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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 907

[Navel Orange Regulation 683]

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

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 683 establishes the quantity of California-Arizona navel oranges that may be shipped to market during the period January 13 through January 19, 1989. Such action is needed to balance the supply of fresh navel oranges with the demand for such oranges during the period specified due to the marketing situation confronting the orange industry.

DATES: Regulation 683 (§ 907.983) is effective for the period January 13, 1989, through January 19, 1989.

FOR FURTHER INFORMATION CONTACT: Jacquelyn R. Schlatter, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2528-S, P.O. Box 96456, Washington, DC., 20090-6456; telephone: (202) 447-5120.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order 907 (7 CFR Part 907), as amended, regulating the handling of navel oranges grown in Arizona and designated part of California. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter referred to as the Act.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of the use of volume regulations on small entities as well as larger ones.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 125 handlers of California-Arizona navel oranges subject to regulation under the navel orange marketing order, and approximately 4,065 producers in California and Arizona. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona navel oranges may be classified as small entities.

This action is consistent with the marketing policy for 1988-89 adopted by the Navel Orange Administrative Committee (Committee). The Committee met publicly on January 10, 1989, in Visalia, California, to consider the current and prospective conditions of supply and demand and recommended, by a nine to two vote, a quantity of navel oranges deemed advisable to be handled during the specified week. The Committee reports that supply and demand has improved, especially on the smaller sizes.

Based on consideration of supply and market conditions, and the evaluation of alternatives to the implementation of prorate regulations, the Administrator of the AMS has determined that this final rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared policy of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. To effectuate the declared purposes of the Act, it is necessary to make this regulatory provision effective as specified, and handlers have been apprised of such provision and the effective time.

List of Subjects in 7 CFR Part 907

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

For the reasons set forth in the preamble, 7 CFR Part 907 is amended as follows:

PART 907—NAVEL ORANGES GROWN IN ARIZONA AND DESIGNATED PART OF CALIFORNIA

1. The authority citation for 7 CFR Part 907 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 907.983 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 907.983 Navel Orange Regulation 683.

The quantity of navel oranges grown in California and Arizona which may be handled during the period January 13, 1989, through January 19, 1989, are established as follows:

(a) District 1: 1,320,000 cartons;
(b) District 2: 180,000 cartons;
(c) District 3: unlimited cartons;
(d) District 4: unlimited cartons.

Dated: January 11, 1989.

Charles R. Brader,
Director, Fruit and Vegetable Division.

[FR Doc. 89-975 Filed 1-11-89; 3:47 pm]
BILLING CODE 3410-02-M

7 CFR Part 910

[Lemon Regulation 648]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 648 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 295,000 cartons during the period January 15 through January 21, 1989. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 648 (§ 910.948) is effective for the period January 15 through January 21, 1989.

FOR FURTHER INFORMATION CONTACT: Raymond C. Martin, Section Head, Volume Control Programs, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 447-5697.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR Part 910) regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee (Committee) and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the marketing policy for 1988-89. The Committee met publicly on January 10, 1989, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that demand for lemons is good.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

For the reasons set forth in the preamble, 7 CFR Part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR Part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 910.948 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 910.948 Lemon Regulation 648.

The quantity of lemons grown in California and Arizona which may be handled during the period January 15, 1989, through January 21, 1989, is established at 295,000 cartons.

Dated: January 11, 1989.

Charles R. Brader,

Director, Fruit and Vegetable Division.

[FR Doc. 89-974 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-02-M

Foreign Agricultural Service

7 CFR Part 1560

Calculation of Factors Which Contribute to the Determination of Whether To Impose a Temporary Duty on Canadian Fresh Fruits and Vegetables in Accordance With the United States-Canada Free-Trade Agreement Implementation Act of 1988

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule sets forth the procedures by which the Foreign Agricultural Service (FAS) will monitor the import prices of certain Canadian fresh fruits and vegetables in accordance with section 301(a) of the United States-Canada Free-Agreement Implementation Act of 1988.

DATES: Effective on January 1, 1989, the date the United States-Canada Free-Trade Agreement enters into force. See Supplementary Information. Comments must be received on or before February 13, 1989.

ADDRESSES: Comments may be mailed to the Inter-America Branch, Foreign Agricultural Service/International Trade Policy, Room 5506 South Building, United States Department of Agriculture, Washington, DC 20250. Copies of all written comments received will be available for examination by interested persons at the above address during regular business hours (8:30 a.m.-5:00 p.m. weekdays).

FOR FURTHER INFORMATION CONTACT: Richard Petges, Inter-America Branch, FAS/ITP, Room 5506 South Building, United States Department of Agriculture, Washington, DC 20250, (202) 382-1338.

SUPPLEMENTARY INFORMATION: This interim rule has been reviewed under United States Department of Agriculture (USDA) procedures implementing Executive Order 12291 and Departmental Regulation 1512-1 and has been classified as "non-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, individuals, industries, Federal, State, or local governments, or geographic regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

An environmental impact statement has not been prepared since FAS is excluded from the requirements to prepare procedures implementing the National Environmental Policy Act in accordance with 7 CFR 1b.4.

This action will not increase the federal paperwork burden for individuals, small businesses and others. Furthermore, since this interim rule is part of the implementation of a bilateral trade agreement between the United States and Canada, it involves a foreign affairs function of the United States. Consequently, FAS is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking for this action and the provisions of the Regulatory Flexibility Act (5 U.S.C. 601) do not apply to this interim rule.

Background

On January 2, 1988, President Reagan notified Congress of his intent to enter into the United States-Canada Free-Trade Agreement (FTA). Pursuant to the FTA, the United States and Canada will each eliminate their tariffs on each other's goods within ten years of the FTA's entry into force. However, Article 702 of the FTA provides that select fresh fruits and vegetables will be eligible for a special duty snap-back. This provision is being implemented in U.S. law pursuant to section 301(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988. Under certain specified conditions, the United States may, during the twenty years following the Agreement's entry into force, temporarily restore the duty on imports of designated Canadian fresh fruits and vegetables. This rule elucidates the procedures that will be used by FAS to monitor the prices of the fresh fruits and vegetables imported from Canada that are eligible for the temporary duty and to notify the Secretary of Agriculture that the conditions outlined in Article 702 of the FTA for imposing such a duty for a particular fresh fruit or vegetable have been met.

These regulations are being promulgated to be effective upon the entry into force of the FTA. Article 2105 of the FTA provides that the FTA enters into force "on January 1, 1989 upon an exchange of diplomatic notes certifying the completion of necessary legal procedures by each Party." The Office of the United States Trade Representative will confirm in a **Federal Register** notice the precise date of the FTA's entry into force.[1]

List of Subject in 7 CFR Part 1560

Procedures to monitor Canadian fresh fruit and vegetable imports.

Accordingly, this interim rule amends Title 7 of the Code of Federal Regulations by adding Part 1560 as follows:

PART 1560—PROCEDURES TO MONITOR CANADIAN FRESH FRUIT AND VEGETABLE IMPORTS

Sec.
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Authority: Sections 105 and 301(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449 (102 Stat. 1855 and 1865-67).

§ 1560.1 Scope.

This Part outlines the procedures that will be used by the Administrator of the Foreign Agricultural Service to monitor and inform the Secretary of Agriculture of data regarding the importation of fresh fruits and vegetables from Canada.

§ 1560.2 Definitions.

The following definitions shall be applicable to this part:

(a) "Administrator" means the Administrator of the Foreign Agricultural Service, United States Department of Agriculture.

(b) "Average Monthly Import Price" means the average unit value for all shipments of a particular Canadian fresh fruit or vegetable imported into the United States from Canada during a particular calendar month based on official data from the U.S. Customs Service and/or the Bureau of Census, and shall be calculated by dividing the total value of the fresh fruit or vegetable imported in that month by the total quantity of the fresh fruit or vegetable imported in that month.

(c) "Average Planted Acreage" means the average of the annual planted acreage in the U.S. for a particular fresh fruit or vegetable for the preceding five years excluding the years with the highest and lowest acreages based on available data from agencies within the United States Department of Agriculture and data from appropriate state agencies, as required.

(d) "Canadian fresh fruit or vegetable" means a fresh fruit or vegetable that is a product of Canada as determined in accordance with the rules of origin set forth in section 202 of the U.S.-Canada Free-Trade Agreement Implementation Act of 1988.

(e) "Corresponding Five-Year Average Monthly Import Price" for a particular day means the average import price of a Canadian fresh fruit or vegetable imported into the United States from Canada, for the calendar month in which that day occurs, for that month in each of the preceding 5 years, excluding the years with the highest and lowest monthly averages.

(f) "F.O.B. Point of Shipment Price in Canada" means the daily average of prices of a particular Canadian fresh fruit or vegetable imported into the United States from Canada that are reported to the U.S. Customs Service at the U.S. border as part of the official documentation accompanying such shipments less freight costs where applicable.

(g) "Fresh Fruit or Vegetable" means a fruit or vegetable determined in accordance with § 1560.3 within one of the HS headings.

(h) "HS heading" means any of the following tariff headings of the Harmonized System (HS) as modified by the description for each heading:

HS tariff heading	Description
07.01	Potatoes, fresh or chilled.
07.02	Tomatoes, fresh or chilled.
07.03	Onions, shallots, garlic, leeks, and other alliaceous vegetables, fresh or chilled.
07.04	Cabbages, cauliflowers, kohlrabi, kale and similar edible brassicas, fresh or chilled.
07.05	Lettuce (lactica sativa) and chicory (cichorium spp.), fresh or chilled.
07.06	Carrots, salad beets or beetroot, salsify, celeriac, radishes and similar edible roots (excluding turnips), fresh or chilled.
07.07	Cucumbers and gherkins, fresh or chilled.

[1] See U.S. Trade Representative document published January 6, 1989 (54 FR 505).

HS tariff heading	Description
07.08	Leguminous vegetables, shelled or unshelled, fresh or chilled.
07.09	Other vegetables (excluding truffles), fresh or chilled.
08.06.10	Grapes, fresh.
08.08.20	Pears and quinces, fresh.
08.09	Apricots, cherries, peaches (including nectarines), plums and sloes, fresh.
08.10	Other fruit (excluding cranberries and blueberries), fresh.

(i) "Import Price" means the unit value based on data available from the U.S. Customs Service of a particular Canadian fresh fruit or vegetable imported into the U.S. from Canada taking into account any other relevant data, as necessary.

(j) "Secretary" means the Secretary of Agriculture.

(k) "United States" means the United States Customs Territory which includes the fifty states, the District of Columbia and Puerto Rico.

(l) "Wine Grape" means grapes of labrusca, vinifera or hybrid vinifera varieties used for making wine.

(m) "Working Day" means a day which falls on a Monday through Friday, excluding holidays observed by the United States Government and days in which the U.S. Customs Service is not operating.

§ 1560.3 Determination of fresh fruit or vegetable.

The specific group of articles that will be monitored as a particular fresh fruit or vegetable will be determined based on the practicability of monitoring at the eight digit subheading level of the Harmonized Tariff Schedule of the United States. The determination of practicability will be made by the Administrator taking into account: (a) The availability of reliable volume and price data on imports from Canada and data on U.S. planted acreage, (b) market differentiation for the group of articles, and (c) such other factors as the Administrator determines to be appropriate.

§ 1560.4 Calculation of data to support imposition of temporary duty.

The Administrator will inform the Secretary when the following conditions are met with respect to a particular fresh fruit or vegetable imported into the United States from Canada:

(a) If for each of five consecutive working days the import price of the fresh fruit or vegetable is below ninety percent of the corresponding five-year average monthly import price for such fresh fruit or vegetable excluding the years with the highest and lowest corresponding monthly import price; and

(b) The planted acreage in the United States for such fresh fruit or vegetable based on the most recent data available is no higher than the average planted acreage over the preceding five years excluding the years with the highest and lowest planted acreages. For the purposes of calculating any planted acreage increase attributed directly to a reduction in wine grape planted acreage existing on October 4, 1987 shall be excluded.

§ 1560.5 Calculation of data to support removal of temporary duty.

During the time a temporary duty on a particular fresh fruit or vegetable is imposed pursuant to section 301(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988, the Administrator will inform the Secretary if the F.O.B. point of shipment price in Canada of such fresh fruit or vegetable exceeds, for five consecutive working days, ninety percent of the corresponding five-year average monthly import price excluding the years with the highest and lowest average corresponding monthly import price, adjusted to an F.O.B. point of shipment price, if necessary, for that fresh fruit or vegetable.

Signed at Washington, DC, on the 30th day of December 1988.

Thomas O. Kay,

Administrator, Foreign Agricultural Service.

[FR Doc. 89-920 Filed 1-12-89; 8:45 am]

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Food Safety and Inspection Service

9 CFR Parts 350 and 352

[Docket No. 86-043F]

Voluntary Inspection of Exotic Animals

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is adopting regulations to provide for voluntary inspection concerning certain exotic animals under the Agricultural Marketing Act of 1946, as amended. This rule amends Part 352 of the regulations promulgated under that Act, which provides voluntary inspection concerning American bison, catalo, and cattalo, to provide for voluntary ante-mortem, post-mortem, and products inspection of elk, deer, antelope, reindeer and water buffalo in the same manner as is presently performed for American bison. A triangular brand will be applied to exotic animal carcasses, meat and meat food products inspected and passed by authorized USDA or State employees in official exotic animal establishments. The rule will facilitate the sale and export of exotic animal carcasses, meat, and meat food products of the additional animals.

EFFECTIVE DATE: February 13, 1989.

FOR FURTHER INFORMATION CONTACT: Dr. Douglas L. Berndt, Director, Slaughter Inspection Standards and Procedures Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-3219.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Agency has determined that this final rule is not a "major rule" under Executive Order 12291. This final rule would not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographical regions; or have 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. Currently less than 2,000 exotic animals are slaughtered annually compared to over 32,000,000 cattle slaughtered in fiscal year 1986. It is not expected that the number of exotic animals slaughtered annually will substantially increase. In addition, since this is a voluntary fee-for-service program, producers must decide if the ability to market a federally inspected product offsets the resulting costs of inspection.

Effect on Small Entities

The Administrator has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act, (5 U.S.C. 601). Since the voluntary inspection service for some exotic animals, with the exception of American bison, catalo, and cattalo, is not yet provided, FSIS does not have specific information on how many small entities may be affected by this final rule. However, FSIS believes that those producers of exotic animals who would be interested in participating in this voluntary inspection service are small in actual numbers and are small businesses. This assumption is based on the limited number of commercially raised exotic animals and the size of the herds of the animals now being

commercially produced in the United States. This rule is expected to have an impact on all exotic animal producers who wish to have their products federally inspected because it will enable such producers to market their products as federally inspected. In determining whether to participate in this voluntary program, each producer decides if the ability to market a federally inspected product offsets the resulting costs of inspection. In addition, FSIS believes that a substantial number of those establishments which may choose to participate in the program, that is, agree to use their establishments for the preparation under official inspection of carcasses, meat, and products of exotic animals, will also be small businesses. This assumption is based on the fact that the locations where exotic animals are commercially produced are generally in remote areas where few large establishments are located. Each establishment will decide if such use of its facility and equipment is economically advantageous.

Background

The Agricultural Marketing Act of 1946, as amended, provides the Secretary of Agriculture with the authority to furnish a voluntary inspection service, on a fee basis, for exotic animals (7 U.S.C. 1622). Under Parts 350 and 352 of the regulations (9 CFR Parts 350 and 352) promulgated under that Act, the Department provides inspection and certification services for reindeer and American bison, catalo, and cattalo, respectively. These inspection services enable persons to have ante-mortem and post-mortem inspection performed on these exotic animals. The inspected and passed meat is branded with a USDA mark of inspection and can be sold interstate or exported.

The increasing consumer demand for exotic animal meat and the increasing number of exotic animals being raised for food prompted exotic animal producers to request the adoption of similar regulations for the inspection and marking of these animals and their meat products as are currently provided for American bison, catalo, and cattalo.

Therefore, on February 24, 1988, FSIS published a proposed rule (53 FR 5387) to add other exotic animal species to Part 352 which provided only for the voluntary inspection of American bison, catalo, and cattalo. FSIS proposed to add elk, deer, antelope, and water buffalo to Part 352 and to transfer reindeer from Part 350 to Part 352 to consolidate the provisions for voluntary inspection of all exotic animals. To avoid confusion, FSIS proposed to redefine buffalo as animals belonging to the buffalo family and bison as animals belonging to the bison family.

This final rule allows the following three alternative locations for ante-mortem inspection of reindeer, elk, deer, antelope, and water buffalo, which are presently allowed for American bison, catalo, and cattalo: (1) in the field in a designated area of an owner's premises; (2) on an appropriate transport vehicle at an official exotic animal establishment; and (3) in ante-mortem pens at an official exotic animal establishment. The ante-mortem inspection performed on reindeer, elk, deer, antelope, water buffalo, and bison which is either in the field or on a transport vehicle will be dependent on the adequacy and safety of the particular situation. Humane handling of exotic animals during ante-mortem inspection will be in accordance with § 313.2 of the Federal meat inspection regulations (9 CFR 313.2) which prescribes various methods of humane slaughter.

The post-mortem inspection procedure will be performed in an official exotic animal establishment by a USDA inspector or an inspector of a cooperating State, with the post-mortem disposition determined by the authorized veterinarian. The final rule allows the utilization of Federal and State meat inspection personnel for ante-mortem and post-mortem inspection of reindeer, elk, deer, antelope, water buffalo, and bison.

The triangular brand was designed not only to identify inspected and passed bison and bison meat food products under FSIS's voluntary inspection service, but was also designed to identify meat of other exotic animals approved for inspection at a future date. The triangular brand will be applied to these specific exotic animal carcasses, meat and meat food products inspected and passed by authorized USDA or State employees in an official exotic animal establishment. The ordering and manufacture of the triangular brand will be in accordance with the provisions contained in § 317.3(c) of the Federal meat inspection regulations (9 CFR 317.3).

Discussion of Comments

The Agency received eight comments in response to the proposal. Four commenters supported the proposal; four opposed it. One of the four opposing commenters provided no additional comment. The remaining three opposing commenters felt the proposal would permit the slaughter of game animals, thereby encouraging poaching in the wild which would decrease the numbers of such animals.

The Agency wishes to emphasize that the proposal was a result of requests from exotic animal producers (persons who are involved in the raising and/or marketing of exotic animals for commercial purposes) that the Agency provide Federal inspection of the slaughter and other preparation of elk, deer, antelope, reindeer and water buffalo. The rule provides for ante-mortem inspection (inspection before slaughter) by an FSIS inspector at a producer's premises, on a transport vehicle, or at an official exotic animal establishment. With regard to exotic animals in the wild, it would be very difficult if not impossible to trap and remove an exotic animal from the wild without tranquilizing the animal. Because animals which have been treated with tranquilizers are not permitted for slaughter, any person who attempted such action would gain nothing for their efforts. Therefore, this regulation would have no affect on poaching.

For the reasons discussed in the preamble, FSIS is amending Parts 350 and 352 of the Federal meat inspection regulations as follows:

Final Rule

List of Subjects in 9 CFR Parts 350 and 352

Meat inspection, Voluntary inspection, Exotic animals, Food labeling.

PART 350—SPECIAL SERVICES RELATING TO MEAT AND OTHER PRODUCTS

1. The authority citation for Part 350 continues to read as follows:

Authority: 41 Stat. 241, 7 U.S.C. 394; 60 Stat. 1087, as amended, 7 U.S.C. 1622; 60 Stat. 1090, as amended, 7 U.S.C. 1624; 34 Stat. 1264, as amended, 21 U.S.C. 621; 62 Stat. 334, 21 U.S.C. 695; 7 CFR 2.15(a), 2.92.

§ 350.2 [Amended]

2. Paragraph (j) of § 350.2 is removed and reserved.

§ 350.3 [Amended]

3. Paragraph (d) of § 350.3 is removed and reserved.

4. The authority citation for Part 352 continues to read as follows:

Authority: 60 Stat. 1087, as amended, 7 U.S.C. 1622, 60 Stat. 1090, as amended, 7 U.S.C. 1624; 7 CFR 2.15(a), 2.92.

