)amino)-	26419738		1	5a			1# (0.454)
Carbophenothion	786196		1	5a			1# (0.454)
Chlorfenvinfos	470906		1	5a			1# (0.454)
Chlormephos	24934916		1	5a			1# (0.454)
Chloroacetic acid	79118		1	5a			1# (0.454)
Chloroethanol	107073		1	5a			1# (0.454)
Chloroethyl chloroformate	627112		1	5a			1# (0.454)
Chloromequat chloride	999815		1	5a			1# (0.454)
Chlorophacinone	3691358		1	5a			1# (0.454)
Chloroxuron	1982474		1	5a			1# (0.454)
Chlorthiophos	21923239		1	5a			1# (0.454)
Chromic chloride	10025737		1	5a			1# (0.454)
Cobalt carbonyl	10210681		1	5a			1# (0.454)
Cobalt, ((2,2'-(1,2-ethanediylbis (nitrilomethylidyne))bis(6-fluorophenolato))(2)	62207765		1	5a			1# (0.454)
Colchicine	64868		1	5a			1# (0.454)
Coumatetralyl	5836293		1	5a			1# (0.454)
Crimidine	535897		1	5a			1# (0.454)
Cyanogen iodide	506785		1	5a			1# (0.454)
Cyanophos	2636262		1	5a			1# (0.454)
Cyanuric fluoride	675149		1	5a			1# (0.454)
Cycloheximide	66819		1	5a			1# (0.454)
Cyclohexylamine	108918		1	5a			1# (0.454)
Decaborane (14)	17702419		1	5a			1# (0.454)
Demeton	8065483		1	5a			1# (0.454)
Demeton-S-methyl	919868		1	5a			1# (0.454)

TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES—Continued

[Note —All comments/notes are located at the end of this table]