5. The title of Part 352 is revised to read as follows:

PART 352—EXOTIC ANIMALS; VOLUNTARY INSPECTION

6. The Table of Contents of Part 352 is revised to read as follows:

Sec.
352.1 Definitions.
352.2 Type of service available.
352.3 Application by official exotic animal establishment for inspection service.
352.4 Application for ante-mortem inspection service in the field.
352.5 Fees and charges.
352.6 Denial or withrawal of inspection service.
352.7 Marking inspected products.
352.8 Time of inspection in the field and in an official exotic animal establishment.
352.9 Report of inspection work.
352.10 Ante-mortem inspection.
352.11 Post-mortem inspection.
352.12 Disposal of diseased or otherwise adulterated carcasses and parts.
352.13 Handling and disposal of condemned or other inedible exotic animal products at official exotic animal establishments.
352.14 Entry into official establishments; reinspection and preparation of products.
352.15 Records, registration and reports.
352.16 Exports.
352.17 Transportation.
352.18 Cooperation of States in Federal programs.

7. Section 352.1 is revised to read as follows:

§ 352.1 Definitions.

The definitions in § 301.2, not otherwise defined in this part, are incorporated into this part. In addition to those definitions, the following definitions will be applicable to the regulations in this part.

(a) "Act" means the applicable provisions of the Agricultural Marketing Act of 1946, as amended (60 Stat. 1087, as amended; 7 U.S.C. 1621 *et seq.*).

(b) "Acceptable" means suitable for the purpose intended and acceptable to the Food Safety and Inspection Service.

(c) "Antelope" means any animal belonging to the antelope family.

(d) "Applicant" means any interested party who requests any inspection service.

(e) "Bison" means any American bison or catalo or cattalo.

(f)"Buffalo" means any animal belonging to the buffalo family.

(g) "Catalo" or "Cattalo" means any hybrid animal with American bison appearance resulting from direct crossbreeding of American bison and cattle.

(h) "Condition" means any condition, including, but not limited to, the state of preservation, cleanliness, or soundness of any product or the processing, handling, or packaging which may affect such product.

(i) "Condition and wholesomeness" means the condition of any product, its healthfulness and fitness for human food.

(j) "Deer" means any member of the deer family.

(k) "Exotic animal" means any reindeer, elk, deer, antelope, water buffalo or bison.

(l) "Elk" means any American elk.

(m) "Exotic animal inspection service" means the personnel who are engaged in the administration, application, and direction of exotic animal inspection programs and services pursuant to the regulations in this part.

(n) "Exotic animal producer" means any interested party that engages in the raising and/or marketing of an exotic animal for commercial purposes.

(o) "Field ante-mortem inspection" means the ante-mortem inspection of an exotic animal away from the official exotic animal establishment's premises.

(p) "Field designated area" means any designated area on the applicant's premises, approved by the Regional Director, where field ante-mortem inspection is to be performed.

(q) "Identify" means to apply official identification to products or containers.

(r) "Inspection" means any inspection by an inspector to determine, in accordance with regulations in this part, (1) the condition and wholesomeness of an exotic animal, or (2) the condition and wholesomeness of edible product of an exotic animal at any state of the preparation or packaging in the official plant where inspected and certified, or (3) the condition and wholesomeness of any previously inspected and certified product of an exotic animal if such product has not lost its identity as an inspected and certified product.

(s) "Interested party" means any person financially interested in a transaction involving any inspection.

(t) "Official exotic animal establishment" means any slaughtering, cutting, boning, curing, smoking, salting, packing, rendering, or similar establishment at which inspection is maintained under the regulations in this part.

(u) "Official device" means a stamping appliance, branding device, stencil printed label, or any other mechanically or manually operated tool that is approved by the Administrator for the purpose of applying any official mark or other identification to any product or packaging material.

(v) "Official identification" means any symbol, stamp, label or seal indicating that the product has been officially inspected and/or indicating the condition of the product approved and authorized by the Administrator to be affixed to any product, or affixed to or printed on the packaging material of any product.

(w) "Program" means the Voluntary Exotic Animal Inspection Program of the Food Safety and Inspection Service.

(x) "Reindeer" means any reindeer commonly referred to as caribou.

(y) "Transport vehicle" means any vehicle used to transport an exotic animal.

(z) "Veterinarian" means an authorized veterinarian of the Program employed by the Department or any cooperating State who is authorized by the Secretary to do any work or perform any duty in connection with the Program.

(aa) "Water buffalo" means any Asiatic water buffalo, commonly referred to as carabao; and the water buffalo of India, commonly referred to as the Indian buffalo.

8. Section 352.2 is revised to read as follows:

§ 352.2 Type of service available.

Upon application, in accordance with § 352.3, § 352.4, and § 352.5, the following type of service may be furnished under the regulations in this part:

(a) Voluntary Inspection Service. An inspection and certification service for wholesomeness relating to the slaughter and processing of exotic animals and the processing of exotic animal products. All provisions of this part shall apply to the slaughter of exotic animals, and the preparation, labeling, and certification of the exotic animal meat and exotic animal products processed under this exotic animal inspection service.

(b) Only exotic animals which have had ante–mortem inspection as described under this part and which are processed in official exotic animal establishments in accordance with this part may be marked inspected and passed.

(c) Exotic animals, exotic animal meat and meat food products shall be handled in an official exotic animal establishment to ensure separation and identity of the exotic animal or exotic animal meat and meat food products until they are shipped from the official exotic animal establishment to prevent commingling with other species.

9. Section 352.3 is revised to read as follows:

§ 352.3 Application by official exotic animal establishment for inspection services.

(a) Any person desiring to process an exotic animal, exotic animal carcasses, exotic animal meat and meat food products in an establishment under exotic animal inspection service must receive approval of such establishment and facilities as an official exotic animal establishment prior to the rendition of such service. An application for inspection service to be rendered in an official exotic animal establishment shall be approved in accordance with the provisions contained in §§ 304.1 and 304.2 of Subchapter A of this Chapter.

(b) Initial survey. When an application has been filed for exotic animal inspection service, the Regional Director or designee, shall examine the establishment, premises, and facilities.

10. Section 352.4 is revised to read as follows:

§ 352.4 Application for ante-mortem inspection service in the field.

Any exotic animal producer desiring field ante-mortem exotic animal inspection service must receive approval of the field ante-mortem designated area from the Regional Director or designee prior to the rendition of such service. An application seeking approval of the designated area for ante-mortem inspection shall be obtained from the Regional Director, and completed and submitted to the Regional Director.

(a) An initial application for field ante-mortem exotic animal inspection service shall be made by an official exotic animal establishment to the Regional Director. Subsequent requests shall be made by the official exotic animal establishment on behalf of an exotic animal producer to the Regional Director in one of the following manners: (1) telephone, (2) telegraph, (3) mail, or (4) in person as determined by the Regional Director.

(b) Upon receipt of the completed application, the Regional Director or designee shall examine the field ante-mortem designated area and facilities for approval of the designated area.

(c) All fees involved for the approval of the designated area, including but not limited to any travel, per diem costs, and time required to perform such approval services, shall be paid directly by the applicant to the Regional Director.

11. Section 352.6 is amended by revising paragraphs (a) and (b) to read as follows:

§ 352.6 Denial or withdrawal of inspection service.

(a) *For miscellaneous reasons.* An application or a request for service may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, any person, without a hearing by the appropriate Regional Director: (1) for administrative reasons such as the nonavailability of personnel to perform the service; (2) for the failure of payment for service; (3) in case the application or request relates to exotic animals or exotic animal products which are not eligible for service under this part; (4) for failure to maintain the designated area or the plant in a state of repair approved by the Service; (5) for the use of operating procedures which are not in accordance with the regulations of this part; (6) for alterations of buildings, facilities, or equipment which cannot be approved under the regulations in this part. Notice of such rejection, denial, or withdrawal, and the reasons therefore, shall promptly be given to the person involved. The applicant or recipient shall be notified of such decision to reject an application or request for service or to deny or withdraw the benefits of the service, and the reasons therefor, in writing in the manner prescribed in § 1.147(b) of the rules of practice (7 CFR 1.147(b)), or orally. Such decision shall be effective upon such oral or written notification, whichever is earlier, to the applicant or recipient. If such notification is oral, the person making such decision shall confirm such decision, and the reasons therefor, in writing, as promptly as circumstances permit, and such written confirmation shall be served upon the applicant or recipient in the manner prescribed in § 1.147(b) of the rules of practice (7 CFR 1.147(b)).

(b) *For disciplinary reasons—Basis for denial or withdrawal.* An application or request for service may be denied, or the benefits of the service may be withdrawn from, any person or entity who, or whose officer, employee or agent in the scope of his employment or agency: (1) Has willfully made any misrepresentation or has committed any other fraudulent or deceptive practice in connection with any application or request for service under this part; (2) has given or attempted to give, as a loan or for any other purpose, any money, favor or other thing of value, to any employee or agent of the Department or a cooperating State authorized to perform any function under this part; (3) has interfered with or obstructed, or attempted to interfere with or to obstruct, any employee or agent of the Department or cooperating State in the performance of his or her duties under this part by intimidation, threats, assaults, abuse, or any other improper means; (4) has knowingly represented that any exotic animal carcass, or exotic animal product, has been officially inspected and passed by an authorized inspector under this part, when it had not, in fact, been so inspected; (5) has been convicted of more than one misdemeanor under any law based upon the acquiring, handling, or distributing of adulterated, mislabeled, or deceptively packaged good, or fraud in connection with transactions in food, or any felony; *Provided,* an application or a request for service made in the name of a person or entity otherwise eligible for service under the regulations may be denied, or the benefits of the service may be withdrawn, from such a person or entity in case the service is or would be performed at a location operated by a person or entity, from whom the benefits of the service are currently being denied or have been withdrawn under this part; or by a person or entity having an officer, director, partner, manager or substantial investor from whom the benefits of service under this part are currently being denied or have been withdrawn under this part, and who has any authority with respect to the location where service is or would be performed; or in case the service is or would be performed with respect to any exotic animal or exotic animal product in which any person or entity, from whom the benefits of service are currently being denied or have been withdrawn under this part, has contract or other financial interest.

* * * * *

12. Section 352.7 is amended by revising the introductory text and paragraphs (a) and (b)(1) to read as follows:

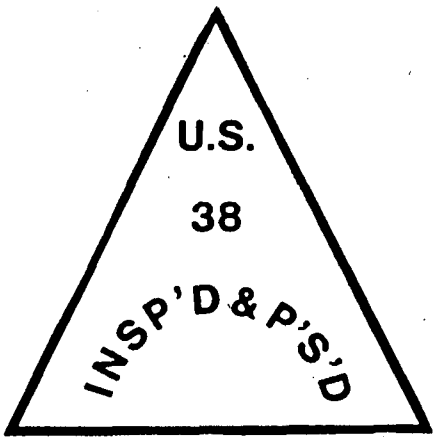
§ 352.7 Marking inspected products.

Wording and form of inspection mark. Except as otherwise authorized by the Administrator, the inspection mark applied to inspected and passed exotic animal carcasses, meat or meat food products under this part shall include wording as follows: "Inspected and Passed by U.S. Department of Agriculture." This wording shall be contained within a triangle in the form

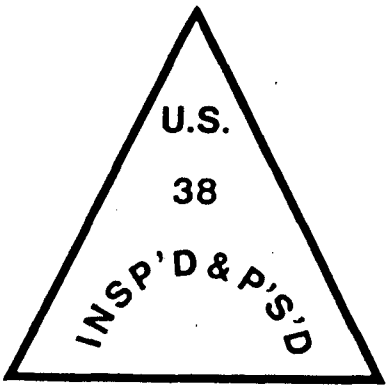
and arrangement shown in this section. The establishment number of the official establishment shall be included in the triangle unless it appears elsewhere on the packaging material. Ordering and manufacture of the triangle brand shall be in accordance with the provisions in 9 CFR 317.3(c) of the Federal meat inspection regulations. The Administrator may approve the use of abbreviations of such inspection mark, and such approved abbreviations shall have the same force and effect as the inspection mark. The inspection mark or approved abbreviation shall be applied, under the supervision of the inspector, to the inspected and passed edible product, packaging material, immediate container or shipping container. When the inspection mark or approved abbreviation is used on packaging material, immediate container or shipping container, it shall be printed on such material or container or on a label to be affixed to the packaging material or container. The name and address of the packer or distributor of such product shall be printed on the packaging material or label. The inspection marks may be stenciled on the container, and when the inspection mark is so stenciled, the name and address of the packer or distributor may be applied by the use of a stencil or rubber stamp. The name and address of the packer or distributor, if prominently shown elsewhere on the packaging material or container, may be omitted from insert labels which bear an official identification if the applicable establishment number is shown.

(a) The inspection mark to be applied to inspected and passed carcasses and parts of carcasses of an exotic animal, and products as therefrom approved by the Administrator, shall be in the form and arrangement as indicated in the example below.[1] The establishment number of the official establishment shall be set forth if it does not appear on the packaging material or container.

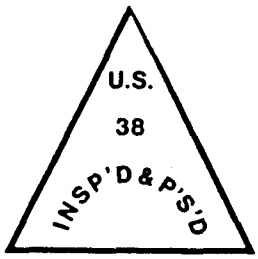
(1) For application to exotic animal carcasses, primal parts and cuts therefrom, exotic animal livers, exotic animal tongues, and exotic animal hearts.



(2) For application to exotic animal calf carcasses.

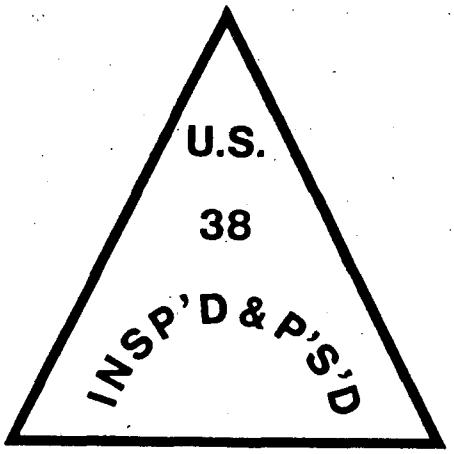


(3) For application to exotic animal tails.

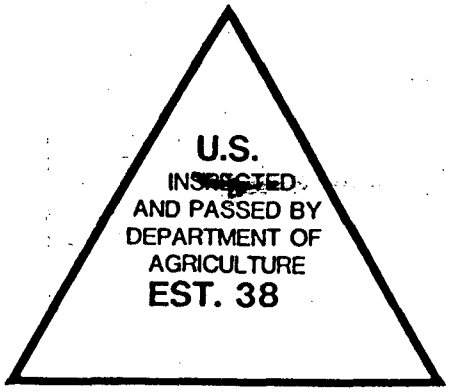


(4) For application to burlap, muslin, cheesecloth, heavy paper, or other acceptable material that encloses carcasses or parts of carcasses.

[1] The number "38" is given as an example only. The establishment number of the official exotic animal establishment where the product is prepared shall be used in lieu thereof.



(b) The official inspection mark to be shown on all labels.[1] (1) For inspected and passed products of an exotic animal shall be in the following form, except that it need not be of the size illustrated, provided that it is a sufficient size and of such color as to be conspicuously displayed and readily legible and the same proportions of letter size and boldness are maintained as illustrated:



* * * * *

13. Section 352.8 is revised to read as follows:

§ 352.8 Time of inspection in the field and in an official exotic animal establishment.

The official exotic animal establishment on behalf of the applicant shall notify the Regional Director or designee, in advance, of the hours when such inspection is desired. Inspection personnel shall have access at all times to every part of any field ante-mortem inspection area and/or official exotic

[1] The number "38" is given as an example only. The establishment number of the official exotic animal establishment where the product is prepared shall be used in lieu thereof.

animal establishment to which they are assigned.

14. Section 352.9 is revised to read as follows:

§ 352.9 Report of inspection work.

Reports of the work of inspection carried on within the field ante-mortem inspection area of an exotic animal producer's premises and/or official exotic animal establishment shall be forwarded to the Administrator by the ante-mortem inspector. The applicant for such inspection shall furnish to the Administrator such information as may be required on forms provided by the Administrator.

15. Section 352.10 is revised to read as follows:

§ 352.10 Ante-mortem inspection.

An ante-mortem inspection of an exotic animal shall, where and to the extent considered necessary by the Administrator and under such instructions as he may issue from time to time, be made on the day of slaughter of an exotic animal, in one of the following listed ways or as determined by the Administrator. Humane handling of an exotic animal during ante-mortem inspection shall be in accordance with the provisions contained in 9 CFR 313.2. Immediately after the animal is stunned or killed, it shall be shackled, hoisted, stuck and bled.

(a) To be performed on an exotic animal in the field in a designated area of an exotic animal producer's premises.

(1) Reindeer, elk, deer, antelope, bison and water buffalo are eligible for field ante-mortem inspection. The field ante-mortem designated area must be approved by the Regional Director or designee prior to rendition of the service.

(2) Any person who desires to receive field ante-mortem inspection must provide:

(i) Notification from an official exotic animal establishment to the Regional Director or designee.

(ii) A field ante-mortem designated area.

(iii) A stunning/slaughtering area which is in a condition that minimizes the possibility of soiling the animal when stunned/slaughtered and bled as determined by the inspector.

(iv) A transport vehicle that is as sanitary as practicable as determined by the inspector.

(3) The ante-mortem inspector shall determine the acceptableness and safety of performing field ante-mortem inspection. If, in the opinion of the ante-mortem inspector, an unsafe circumstance exists at the time of field ante-mortem inspection, the service shall be denied.

(4) An exotic animal that, in the ante-mortem inspector's opinion, does not pass ante-mortem inspection must be withheld from slaughter.

(5) Stunning to render the animal unconscious shall be in accordance with 9 CFR 313.15 or 313.16.

(6) All stunned/slaughtered and bled exotic animals shall be tagged with a "U.S. Suspect" tag in an ear by the ante-mortem inspector or designee prior to loading on the transport vehicle.

(7) The transport of intact exotic animal carcasses to an official exotic animal establishment for post-mortem inspection shall be as expedient as possible, and must be within the same day as field slaughter.

(8) Ante-mortem cards (Form MP 402-2) shall be filled out by the ante-mortem inspector. One copy is to be retained by the ante-mortem inspector. The other copy shall accompany the transport vehicle to the official exotic animal establishment and shall be delivered to the post-mortem veterinarian.

(9) The ante-mortem inspector shall supervise all phases of field ante-mortem inspection.

(b) To be performed on exotic animals that are inside of the transport vehicle at an official exotic animal establishment.

(1) Reindeer, elk, deer, antelope, bison, and water buffalo are eligible for transport vehicle inspection.

(2) The ante-mortem inspector shall remain outside the transport vehicle while performing ante-mortem inspection.

(3) The person requesting transport vehicle inspection must provide a transport vehicle that is as sanitary as practicable and that would safely and thoroughly permit the inspection of an exotic animal from outside of the transport vehicle as determined by the inspector.

(4) The ante-mortem inspector shall determine the adequacy and safety of performing ante-mortem inspection. If, in the ante-mortem inspector's opinion, the transport vehicle is not adequate or safe to perform ante-mortem inspection, the service shall be denied.

(c) To be performed in pens at official exotic animal establishments. The inspection shall be conducted in accordance with the provisions contained in 9 CFR Part 309.

16. Section 352.11 is revised to read as follows:

§ 352.11 Post-mortem inspection.

(a) Post-mortem inspection of reindeer, elk, deer, antelope, bison and water buffalo shall be conducted in accordance with the provisions contained in 9 CFR Part 310 or as determined by the Administrator.

(b) The post-mortem examination of field ante-mortem-inspected exotic animals must occur in the shortest length of time practicable and on the day that field ante-mortem inspection is performed to minimize the changes in the carcass which can affect the post-mortem examination, disposition and wholesomeness of the carcass and its parts.

(c) The post-mortem veterinarian shall inspect and make the disposition of all incoming "U.S. Suspect" tagged exotic animals.

17. The title of § 352.13 is revised to read as follows:

§ 352.13 Handling and disposal of condemned or other inedible exotic animal products at official exotic animal establishments.

Done at Washington, DC, on January 10, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-896 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-DM-M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 1

[Docket No. 89-1]

Investment Securities Regulation

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency ("OCC") is amending 12 CFR Part 1 to make two nonsubstantive changes in the regulation. The first change in the regulation incorporates the existing statutory authority of national banks to underwrite and deal in obligations of the African Development Bank, the Inter-American Investment Corporation, and other Type II securities listed in 12 U.S.C. 24(Seventh). The second change deletes from the regulation an outdated and unnecessary provision describing procedures for banks to request rulings by OCC.

EFFECTIVE DATE: January 13, 1989.

FOR FURTHER INFORMATION CONTACT: Horace Sneed, Attorney, Legal Advisory Services Division, Office of the Comptroller of the Currency,

Washington, DC 20219 (202-447-1880); Owen Carney, Director, Investment Securities, Office of the Comptroller of the Currency, Washington, DC 20219 (202-447-1901).

SUPPLEMENTARY INFORMATION:

Background

This rule updates the OCC's investment securities regulation, 12 CFR Part 1 ("Regulation"), to reflect national banks' existing powers with respect to obligations of the African Development Bank. In the African Development Bank Act, Congress amended section 16 of the Glass-Steagall Act, 12 U.S.C. 24(Seventh), to include obligations of the African Development Bank among those obligations, commonly referred to as "Type II Securities," that banks may underwrite and deal in, and that are eligible for national banks to purchase for their own accounts subject to a limitation of ten percent of capital and surplus on the amount that may be held per obligor. *See* African Development Bank Act, Pub. L. No. 97-35, section 1342(a), 95 Stat. 357, 743 (1981). Congress' provision of the described authority was not conditioned on the OCC's adoption of an implementing regulation. Therefore, our revision of the Regulation to specifically include African Development Bank obligations as Type II Securities does not alter banks' existing securities underwriting, dealing, or investment authority. *See* Interpretive Letter 392 from Robert L. Clarke, Comptroller of the Currency (June 25, 1987), *reprinted in* Fed. Banking L. Rep. (CCH) ¶85,616 (recognizing that national banks may exercise the subject authority regarding African Development Bank obligations pursuant to 12 U.S.C. 24(Seventh) prior to OCC revision of the Regulation).

Similarly, this action updates the Regulation to reflect national banks' existing powers with respect to obligations of the Inter-American Investment Corporation. In the Foreign Assistance and Related Appropriations Act, 1985, Congress amended 12 U.S.C. 24(Seventh) to include obligations of the Inter-American Investment Corporation as Type II Securities without requiring an implementing regulation by OCC. *See* Foreign Assistance and Related Appropriations Act, 1985, Pub. L. No. 98-473, Title I, 98 Stat. 1837, 1885 (1984) (enacting Title II of S. 2416, as introduced in the Senate on March 13, 1984); S. 2416, 98th Cong., 2d Sess. section 211(a), 130 Cong. Rec. S2622-3 (daily ed. March 13, 1984) (containing provision that was enacted to amend 12 U.S.C. 24(Seventh) as described). Therefore, our revision of the Regulation to specifically include Inter-American Investment Corporation obligations as Type II Securities does not alter banks' existing securities underwriting, dealing, or investment authority.

We are also revising the Regulation by deleting an outdated and unnecessary provision that describes procedures for banks to request rulings on matters pertaining to the Regulation. The subject provision, 12 CFR 1.9, requires that banks send their requests to the Deputy Comptroller for Bank Operations—a position that no longer exists—and to include sufficient facts and analysis to enable the OCC to make a determination. Rather than revise § 1.9 to direct requests to a current OCC official, we are removing the section from the Regulation because there is no need to continue the requirement that requests be directed to one official or to remind banks to accompany their requests with appropriate information. Banks may therefore submit requests for rulings regarding the Regulation in accordance with ordinary practices for requesting OCC legal opinions. The deletion of § 1.9 is not expected to affect the OCC's processing or banks' submission of requests regarding the Regulation.

Technical Explanation of Revisions

Currently, 12 CFR 1.3(d) defines "Type II Security" by describing such securities as those obligations that banks may deal in, underwrite, and purchase subject to a ten percent limitation, and then enumerates specific examples of such obligations. We are amending § 1.3(d) to specifically include African Development Bank and Inter-American Investment Corporation obligations among the enumerated Type II Securities and to include a generic reference to all Type II securities listed in 12 U.S.C. 24(Seventh). No revision is required for 12 CFR 1.5, which describes the qualitative standards applicable to purchases of Type II Securities for a bank's own account, or for 12 CFR 1.7, which describes the ten percent quantitative limitation on holdings of Type II Securities, since those sections refer to all Type II Securities generically rather than enumerating particular Type II Securities. We are amending the description of banks' authority to underwrite and deal in Type II Securities at 12 CFR 1.6 to remove that section's current enumeration of particular Type II Securities to which the underwriting and dealing authority applies, and adding a generic reference to all Type II Securities so that § 1.6 will not require updating to reflect any future additions of Type II Securities by Congress.

Finally, we are removing the provision at 12 CFR 1.9 for requesting OCC rulings on the Regulation. To reflect the removal of § 1.9, we are deleting the existing references to that section from 12 CFR 1.4 and 1.100(b). We are also changing the numbering of the sections that follow § 1.9 to reflect the removal of that section. Specifically, §§ 1.10, 1.11 and 1.12 are being renumbered as §§ 1.09, 1.10 and 1.11, respectively. The existing cross-reference at 12 CFR 1.4 to § 1.11 is being changed to cross-reference § 1.10 to reflect the described renumbering.

Regulatory Flexibility Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 5 U.S.C. 601 *et seq.*, it has been determined that this proposed rule, if issued as a final rule, would not have a significant economic impact on a substantial number of small entities.

Executive Order 12291

Pursuant to Executive Order 12291, it has been determined that this proposed rule, if issued as a final rule, would not have an annual effect on the economy of $100 million or more; would not cause a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; and would not have an adverse effect on competition, employment, investment, productivity, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Adoption Without Notice and Comment and Reason for Immediate Effective Date

Publication for notice and comment and delayed effectiveness as set forth in the Administrative Procedure Act, 5 U.S.C. 553, are not required. The amendments made by this final rule are technical in nature and have no substantive effect on the banking industry or the public.

List of Subjects in 12 CFR Part 1

African Development Bank, Inter-American Investment Corporation, National banks' investment securities, Type II securities.

Authority and Issuance

For the reasons set forth in the preamble, Part 1 of Chapter I of Title 12 of the Code of Federal Regulations is amended as follows:

PART 1—INVESTMENT SECURITIES REGULATION

1. The authority citation for 12 CFR Part 1 is revised to read as follows:

Authority: Paragraph Seventh of R.S. 5136, as amended, 12 U.S.C. 24(Seventh); 12 U.S.C. 93a.

2. Part 1 is amended by revising §§ 1.3(d), 1.4, 1.6, and 1.100(b); by removing § 1.9; by redesignating §§ 1.10, 1.11, and 1.12 as §§ 1.9, 1.10, and 1.11; and by revising newly redesignated § 1.10(b) to read as follows:

§ 1.3 Definitions.

* * * * *

(d) The term "Type II security" means a security that a bank may deal in, underwrite, purchase, and sell for its own account, subject to a 10-percent limitation. These include obligations of the International Bank for Reconstruction and Development, Inter-American Development Bank, the Asian Development Bank, the African Development Bank, Inter-American Investment Corporation, and the Tennessee Valley Authority, obligations issued by any State or political subdivision or any agency of a State or a political subdivision for housing, university, or dormitory purposes, and other obligations listed in paragraph Seventh of 12 U.S.C. 24.

* * * * *

§ 1.4 Type I securities; standards for authorized transactions.

Type I securities are not subject to the limitations and restrictions contained in 12 U.S.C. 24 or in this Part other than §§ 1.3(c), 1.3(g), 1.4, 1.8, and 1.10. Consequently, a bank may deal in, underwrite, purchase, and sell for its own account a security of Type I subject only to the exercise of prudent banking judgment. Prudence will require such determinations as are appropriate for the type of transaction involved. For the purpose of underwriting or investment, prudence will also require a consideration of the resources and obligations of the obligor and a determination that the obligor possesses resources sufficient to provide for all required payments in connection with the obligations.

§ 1.6 Type II securities; authority to deal in and underwrite.

A bank may deal in and underwrite Type II securities pursuant to 12 U.S.C. 24(Seventh).

§ 1.10 Amortization of premiums.

* * * * *

(b) Provide for a program to amortize the premium paid or that portion of premium remaining after the writedown required by § 1.9 so that such premium or portion thereof shall be entirely extinguished at or before the maturity of the security.

* * * * *

§ 1.100 Eligibility of securities for purchase, dealing in, and underwriting by national banks; general guidelines.

* * * * *

(b) The general guidelines are issued to assist national banks and bank counsel in independently applying the relevant law. Due to their summary character, the guidelines are not exclusive or exhaustive. For instance, the guidelines do not provide guidance in evaluating issues which, because of their unique or complex characteristics, are not susceptible to generalization. Neither do the guidelines address novel legal problems which are not reflected in the past rulings. In encountering such complex or novel issues, national banks may wish to request a specific ruling. The general guidelines will be reviewed and amended periodically to reflect new rulings.

Date: January 6, 1989.

Robert L. Clarke,

Comptroller of the Currency.

[FR Doc. 89-696 Filed 1-12-89; 8:45 am]

BILLING CODE 4810-33-M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards; Construction Industries, Surveying and Mapping Services; and Refuse and Garbage Collection Services

AGENCY: Small Business Administration.

ACTION: Notice of retention of current size standards in compliance with Pub. L. 100-656.

SUMMARY: This notice announces to the public that the Small Business Administration (SBA) will not promulgate lower size standards as previously proposed for the Construction, Surveying and Mapping Services and Refuse and Garbage Collection Industries. The current size standards for these industries will remain in effect as mandated by Pub. L. 100-656.

FOR FURTHER INFORMATION CONTACT: Gary M. Jackson, Director, Size Standards Staff, 1441 L Street, NW.—Room 601, Washington, DC 20416, Tele. (202) 653-6373.

SUPPLEMENTARY INFORMATION: Section 921(f) of Pub. L.'s 99-591 and 99-661 directed the Small Business Administration (SBA) to lower its size standards for the construction industries, surveying and mapping, and refuse and garbage collection services if the total dollar value of small business set-aside and SBA's Minority Small Business and Capital Ownership Development Assistance (section 8(a)) Program awards for these activities annually exceed 30 percent of the dollar value of overall Federal procurements for these activities. In compliance with these laws, SBA published in the **Federal Register** proposals to lower the size standards for the construction industries on December 17, 1987 (52 FR 47937) and to lower the size standards for surveying and mapping services as well as refuse and garbage collection services on August 15, 1988 (53 FR 30689, 30691). These proposals each provided for a 60-day comment period.

On November 15, 1988, President Reagan signed the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656). Title VII of this act repeals the requirements to lower the size standards as provided in Pub. L. 99-591 and Pub. L. 99-661. In lieu of revised size standards, a small business competitiveness demonstration program is to be put into effect for 4 years by nine Federal Agencies. Section 732 of the act requires current size standards for the affected industries to be retained during this demonstration program.

Dated: January 4, 1989.

James Abdnor,

Administrator, U.S. Small Business Administration.

[FR Doc. 89-824 Filed 1-12-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

Separation of Functions; Civil Penalty Demonstration Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Announcement of separation of functions.

SUMMARY: This notice advises the public of how the separation of functions under the Rules of Practice in FAA Civil Penalty Actions will be implemented within the Office of the Chief Counsel. Under 14 CFR 13.203(b), the Chief Counsel advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker in civil penalty actions not exceeding $50,000. In that function he will be assisted by the Assistant Chief Counsel for Litigation.

EFFECTIVE DATE: January 10, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. James S. Dillman, Assistant Chief Counsel for Litigation (AGC-400), Office of the Chief Counsel, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-3661.

SUPPLEMENTARY INFORMATION: On August 31, 1988, the Federal Aviation Administration (FAA) issued its Rules of Practice for FAA Civil Penalty Actions (53 FR 34646; September 7, 1988). The rules provide detailed procedures for on-the-record hearings required in civil penalty actions not exceeding $50,000, pursuant to the Civil Penalty Assessment Demonstration Program established by Congress in Pub. L. 100-223. Among other things, the rules provide that an agency attorney involved in the prosecution of a civil penalty action will not be participate in or advise the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker under these rules, except as a witness or counsel in the proceedings, after a notice of proposed civil penalty has been issued (14 CFR 13.203(b)). In addition, the rules provide that the Chief Counsel will not perform prosecutorial functions in a civil penalty action or supervise the agency attorney in the performance of prosecutorial functions after a notice of proposed civil penalty has been issued in a particular case (14 CFR 13.203(c)). Thus, the Chief Counsel will not perform the dual functions of advising the FAA decisionmaker and prosecuting, or supervising the prosecution of, a civil penalty action after a notice of proposed civil penalty has been issued in that case.

Section 13.203(d) of the rules identifies the Chief Counsel or the delegate of the Chief Counsel as the person who will advise the FAA decisionmaker regarding an initial decision or any appeal of an initial decision to the decisionmaker. In order to implement the separation of functions contained in the procedural rules, the Chief Counsel will be assisted in the advisory function under § 13.203(d) by the Assistant Chief Counsel for Litigation and his staff. Consequently, in the performance of such assistance, the Assistant Chief Counsel for Litigation and his staff will not perform prosecutorial functions. In accordance with §§ 13.202 and 13.203(a), prosecutorial functions will be performed by other agency attorneys, supervised by the Assistant Chief Counsel for Regulations and Enforcement or by the Assistant Chief Counsel for the Regions and Centers, and by the Deputy Chief Counsel.

Issued in Washington, DC, on January 10, 1989.

Gregory S. Walden,

Chief Counsel.

[FR Doc. 89-897 Filed 1-10-89; 5:10 pm]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-71-AD; Amdt. 39-6106]

Airworthiness Directives; BFGoodrich (or Former Company Name Sargent Industries, Pico Division) 7-Man Liferaft, P/N 100102-( )

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to BFGoodrich 7-Man Liferafts, P/N 100102-( ), which requires replacement of certain inflation gas cylinders. This amendment is prompted by a report that three cylinders were found which had leaked to 0 psi while in the packed state. This condition, if not corrected, could lead to a situation where the raft would not be available for use in an aircraft ditching. These liferafts would most likely be used in helicopters or transport airplanes.

EFFECTIVE DATE: February 13, 1989.

ADDRESS: The applicable service information may be obtained from BFGoodrich Aircraft Evacuation Systems, 3414 South Fifth Street, Phoenix, Arizona 85040. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. Walter S. Eierman, Aerospace Engineer, ANM-130L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806; telephone (213) 988-5336.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive which requires replacement of certain BFGoodrich 7-man liferaft inflation gas cylinders, was published in the **Federal Register** on August 18, 1988 (53 FR 31364).

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the two comments received. Both commenters supported the proposed rule.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 100 cylinders would be affected by this AD, that it would take approximately 3 manhours per cylinder to remove and replace an unsatisfactory cylinder, and that the average labor cost would be $40 per manhour. BFGoodrich will provide replacement cylinders at no charge. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $12,000.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per liferaft ($120). A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

BFGoodrich (Sargent Industries, Pico Division): Applies to BFGoodrich (or former company name Sargent Industries, PicO Division) 7-man liferaft, P/N 100102-( ). This liferaft is approved under Technical Standard Order C70.

Note.—These liferafts would most likely be used in helicopters or transport category airplanes.

Compliance required within 90 days after the effective date of this AD, unless previously accomplished.

To eliminate cylinders which may leak due to certain material used in their fabrication, accomplish the following:

A. Inspect the liferafts to determine the cylinder part number (P/N). If the liferaft contains a P/N 630104-205 cylinder with a serial number listed in BFGoodrich Alert Bulletin No. 130101-25A-203, dated March 29, 1988, the cylinder must be replaced prior to further flight, in accordance with that service bulletin.

Note.—The BFGoodrich service bulletin lists the raft P/N and S/N on which the cylinders were originally installed.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to BFGoodrich Aircraft Evacuation Systems, 3414 South Fifth Street, Phoenix, Arizona 85040. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 3229 East Spring Street, Long Beach, California.

This amendment becomes effective February 13, 1989.

Issued in Seattle, Washington, on December 23, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-789 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-141-AD; Amdt. 39-6114]

Airworthiness Directives: Aerospatiale Model ATR-42 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Aerospatiale Model ATR-42 series airplanes, which requires the installation of screws and nuts with two separate locking devices in the forward and aft quadrant cable stops in the rudder control system. This amendment is prompted by reports that the single locking device on the cable stop retention screw and nut in the rudder control system is inadequate in the event of a single failure. A dual locking system has been shown to be necessary to provide an adequate level of safety. This condition, if not corrected, could lead to loss of control of the airplane while in flight or landing.

EFFECTIVE DATE: February 22, 1989.

ADDRESSES: The applicable service information may be obtained from Aerospatiale, 216 Route de Bayonne, 31060 Toulouse, Cedex 03, France. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. William Schroeder, Standardization Branch, ANM-113; telephone (206) 431-1565. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations, to include a new airworthiness directive applicable to Aerospatiale Model ATR-42 series airplanes, which requires the installation of screws and nuts with two separate locking devices in the forward and aft quadrant cable stops in the rudder control system, was published in the **Federal Register** on October 20, 1988 (53 FR 41186).

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received in response to the proposal.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 35 airplanes of U.S. registry will be affected by this AD, that it will take approximately 4 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be $5,600.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane ($160). A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Aerospatiale: Applies to Model ATR-42 series airplanes, as listed in Aerospatiale Service Bulletin ATR42-27-0027, Revision 2, dated June 27, 1988, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent loss of rudder control, accomplish the following:

A. Within 60 days after the effective date of this AD, install screws and nuts having two separate locking devices in the forward and aft quadrant cable stops in the rudder control system, in accordance with Aerospatiale Service Bulletin ATR42-27-0027, Revision 2, dated June 27, 1988.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance

Inspector (PMI), who may add any comments and then send it to the Manager, Standardization Branch, ANM-113.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modification required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective February 22, 1989.

Issued in Seattle, Washington, on January 4, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-788 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 87-ASW-63; Amdt. 39-6112]

Airworthiness Directives; Bell Helicopter Textron, Inc. (BHTI), Model 204B, 205A, 205A-1, and 212 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) which establishes a mandatory fatigue retirement life limit on main rotor masts and trunnions used on Bell Model 204B, 205A, 205A-1, and 212 helicopters. The AD is needed to prevent main rotor mast and trunnion fatigue failures which could result in a catastrophic failure of the main rotor system and subsequent loss of the helicopter.

DATES: *Effective Date:* February 11, 1989.

Compliance: As indicated in the body of the AD.

ADDRESSES: The applicable service bulletins may be obtained from Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, Texas 76101, Attention: Customer Support, or may be examined in the Regional Rules Docket, Office of the Assistant Chief Counsel, FAA, Building 3B, Room 158, 4400 Blue Mound Road, Fort Worth, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Tyrone D. Millard, Helicopter Certification Branch, ASW-170, Federal Aviation Administration, Fort Worth, Texas 76193-0170, telephone (817) 624-5177.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD which establishes a mandatory fatigue retirement life limit on main rotor masts and trunnions used on Bell Model 204B, 205A, 205A-1, and 212 helicopters was published in the **Federal Register** (FR 11678) on April 8, 1988.

The proposal was prompted by results of the manufacturer's fatigue stress tests and fatigue analysis of the main rotor mast and trunnion under ground-air-ground (GAG) and repeated heavy lift (RHL) loading conditions. The FAA concluded from the tests and analysis that these components can no longer be operated with an unlimited service life and must be removed after a specified time in service.

Interested persons have been afforded an opportunity to participate in the making of this amendment. One comment was received. The commenter recommends that the FAA establish the time in service of the main rotor mast and trunnion based on flight hours or RHL cycles, but not both. The FAA disagrees since normal flight operations and RHL operations cause fatigue damaging stress levels and, therefore, should both be considered when determining the allowable time in service. Accordingly, the proposal is adopted without change.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation involves 821 aircraft. It is anticipated that 5 helicopters per year will require replacement of the main rotor mast and trunnion at an annual cost of approximately $51,250 for five helicopters. Therefore, I certify that this action (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); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal; and (4) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Bell Helicopter Textron, Inc. (BHTI): Applies to Model 204B, 205A, 205A-1, and 212 helicopters certificated in any category. (Airworthiness Docket No. 87-ASW-63)

Compliance is required as indicated, unless already accomplished.