Hazardous substance	CASRN	Regulatory synonyms	Statutory			Proposed RQ	
			RQ	Code †	RCRA waste number	Category	Pounds (Kg)
Dialifor	10311849		1	5a			1# (0.454)
Diborane	19287457		1	5a			1# (0.454)
Dichloromethylphenylsilane	149746		1	5a			1# (0.454)
Dicrotophos	141662		1	5a			1# (0.454)
Diethyl chlorophosphate	814493		1	5a			1# (0.454)
Diethylcarbamazine citrate	1642542		1	5a			1# (0.454)
Digitoxin	71636		1	5a			1# (0.454)
Diglycidyl ether	2238075		1	5a			1# (0.454)
Digoxin	20830755		1	5a			1# (0.454)
Dimefox	115264		1	5a			1# (0.454)
Dimethyldichlorosilane	75785		1	5a			1# (0.454)
Dimethyl-p-phenylenediamine	99989		1	5a			1# (0.454)
Dimethyl phosphorochloridothioate	2524030		1	5a			1# (0.454)
Dimethyl sulfide	75183		1	5a			1# (0.454)
Dimetilan	644644		1	5a			1# (0.454)
Dinoterb	1420071		1	5a			1# (0.454)
Dioxathion	78342		1	5a			1# (0.454)
Diphacinone	82666		1	5a			1# (0.454)
Dithiazanine iodide	514738		1	5a			1# (0.454)
Emetine, dihydrochloride	316427		1	5a			1# (0.454)
Endothion	2778043		1	5a			1# (0.454)
EPN	2104645		1	5a			1# (0.454)
Ergocalciferol	50146		1	5a			1# (0.454)
Ergotamine tartrate	379793		1	5a			1# (0.454)
Ethanesulfonyl chloride, 2-chloro-	1622328		1	5a			1# (0.454)
Ethanol, 1,2-dichloro-, acetate	10140871		1	5a			1# (0.454)
Ethoprophos	13194484		1	5a			1# (0.454)
Ethylbis(2-chloroethyl)amine	538078		1	5a			1# (0.454)
Ethylene fluorohydrin	371620		1	5a			1# (0.454)
Ethyl thiocyanate	542905		1	5a			1# (0.454)
Fenamiphos	22224926		1	5a			1# (0.454)
Fenitrothion	122145		1	5a			1# (0.454)
Fensulfothion	115902		1	5a			1# (0.454)
Fluenetil	4301502		1	5a			1# (0.454)
Fluoroacetic acid	144490		1	5a			1# (0.454)
Fluoroacetyl chloride	359068		1	5a			1# (0.454)
Fluorouracil	51218		1	5a			1# (0.454)
Fonofos	944229		1	5a			1# (0.454)
Formaldehyde cyanohydrin	107164		1	5a			1# (0.454)
Formetanate hydrochloride	23422539		1	5a			1# (0.454)
Formothion	2540821		1	5a			1# (0.454)
Formparanate	17702577		1	5a			1# (0.454)
Fosthietan	21548323		1	5a			1# (0.454)
Fuberidazole	3878191		1	5a			1# (0.454)
Gallium trichloride	13450903		1	5a			1# (0.454)
Hexamethylenediamine, N,N'-dibutyl-	4835114		1	5a			1# (0.454)
Hydrogen peroxide (concentration >52%)	7722841		1	5a			1# (0.454)
Hydrogen selenide	7783075		1	5a			1# (0.454)
Hydroquinone	123319		1	5a			1# (0.454)
Iron, pentacarbonyl-	13463406		1	5a			1# (0.454)
Isobenzan	297789		1	5a			1# (0.454)
Isobutyronitrile	78820		1	5a			1# (0.454)
Isocyanic acid, 3,4-dichlorophenyl ester	102363		1	5a			1# (0.454)
Isophorone diisocyanate	4098719		1	5a			1# (0.454)
Isopropyl chloroformate	108236		1	5a			1# (0.454)
Isopropyl formate	625558		1	5a			1# (0.454)
Isopropylmethylpyrazolyl dimethylcarbamate	119380		1	5a			1# (0.454)
Lactonitrile	78977		1	5a			1# (0.454)
Leptophos	21609905		1	5a			1# (0.454)
Lewisite	541253		1	5a			1# (0.454)
Lithium hydride	7580678		1	5a			1# (0.454)
Manganese, tricarbonyl methylcyclopentadienyl	12108133		1	5a			1# (0.454)
Mechlorethamine	51752		1	5a			1# (0.454)
Mephosfolan	950107		1	5a			1# (0.454)
Acetone thiosemicarbazide	1752303		1	5a			1# (0.454)
Acrylyl chloride	814686		1	5a			1# (0.454)
Adiponitrile	111693		1	5a			1# (0.454)
Allylamine	107119		1	5a			1# (0.454)
Aminopterin	54626		1	5a			1# (0.454)
Amiton	78535		1	5a			1# (0.454)
Amiton oxalate	3734972		1	5a			1# (0.454)
Amphetamine	300629		1	5a			1# (0.454)
Aniline, 2,4,6-trimethyl-	88051		1	5a			1# (0.454)
Antimony pentafluoride	7783702		1	5a			1# (0.454)

TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES—Continued

[Note.—All comments/notes are located at the end of this table]