To prevent possible fatigue failure of the main rotor mast, P/N 204-011-450 (all dash numbers), and main rotor trunnion, P/N 204-011-105-001, which could result in a catastrophic failure of the main rotor system and subsequent loss of the helicopter, accomplish the following:

(a) Within 10 days after the effective date of this AD, create a historical service record for the main rotor mast, P/N 204-011-450 (all dash numbers), and main rotor trunnion, P/N 204-011-105-001, and record the time in service accumulated on the main rotor mast and trunnion. If the time in service cannot be determined, enter 900 hours for each each from the date the mast and trunnion were installed.

(b) For masts and trunnions with more than 14,900 hours' time in service on the effective date of this AD, remove the masts and trunnions from service within the next 100 hours' time in service.

(c) For masts and trunnions with less than 14,900 hours' time in service on the effective date of this AD, remove the masts and trunnions from service at 15,000 hours' time in service.

(d) If the mast and trunnion are installed on the Model 205A or 205A-1 and used for high frequency external load operations, the time in service must be determined as follows:

(1) For 1 to 20 external load lift events per hour, 1 hour time in service must be entered on the historical service record.

(2) For 21 or more external load lift events per hour, 2 hours' time in service must be entered on the historical service record.

(e) If the mast and trunnion are installed on the Model 212 and used for high frequency

external load operations, the time in service must be determined as follows:

(1) For 1 to 9 external load lift events per hour, 2 hours' time in service must be entered on the historical service record.

(2) For 10 to 17 external load lift events per hour, 3 hours' time in service must be entered on the historical service record.

(3) For 18 or more external load life events per hour, 5 hours' time in service must be entered on the historical service record.

(f) Compliance with Bell Helicopter Textron, Inc., Alert Service Bulletins 204-87-15, Rev. A, dated 8/21/87, 205-87-26, Rev. A, dated 8/21/87; or 212-87-44, Rev. A, dated 8/21/87, as applicable, is an acceptable means of compliance with this AD.

(g) An alternate method of compliance which provides an equivalent level of safety with this AD may be used when approved by the Manager, Helicopter Certification Branch, Federal Aviation Administration, Fort Worth, Texas 76193-0170.

This amendment becomes effective February 11, 1989.

Issued in Fort Worth, Texas, on December 28, 1988.

Larry M. Kelly,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 89-792 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-198-AD; Amdt. 39-6113]

Airworthiness Directives: Boeing Model 757 Series Airplanes Equipped With Pratt and Whitney Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Boeing Model 757 series airplanes equipped with Pratt and Whitney engines, which requires periodic inspections for cracking of the strut attach fuse pins, and replacement of the pins, if necessary. This amendment is prompted by reports of cracks found in the fuse pins during a strut modification. This condition, if not corrected, could result in a strut and engine separating from the wing.

EFFECTIVE DATE: February 3, 1989.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Dan R. Bui, Airframe Branch, ANM-120S; telephone (206) 431-1919. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: One operator has reported finding 15 cracked engine strut midspar fuse pins on 14 Boeing Model 757 series airplanes while accomplishing an engine and strut vibration isolation modification on airplanes equipped with Pratt and Whitney (PW) engines. Cracked fuse pins have been found on left and right struts and on both the inboard and outboard midspar fittings. It has been determined that the cracks were initiated and propagated by fatigue. Cracked fuse pins can result in separation of the strut and engine from the wing.

The FAA has reviewed and approved Boeing Alert Service Bulletin 757-54A0019, dated December 1, 1988, which describes procedures for inspection of the fuse pins for cracks, and replacement of the pins, if necessary.

Since this condition is likely to exist or develop on other airplanes of the same type design, this AD requires periodic fuse pins inspections on all Model 757 series airplanes equipped with PW engines, and replacement of the fuse pins if cracks are found, in accordance with the service bulletin previously described.

The manufacturer has advised FAA that a modification is under development which, if installed, will preclude the unsafe condition addressed in this AD action. Once this modification is available, the FAA may consider further rulemaking to address it.

Since a situation exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

The regulations adopted herein will 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 final rule does not have federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required).

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to all Model 757 series airplanes equipped with Pratt and Whitney engines, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent engine separation, accomplish the following:

A. Prior to the accumulation of 4,000 flight hours or 3,800 landings, whichever occurs first; or within the next 30 days after the effective date of this AD, whichever occurs later; and thereafter at intervals not to exceed 4,000 flight hours or 3,800 landings, whichever occurs first; perform an eddy current inspection of the engine strut midspar fuse pins for cracks, in accordance with Boeing Alert Service Bulletin 757-54A0019, dated December 1, 1988.

B. Replace cracked fuse pins with serviceable fuse pins prior to further flight, in accordance with Boeing Alert Service Bulletin, 757-54A0019, dated December 1, 1988. Replacement of cracked fuse pins with new fuse pins does not terminate the requirement to continue to inspect in accordance with paragraph A., above.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager,

Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective February 3, 1989.

Issued in Seattle, Washington, on January 3, 1989.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-793 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-197-AD; Amdt. 39-6107]

Airworthiness Directives: Boeing of Canada, Ltd., de Havilland Division, Model DHC-8-100 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action publishes in the Federal Register and makes effective as to all persons an amendment adopting a new airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of de Havilland Model DHC-8-100 series airplanes by individual telegrams. This AD requires inspection of the left and right elevator output quadrant levers for correct installation, and replacement of any incorrectly assembled or damaged parts found. This action is prompted by reports of an incorrectly installed elevator quadrant lever and a deformed rod in a prototype Model DHC-8-300 series airplane, which has an elevator control system similar to the Model DHC-8-100 series. This condition, if not corrected, could result in jamming of the control system and could subsequently compromise the pilot's ability to control the airplane during critical flight regimes.

DATES: Effective January 27, 1989.

This AD was effective earlier to all recipients of telegraphic AD T88-24-51, dated December 9, 1988.

ADDRESSES: The applicable service information may be obtained from Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Mr. John Maher, Aerospace Engineer, New York Aircraft Certification Office (ANE-172), FAA, New England Region, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581; telephone (516) 791-6220.

SUPPLEMENTARY INFORMATION: On December 9, 1988, the FAA issued telegraphic AD T88-24-51, applicable to de Havilland Model DHC-8-100 series airplanes, which requires a visual inspection of the left and right elevator output quadrant lever for correct installation, and replacement of any incorrectly assembled or damaged parts with serviceable parts prior to further flight. That action was prompted by the finding of an elevator output quadrant lever installed in reverse in a prototype Model DHC-8-300 airplane. This incorrect installation caused the elevator control rod to deform. This condition, if not corrected, could result in jamming or loss of the elevator control, and could compromise the pilot's control of the airplane during critical flight regimes. Model DHC-8-100 series airplanes have a similar elevator control system to Model DHC-8-300 planes and, therefore, may be subject to this same problem.

This airplane model is manufactured in Canada and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since a situation existed, and still exists, that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

Transport Canada, which is the airworthiness authority of Canada, has issued Telegraphic AD CF-88-25 addressing this same subject.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Federal Aviation Administration has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required).

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing Canada, de Havilland Division: Applies to Model DHC-8-100 series airplanes, Serial Numbers 1 through 126, certificated in any category. Compliance is required within the next 50 hours time-in-service, unless previously accomplished.

To preclude the possibility of deformation or jamming of the elevator control system, accomplish the following:

A. Remove inspection panels 121 BL and 121 BR or the floor panel in flight compartment aft of center console, and

inspect the elevator control quadrant levers, Item 160/Part Numbers 82710146-101 (left side) and 82710146-102 (right side), for correct installation. Ensure that the curved portion of each lever points forward.

B. If both left and right levers curve forward, no further action is necessary and the inspection panels may be reinstalled.

C. If either lever curves rearward, inspect the associated push rod for evidence of bending or binding. Replace, prior to further flight, any incorrectly installed levers and damaged push rods with new or serviceable units, as applicable.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, New York Aircraft Certification Office, FAA, New England Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, New York Aircraft Certification Office.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer, may obtain copies upon request to Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

This amendment becomes effective January 27, 1989.

It was effective earlier to all recipients of Telegraphic AD T88-24-51, issued December 9, 1988.

Issued in Seattle, Washington, on December 28, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate Aircraft Certification Service.

[FR Doc. 89-785 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-116-AD; Amdt. 39-6111]

Airworthiness Directives: CASA Model C-212 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to CASA Model C-212 series airplanes, which requires structural inspections of the mechanical wing flap control system and repair or replacement, as necessary. This amendment is prompted by a structural reevaluation of the entire flap control system, which identified certain significant structural components which need to be inspected for damage, including corrosion and cracking, to assure the continued airworthiness of the flap system. Corrosion or cracking in components of the wing flap control system, if not detected and corrected, could compromise the structural integrity of the flap system.

EFFECTIVE DATE: February 17, 1989.

ADDRESSES: The applicable service information may be obtained from Contrucciones Aeronautics S.A., Getafe, Madrid, Spain. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Robert C. McCracken, Standardization Branch, ANM-113; telephone (206) 431-1979. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include a new airworthiness directive, applicable to CASA Model C-212 series airplanes, which requires structural inspections of the mechanical wing flap control system and repair or replacement, as necessary, was published in the **Federal Register** on October 20, 1988 (53 FR 41188).

Interested parties have been afforded an opportunity to participate in the making of this amendment. No comments were received in response to the proposal.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0056.

It is estimated that 61 airplanes of U.S. registry will be affected by this AD, that it will take approximately 11 manhours per airplanes to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be $26,840.

The regulations adopted herein will 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 determind that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation in not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, CASA Model C-212 series airplane are operated by small entities. A final evaluaton has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

CASA: Applies to all CASA Model C-212 series airplanes, certificated in any category. Compliance is required as indicated below, unless previously accomplished.

To ensure continuing structural integrity of the wing flap control system, accomplish the following:

A. Within six months after the effective date of this AD, incorporate a revision into the FAA-approved maintenance inspection program that will provide for inspection of the wing flap control system in accordance with CASA Document COM. 212-206, Revision 1, dated May 20, 1988. The non-destructive inspection techniques set forth in the CASA C-212 non-destructive procedures (27-50-01 through 27-50-05) provide

acceptable methods for accomplishing the inspections required by this AD. All inspection results, positive or negative, must be reported to CASA Product Support, in accordance with instructions in the CASA Flap Control System Inspection Document. This Supplemental Structural Inspection (SSI) is to be repeated at intervals not to exceed 4,000 landings.

B. Cracked structure or damaged components detected during the inspection required by paragraph A., above, must be replaced prior to further flight, in accordance with CASA Document Com. 212-206, Revision 1, dated May 20, 1988.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Standardization Branch, ANM-113.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Contrucciones Aeronauticas S.A, Getafe, Madrid, Spain. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective February 17, 1989.

Issued in Seattle, Washington, on December 28, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-790 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-ANE-44; Amdt. 39-6103]

Airworthiness Directives; Goodyear 32x8.8R16, 10PR, P/N 328Q08G2 Radial Tires

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) which requires early removal of Goodyear 32x8.8R16, 10PR, P/N 328Q08G2 radial tires installed on, but not limited to, ATR-42 aircraft. The AD is needed to prevent tire failure which could cause an unsafe takeoff or landing condition.

DATES: *Effective*—February 12, 1989.

Compliance—As required in the body of the AD.

ADDRESSES: The applicable Service Bulletin (SB) may be obtained from Goodyear S.A., Colmar-Berg, Luxembourg.

A copy of the applicable SB is contained in the Rules Docket, Docket No. 88-ANE-44, Federal Aviation Administration, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, Massachusetts 01803, and may be examined between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Terry Fahr, Boston Aircraft Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7103.

SUPPLEMENTARY INFORMATION: The FAA has determined that there have been at least 13 tire failures due to the use of an incorrect compound material in the tire carcass during manufacture. Premature tire failures such as those experienced could cause an unsafe takeoff and/or landing possibly leading to extensive aircraft damage. Since this condition is likely to exist or develop on other tires of the same type design, an AD is being issued which requires early removal of certain serial dated Goodyear 32x8.8R16, 10PR, P/N 328Q08G2, radial tires installed on, but not limited to, ATR-42 aircraft.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

The FAA has determined that this regulation only involves approximately 900 tires and will cost approximately $360,000.00. Therefore, I certify that this action: (1) Is not a "major rule" under Executive Order 12291, and (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the person identified under the caption "FOR FURTHER INFORMATION CONTACT".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration (FAA) amends Part 39 of the Federal Aviation Regulations (FAR) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding to § 39.13 the following new airworthiness directive (AD):

Goodyear: Applies to 32x8.8R16, 10PR, P/N 328Q08G2 radial tires, with serial dates between 8060Gxxx and 8320Gxxx, inclusive, installed on, but not limited to, ATR-42 aircraft.

Compliance is required within 14 days after the effective date of this AD, unless already accomplished.

To prevent tire failure, accomplish the following:

(a) Remove from service all tires which have accumulated more than 300 landings. On tires for which no landing record has been maintained, remove when the center grooves measure 0.15 in. (4mm), or less, in any location on the circumference of the tire, and replace with serviceable tires.

Notes: (1) Tires with serial dates between 8060Gxxx and 8320Gxxx, inclusive, may be used as replacements subject to the restrictions of paragraph (a) above. Tires with serial dates prior to 8060Gxxx and after 8320xxx are approved without restrictions.

(2) Goodyear Alert Service Bulletin 32-001, dated December 5, 1988, applies to this AD.

(3) Investigation is continuing and this AD may be amended in light of the results of the investigation.

(b) Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

(c) Upon request, an equivalent means of compliance with the requirements of this AD may be approved by the Manager, Boston Aircraft Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7103.

(d) Upon submission of substantiating data by an owner or operator through an FAA Airworthiness Inspector, the Manager, Boston Aircraft Certification Office, Engine and Propeller Directorate, Aircraft

Certification Service, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7103, may adjust the compliance time specified in this AD.

This amendment becomes effective on February 12, 1989.

Issued in Burlington, Massachusetts, on December 29, 1988.

Jack A. Sain,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 89-786 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-112-AD; Amdt. 39-6105]

Airworthiness Directives: Gulfstream Aerospace Model G-IV Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment revises an existing airworthiness directive (AD), applicable to Gulfstream Model G-IV series airplanes, which currently requires discontinuing all autopilot/flight director instrument landing system (ILS) operations, and disabling of the approach mode in the autopilot/flight director. This amendment adds an optional modification which, if installed, removes the restrictions on the use of the autopilot/flight director established by the existing AD, and reestablishes normal ILS operations. This amendment also limits the applicability of the AD to airplanes, Serial Numbers 1000 through 1059 only. This action is prompted by recent modifications to the design of the Sperry/Honeywell SPZ-8000 flight guidance computer (FGC), which have corrected the deficiencies addressed in the existing AD.

EFFECTIVE DATE: February 13, 1989.

ADDRESSES: The applicable service information may be obtained from Gulfstream Aerospace Corporation, P.O. Box 2206, Savannah, Georgia 31402-2206. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or FAA, Central Region, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Mr. James H. Williams, Aerospace Engineer, Atlanta Aircraft Certification Office, Systems and Equipment Branch, ACE-130A, FAA, Central Region, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349; telephone (404) 991-3020.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regultions to revise AD 88-02-01, Amendment 39-5849 (53 FR 3737; February 9, 1988), applicable to Gulfstream Model G-IV series airplanes, to provide for an optional terminating action that would permit normal autopilot/flight director ILS operations to be resumed, and to limit the applicability of the existing AD, was published in the **Federal Register** on August 31, 1988 (53 FR 33499).

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received in response to the Notice.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 60 airplanes of U.S. registry will be affected by this AD. It will take approximately 4 manhours per airplane to accomplish the optional terminating modification, at an average labor cost of $40 per manhour. There is no charge for modification parts. Based on these figures, the total cost impact of this AD on those U.S. operators who accomplish the optional terminating action is established to be $160 per airplane.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities, because this action does not impose a requirement, but provides an optional means of compliance with an existing regulation. A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By revising AD 88-02-01, Amendment 39-5849 (53 FR 3737; February 9, 1988), by revising the applicability statement and adding a new paragraph F., as follows:

Gulfstream Aerospace: Applies to Model G-IV series airplanes, Serial Numbers 1000 through 1059, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent the potential display and use of hazardously misleading information from the flight guidance computer (FGC) during an ILS approach, accomplish the following:

A. Prior to further flight, add the following to the limitations section of the airplane flight manual (AFM) and notify all crewmembers. This may be accomplished by inserting a copy of this AD in the AFM:

"ILS approaches utilizing the flight director and/or autopilot are prohibited."

B. Prior to further flight, affix an appropriate placard(s) on the instrument panel in full view of both crewmembers, stating:

"FLIGHT DIRECTOR/COUPLED ILS APPROACHES PROHIBITED."

C. Prior to further flight, affix an appropriate placard to the Approach Mode Arm (APR) switch on the autopilot control panel stating:

"USE PROHIBITED."

D. Within 15 days after the effective date of this AD, disable the approach mode in the autopilot/flight director in a manner approved by the Manager, Atlanta Aircraft Certification Office, FAA, Central Region.

E. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Atlanta Aircraft Certification Office, FAA, Central Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add comments and then send it to the Manager, Atlanta Aircraft Certification Office.

F. Installation of the modification of the autopilot/radio altimeter in accordance with Gulfstream Aerospace Aircraft Service Change (ASC) #53A, dated May 12, 1988, constitutes terminating action for the requirements of paragraphs A. through D., above.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Gulfstream Aerospace Corporation, P.O. Box 2206, Savannah, Georgia 31402-2206. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or FAA, Central Region, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia.

This amendment becomes effective February 13, 1989.

Issued in Seattle, Washington, on December 23, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Northwest Mountain Region.

[FR Doc. 89-784 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-181-AD; Amdt. 39-6116]

Airworthiness Directives: Honeywell, Inc., Sperry FMZ-800 Flight Management System, as Installed in, but Not Limited to, Gulfstream Model G-IV and Canadair Model CL-601 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to any aircraft equipped with certain Honeywell, Inc., Sperry FMZ-800 Flight Management Systems (FMS) using triple inertial reference systems (IRS) as navigation sensors. This AD requires operation of the third IRS in the attitude mode on entire flights when intending to cross the 180 degree meridian. This amendment is prompted by reports of FMS navigation position jumps as high as 300 nautical miles when crossing the 180 degree meridian. This condition, if not corrected, could result in aircraft navigation outside the assigned airspace.

EFFECTIVE DATE: February 6, 1989.

ADDRESSES: There is no applicable service information.

FOR FURTHER INFORMATION CONTACT: Mr. Herb Peters, Aerospace Engineer, Los Angeles Aircraft Certification Office, ANM-133L, FAA, Northwest Mountain Region, 3229 East Spring Street, Long Beach, California; telephone (213) 988-5353.

SUPPLEMENTARY INFORMATION: An aircraft operator, whose aircraft was equipped with dual Honeywell, Sperry FMZ-800 Flight Management Systems (FMS) and triple inertial reference systems (IRS), reported an FMS position jump after crossing the 180 degree meridian. Investigation revealed that the position jump was caused by a design error in the part of the FMS's navigation computer that determines present position when the system is receiving position information from three IRS. The investigation also revealed that these navigation computers operate satisfactorily when the system is receiving position information from two or fewer IRS, and that aircraft equipped with three IRS can prevent the FMS position jump by operation of the third IRS in the attitude mode (by selecting "ATT" using the appropriate third IRS mode select switch).

The magnitude of the inadvertent position jump can be as high as 300 nautical miles, either due east or due west from the aircraft's actual position. The FMS outputs navigation information to the aircraft's course deviation indicator, flight director, and autopilot. Such an FMS position jump, if not corrected, could cause the aircraft to be navigated off-course. Continued use of the erroneous data could cause the aircraft to be navigated outside its assigned airspace.

Since this condition is likely to exist on aircraft equipped with the deficient Honeywell, Inc., Sperry FMZ-800 FMS navigation computers and triple IRS, this AD requires a revision to the FAA-approved Airplane Flight Manual (AFM) or the FAA-approved Airplane Flight Manual Supplement (AFMS) to require that the third IRS be operated in the attitude mode on flights intending to cross the 180 degree meridian.

Honeywell has produced a family of FMS navigation computers, only some of which include the subject design error. This AD applies to any aircraft equipped with three IRS, and one or more of the deficient FMS navigation computers. The deficient navigation computers can be identified by the navigation computer's part number or the navigation computer's software configuration as indicated on the FMS control display unit (CDU).

This AD also provides for an optional terminating action which consists of replacing certain software in the deficient navigation computers with modified software. Although this action is currently optional, the FAA may consider further rulemaking action to require the replacement of the deficient computers in all affected aircraft.

Since a situation exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in an aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required).

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Honeywell, Inc.: Applies to Sperry FMZ-800 Flight Management System (FMS) navigation computers, part numbers 7004402-801, -811, or -832, if the FMS's are interfaced with and configured for the use of navigation data from triple inertial reference systems. These FMS navigation computers are known to be installed in, but not limited to Gulfstream Model G-IV and Canadair Model CL-601 series airplanes. Compliance required as indicated, unless previously accomplished.

To prevent FMS position jumps while crossing the 180 degree meridian, accomplish the following:

A. Within 15 days after the effective date of this AD, add the following to the Limitations Section of the FAA-Approved Airplane Flight Manual (AFM), or FAA-approved Airplane Flight Manual Supplement (AFMS). This may be accomplished by inserting a copy of this AD in the AFM or AFMS.

IF FLIGHT ACROSS THE 180 DEGREE MERIDIAN IS INTENDED, THE THIRD INERTIAL REFERENCE SYSTEM MUST BE OPERATED IN THE "ATT" MODE.

B. The required AFM or AFMS limitation, required by paragraph A., above, may be removed and the third IRS may be operated normally when the aircraft's FMS navigation computers are replaced, as follows:

1. Replace Honeywell P/N 7004402-801 (software configuration DEL-8N) computers with P/N 7004402-803 (software configuration DEL 10J), -804 -806, or -906 (software configuration NZ-8804) computers;

2. Replace Honeywell P/N 7004402-811 (software configuration DEL-9S) computers with P/N 7004402-813 or -903 (software configuration DEL 10P) computers;

3. Replace Honeywell P/N 7004402-832 (software configuration DEL-9T) with P/N 7004402-833 or -904 (software configuration NZ-8801) computers.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

This amendment becomes effective February 6, 1989.

Issued in Seattle, Washington, on January 4, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-787 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 88-NM-113-AD; Amdt. 39-6110]

Airworthiness Directives: Short Brothers, PLC, Model SD3-60 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Shorts Model SD3-60 series airplanes, which requires repetitive inspections of the engine power control cables, and replacement of the cable(s), if necessary. This amendment is prompted by reports of frayed or damaged wires in the power control cables. This condition, if not corrected, could lead to loss of engine power or loss of the pilot's control of engine power during flight, which could result in a forced engine shutdown. This amendment also provides for an optional terminating action for the required repetitive inspections.

EFFECTIVE DATE: February 17, 1989.

ADDRESSES: The applicable service information may be obtained from Short Brothers, PLC, Service Representative, 2011 Crystal Drive, Suite 713, Arlington, Virginia 22202-3702. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. William Schroeder, Standardization Branch, ANM-113; telephone (206) 431-1565. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington, 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations, to include a new airworthiness directive, applicable to Model SD3-60 series airplanes, to require repetitive inspections of the engine power control cables, and replacement of the cable(s), if necessary, was published in the **Federal Register** on September 13, 1988 (53 FR 35322).

Interested parties have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter supported the rule, but noted that there is a Revision 1 to Service Bulletin SD360-76-08, dated October 12, 1988, and recommended that this revision be reflected in the final rule. The FAA concurs and has revised the final rule to reflect Revision 1 as an alternate service information reference for the inspection procedures.

Since issuance of the Notice, Short Brothers has issued Service Bulletin SD360-76-09, dated October 1988, which describes procedures to replace the power control cables and pulleys. Such replacement terminates the need for the repetitive inspections. Accordingly, a new paragraph C. has been added to the final rule to indicate that the required repetitive inspections may be terminated following completion of the replacement of the power control cables and pulleys, in accordance with that service bulletin.

In addition, while the applicability statement in the Notice specified airplanes "as listed in Service Bulletin SD360-76-08," that service bulletin applies to "all SD3-60 aircraft." Therefore, the applicability statement of the final rule has been revised to apply to all Model SD3-60 series airplanes.

The FAA has determined that these changes will neither increase the economic burden on any operator, nor increase the scope of the AD.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes noted above.

It is estimated that 78 airplanes of U.S. registry will be affected by this AD, that it will take approximately 40 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be $124,800.

The regulations adopted herein will 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation

is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, Accpositive or negative, on a substantial number of small entities because few, if any, Shorts Model SD3-60 are operated by small entities. A final evaluaton has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends section 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Short Brothers: Applies to all Model SD3-60 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent loss of engine power during flight, accomplish the following:

A. Prior to the accumulation of 1,200 flight hours or within 60 days after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed 1,200 flight hours, inspect the engine power control cables for broken wires, in accordance with Shorts Service Bulletin SD360-76-08, dated May 9, 1988, or Revision 1, dated October 12, 1988.

B. If four or more broken wires are detected in any 24-inch length of cable during the inspection required by paragraph A., above, replace the cable with an airworthy cable assembly prior to further flight, and repeat the inspections required by paragraph A., at intervals not to exceed 1,200 flight hours.

C. The repetitive inspections required by paragraphs A. and B., above, may be terminated following completion of the replacement of the power control cables and pulleys, in accordance with Shorts Model SD3-60 Service Bulletin SD260-76-09, dated October 1988.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Standardization Branch, ANM-113.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishemnt of inspections and/or modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Short Brothers, PLC, Service Representative, 2011 Crystal Drive, Suite 713, Arlington, Virginia 22202-3702. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Transport Airplane Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective February 17, 1989.

Issued in Seattle, Washington, on December 28, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-791 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 88-AGL-12]

Control Zone Establishment and Transition Area Alteration; Wilmington, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The nature of this action is to establish a control zone area and alter the existing transition airspace near Wilmington, OH. Airborne Express hub operations take place nightly, Monday through Friday between 2300 to 0700 hours local time. Aircraft arrivals and departures during these hours are highly concentrated.

During these peak hours of operations in the vicinity of Airborne Airpark Airport, especially during marginal Visual Flight Rule (VFR) weather conditions, the number of VFR flights has increased. The FAA believes this mix between Instrument Flight Rule (IFR) and VFR aircraft is a degradation of air safety.

The intent of this action is to enhance safety for all potential users of this airspace. The establishment of a control zone will segregate aircraft using approach procedures in IFR conditions from other aircraft operating under VFR weather conditions in controlled airspace.

EFFECTIVE DATE: 0901 u.t.c., April 6, 1989.

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:

History

On Monday, July 25, 1988, the Federal Aviation Administration (FAA) proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish a control zone and alter the existing transition area near Wilmington, OH (53 FR 27870).

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. Five comments were received including Gail Lewis, Director Airspace, Aircraft Owners and Pilots Association (AOPA); Messrs. David Beam, Clinton County Airport Authority; Don Brown; Robert McLane, Highland County Airport Authority; and Ed Wright. Four of the commenters objected to the proposed action and one commenter offered recommendations.

All five comments expressed concerns that the proposal would negatively affect other area airports. The primary airports of concern include Clinton County, Barnett, and Hollister. Although it appears that Clinton County Airport borders the zone, in actuality the airport is outside the zone by a statute mile and will be minimally affected by this proposal. Barnett and Hollister are the only airports located within the proposed control zone. The FAA found that accommodations could be made for Hollister Airport by using a one mile cutout without compromising safety. No provisions could be made for Barnett since it underlies the Final Approach Area of the VOR RWY 04 Standard Instrument Approach Procedure.

Three commenters objected to the proposal because of the potential impact it would have on general aviation during daylight hours. These commenters stated that many aircraft are not radio equipped, and that a hardship would result in obtaining clearances when the control zone is effective. The FAA believes that these commenters were not cognizant of the fact that the control zone would only be operational at night. The proposed control zone was never intended to be effective 24 hours a day, nor during daylight hours.

The intent is to enhance safety during the nightly hours of Airborne Express hub operations and the control zone is only in effect during IFR weather conditions. In Notices of Proposed Rulemaking (NPRM) the phrase "The control zone is effective during specific dates and times established in advance by a Notice to Airmen * * *" is commonly used for the establishment of part-time control zones. In order to alleviate concerns of a 24-hour a day zone at Wilmington, OH, this rule includes the specific days and times the control zone is effective.

In addition to the above, one of the commenters stated that the control zone would have a negative economic and regulatory impact; the zone was not justifiable for training purposes; was inappropriate in terms of size and geographic layout; and, that Notices to Airmen (NOTAM's) are issued during Airborne Express hub operation hours and are working well.

The FAA believes the economic and regulatory effect to be minimal since the zone will be effective at night and only during periods when weather conditions are below three (3) miles visibility and/or 1000' ceiling. We agree that training does not justify the establishment for the control zone. The zone is solely based on enhancing safety during Airborne's hub operations. The size of the zone is based on data from the Flight Standards Division, and the type of aircraft flying in and out of the airport. From this information the zone is designed to protect all Standard Instrument Approach Procedures (SIAPs) at the airport. The NOTAM process is strictly for temporary situations and not intended for permanency. The NOTAM process does not allow for the advantage of a graphic on a chart.

There were other comments which were non-aeronautical in substance which were not made a part of this study.

Because there would be no significant impact on the operation and use of underlying airports, the FAA believes that the economic and regulatory impact effects of this action will be minimal.

Except for editorial changes, this amendment is the same as that proposed in the notice. Sections 71.171 and 71.181 of Part 71 of the Federal Aviation Regulations were republished in Handbook 7400.6D dated January 4, 1988.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations establishes a control zone area and modifies the existing transition area airspace near Wilmington, OH.

This control zone is necessary to enhance safety due to the increasing number of VFR flights in the vicinity of Airborne Airpark Airport, Wilmington, OH, during marginal and below VFR weather conditions and while air traffic operations are at peak activity.

The FAA believes this control zone will reduce the risk of midair collisions and promote the efficient control of air traffic. The airspace required would lower the floor of controlled airspace from 700 feet above the surface down to the surface within a five statute mile radius of the geographic center of Airborne Airpark Airport and with 4.25 statute miles each side of the 040 Midwest VOR radial, extending from the five mile radius to 8.5 statute miles northeast of the airport; and within 4.25 statute miles each side of the 214 Midwest VOR radial, extending from the five mile radius to 8.5 statute miles southwest of the airport excluding that portion of airspace within a 1-mile radius of Hollister Field Airport, Wilmington, OH (lat. 39°26'15" N., long. 83°42'30" W.). The control zone will be effective from 2300 to 0700 hours, local time, Monday through Friday.

The present transition area is being modified to accommodate existing SIAPs to Airborne Airpark Airport. The modification consists of reducing the 10 mile radius to an 8.5 mile radius and adding an extension from the radius to 13 miles northeast of the airport. The width of the extension includes 5.25 miles each side of the Midwest VOR 040 radial.

Aeronautical maps and charts will reflect the defined areas which will enable other aircraft to circumnavigate the areas in order to comply with applicable visual flight rule requirements.

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, Transition areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended 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.

§ 71.171 [Amended]

2. Section 71.171 is amended as follows:

Wilmington, OH [New]

Within a 5 mile radius of Airborne Airpark Airport, Wilmington, OH (lat. 39°25'46" N., long. 83°47'58" W.); and within 4.25 miles each side of the 040 Midwest VOR radial, extending from the 5 mile radius area to 8.5 miles northeast of the Airborne Airpark Airport; and within 4.25 miles each side of the 214 Midwest VOR radial, extending from the 5 mile radius area to 8.5 miles southwest of the Airborne Airpark Airport excluding that portion of airspace within a 1-mile radius of Hollister Field Airport, Wilmington, OH (lat. 39°26'15" N., long. 83°42'30" W.). This control zone is effective from 2300 to 0700 hours, local time, Monday through Friday.

§ 71.181 [Amended]

3. Section 71.181 is amended as follows:

Wilmington, OH [Revised]

That airspace extending upward from 700 feet above the surface within an 8.5 mile radius of Airborne Airpark Airport, Wilmington, OH (lat. 39°25'46" N., long. 83°47'58" W.); and within 5.25 miles each side of the 040 Midwest VOR radial, extending from the 8.5 mile radius to 13 miles northeast of Airborne Airpark Airport.

Issued in Des Plaines, Illinois, on December 21, 1988.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 89-794 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 97

[Docket No. 25771; Amdt. No. 1391]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: *Effective:* An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which the affected airport is located; or
3. The Flight Inspection Field Office which originated the SIAP.

For Purchase—

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA-200), FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS-420), Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-8277.

SUPPLEMENTARY INFORMATION: This amendment to Part 97 of the Federal Aviation Regulations (14 CFR Part 97) prescribes new, amended, suspended, or revoked Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR Part 51, and § 97.20 of the Federal Aviation Regulations (FARs). The applicable FAA Forms are identified as FAA Forms 8260-3, 8260-4, and 8260-5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form document is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

This amendment to Part 97 is effective on the date of publication and contains separate SIAPs which have compliance dates stated as effective dates based on related changes in the National Airspace System or the application of new or revised criteria. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPs). In developing these SIAPs, the TERPs criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs is unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this 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. For the same reason, the FAA certifies that this amendment 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 CFR Part 97

Approaches, Standard instrument, Incorporation by reference.

Issued in Washington, DC on January 6, 1989.

Robert L. Goodrich,

Acting Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 97 of the Federal Aviation Regulations (14 CFR Part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 g.m.t. on the dates specified, as follows:

PART 97—[AMENDED]

1. The authority citation for Part 97 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354(a), 1421, and 1510; 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983; and 14 CFR 11.49(b) (2)).

. . . *Effective April 6, 1989*

Valdez, AK—Valdez, LDA/DME-C, Amdt. 2
Casper, WY—Natrona County Intl, VOR/DME RWY 3, Amdt. 3
Casper, WY—Natrona County Intl, VOR/DME or TACAN RWY 21, Amdt. 7
Casper, WY—Natrona County Intl, ILS RWY 3, Amdt. 4

. . . *Effective March 9, 1989*

Fort Huachuca-Sierra Vista, AZ—Libby AAF/Sierra Vista Muni, LOC RWY 26, Amdt. 1, CANCELLED
Magnolia, AR—Magnolia Muni, NDB RWY 35, Amdt. 2, CANCELLED
Magnolia, AR—Magnolia Muni, NDB RWY 35, Orig.
St. Augustine, FL—St. Augustine, VOR RWY 13, Amdt. 4
Atlanta, GA—Dekalb-Peachtree, VOR/DME RWY 34, Orig., CANCELLED
Waycross, GA—Waycross-Ware County, NDB RWY 18, Amdt. 5

Mount Airy, NC—Mount Airy/Surry County, NDB-A, Amdt. 2
Whiteville, NC—Columbus County Muni, NDB RWY 5, Amdt. 3
Charleston, SC—Charleston AFB/Intl, VOR/DME or TACAN RWY 3, Amdt. 12
Charleston, SC—Charleston AFB/Intl, VOR/DME or TACAN RWY 15, Amdt. 13
Charleston, SC—Charleston AFB/Intl, VOR/DME or TACAN RWY 21, Amdt. 12
Charleston, SC—Charleston AFB/Intl, VOR/DME or TACAN RWY 33, Amdt. 12
Charleston, SC—Charleston AFB/Intl, RADAR-1, Amdt. 15

. . . *Effective February 9, 1989*

Windsor Locks, CT—Bradley Intl, VOR RWY 15, Orig.
Muncie, IN—Delaware County-Johnson Field, NDB RWY 32, Amdt. 10
Muncie, IN—Delaware County-Johnson Field, ILS RWY 32, Amdt. 7
Baltimore, MD—Martin State, NDB RWY 14, Amdt. 6
Baltimore, MD—Martin State, NDB RWY 32, Amdt. 6
Falls City, NE—Brenner Field, NDB-A, Amdt. 2
Cleveland, OH—Cleveland-Hopkins Intl, ILS RWY 28, Amdt. 19
Cleveland, OH—Cleveland-Hopkins Intl, RADAR-1, Amdt. 31
Cleveland, OH—Cleveland-Hopkins Intl, RNAV RWY 10, Amdt. 10

. . . *Effective December 23, 1988*

Baltimore, MD—Martin State, VOR/DME or TACAN 1 RWY 14, Amdt. 4
Baltimore, MD—Martin State, ILS RWY 32, Amdt. 2
Baltimore, MD—Martin State, RNAV RWY 14, Amdt. 3

[FR Doc. 89-795 Filed 1-12-89; 8:45am]
BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Part 777

[Docket No. 81269-8269]

Exports of Certain Alaska Crude Oil to Canada

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule with request for comments.

SUMMARY: Section 777.6(d)(1) of the Export Administration Regulations (EAR) permits the export of crude oil for use or consumption in Canada, except for crude oil transported by pipeline over a right-of-way granted pursuant to section 203 of the Trans-Alaska Pipeline Authorization Act (Alaska crude oil) and crude oil from the Naval Petroleum Reserves. This rule amends that section of the EAR to authorize the export of 50,000 barrels per day of Alaska crude oil to Canada. The amendment made by this rule implements Annex 902.5 of the United States-Canada Free-Trade Agreement which became effective on January 1, 1989.

EFFECTIVE DATES: This rule is effective January 13, 1989. Comments must be received by February 13, 1989.

ADDRESSES: Written comments (six copies) should be sent to: Rodney A. Joseph, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, Room 1600, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT:

Rodney A. Joseph, Office of Technology and Policy Analysis, Bureau of Export Administration, Telephone: (202) 377-8171.

SUPPLEMENTARY INFORMATION:

Background

On September 28, 1988, President Reagan signed the United States-Canada Free-Trade Agreement Implementation Act of 1988 (Pub. L. 100-449). Section 305 of that Act implements Annex 902.5(3) of the United States-Canada Free-Trade Agreement that deals with trade in energy goods, including a provision to export up to 50,000 barrels per day of Alaska North Slope crude oil. In order to implement this provision, section 305(a) amends section 7(d) of the Export Administration Act of 1979, as amended, to permit the export to Canada of 50,000 barrels per day of crude oil that has been transported by pipeline over a right-of-way granted pursuant to section 203 of the Trans-Alaska Pipeline Authorization Act. In addition, on December 31, 1988, President Reagan made certain findings and determinations under four other statutes that restrict exports of crude oil, specifically: section 103 of the Energy Policy and Conservation Act (42 U.S.C. 6212); section 28(u) of the Mineral Leasing Act, as amended by the Trans-Alaska Pipeline Authorization Act of 1973 (30 U.S.C. 185(u)); section 28 of the Outer Continental Shelf Lands Act (43 U.S.C. 1354); and 10 U.S.C. 7430(e).

The Statement of Administrative Action that accompanied the Free-Trade Agreement to the Congress contained a description of all the actions that would be taken to implement the crude oil provision, including a change in the EAR to allow petroleum (crude or products) to be exported, even in the absence of proof that the petroleum is not commingled with products of the Naval Petroleum Reserves.

This interim rule amends § 777.6 of the Export Administration Regulations to provide for the licensing of the 50,000 barrels per day to Canada to be distributed quarterly among applicants on a pro rata basis. In accordance with the implementation Act, this interim rule requires that any ocean transportation of Alaska crude oil authorization under this rule be by vessels documented under section 12106 of Title 46, United States Code. Furthermore, this interim rule provides that an application must be submitted on Form BXA-622P, that an applicant must have title to or a contract to purchase the quantity stated on the application, that licensed quantities for four calendar quarters may be combined into one or more shipments, ant that the applicant cannot transfer the license to another person.

This rule establishes procedures and time limits for filing applications and the procedures to followed in approving quantities for export by applicants. For each calendar quarter, applications may be filed in February, May, August, and November preceding the quarter for which authorization will be requested. Applications will be issued prior to the beginning of a quarter. For the First Quarter of 1989, applications will be accepted until February 1, 1989. Validated licenses will be issued by February 15, 1989. The quantities authorized will be computed based on the total amount of oil permitted by this rule for the period February 15 through March 31.

The interim rule also contains a provision to ensure that petroleum exports are not disallowed because of lack of proof that those exports are not derived from or commingled with petroleum from the Naval Petroleum Reserves.

This rule is being issued in interim form to permit timely implementation of the terms of the Agreement, while providing for public comment prior to the development of the final regulations. Comments are encouraged on all aspects of this rule. Comments are particularly requested concerning the method for determining the quantity to be authorized for each validated license and how licensed quantities should be determined when a pro-rata share would be less than an economical shipment quantity.