Hazardous substance	CASRN	Regulatory synonyms	Statutory			Proposed RQ	
			RQ	Code †	RCRA waste number	Category	Pounds (Kg)
Antimycin A	1397940		1	5a			1# (0.454)
Arsine	7784421		1	5a			1# (0.454)
Azinphos-ethyl	2642719		1	5a			1# (0.454)
Benzenamine, 3-(trifluoromethyl)-	98168		1	5a			1# (0.454)
Benzenearsonic acid	98055		1	5a			1# (0.454)
Benzene, 1-(chloromethyl)-4-nitro-	100141		1	5a			1# (0.454)
Benzimidazole, 4,5-dichloro-2-(trifluoromethyl)-	3615212		1	5a			1# (0.454)
Benzyl cyanide	140294		1	5a			1# (0.454)
Bicyclo[2,2,1]heptane-2-carbonitrile, 5-chloro-6((((methylamino)carbonyl)oxy)m	15271417		1	5a			1# (0.454)
Mercuric acetate	1600277		1	5a			1# (0.454)
Mercuric chloride	7487947		1	5a			1# (0.454)
Mercuric oxide	21908532		1	5a			1# (0.454)
Methacrolein diacetate	10476956		1	5a			1# (0.454)
Methacrylic anhydride	760930		1	5a			1# (0.454)
Methacryloyl chloride	920467		1	5a			1# (0.454)
Methacryloyloxyethyl isocyanate	30674807		1	5a			1# (0.454)
Methamidophos	10265926		1	5a			1# (0.454)
Methanesulfonyl fluoride	558258		1	5a			1# (0.454)
Methidathion	950378		1	5a			1# (0.454)
Methoxyethylmercuric acetate	151382		1	5a			1# (0.454)
Methyl 2-chloroacrylate	80637		1	5a			1# (0.454)
Methyl disulfide	624920		1	5a			1# (0.454)
Methyl isothiocyanate	556616		1	5a			1# (0.454)
Methylmercuric dicyanamide	502396		1	5a			1# (0.454)
Methyl phenkapton	3735237		1	5a			1# (0.454)
Methyl phosphonic dichloride	676971		1	5a			1# (0.454)
Methyl thiocyanate	556649		1	5a			1# (0.454)
Methyltrichlorosilane	75796		1	5a			1# (0.454)
Methyl vinyl ketone	78944		1	5a			1# (0.454)
Metolcarb	1129415		1	5a			1# (0.454)
Monocrotophos	6923224		1	5a			1# (0.454)
Mustard gas	505602		1	5a			1# (0.454)
Nicotine sulfate	65305		1	5a			1# (0.454)
Nitrocyclohexane	1122607		1	5a			1# (0.454)
Norbormide	991424		1	5a			1# (0.454)
Organorhodium complex (PMN-82-147)	00		1	5a			1# (0.454)
Ouabain	630604		1	5a			1# (0.454)
Oxamyl	23135220		1	5a			1# (0.454)
Oxetane, 3,3-bis(chloromethyl)-	78717		1	5a			1# (0.454)
Oxydisulfoton	2497076		1	5a			1# (0.454)
Ozone	10028156		1	5a			1# (0.454)
Paraquat	1910425		1	5a			1# (0.454)
Paraquat methosulfate	2074502		1	5a			1# (0.454)
Pentaborane	19624227		1	5a			1# (0.454)
Pentadecylamine	2570265		1	5a			1# (0.454)
Peracetic acid	79210		1	5a			1# (0.454)
Phenol, 3-(1-methylethyl)-, methylcarbamate	64006		1	5a			1# (0.454)
Phenol, 2,2'-thiobis[4-chloro-6-methyl-	4418660		1	5a			1# (0.454)
Phenol, 2,2'-thiobis(4,6-dichloro-	97187		1	5a			1# (0.454)
Phenoxarsine, 10,10'-oxydi	58366		1	5a			1# (0.454)
Phenylhydrazine hydrochloride	59881		1	5a			1# (0.454)
Phenylsilatrane	2097190		1	5a			1# (0.454)
Phosacetim	4104147		1	5a			1# (0.454)
Phosfolan	947024		1	5a			1# (0.454)
Phosmet	732116		1	5a			1# (0.454)
Phosphamidon	13171216		1	5a			1# (0.454)
Phosphonothioic acid, methyl-, S-(2-(bis(1-methylethyl)amino)ethyl O-ethyl ester.	50782699		1	5a			1# (0.454)
Phosphonothioic acid, methyl-,O-(4-nitrophenyl) O-phenyl ester	2665307		1	5a			1# (0.454)
Phosphonothioic acid, methyl-,O-ethyl O-(4-(methylthio)phenyl) ester	2703131		1	5a			1# (0.454)
Phosphoric acid, dimethyl 4-(methylthio)phenyl ester	3254635		1	5a			1# (0.454)
Phosphorothioic acid, O,O-dimethyl-S-(2-methylthio)ethyl ester	2587908		1	5a			1# (0.454)
Phosphorus pentachloride	10026138		1	5a			1# (0.454)
Phosphorus pentoxide	1314563		1	5a			1# (0.454)
Physostigmine	57476		1	5a			1# (0.454)
Physostigmine, salicylate (1:1)	57647		1	5a			1# (0.454)
Picrotoxin	124878		1	5a			1# (0.454)
Piperidine	110894		1	5a			1# (0.454)
Piprotal	5281130		1	5a			1# (0.454)
Pirimifos-ethyl	23505411		1	5a			1# (0.454)
Promecarb	2631370		1	5a			1# (0.454)
Propargyl bromide	106967		1	5a			1# (0.454)
Propiolactone, beta-	57578		1	5a			1# (0.454)
Propiophenone, 4-amino	70699		1	5a			1# (0.454)

TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES—Continued

[Note.—All comments/notes are located at the end of this table]

Hazardous substance	CASRN	Regulatory synonyms	Statutory			Proposed RQ	
			RQ	Code †	RCRA waste number	Category	Pounds (Kg)
Propyl chloroformate	109615		1	5a			1# (0.454)
Prothoate	2275185		1	5a			1# (0.454)
Pyridine, 2-methyl-5-vinyl	140761		1	5a			1# (0.454)
Pyridine, 4-nitro-, 1-oxide	1124330		1	5a			1# (0.454)
Pyriminil	53558251		1	5a			1# (0.454)
Salcomine	14167181		1	5a			1# (0.454)
Sarin	107448		1	5a			1# (0.454)
Selenium oxychloride	7791233		1	5a			1# (0.454)
Semicarbazide hydrochloride	563417		1	5a			1# (0.454)
Silane, (4-aminobutyl)diethoxymethyl-	3037727		1	5a			1# (0.454)
Sodium cacodylate	124652		1	5a			1# (0.454)
Sodium pentachlorophenate	131522		1	5a			1# (0.454)
Sodium selenate	13410010		1	5a			1# (0.454)
Sodium tellurite	10102202		1	5a			1# (0.454)
Stannane, acetoxytriphenyl-	900958		1	5a			1# (0.454)
Strychnine, sulfate	60413		1	5a			1# (0.454)
Sulfoxide, 3-chloropropyl octyl	3569571		1	5a			1# (0.454)
Sulfur dioxide	7446095		1	5a			1# (0.454)
Sulfur tetrafluoride	7783600		1	5a			1# (0.454)
Sulfur trioxide	7446119		1	5a			1# (0.454)
Tabun	77816		1	5a			1# (0.454)
Tellurium	13494809		1	5a			1# (0.454)
Tellurium hexafluoride	7783804		1	5a			1# (0.454)
Terbufos	13071799		1	5a			1# (0.454)
Tetraethyltin	597648		1	5a			1# (0.454)
Tetramethyl lead	75741		1	5a			1# (0.454)
Thallous malonate	2757188		1	5a			1# (0.454)
Thiocarbazide	2231574		1	5a			1# (0.454)
Thiourea, (2-methylphenyl)-	614788		1	5a			1# (0.454)
Titanium tetrachloride	7550450		1	5a			1# (0.454)
Trans-1,4-dichlorobutene	110576		1	5a			1# (0.454)
Triamiphos	1031476		1	5a			1# (0.454)
Triazofos	24017478		1	5a			1# (0.454)
Trichloroacetyl chloride	76028		1	5a			1# (0.454)
Trichloro(chloromethyl)silane	1558254		1	5a			1# (0.454)
Trichloro(dichloropheny)silane	27137855		1	5a			1# (0.454)
Trichloroethylsilane	115219		1	5a			1# (0.454)
Trichloronate	327980		1	5a			1# (0.454)
Trichlorophenylsilane	98135		1	5a			1# (0.454)
Triethoxysilane	998301		1	5a			1# (0.454)
Trimethylchlorosilane	75774		1	5a			1# (0.454)
Trimethylolpropane phosphite	824113		1	5a			1# (0.454)
Trimethyltin chloride	1066451		1	5a			1# (0.454)
Triphenyltin chloride	639587		1	5a			1# (0.454)
Tris(2-chloroethyl)amine	555771		1	5a			1# (0.454)
Valinomycin	2001958		1	5a			1# (0.454)
Warfarin sodium	129066		1	5a			1# (0.454)
Xylylene dichloride	28347139		1	5a			1# (0.454)
Zinc, dichloro(4,4-dimethyl-5((((methylamino) carbonyl)oxy)imino)pentanenitrile)-(T-4)-	58270089		1	5a			1# (0.454)

† —indicates the statutory source as defined by 1, 2, 3, 4, or 5a below
1 —indicates that the statutory source for designation of this hazardous substance under CERCLA is CWA Section 311(b)(4)
2 —indicates that the statutory source for designation of this hazardous substance under CERCLA is CWA Section 307(a)
3 —indicates that the statutory source for designation of this hazardous substance under CERCLA is CAA Section 112
4 —indicates that the statutory source for designation of this hazardous substance under CERCLA is RCRA Section 3001
5a —indicates that the statutory source for designation of this hazardous substance is CERCLA Section 102(a)
—The Agency is in the process of applying the primary and secondary RQ adjustment criteria to this hazardous substance. When complete, the Agency may propose to adjust the 1-pound statutory RQ. Until then, the 1-pound statutory RQ applies.