Rulemaking Requirements and Invitation to Comment

1. Because this rule concerns a foreign affairs function of the United States, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the

requirements of that Order. Accordingly, no preliminary or final Regulatory Impact Analysis has to be or will be prepared.

2. This rule contains a collections of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control numbers 0694–0005 and 0694–0027. The public reporting burden to apply for a short supply crude oil license is estimated to average 4 hours. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Administration, Bureau of Export Administration, Room 3889, Department of Commerce, Washington, DC 20230 and to the Office of Management and Budget Paperwork Reduction Projects, 0694–0005 and 0694–0027, Washington, DC 20503.

3. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedures Act (5 U.S.C. 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

4. Section 13(a) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from these requirements because it involves a foreign affairs function of the United States in that it implements a part of the United States-Canada Free-Trade Agreement.

This rule is not subject to the requirements of section 13(b) of the Export Administration Act because it is not imposing new controls. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, because of the importance of the issues raised by these regulations, this rule is issued in interim form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close February 13, 1989. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4086, Department of Commerce, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 377–2593.

5. This interim rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

List of Subjects in 15 CFR Part 777

Administrative practice and procedure, Exports, Forests and forest products, Petroleum, and Reporting and recordkeeping requirements.

Accordingly, Part 777 of the Export Administration Regulations (15 CFR Parts 768 through 799) is amended as follows:

PART 777—[AMENDED]

1. The authority citation for 15 CFR Part 777 is revised to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, by Pub. L. 100–180 of December 4, 1987, by Pub. L. 100–418 of August 23, 1988, and by Pub. L. 100–449 of September 28, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757), July 16, 1985); sec. 103, Pub. L. 94–163 of December 22, 1985 (42 U.S.C. 6212), as amended by Pub. L. 99–58 of July 2, 1985; sec. 101, Pub. L. 93–153 of November 16, 1973 (30 U.S.C. 185); sec. 28, Pub. L. 95–372 of September 18, 1978 (43 U.S.C. 1354); E.O. 11912 of April 13, 1976 (41 FR 15825, April 15, 1976), as amended; secs. 201(1) and 201(11)(e), Pub. L. 94–258 of April 5, 1976 (10 U.S.C. 7420 and 7430(e)); Presidential Findings of June 14, 1985 (50 FR 25189, June 18, 1985) and December 31, 1988 (54 FR 271, January 5, 1989); and sec. 125, Pub. L. 99–64 of July 12, 1985 (46 U.S.C. 466(c)).

2. In § 777.6, paragraph (d) is amended by revising the introductory text, by revising the NOTE that follows paragraph (d)(1)(i)(B), and by adding a new paragraph (d)(1)(x), as follows:

§ 777.6 Petroleum and petroleum products.

* * * * *

(d) *Issuance of Export Licenses.* Petroleum Commodity Groups, as identified in the following paragraphs, are defined in Supplement No. 2 to Part 777. Submit each application for a validated license to export a commodity from one of these groups to: Office of Export Licensing, ATTN: Short Supply, Bureau of Export Administration, U.S. Department of Commerce, Washington, DC 20230.

Include with each license application the documentation required by § 777.6(e). Applications will be considered subject to the appropriate provisions of this section.

(1) * * *

(i) * * *

(B) * * *

Note: Paragraphs 777.6(d)(1) (ii) through (vii) and (x) below apply to all crude oil, including Alaska North Slope crude oil.

* * * * *

(x) Exports of Certain Alaska Crude Oil to Canada. The Group A commodity will be exported under the following conditions:

(A) The commodity is domestically produced, has been transported by pipeline over a right-of-way granted pursuant to section 203 of the Trans Alaska Pipeline Authorization Act (43 U.S.C. 1652), and is being exported to Canada for consumption, in Canada;

(B) Any ocean transportation of the commodity will be made by vessels documented for United States coastwise trade under 46 U.S.C. 12106. Only barge voyages between the State of Washington and Vancouver, British Columbia, and comparable barge movements across waters between the U.S. and Canada may be excluded from this requirement. The Department of Commerce will determine, in consultation with the Maritime Administration, whether such transportation is "ocean" transportation; *and*

(C) The export complies with the provisions contained in paragraph (f) of this section.

* * * * *

3. In § 777.6, paragraph (e)(2), is amended by revising the introductory text and the introductory text of the affidavit and by removing paragraph (d) of the affidavit and footnote 3 as follows:

§ 777.6 Petroleum and petroleum products.

* * * * *

(e) *Documentation.* * * *

(1) * * *

(2) A sworn affidavit, signed by an authorized representative of the exporter, reading as follows (insert paragraph (a) or (b), as appropriate, and paragraph (c)):

AFFIDAVIT

"I, _____
(Name)

_____
(Title)
of _____
(Company)
HEREBY CERTIFY that to the best of my knowledge and belief the

_____
(Quantity)
bbls of _____
(Commodity)

* * * * *

4. In § 777.6, paragraph (f) is added to read as follows:

§ 777.6 Petroleum and petroleum products.

* * * * *

(f) *Exports of Certain Alaska Crude Oil Pursuant to § 777.6(d)(1)(x).* An average of no more than 50,000 barrels per day of Alaska crude oil transported by pipeline over a right-of-way granted pursuant to section 203 of the Trans-Alaska Pipeline Authorization Act for use or consumption in Canada will be authorized as follows:

(1) Authorization to export such Alaska crude oil will be granted on a quarterly basis. Applications will be accepted by the Office of Export Licensing *no earlier* than two months prior to the beginning of the calendar quarter in question, but must be received *no later* than the first day of the month preceding the calendar quarter. For example, for the calendar quarter beginning April 1 and ending June 30, applications will be accepted beginning February 1, but must be received no later than March 1.

(2) The quantity stated on each application must be the total number of barrels for the quarter—not a per day rate. This quantity must not exceed 50,000 barrels times the number of calendar days in the quarter.

(3) Each application shall include support documents providing evidence that the applicant has either:

(i) Title to the quantity of barrels stated in the application *or*

(ii) A contract to purchase the quantity of barrels stated in the application.

(4) The quantity of barrels authorized on each validated license for export during the calendar quarter will be determined by the Office of Export Licensing as a prorated amount based on:

(i) The number of licenses issued for the quarter;

(ii) The quantity requested on each license application; *and*

(iii) The total number of barrels that may be exported by all license holders during the quarter (50,000 barrels per day multiplied by the number of calendar days during the quarter).

(5) Applicant may combine their licensed quantities for as many as four consecutive calendar quarters into one or more shipments, *provided* that the validity period of none of the affected licenses has expired.

* * * * *

Dated: January 10, 1989.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 89-902 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-DT-M

Bureau of Economic Analysis

15 CFR Part 806

[Docket No. 80858-8262]

Direct Investment Surveys; Change in Reporting Requirements for the Annual Survey of Foreign Direct Investment in the United States

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends 15 CFR Part 806 by changing the reporting requirements for the BE-15, Annual Survey of Foreign Direct Investment in the United States. The survey is a mandatory survey conducted by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce, under authority of the International Investment and Trade in Services Survey Act.

Under a proposed rule published earlier in the **Federal Register**, BEA had planned to raise the exemption level for the BE-15 survey—the level below which reports are not required—from $10 million to $20 million. Since publication of the proposed rule, BEA has received public comment opposing the raising of the exemption level. Under this final rule, the exemption level for the survey will remain at $10 million, but, in order to keep the reporting burden to a minimum, a short form will be instituted for reporting by foreign-owned U.S. affiliates between the $10 and $20 million levels.

EFFECTIVE DATE: This rule will be effective February 13, 1989.

FOR FURTHER INFORMATION CONTACT: Betty L. Barker, Chief, International Investment Division (BE-50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 523-0659.

SUPPLEMENTARY INFORMATION: In the September 20, 1988, **Federal Register**, Volume 53, No. 182, 53 FR 36468, the Bureau of Economic Analysis published a notice of proposed rulemaking to raise the exemption level for the BE-15, Annual Survey of Foreign Direct Investment in the United States, from $10 million to $20 million, primarily to minimize the burden on respondents. Thereafter, a number of letters commenting on the proposed rule were received by BEA. One letter supported the increase in the exemption level on the grounds that it would have reduced the survey reporting burden without causing significant loss of data. The other letters opposed the increase in the exemption level on the grounds that it would have resulted in a deterioration of the database.

Because large affiliates account for a very high percentage of the foreign direct investment universe in value terms, the increase in the exemption level would not have significantly reduced the reliability of the data overall or for the vast majority of country, industry, and State cells published. However, it could have adversely affected the data for certain countries, industries, and States in which small investments account for a

significant share of the total. The additional data collected under a $10 million exemption level would ensure that the quality of the data in these cells is maintained. Thus, after careful consideration of the comments received, BEA has decided to leave the exemption level at $10 million, but, in an effort to keep the reporting burden to a minimum, to institute a short form for reporting by affiliates in the $10 to $20 million range.

The exemption level for a given survey is the level of a U.S. affiliate's assets, sales, or net income below which reporting is not required. (A U.S. affiliate is a U.S. business enterprise in which a foreign person owns or controls, directly or indirectly, 10 percent or more of the voting securities if an incorporated business enterprise or an equivalent interest if an unincorporated business enterprise.)

The BE-15 annual survey is part of BEA's regular data collection program for foreign direct investment in the United States. The survey is mandatory and is conducted pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. 3101-3108).

This rule will be effective with the BE-15 survey covering a U.S. affiliate's fiscal year ending during 1988. The 1988 forms will be mailed out in March 1989 and will be due May 31, 1989. The last BE-15 survey conducted covered the year 1986. (A BE-15 survey is not conducted in a year, such as 1987, when a BE-12 benchmark survey is conducted.)

BEA estimates that 5,100 U.S. affiliates will be required to file the BE-15 survey. Of these, 3,300 will be required to file the long form and 1,800 will be required to file the short form.

The public reporting burden for the long form is estimated to vary from 2 to 685 hours per response, with an average of 9 hours per response, and the burden for the short form is estimated to vary from 1 to 2 hours per response, with an average of 1.5 hours 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. Comments regarding the burden estimate, including suggestions for reducing this burden, may be sent to Director, Bureau of Economic Analysis (BE-1), U.S. Department of Commerce, Washington, DC 20230; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (0608-0034), Washington, DC 20503.

Executive Order 12291

BEA has determined that this proposed rule is not "major" as defined in E.O. 12291 because it is not 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, 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.

Executive Order 12612

This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 12612.

Paperwork Reduction Act

The collection of information requirement in this final rule has been approved by OMB (OMB No. 0608-0034).

Regulatory Flexibility Act

The General Counsel, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this rule will not have a significant economic impact on a substantial number of small entities. U.S. affiliates below the $10 million level are exempt from reporting in the survey. In addition, in order to keep the reporting burden on smaller entities to a minimum, a short form is being instituted for affiliates in the $10 to $20 million range. Therefore, a regulatory flexibility analysis was not prepared.

List of Subjects in 15 CFR Part 806

Economic statistics, Foreign direct investment in the United States, Reporting and recordkeeping requirements.

Dated: December 20, 1988.

Allan H. Young,

Director, Bureau of Economic Analysis.

For the reasons set forth in the preamble, BEA amends 15 CFR Part 806 as follows:

PART 806—[AMENDED]

1. The authority citation for 15 CFR Part 806 continues to read as follows:

Authority: 5 U.S.C. 301, 22 U.S.C. 3101-3108, and E.O. 11961, as amended.

2. Section 806.15 is amended by revising paragraph (i) to read as follows:

§ 806.15 Foreign direct investment in the United States.

* * * * *

(i) *Annual report form.* BE-15—Annual Survey of Foreign Direct Investment in the United States: One report is required for each consolidated U.S. affiliate, except a bank, exceeding an exemption level of $10,000,000. A long form, Form BE-15(LF), must be filed by each nonbank U.S. affiliate for which at least one of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes—exceeds $20,000,000 (positive or negative); a short form, Form BE-15(SF), must be filed by each nonbank U.S. affiliate for which at least one of the three items exceeds $10,000,000 but no one item exceeds $20,000,000 (positive or negative). U.S. affiliates that are banks are exempt from the reporting requirements of this survey.

* * * * *

[FR Doc. 89-831 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-06-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs Not Subject To Certification; Levamisole Resinate and Famphur Paste

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: In the **Federal Register** of June 24, 1988 (53 FR 23756), the Food and Drug Administration (FDA) published a document which amended the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by American Cyanamid Co. The NADA provides for use of a paste containing levamisole resinate and famphur for treating cattle infected with certain worms, grubs, and lice. FDA is amending the Regulation for the paste so that its warning statement will be

consistent with those of the other levamisole drug products.

EFFECTIVE DATE: January 13, 1989.

FOR FURTHER INFORMATION CONTACT: Dianne T. McRae, Center for Veterinary Medicine (HFV-135), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4913.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 24, 1988 (53 FR 23756), FDA published a document which amended the animal drug regulations to reflect approval of NADA 139-858 filed by American Cyanamid Co. The NADA provides for the use of a paste containing levamisole resinate and famphur for treating cattle infected with specified worms, grubs, and lice.

The regulation reflecting approval of the paste contains the warning statement "Do not use in lactating or dry dairy cows within 10 days of freshening." However, regulations covering several other levamisole-containing drug products contain statements warning against use of the drugs in dairy animals of breeding age. Accordingly, the regulation for the paste is being amended in 21 CFR 520.1242g(f)(3) so that its warning statement will be consistent with those of the other drug products.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

1. The authority citation for 21 CFR Part 520 continues to read as follows:

Authority: Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)); 21 CFR 5.10 and 5.83.

§ 520.1242g [Amended]

2. Section 520.1242g. *Levamisole resinate and famphur paste* is amended in paragraph (f)(3) by removing the fourth sentence which reads "Do not use in lactating or dry dairy cows within 10 days of freshening." and adding in its place "Do not administer to dairy animals of breeding age."

Dated: January 9, 1989.

Robert C. Livingston,

Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 89-833 Filed 1-12-89; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 94

[108.880]

International Child Abduction

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This rule adds a Part 94 to 22 CFR for the purpose of setting forth the functions of the U.S. "Central Authority" under the 1980 Hague Convention between the United States and other countries on the Civil Aspects of International Child Abduction. The functions of a "Central Authority" are enumerated in the Convention and further defined in federal implementing legislation. The purpose of this regulation is to explain in non-technical terms how the U.S. "Central Authority" will function.

EFFECTIVE DATE: Final rule effective July 1, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Carmen A. DiPlacido, Director, Office of Citizens Consular Services, 202-647-3666.

SUPPLEMENTARY INFORMATION: The Department of State published in 53 FR 23608 of June 23, 1988 an interim rule to provide an opportunity for comment prior to the entry into force of the Convention.

We have received no comments, and are therefore adopting the interim as the final rule with the effective date of July 1, 1988 as originally published.

This rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, and, for the purposes of certification required by the Regulatory Flexibility Act, will not have an impact on small business entities. The collection of information requirements contained in the rule have been approved by the Office of Management and Budget (OMB) under section 3504(h) of the Paperwork Reduction Act of 1980.

List of Subjects in 22 CFR Part 94

International child abduction.

For the reasons set forth in the preamble, Part 94, added as an interim rule on June 23, 1988, (53 FR 23608) is adopted as final without change.

Joan M. Clark,

Assistant Secretary for Consular Affairs.

December 23, 1988.

[FR Doc. 89-619 Filed 1-12-89; 8:45 am]

BILLING CODE 4710-06-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 626

[FHWA Docket No. 87-16]

RIN 2125-AA88

Pavement Policy for Highways

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This document revises the regulation on pavement design policy and procedures in order to set forth a policy to select, design, and manage Federal-aid highway pavements in a cost-effective manner and to identify pavement work eligible for Federal-aid funding. The revisions will require each State Highway Agency (SHA) to have a Pavement Management System (PMS) that is acceptable to the FHWA and is based on concepts described in American Association of State Highway and Transportation Officials (AASHTO) publications including its 1985 "Guidelines on Pavement Management." Each SHA will be required to have a process that is acceptable to FHWA for the type selection and design of new or reconstructed pavement structures. Each SHA will also be required to have a pavement rehabilitation selection process that is acceptable to FHWA and that includes identification of candidate solutions and a methodology for structural design. The revisions will replace the existing regulation to assure that appropriate practices and procedures are utilized by the SHAs in order to promote safe and cost-effective pavements.

EFFECTIVE DATE: January 13, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Norman J. Van Ness, Director, Office of Highway Operations, (202) 366-0341 or Mr. Michael J. Laska, Office of Chief Counsel, (202) 366-1383. Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:30 a.m. to 4:00 p.m. e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: Pavement design policy and procedures for Federal-aid highway projects are contained in 23 CFR Part 626. The standards, policies, standard specifications, guides, and references (publications) that are approved by the FHWA for application on all Federal-aid highway projects are listed in 23 CFR Part 625. The standards, policies, and standard specifications for pavement

design are cited in § 625.4(a)(11). Part 626 currently approves and incorporates by reference the publication entitled the "American Association of State Highway and Transportation Officials (AASHTO) Interim Guide for Design of Pavement Structures, 1972," Chapter III Revised 1981, for application on Federal-aid projects. On May 7, 1986 (51 FR 16830), the list of publications contained in Part 625 was revised and updated. In order to accurately differentiate between those publications establishing Federal standards and those containing guidance and information, a new section entitled "Guides and references" was added to Part 625. For those publications that provide informational and guidance material only, the incorporation by reference was withdrawn and the publication citation was placed in the new guide and reference section. By the May 7, 1986, final rule, an additional publication entitled "Guidelines on Pavement Management, AASHTO 1985" (Pavement Management Guide) was added as a reference at § 625.5(a)(7). To be consistent with the May 7, 1986, policy on reference citations, the FHWA will add the 1986 publication entitled "AASHTO Guide for Design of Pavement Structures" (1986 Guide) to § 625.5(a), "Guides and references." The AASHTO views the Pavement Management Guide and the 1986 Guide as information and guidance materials and not as technical policies and standards. The FHWA shares this view and is revising Part 626. A notice of proposed rulemaking (NPRM) was published in the **Federal Register** on January 26, 1988, (53 FR 2041) in which the FHWA requested comments on the proposed regulation. Originally comments were to be received by April 25, 1988; however, pursuant to a request received, the comment period was extended to May 27, 1988, by notice published in the **Federal Register** on April 11, 1988, (53 FR 11875).

Discussion of Comments

Sixty-nine written comments were received in the docket. Of the sixty-nine comments, thirty-six were from SHAs, fourteen were from county and city highway agencies, three were from local planning organizations and sixteen from other public and private organizations or individuals. The majority of comments received, including those from AASHTO, support both the intent and content of the proposed policy. The following summarizes the comments, suggestions and actions taken.

Several commenters expressed concern that the 1986 "AASHTO Guide for Design of Pavement Structures" (1986 Guide) was being mandated as a standard. It was never the intent of the FHWA to mandate the use of 1986 Guide. The FHWA recognizes that there are several acceptable pavement design procedures. The States may use the design procedures outlined in the 1986 Guide or they may use other pavement design procedures that either by past performance or by support from research are satisfactory for the pertinent conditions.

A number of commenters addressed PMS technical issues, many of which were discussed in the supplementary information section of the proposed rule. Most of these comments stated that the FHWA should not be too prescriptive regarding the detailed features and analysis procedures to be contained in a PMS. As explained in the following paragraphs, it is the intent of this policy that SHAs develop a PMS tailored to their specific needs and circumstances. The listing of key features included in the supplementary information to the proposed rule is intended to demonstrate typical processes and scope of PMSs. The "Pavement Management Guide" is cited as guidance, and along with other PMS-related materials will be used as reference material for determining the acceptability of an SHA's PMS. The FHWA will allow flexibility to SHAs in the development of their PMS.

A number of commenters stated that a complete detailed inventory, including information on pavement materials and structural composition, represents a great amount of effort and should not be required. The statement concerning detailed inventory was part of the discussion on the "Pavement Management Guide" concepts, and as such represents guidance on good practice in PMS development, but it is not a required part of a PMS. The use of inventories with extensive information such as layer types, thicknesses, material properties, etc. can be very valuable within a PMS; particularly when conducting investigations into the performance of a range of design parameters. It may be appropriate to collect and store this information on higher-order routes only where reliability is more critical and loads are more extensive. One commenter stated that the policy should distinguish between network level and project level data needs. The FHWA considers both levels to be important; however, the SHAs will have the flexibility to determine the appropriate data requirements for each level.

One commenter stated that traffic control devices such as edge and center lines should be included as part of the PMS data elements. The FHWA intent regarding the PMS requirement is restricted to achievement of safe, cost-effective structural and ride quality performance of the pavement. There is nothing to prevent an SHA from including items such as edge and center lines, signs, guardrail, etc. in a more complete inventory. While the FHWA recognizes the benefits that can be obtained from such data, it is not appropriate to require it as part of the PMS.

Section 626.3 as published in the notice of proposed rulemaking contained ten definitions. A few commenters suggested that the definitions be the same as those used by AASHTO. This was accomplished to the extent believed prudent. The definition for "analysis period" was changed to more closely conform to the ASSHTO definition. The definition for "pavement structure" remains the same as the AASHTO definition. Several commenters objected to the inclusion of user costs in the definition of "life cycle cost." They pointed out that there is substantial disagreement in the highway industry regarding the make-up of user costs, as well as considerable disagreement in the literature regarding the specific magnitudes of these costs. It is recognized that the current state-of-the-art includes many uncertainties which may have an unrealistic or unbalanced effect on life cycle cost analyses. Because the definition of "analysis period" was revised, thus eliminating the reference to life cycle costs, and because of these uncertainties relating to user costs, the definition of "life cycle cost" has been deleted. The definitions for "low volume road" and "pavement design" have also been eliminated, as they have become unnecessary. The definition for "pavement maintenance" has been modified to: "all routine actions, both responsive and preventative, which are taken by a State or other parties to preserve the pavement structure including joints, drainage, surface, and shoulders, as necessary for its safe and efficient utilization." The definition for "pavement management" has been replaced with a definition for "pavement management system", as the concept of an all-inclusive pavement management has been removed. One commenter questioned the use of the phrase "* * * finding optimum strategies * * *" within the definition of pavement management (now pavement management system). The commenter stated that optimizing a product implies that some aspect of the product will be maximized; yet, the parameter to be optimized (such as

years of life or pavement condition) is not specified in the definition. The FHWA agrees that this pharase is somewhat ambiguous, and has replaced "optimum" with "cost-effective" in the definition of PMS. The definitions for "pavement performance period", "pavement reconstruction", and "pavement rehabilitation" remain unchanged.

Section 626.5(a) published in the proposed rulemaking required that each SHA have a PMS approved by the FHWA. Several commenters stated that it is not necessary to require that SHAs have PMS, or that it is not the role of the FHWA to mandate implementation of such a system. One commenter went further to state that these requirements were contrary to the Administration's "new Federalism," wherein States are to be given as much flexibility as possible when expending Federal funds. On the other hand, most of the commenters took a very positive view of the PMS requirement and the role of the FHWA, and endorsed the proposed rule. The FHWA continues to believe that it is appropriate to require that SHA's have a system that will help assure that the Federal investment is used in a way that protects safety and provides cost-effective pavement life cycles. General guidelines on the various features of a PMS are not considered sufficient. Only a complete PMS will enable an SHA to effectively produce the full range of information needed to assist decisionmakers. To better define the FHWA role, the requirement that a PMS be "approved by FHWA" has been changed to "acceptable to FHWA." The goal is to have each SHA implement a PMS which will be used in the State's decisionmaking process. It is not the intent to produce voluminous documentation for FHWA approval. The new language encourages each SHA to design a PMS tailored to its own needs, and to work with the FHWA during the development process to assure that it will be capable of providing the desired products.

Most of the local agency commenters, and a number of SHAs, indicated that the rule should not require the PMS to include Federal-aid routes under city and county jurisdiction. The FHWA never intended that this be the case. The FHWA's original statement that "each SHA shall have a pavement management system * * *" assumed that the PMS would be limited to routes under SHA jurisdiction. The final rule clearifies this by adding the phrase "* * * under its jurisdiction" to the sentence. Several commenters on this issue went on to state the significant benefits of local-level PMSs, and the value of some level of coordination between SHA and local-level systems. The FHWA agrees with these comments, and a sentence expressing the desirability of a local PMS for pavements under local jurisdiction has been added.

Section 626.5(a) of the proposed rulemaking also stated that the PMS was to be implemented within 4 years from the effective date of this regulation. Several commenters indicated that more than 4 years would be required to implement a PMS. In order to restrict required actions to areas of highest Federal interest, the final rule requires that only rural arterial and urban principal arterial routes under SHA jursidiction must be a part of the PMS. Rural arterial routes are defined as those routes having a functional classification of Interestate. Other Principal Arterial, or Minor Arterial. Urban principal arterial routes are defined as those routes having a functional classification of Interstate. Other principal Arterial, and Other Freeways and Expressways. The SHAs are encouraged to expand coverage to other routes, but it is not a requirement. With the PMS coverage limited to only the more important routes, the 4 year period is considered to be reasonable and appropriate. In addition, the requirement that a PMS be "implemented" in 4 years has been changed to "operational" within 4 years. This was done in recognition that some components of a PMS may not be fully implemented in 4 years, especially those which may require several years' worth of performance data. The FHWA would expect that the framework and basic procedures of a PMS would be in-place and operational within the 4 year period.

A few commenters complained that the pavement management requirement would necessitate significant expenditures for the purchasing of equipment and the measuring of pavement condition and distress. Many States have already purchased highly sophisticated pavement condition measuring devices such as profile-measuring equipment and video distress gathering systems. Significant productivity, accuracy, and repeatability benefits can be gained from using these systems, and they are continually being improved. However, the FHWA recognizes that acceptable PMSs can be developed without the use of these systems, and they are not required as part of SHA's PMSs. The SHA's are provided the flexibility necessary to develop a practical and implementable PMS acceptable to the FHWA, within reasonable resource levels.

Section 626.5(b) of the proposed rulemaking prescribed policy for the design of new, reconstructed, and rehabilitated pavements. Based on the number of comments received, it became apparent that this section should be split into two paragraphs for purposes of clarification. Section 626.5(b) now prescribes policy for the design of new and reconstructed pavements, whereas § 626.5(c) prescribes policy for the design of rehabilitated pavements.

Section 626.5(b) of the proposed rulemaking required that a comprehensive payment type selection and design process for new, reconstructed, and rehabilitated pavements be included as part of the PMS. Several commenters stated that pavement design should not be required as part of the functional responsibility of a PMS, or in the same SHA organizational element as a PMS. Others stated that the PMS should not decide the final design alternative. One commenter stated that the rule erroneously implied that States center their entire pavement strategy on data and reports generated from the PMS. The FHWA agrees with these comments. It is not the intent to change State organizational structures or to require that the PMS itself include final pavement design functions. A PMS is best characterized as a tool for decisionmakers to consult for information, which is then combined with engineering judgment and other factors in reaching decisions. It is clear that the characterization of pavement management as encompassing "all the activities involved in the planning, design, construction, maintenance, evaluation, and rehabilitation of pavements" is too extensive when translating to existing SHA organizational lines of authority and functions. While the FHWA believes that this concept is valid when viewing SHA functions as a whole, it is certainly not the FHWA's intent that this rule needlessly disrupt current operating procedures. Accordingly, the FHWA is not requiring that the final pavement type selection and design processes be part of the PMS. Instead, each SHA will be required to have a type selection and design process which is acceptable to the FHWA. However, the type selection and design analytical processes should be coordinated with the PMS process, and draw upon and use the inventory and performance data which is contained in the PMS database.

Section 626.5(b) also required that an analysis period of at least 30 years be used for all projects except that a shorter period may be used for low volume roads. Many commenters objected to the mandatory 30 year analysis period and the term "low volume" roads as a threshold for a shorter analysis period. They felt that 30 years was an arbitrary number. Most agencies did not have the historic performance data to make an economic analysis of several alternatives for a 30 year period. Because of these concerns, the policy has been revised and the low volume road threshold eliminated. The 30-year analysis period was originally established to ensure that at least one rehabilitation operation was included during the economic analysis. This section was reworded to require that the analysis period include an initial performance period, plus at least one rehabilitation operation. The reference to a shorter analysis period for low volume roads was eliminated, as it is considered to be no longer necessary.

Section 626.5(b) also required that an engineering and economic analysis of an appropriate range of strategies be performed for all new, reconstructed, and rehabilitated pavements. For existing pavements, the analysis should include both reconstruction and rehabilitation alternatives. Several commenters stated that requiring an economic analysis for the design of all rehabilitated pavements would not be practical, as it would generate unnecessary paperwork. The FHWA agrees that this would be the case for minor rehabilitation projects, where the corrective strategy is obvious. The policy no longer requires an economic analysis of alternative actions for all rehabilitation projects. However, in order to obtain the goal of achieving the best return possible for the money expended, it is considered essential that major rehabilitation projects include an economic analysis. For projects involving rehabilitated pavements, an engineering and an economic analysis of alternative rehabilitation strategies will be required if the pavement is approaching terminal serviceability and exhibiting significant structural deficiencies. Alternative rehabilitation strategies should include both reconstruction and rehabilitation alternatives. The analysis period used shall be the same for all alternatives. If an existing pavement structure is sound and the cost to restore serviceability is minor when compared to the cost of a new pavement structure or major rehabilitation, an engineering and economic analysis of alternative actions may not be necessary.

Section 626.5(c) as published in the proposed rulemaking required that each project involving construction of a pavement have a skid resistant surface. It also required all pavement rehabilitation and reconstruction projects to incorporate other cost-effective opportunities to enhance safety. Several commenters requested that the reference to skid resistance surface be deleted, whereas one commenter requested that specific skid values be provided. It is felt that the existing FHWA policy and technical guidance on this subject are adequate. No revisions were made to the safety section of the policy, but it is now referenced under § 626.5(d).

One commenter criticized the FHWA proposal for not providing uniform performance standards for pavements. In particular, the commenter cited the lack of a threshold for coefficients of friction and the absence of performance criteria for maintained levels of skid resistance. According to this commenter, the FHWA is acting irresponsibly from a safety standpoint by basing the skid resistance requirement on subjective factors. The FHWA disagrees with this comment. Imposing numerical requirements for minimum skid resistance would create many legal difficulties. Such requirements would impose a severe financial burden on all agencies involved in construction of pavements under the Federal-aid highway program. Many city and county agencies would be forced to discontinue construction of Federal-aid projects, creating a financial hardship for them. Many other cities and counties, to avoid the legal ramifications resulting whenever a pavement failed to meet the requirements, would also decide to stop using Federal-aid funds. On the resulting non-Federal-aid projects, officials would not have to comply with any minimum skid resistance values included in the pavement policy. In addition, although most projects are designed with safety in mind, the FHWA recognizes that reasonable opportunities to enhance safety are sometimes overlooked. Under the new pavement policy, State and local officials developing Federal-aid projects would have to comply with § 626.5(d), which would ensure that other opportunities to enhance safety are considered. By causing many of these officials to forego Federal-aid, incorporating minimum requirements to increase skid resistance would have the opposite effect. These non-Federal-aid projects would not be covered by the skid resistance requirements or § 626.5(d). Overall safety would be significantly less than if Federal-aid funds were used and the projects were developed in accordance with the proposed rulemaking and other Federal-aid requirements. Thus, this commenter's recommendation was not adopted. The FHWA believes that existing policies and technical guidance are adequate.

Proposed § 626.7(a) required that the design of new and reconstructed pavements be based on the approved pavement management system. As discussed previously, several commenters indicated that pavement design should not be placed by mandate under the organizational responsibility of a PMS, or that the PMS should not decide the design alternative. Section 626.5(b) was subsequently modified to require that each SHA have a design process acceptable to the FHWA. The inclusion of this design process within the PMS is optional. Section 626.7(a) is thus being modified to provide consistency with § 626.5(b) by requiring that the design of new and reconstructed pavements be based on the SHA's pavement type selection and pavement design processes.

Proposed § 626.7(b) required that the design of rehabilitated pavements both be a cost-effective solution based on the approved PMS and provide a minimum performance period of 8-years. Longer performance periods were recommended on high type, high volume facilities, especially where traffic disruption costs were significant. A provision for exceptions to the 8-year minimum performance period was provided, when supported by historical performance data and economic analyses. This section received a large number of comments.

Several commenters stated that requiring a detailed economic analysis of alternative actions for the design of all rehabilitated pavements would not be practical, as it would generate unnecessary paperwork. This is felt to be the case in many minor rehabilitation projects, where the corrective strategy is obvious. Therefore, in those cases where the existing pavement structure is sound and the cost to restore serviceability is minor when compared to the cost of a new pavement structure, a detailed economic analysis is not necessary. However, as discussed previously, in order to obtain the goal of achieving the best return possible for the money expended, it is considered essential that major rehabilitation projects include an economic analysis of the alternative actions. Section 626.5(c) has been modified to require an economic

analysis for major rehabilitation projects as part of the pavement rehabilitation selection process, which must be acceptable to the FHWA. Since these analyses are part of the process, it is no longer necessary to refer to them under § 626.7(b).

As discussed previously, several commenters responded that the design of rehabilitated pavements should not be a required element of a PMS. Section 626.5(c) has been modified to require that each SHA have a pavement rehabilitation selection process that is acceptable to the FHWA. This selection process shall include a methodology for structural design. The inclusion of this design process within the PMS is optional. Section 626.7(b) has thus been modified to conform with § 626.5(c) by eliminating the requirement that the design be based on the PMS.

Several commenters suggested that the minimum performance period of 8 years was too restrictive and recommended that it be shortened. As discussed previously, the proposed rulemaking addressed all Federal-aid systems, whereas § 626.5(a) has been revised so that only rural arterials and urban principal arterials are covered by a SHA's PMS. While all of these routes are to be included in the PMS, it is recognized that some routes are far more important than others. Section 626.7(b) has subsequently been modified to require a minimum performance period of 8-years only for rehabilitation projects on routes classified as Interstate, Other Principal Arterials (both rural and urban), and Other Freeways and Expressways, regardless of jurisdiction. For all other Federal-aid pavement rehabilitation projects, a minimum performance period of 5 years may be allowed.

As a result of the above change, the lower order of the Federal-aid system is now subject to the 5-year minimum performance period for rehabilitation projects. There is no provision for exceptions to the 5-year performance period. Shorter term strategies on these types of roadways are considered maintenance. Exceptions may be granted to the 8-year performance period on a project-by-project basis.

Proposed § 626.7(c) required that pavement maintenance not be eligible for Federal-aid funding. No comments were received, and this section was not modified.

Based on a further review and consideration of comments received, the FHWA is establishing a policy which will ensure that SHAs utilize appropriate practices and procedures to provide safe and cost-effective pavements. The SHAs will have a PMS that is acceptable to the FHWA and that covers the more major routes under their jurisdiction. The PMS shall be operational within four years. Each SHA will be required to have a process that is acceptable to the FHWA for the type selection and design of new and reconstructed pavement structures. Each SHA will also be required to have a pavement rehabilitation selection process that is acceptable to the FHWA and that includes identification of candidate solutions and a methodology for structural design.

Regulatory Impact

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant rgulation under the regulatory policies and procedures of the Department of Transportation. The FHWA has also determined that the expected impact of these revisions will be minimal. This determination is based on the fact that the SHAs will be required to merely formalize the pavement management processes that are currently being followed. In addition, the basic design criteria for pavement design remains essentially unchanged. The material contained in the publications "Guidelines on Pavement Management, AASHTO 1985" and the 1986 "AASHTO Guide for Design of Pavement Structures" is not in fact a policy or standard, but simply provides guidance for use at the discretion of the designer. The SHAs will be allowed to continue to use the same basic pavement design procedures based on past performances. Variation from present practices and technical criteria will not be significant. As stated in the preamble, the preparation of a Pavement Management System (PMS) should not place any undue burdens on the States' resources. As a practical matter, most SHAs have informally been establishing a procedure for the selection and design of new pavement structures and rehabilitation strategies. Therefore, a full regulatory evaluation is not required. For the same reasons and under the criteria of the Regulatory Flexibility Act (Pub. L. 96–354), it is hereby certified that this action will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96–511), the reporting or recordkeeping requirements that are included in the proposed regulation will be submitted for approval to the Office of Management and Budget.

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.

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.

(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.)

List of Subjects in 23 CFR Part 626

Grant programs—transportation, Highways and roads, Pavement policy, Reporting and recordkeeping requirements.

In consideration of the foregoing, the FHWA hereby amends Chapter I of Title 23, Code of Federal Regulations, Part 626 as set forth below.

Issued on January 5, 1989.

Robert E. Farris,

Federal Highway Administrator.

The FHWA is revising 23 CFR Part 626 as follows:

PART 626—PAVEMENT POLICY

Sec.

626.1 Purpose.
626.3 Definitions.
626.5 Policy.
626.7 Eligibility.

Authority: 23 U.S.C. 101(e), 109, and 315; 49 CFR 1.48(b).

§ 626.1 Purpose.

To set forth a policy to select, design, and manage Federal-aid highway pavements in a cost-effective manner and identify pavement work eligible for Federal-aid funding.

§ 626.3 Definitions.

(a) "Analysis period." The period of time for which the economic analysis is to be made.

(b) "Pavement maintenance." All routine actions, both responsive and preventative, which are taken by the State or other parties to preserve the pavement structure, including joints, drainage, surface, and shoulders, as necessary for its safe and efficient utilization.

(c) "Pavement management system." A set of tools or methods that assist

decisionmakers in finding cost-effective strategies for providing, evaluating and maintaining pavements in a serviceable condition.

(d) "Pavement performance period." The period of time that a newly constructed, rehabilitated or reconstructed pavement will perform before reaching its terminal serviceability. This may also be referred to as service life.

(e) "Pavement reconstruction." Construction of the equivalent of a new pavement structure which usually involves complete removal and replacement of the existing pavement structure including new and/or recycled materials.

(f) "Pavement rehabilitation." Resurfacing, restoration, and rehabilitation (3R) work undertaken to restore serviceability and to extend the service life of an existing facility. This may include partial recycling of the existing pavement, placement of additional surface materials or other work necessary to return an existing pavement, including shoulders, to a condition of structural or functional adequacy.

(g) "Pavement structure." A combination of a subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

§ 626.5 Policy.

(a) *Pavement Management System.* Each State highway agency (SHA) shall have a pavement management system (PMS) that is acceptable to the FHWA and is based on concepts described in American Association of State Highway and Transportation Officials publications including its 1985 "Guidelines on Pavement Management." The SHA's PMS shall cover all Rural Arterial (Interstate, other Principal Arterials and Minor Arterials) and Urban Principal Arterial (Interstate, other Freeways and Expressways, and Other Principal Arterials) routes under its jurisdiction. The expansion of a SHA's PMS to include all rural and urban arterials, regardless of jurisdiction, is desirable. The development of a local PMS for pavements under local jurisdiction is also desirable. The SHA's PMS shall be operational within a reasonable period of time, not to exceed 4 years from January 13, 1989.

(b) *Pavement Design—New and Reconstructed Pavements.* Each SHA shall have a process that is acceptable to the FHWA for the type selection and design of new and reconstructed pavement structures. The type selection process shall include an engineering and economic analysis for alternate designs. The analysis period selected shall be the same for all alternates being considered.

(c) *Pavement Design—Rehabilitated Pavements.* Each SHA shall have a pavement rehabilitation selection process that is acceptable to the FHWA and that includes identification of candidate solutions and a methodology for structural design. For pavements approaching terminal serviceability and exhibiting significant structural deficiencies, the process shall include procedures for making an engineering and economic analysis of alternative rehabilitation strategies. These alternative rehabilitation strategies should include both reconstruction and rehabilitation alternatives.

(d) *Safety.* Each project involving construction of a pavement shall have a skid resistant surface. Pavement rehabilitation and reconstruction projects shall also incorporate other cost-effective opportunities to enhance safety as required by 23 CFR 625.2.

§ 626.7 Eligibility.

(a) *New and Reconstructed Pavements.* To be eligible for Federal-aid funding, the design of new and reconstructed pavement structures shall be a cost-effective solution based on the State's pavement type selection and pavement design processes.