APPENDIX A—SEQUENTIAL CAS REGISTRY NUMBER LIST OF EXTREMELY HAZARDOUS SUBSTANCES

CASRN	Hazardous substance
00	Organorhodium complex (PMN-82-147).
50146	Ergocalciferol.
51218	Fluorouracil.
51752	Mechloretharnine.
51832	Carbachol chloride.
54626	Aminopterin.

APPENDIX A—SEQUENTIAL CAS REGISTRY NUMBER LIST OF EXTREMELY HAZARDOUS SUBSTANCES—Continued

CASRN	Hazardous substance
56257	Cantharidin.
57476	Physostigmine.
57578	Propiolactone, beta.
57647	Physostigmine, salicylate (1:1).
58366	Phenoxarsine, 10,10'-oxydi.
59881	Phenylhydrazine hydrochloride.

APPENDIX A—SEQUENTIAL CAS REGISTRY NUMBER LIST OF EXTREMELY HAZARDOUS SUBSTANCES—Continued

CASRN	Hazardous substance
60413	Strychnine, sulfate.
64006	Phenol, 3-(1-methylethyl)-, methylcarbamate.
64868	Colchicine.
65305	Nicotine sulfate.
66819	Cycloheximide.

APPENDIX A—SEQUENTIAL CAS REGISTRY NUMBER LIST OF EXTREMELY HAZARDOUS SUBSTANCES—Continued

CASRN	Hazardous substance
70699	Propiophenone, 4-amino.
71636	Digitoxin.
75183	Dimethyl sulfide.
75741	Tetramethyllead.
75774	Trimethylchlorosilane.
75785	Dimethyldichlorosilane.
75796	Methyltrichlorosilane
76028	Trichloroacetyl chloride.
77816	Tabun.
78342	Dioxathion.
78535	Amiton.
78717	Oxetane, 3,3-bis(chloromethyl).
78820	Isobutyronitrile.
78944	Methyl vinyl ketone.
78977	Lactonitrile.
79118	Choroacetic acid.
79210	Peracetic acid.
80637	Methyl 2-chloroacrylate.
82666	Diphacinone.
88051	Aniline, 2,4,6-trimethyl.
97187	Phenol, 2,2'-thiobis(4,6-dichloro).
98055	Benzenearsonic acid.
98135	Trichlorophenylsilane.
98168	Benzenamine, 3-(trifluoromethyl).
99989	Dimethyl-p-phenylenediamine.
100141	Benzene, 1-(chloromethyl)-4-nitro.
102363	Isocyanic acid, 3,4-dichlorophenyl ester.
106967	Propargyl bromide.
107073	Chloroethanol.
107119	Allylamine.
107164	Formaldehyde cyanohydrin.
107448	Sarin.
108236	Isopropyl chloroformate.
108918	Cyclohexylamine.
109615	Propyl chloroformate.
110576	Trans-1,4-dichlorobutene.
110894	Piperidine.
111693	Adiponitrile.
115219	Trichloroethylsilane.
115264	Dimefox.
115902	Fensulfothion.
119380	Isopropylmethylpyrazolyl dimethylcarbamate.
122145	Fenitrothion.
123319	Hydroquinone.
124652	Sodium cacodylate.
124878	Picrotoxin.
129066	Warfarin sodium.
131522	Sodium pentachlorophenate.
140294	Benzyl cyanide.
140761	Pyridine, 2-methyl-5-vinyl.
141662	Dicrotophos.
144490	Fluoroacetic acid.
149746	Dichloromethylphenylsilane.
151382	Methoxyethylmercuric acetate.
297789	Isobenzan.
300629	Amphetamine.
316427	Emetine, dihydrochloride.
327980	Trichloronate.
353424	Boron trifluoride compound with methyl ether (1:1).
359068	Fluoroacetyl chloride.
371620	Ethylene fluorohydrin.
379793	Ergotamine tartrate.
470906	Chlorfenvinfos.
502396	Methylmercuric dicyanamide.
505602	Mustard gas.
506785	Cyanogen iodide.
514738	Dithiazanine iodide.
534076	Bis(chloromethyl) ketone.
535897	Crimidine.
538078	Ethylbis(2-chloroethyl)amine.
541253	Lewisite.
542905	Ethylthiocyanate.
555771	Tris(2-chloroethyl)amine.
556616	Methyl isothiocyanate.
556649	Methyl thiocyanate.
558258	Methanesulfonyl fluoride.
563417	Semicarbazide hydrochloride.
597648	Tetraethyltin.
614788	Thiourea, (2-methylphenyl).
624920	Methyl disulfide.
625558	Isopropyl formate.
627112	Chloroethyl chloroformate.
630604	Ouabain.
639587	Triphenyltin chloride.
644644	Dimetilan.
675149	Cyanuric fluoride.
676971	Methyl phosphonic dichloride.
732116	Phosmet.
760930	Methacrylic anhydride.
786196	Carbophenothion.
814493	Diethyl chlorophosphate.
814686	Acrylyl chloride.
824113	Trimethylolpropane phosphite.
900958	Stannane, acetoxytriphenyl.
919868	Demeton-S-methyl.
920467	Methacryloyl chloride.
944229	Fonofos.
947024	Phosfolan.
950107	Mephosfolan.
950378	Methidathion.
991424	Norbormide.
998301	Triethoxysilane.
999815	Chlormequat chloride.
1031476	Triamiphos.
1066451	Trimethyltin chloride.
1122607	Nitrocyclohexane.
1124330	Pyridine, 4-nitro-, 1-oxide.
1129415	Metolcarb.
1306190	Cadmium oxide.
1314563	Phosphorus pentoxide.
1397940	Antimycin A.
1420071	Dinoterb.
1558254	Trichloro(chloromethyl)silane.
1600277	Mercuric acetate.
1622328	Ethanesulfonyl chloride, 2-chloro.
1642542	Diethylcarbamazine citrate.
1752303	Acetone thiosemicarbazide.
1910425	Paraquat.
1982474	Chloroxuron.
2001958	Valinomycin.
2074502	Paraquat methosulfate.
2097190	Phenylsilatrane.
2104645	EPN.
2223930	Cadmium stearate.
2231574	Thiocarbazide.
2238075	Diglycidyl ether.
2275185	Prothoate.
2497076	Oxydisulfoton.
2524030	Dimethyl phosphorochloridothioate.
2540821	Formothion.
2570265	Pentadecylamine.
2587908	Phosphorothioic acid, 0,0-dimethyl-S-(2-methylthio) ethyl ester.
2631370	Promecarb.
2636262	Cyanophos.
2642719	Azinphos-ethyl.
2665307	Phosphonothioc acid, methyl-,0-(4-nitrophenyl) 0-phenyl ester.
2703131	Phosphonothioic acid, methyl-,0-ethyl 0-(4-(methylthio)phenyl) ester.
2757188	Thallous malonate.
2778043	Endothion.
3037727	Silane, (4-aminobutyl)diethoxymethyl.
3254635	Phosphoric acid, dimethyl 4-(methylthio)phenyl ester.
3569571	Sulfoxide, 3-chloropropyl octyl.
3615212	Benzimidazole, 4,5-dichloro-2-(trifluoromethyl)
3691358	Chlorophacinone.
3734972	Amiton oxalate.
3735237	Methyl phenkapton.
3878191	Fuberidazole.
4044659	Bitoscanate.
4098719	Isophorone diisocyanate.
4104147	Phosacetim.
4301502	Fluenetil.
4418660	Phenol, 2,2'-thiobis[4-chloro-6-methylphenol, 2,2'-thiobis (4-chloro-6-methyl).
4835114	hexamethylenediamine, N,N'-dibutyl.
5281130	Piprotal.
5836293	Coumatetralyl.
6923224	Monocrotophos.
7446095	Sulfur dioxide.
7446119	Sulfur trioxide.
7487947	Mercuric chloride.
7550450	Titanium tetrachloride.
7580678	Lithium hydride.
7637072	Boron trifluoride.
7722841	Hydrogen peroxide (concentration>52%).
7726956	Bromine.
7783075	Hydrogen selenide.
7783600	Sulfur tetrafluoride.
7783702	Antimony pentafluoride.
7783804	Tellurium hexafluoride.
7784421	Arsine.
7791233	Selenium oxychloride.
8065483	Demeton.
10025737	Chromic chloride.
10026138	Phosphorus pentachloride.
10028156	Ozone.
10102202	Sodium tellurite.
10140871	Ethanol, 1,2-dichloro-, acetate.
10210681	Cobalt carbonyl.
10265926	Methamidophos.
10294345	Boron trichloride.
10311849	Dialifor.
10476956	Methacrolein diacetate.
12108133	Manganese, tricarbonyl methylcyclopentadienyl.
13071799	Terbufos.
13171216	Phosphamidon.
13194484	Ethoprophos.
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[FR Doc. 89-1360 Filed 1-19-89; 8:45 am]

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federal register

Monday
January 23, 1989

Part IX

The President

Proclamation 5935—National Day of Excellence, 1989

Executive Order 12667—Presidential Records

Federal Register
Vol. 54, No. 13
Monday, January 23, 1989

Presidential Documents

Title 3—

The President

Proclamation 5935 of January 18, 1989

National Day of Excellence, 1989

By the President of the United States of America

A Proclamation

On this third anniversary of the Space Shuttle Challenger's tragic accident, the lines of Tennyson in his poem "Ulysses" seem most appropriate:

Come, my friends,
'Tis not too late to seek a newer world.
It may be that the gulf will wash us down;
It may be that we touch the Happy Isles,
And see the great Achilles, whom we knew.
Tho' much is taken, much abides; . . .

Indeed, much was taken when we lost Challenger's brave crew. Yet much abides, because the American people will forever remember them and salute the devotion to excellence that characterized them and continues to characterize the members of the U.S. space program. That spirit has manifested itself again and again as we have journeyed to the moon and probed planets, our solar system, and beyond. It thrives today as we seek a permanent base in space and further manned exploration.

The Challenger crew made the supreme sacrifice on their quest to extend man's horizons. As we resolve to go forward in space, let us always take with us the spirit of vision, skill, and excellence.

That spirit was evident on September 29, 1988, when the Space Shuttle Discovery lifted off from the launch pad. There could be no more fitting testimony to the Challenger crew and the excellence they personified than this mission, which returned our Nation to manned space flight. May our boundless dreams continue to inspire us in the pursuit of excellence—in space and in every endeavor.

The Congress, by Public Law 100-681, has designated January 28, 1989, as "National Day of Excellence" and authorized and requested the President to issue a proclamation in observance of that day.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim January 28, 1989, as National Day of Excellence. I call upon the people of the United States to observe that day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of January, in the year of our Lord nineteen hundred and eighty-nine, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 89-1577
Filed 1-19-89; 11:06 am]
Billing code 3195-01-M

Presidential Documents

Executive Order 12667 of January 18, 1989

Presidential Records

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "NARA" refers to the National Archives and Records Administration.

(c) "Presidential Records Act" refers to the Presidential Records Act of 1978 (Pub. L. No. 95–591, 92 Stat. 2523–27, as amended by Pub. L. No. 98–497, 98 Stat. 2287), codified at 44 U.S.C. 2201–2207.

(d) "NARA regulations" refers to the NARA regulations implementing the Presidential Records Act. 53 Fed. Reg. 50404 (1988), codified at 36 C.F.R. Part 1270.

(e) "Presidential records" refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act and the NARA regulations.

(f) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A "substantial question of Executive privilege" exists if NARA's disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch.

(h) A "final court order" is a court order from which no appeal may be taken.

Sec. 2. *Notice of Intent to Disclose Presidential Records.*

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. However, nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. *Claim of Executive Privilege by Incumbent President.*

(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other Federal agencies as they deem appropriate concerning whether invocation of Executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of Executive privilege is not justified. The Archivist shall be promptly notified of any such determination.

(c) If after appropriate review and consultation under subsection (a) of this section, either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of Executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke Executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.*

(a) Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this Order that Executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
January 18, 1989.

[FR Doc. 89-1578
Filed 1-19-89; 11:07 am]
Billing code 3195-01-M

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CFR CHECKLIST

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An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

New units issued during the week are announced on the back cover of the daily **Federal Register** as they become available.

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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1987. The CFR volume issued January 1, 1987, should be retained.

[3] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1988. The CFR volume issued as of Apr. 1, 1980, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

[6] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

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