(b) *Rehabilitated (3R) Pavements.* To be eligible for Federal-aid funding, the design of rehabilitation pavement projects on routes classified as Interstate, Other Principal Arterials (rural and urban), and Other Freeways and Expressways, regardless of jurisdiction, shall provide for a performance period of at least 8 years. The FHWA may approve exceptions to the 8-year performance requirement when the State's historical performance data indicate that a lesser period would be appropriate. A minimum performance period of 5 years may be approved for all other Federal-aid pavement rehabilitation projects.

(c) *Pavement Maintenance.* Pavement maintenance as defined under 23 CFR 626.3(b) is not eligible for Federal-aid funding.

[FR Doc. 89-875 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-22-M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2610

Payment of Premiums; Interest Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Interim rule.

SUMMARY: This is an amendment to the Pension Benefit Guaranty Corporation's interim regulation on Payment of Premiums, which was published on June 30, 1988 (53 FR 24906). Appendix B to the interim regulation contains a table setting forth the interest rates that are required by statute to be used in valuing a plan's vested benefits for purposes of determining the amount of the premium due to the PBGC. This amendment adds to that table the interest rate applicable to plan years beginning in January 1989.

EFFECTIVE DATE: January 13, 1989.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Senior Counsel, Office of the General Counsel (Code 22500), Pension Benefit Guaranty Corporation, 2020 K Street NW., Washington, DC 20006; telephone 202-778-8823 (202-778-8859 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Section 9331 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, amended section 4006 of the Employee Retirement Income Security Act of 1974 ("ERISA") to establish a two-part premium structure for single-employer plans, *i.e.*, a flat rate per capita assessment and a variable rate assessment based on a plan's unfunded vested benefits, effective for plan years beginning on or after January 1, 1988. Under amended ERISA section 4006(a)(3)(E)(iii)(II), the interest rate used in valuing a plan's vested benefits for purposes of determining the amount of the plan's unfunded vested benefits must equal 80% of the annual yield on 30-year Treasury securities for the month preceding the month in which the plan year begins.

The Pension Benefit Guaranty Corporation's (the "PBGC's") interim regulation on Payment of Premiums (53 FR 24906 (June 30, 1988)) implements these new premium rules. Under § 2610.23(b)(1) of the regulation, the interest rate for valuing vested benefits is determined by reference to the annual yield for 30-year Treasury constant maturities as reported in Federal Reserve Statistical Release G.13 and H.15. The required interest rate for a given "premium payment year" (the plan year for which the premium is being paid) is 80% of this rate for the calendar month preceding the calendar month in which the premium payment year begins. As a convenience, the PBGC established an Appendix B to the interim regulation containing a table setting forth the required interest rates

for premium payment years beginning in January 1988 and thereafter.

The PBGC is amending Appendix B to add the required interest rate for premium payment years beginning in January 1989. Appendix B to the interim regulation does not prescribe the required interest rates for valuing vested benefits. These rates are prescribed by section 4006(a)(3)(E)(iii)(II) of ERISA and § 2610.23(b)(1) of the regulation. The purpose of Appendix B is merely to collect and to republish these rates in a convenient place. Thus, the interest rates in Appendix B are informational only. Accordingly, the PBGC finds that notice of and public comment on this amendment would be unnecessary and contrary to the public interest. See 5 U.S.C. 553(b). For these same reasons, the PBGC also finds that good cause exists for making these amendments effective immediately. See 5 U.S.C. 553(d)(3).

The PBGC has determined that this amendment is not a "major rule" within the meaning of Executive Order 12291, because it will not have an annual effect on the economy of $100 million or more; nor create a major increase in costs or prices for consumers, individual industries, or geographic regions, nor have significant adverse effects on competition, employment, investment, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 2610

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, Appendix B to Part 2610 of Chapter XXVI of Title 29, Code of Federal Regulations, is hereby amended as follows:

PART 2610—PAYMENT OF PREMIUMS

1. The authority citation for Part 2610 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1306, 1307, as amended by sec. 9331, Pub. L. 100-203, 101 Stat. 1330.

2. Appendix B to Part 2610 is amended by adding to the table of interest rates therein a new entry to read as follows. The explanatory text is republished for the convenience of the reader and remains unchanged.

Appendix B—Interest Rates for Valuing Vested Benefits

The following table lists the required interest rates to be used in valuing a plan's vested benefits under § 2610.23(b) and in calculating a plan's adjusted vested benefits under § 2610.23(c)(1):

For premium payment years beginning in—	Required interest rate [1]
* * * * *	
January 1989	7.21

[1] The required interest rate listed above is equal to 80% of the annual yield for 30-year Treasury constant maturities, as reported in Federal Reserve Statistical Release G.13 and H.15, for the calendar month preceding the calendar month in which the premium payment year begins.

Issued in Washington, DC on this 10th day of January 1989.

Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 89-851 Filed 1-12-89; 8:45 am]

BILLING CODE 7708-01-M

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29 CFR Part 2676

Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal; Interest Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This is an amendment to the Pension Benefit Guaranty Corporation's regulation on Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal (29 CFR Part 2676). The regulation prescribes rules for valuing benefits and certain assets of multiemployer plans under sections 4219(c)(1)(D) and 4281(b) of the Employee Retirement Income Security Act of 1974. Section 2676.15(c) of the regulation contains a table setting forth, for each calendar month, a series of interest rates to be used in any valuation performed as of a valuation date within that calendar month. On or about the fifteenth of each month, the PBGC publishes a new entry in the table for the following month, whether or not the rates are changing. This amendment adds to the table the rate series for the month of February 1989.

EFFECTIVE DATE: February 1, 1989.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street NW., Washington DC 20006; 202-778-8820 (202-778-8859 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The PBGC finds that notice of and public comment on this amendment would be impracticable and contrary to the public interest, and that there is good cause for making this amendment effective immediately. These findings are based on the need to have the interest rates in this amendment reflect market conditions that are as nearly current as possible and the need to issue the interest rates promptly so that they are available to the public before the beginning of the period to which they apply. (*See* 5 U.S.C. 533 (b) and (d).) Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

The PBGC has also determined that this amendment is not a "major rule" within the meaning of Executive Order 12291 because it will not have an annual effect on the economy of $100 million or more; or create a major increase in costs or prices for consumers, individual industries, or geographic regions; or have significant adverse effects on competition, employment, investment, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

List of Subjects in 29 CFR Part 2676

Employee benefit plans, Pensions.

In consideration of the foregoing, Part 2676 of Subchapter H of Chapter XXVI of Title 29, Code of Federal Regulations, is amended as follows:

PART 2676—VALUATION OF PLAN BENEFITS AND PLAN ASSETS FOLLOWING MASS WITHDRAWAL

1. The authority citation for Part 2676 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1399(c)(1)(D), and 1441(b)(1).

2. In § 2676.15, paragraph (c) is amended by adding to the end of the table of interest rates therein the following new entry:

§ 2676.15 Interest.

* * * * *

(c) *Interest rates.*

For valuation dates occurring in the month:	The values of i_k are:															
	i_1	i_2	i_3	i_4	i_5	i_6	i_7	i_8	i_9	i_{10}	i_{11}	i_{12}	i_{13}	i_{14}	i_{15}	i_u
*		*			*		*		*			*			*	
February 1989	.09625	.0925	.0875	.0825	.0775	.07125	.07125	.07125	.07125	.07125	.065	.065	.065	.065	.065	.06

Issued at Washington, DC, on this 5th day of January 1989.

Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 89-852 Filed 1-12-89; 8:45 am]

BILLING CODE 7708-01-M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

Safety Standards for Explosives and Blasting

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Stay of final rule provision.

SUMMARY: MSHA published a final rule for safety standards for explosives and blasting in underground coal mines on November 18, 1988, to take effect January 17, 1989. After further Agency analysis and review of public comments, MSHA has determined that the effective date of 30 CFR 75.1325(b) should be stayed.

DATES: The final rule takes effect January 17, 1989 except that the effective date of § 75.1325(b) is stayed until further notice.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, Room 631, Ballston Towers No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203; phone (703) 235-1910.

SUPPLEMENTARY INFORMATION:

I. Introduction and Rulemaking Background

On November 18, 1988 (53 FR 46768), MSHA published a final rule addressing explosives and blasting in underground coal mines. The final rule is effective January 17, 1989. The Agency has recently received questions regarding firing procedures in 30 CFR 75.1325(b). Paragraph (b) addresses blasting of the face in a working place and limits such blasting to a single face at a time. During the rulemaking process, MSHA received conflicting comments from the mining public on single face versus multiface blasting. Some commenters stated that multiface blasting should be prohibited. Others stated that up to three faces could be safely blasted so long as each face had a separate kerf and no more than a total of 20 shots were fired in a round.

However, none of the commenters provided substantive information to support their views. Further, the statistical data currently available to MSHA do not address the occurrence of accidents or injuries resulting from or caused by this practice. Because of the additional comments from the mining public, the Agency's limited information, the lack of definitive Agency statistics and the inconclusive rulemaking record, MSHA believes that multiface blasting requires further study. As a result, MSHA is reconsidering the issue of single versus multiface blasting in a working place and is staying § 75.1325(b) to permit the Agency to gain additional information on this issue. After additional analysis, MSHA will repropose rules addressing this issue and allow further public comment.

Therefore, the effective date of § 75.1325(b) of the final rule is stayed. The Agency anticipates the publication of a reproposal as soon as its analysis is completed.

Date: January 11, 1989.

Roy L. Bernard,

Acting Deputy Assistant Secretary for Mine Safety and Health.

Accordingly, Subpart N, Part 75, Chapter I, Title 30, Code of Federal Regulations is amended as follows:

PART 75—[AMENDED]

1. The authority citation for Part 75 continues to read as follows:

Authority: 30 U.S.C. 811, 957 and 961.

§ 75.1325 [Amended]

2. Section 75.1325(b) is stayed until further notice.

[FR Doc. 89-1015 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-43-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD5-88-53]

Drawbridge Operation Regulations; Trent River, New Bern, NC

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: At the request of the North Carolina Department of Transportation, the County of Pamlico, North Carolina, and the County of Craven, North Carolina, the Coast Guard is changing the regulations that govern the operation of the drawbridge across the Trent River at mile 0.0 on U.S. 70 in New Bern, North Carolina, by further restricting the number of bridge openings during weekday rush hours. This change is being made to alleviate vehicular traffic congestion caused by the steady increase in recreational traffic on the Trent River during the boating season and the resulting increase in bridge openings. The Coast Guard is making similar changes to the regulations governing the operation of the drawbridge across the Neuse River, mile 33.7, in New Bern, North Carolina. The changes to this regulation are, to the extent practical and feasible, intended to provide for regularly scheduled drawbridge openings to help reduce motor vehicle traffic delays and congestion on the roads and highways linked by this drawbridge.

EFFECTIVE DATE: These regulations become effective on February 13, 1989.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, VA 23704-5004, (804) 398-6222.

SUPPLEMENTARY INFORMATION: On September 20, 1988, the Coast Guard published a notice of proposed rulemaking in the **Federal Register** (53 FR 36472) concerning the bridge across the Trent River in New Bern, North Carolina. The Commander, Fifth Coast Guard District, also published the

proposal as a Public Notice dated September 16, 1988. In the notice of proposed rulemaking, interested persons were given until November 4, 1988, to submit comments. In the public notice, interested persons were given until October 21, 1988, to submit comments. Four comments were received.

Drafting Information

The drafters of these regulations are Linda L. Gilliam, Project Officer, and LCDR Robin K. Kutz, Project Attorney.

Discussion of Comments

The North Carolina Department of Transportation, the County of Pamlico, North Carolina, and the County of Craven, North Carolina, requested that the drawbridge across the Trent River at mile 0.0 on U.S. 70 in New Bern, North Carolina, be regulated to restrict openings from 6:30 a.m. to 8:30 a.m. and from 4:00 p.m. to 6:00 p.m., Monday through Friday, with the exception of an opening at 7:30 a.m. and at 5:00 p.m. for any vessels waiting to pass through the bridge. The request also included the preservation of the current requirement that from May 24 to September 8, on Sundays and Federal holidays, drawbridge openings be restricted from 2:00 p.m. to 7:00 p.m., except for openings at 4:00 p.m. and 6:00 p.m. for any vessels waiting to pass. This request was made as a result of the steady increase in pleasure craft traffic on the Trent River, resulting in excessive draw openings, which are causing vehicular traffic congestion. The marina upstream from the Trent River drawbridge is also adding to the increase in bridge openings.

A proposed rule restricting drawbridge openings during the requested time frame was published in the **Federal Register** (53 FR 36472) on September 20, 1988, and the proposal was announced in a Public Notice dated September 16, 1988. Comments were solicited through November 4, 1988, and four comments were received. One comment supported the extended weekday morning and afternoon closures. The other three comments opposed further restrictions to the Trent River drawbridge.

One commentor believed that further restrictions to the drawbridge were unnecessary and that they would have a negative impact on waterfront businesses that depend on pleasure boat traffic. He stated that due to a high-rise bridge located ½ mile from the drawbridge, extending the hours during morning and afternoon rush hours was not warranted since the high-rise bridge also could be used to cross the Trent River. After considering the points raised by this commentor, the Coast Guard has concluded that extending the rush hour restricted periods will not have a significant negative impact on waterfront businesses serving the boating public. Although each restricted period will now last two hours, no boater will have to wait more than an hour for a bridge opening, because the Coast Guard has provided for an opening in the midst of each rush hour period to allow accumulated vessels to pass. Thus, the maximum waiting period for vessels remains the same as in the prior regulations. The other two comments were received from a private boatowner and the Fairfield Harbour Yacht Club opposing the Sunday and Federal holiday restrictions that begin on May 24 and run through September 8. These comments have been considered and it is felt that continuing the May 24 through September 8 restrictions for drawbridge openings on Sundays and Federal holidays should inconvenience boaters very little. This restriction was initially published in the **Federal Register** (37 FR 5295) on March 14, 1972, and for sixteen years it has remained in effect without objection. Consequently, the Coast Guard believes these restrictions are not unduly burdensome, and this provision shall remain untouched in the final rule.

Federalism Assessment

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 raise sufficient federalism implications to warrant the preparation of a Federalism Assessment. Although the rule does impact both the town of New Bern and the State of North Carolina, specifically the Department of Transportation which operates the bridge, the effect on state and local operations is minimal and entirely positive.

Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and non-significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact has been found to be so minimal that a full regulatory evaluation is unnecessary. This conclusion is based on the fact that these regulations are not expected to have any effect on commercial navigation or on any businesses that depend on waterborne transportation for successful operations. Since the economic impact on these regulations is expected to be minimal, the Coast Guard certifies that they will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Regulation. In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations, is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-1(g); 33 CFR 117.43.

2. Section 117.843(a) is revised to read as follows:

§ 117.843 Trent River.

(a) The draw of the U.S. 70 bridge, mile 0.0, at New Bern:

(1) Need not open from 6:30 a.m. to 8:30 a.m. and from 4:00 p.m. to 6:00 p.m., Monday through Friday, for pleasure vessels. However, the draw shall open at 7:30 a.m. and 5:00 p.m. for any vessel waiting to pass.

(2) Need not open from 2:00 p.m. to 7:00 p.m. from May 24 through September 8, on Sundays and Federal holidays, for pleasure vessels. However, the draw shall open at 4:00 p.m. and 6:00 p.m. for any vessel waiting to pass.

(3) Shall always open on signal for public vessels of the United States, State or local vessels used for public safety, tugs with tows, and vessels in distress.

(4) Shall open on signal at all other times.

* * * * *

Dated: January 4, 1989.

A. D. Breed,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 89-746 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-14-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6821]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective date

shown in this rule because of noncompliance with the revised floodplain management criteria of the NFIP. If FEMA receives documentation that the community has adopted the required revisions prior to the effective suspension date given in this rule, the community will not be suspended and the suspension will be withdrawn by publication in the **Federal Register.**

EFFECTIVE DATE: As shown in fifth column.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction Federal Insurance Administration, Federal Center Plaza, 500 C Street, SW., Room 416, Washington, DC 20472. (202) 646-2717.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022), prohibits flood insurance coverage as authorized under the NFIP (42 U.S.C. 4001-4128) unless an appropriate public body shall have adopted adequate floodplain management measures with effective enforcement measures.

On August 25, 1986, FEMA published a final rule in the **Federal Register** that revised the NFIP floodplain management criteria. The rule became effective on October 1, 1986. As a condition for continued eligibility in the NFIP, the criteria at 44 CFR 60.7 require communities to revise their floodplain management regulations to make them consistent with any revised NFIP regulation within 6 months of the effective date of that revision or be subject to suspension from participation in the NFIP.

The communities listed in this notice have not amended or adopted floodplain management regulations that incorporate the rule revision. Accordingly, the communities are not compliant with NFIP criteria and will be suspended on the effective date shown in this final rule. However, some of these communities may adopt and submit the required documentation of legally enforceable revised floodplain management regulations after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register.** In the interim, if you wish to determine if a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office of the NFIP servicing contractor.

The Administrator finds that notice and public procedures under 5 U.S.C. 533(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified. Each community receives a 90- and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, FEMA, hereby certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As stated in Section 2 of the Flood Disaster Protection Act of 1973, the establishment of local floodplain management together with the availability of flood insurance decreases the economic impact of future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to adopt adequate floodplain management measures, thus placing itself in noncompliance with the Federal standards required for community participation.

List of Subjects in 44 CFR Part 64

Flood insurance and floodplains.

PART 64—[AMENDED]

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et. seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

§ 64.6 List of Eligible Communities.

State	Community name	County	Community No.	Effective date
Arkansas	Pea Ridge, city of	Benton	050361	Jan. 18, 1989.
Louisiana	Simmesport, town of	Avoyelles	220025	Do.
New Mexico	Unincorporated areas	Eddy	350120	Do.
Oklahoma	Heavener, city of	LeFlore	400090	Do.
Do.	Meeker, town of	Lincoln	400404	Do.
Do.	Wister, town of	LeFlore	400095	Do.
Texas	Alamo, city of	Hidalgo	480335	Do.
Do.	Austin, city of	Travis	480624	Do.
Do.	Unincorporated areas	Burnet	481209	Do.
Do.	Cibolo, city of	Guadalupe	480267	Do.
Do.	Unincorporated areas	Kerr	480419	Do.
Do.	Piney Point Village, city of	Harris	480308	Do.
Do.	Poth, city of	Wilson	480672	Do.
Do.	Rising Star, city of	Eastland	480795	Do.
Do.	Wilmer, city of	Dallas	480190	Do.
Do.	Woodbranch, village of	Montgomery	480694	Do.
Do.	Bayview, town of	Cameron	480102	Do.
Oregon	Ashland, city of	Jackson	410090	Feb. 2, 1989.
Do.	Burns, city of	Harney Co	410084	Do.
Do.	Carlton, city of	Yamhill	410251	Do.
Do.	Cascade Locks, city of	Hood River	410087	Do.
Do.	Chiloquin, city of	Klamath	410111	Do.
Do.	Coos Bay, city of	Coos	410044	Do.
Do.	Dayville, city of	Grant	410076	Do.
Do.	Detroit, city of	Marion	410157	Do.
Do.	Unincorporated areas	Douglas	410059	Do.
Do.	Dundee, city of	Yamhill	410253	Do.

State	Community name	County	Community No.	Effective date
Do	Dunes City, city of	Lane	410262	Do.
Do	Unincorporated areas	Grant	410074	Do.
Do	Heppner, city of	Morrow	410175	Do.
Do	Hines, city of	Harney	410085	Do.
Do	Hood River, city of	Hood River	410088	Do.
Do	Lakeside, city of	Coos	410278	Do.
Do	Lakeview, city of	Lake	410116	Do.
Do	Lexington, city of	Morrow	410178	Do.
Do	Milwaukie, city of	Clackamas	410019	Do.
Do	Monroe, city of	Benton	410010	Do.
Do	Monument, city of	Grant	410079	Do.
Do	Unincorporated areas	Morrow	410173	Do.
Do	Mt. Angel, city of	Marion	410165	Do.
Do	North Powder, city of	Union	410221	Do.
Do	Powers, city of	Coos	410049	Do.
Do	Sandy, city of	Clackamas	410023	Do.
Do	Shady Cove, city of	Jackson	410099	Do.
Do	Summerville, city of	Union	410222	Do.
Do	Sweet Home, city of	Linn	410146	Do.
Do	Union, city of	Union	410223	Do.
Do	Woodburn, city of	Marion	410172	Do.
Do	Unincorporated areas	Yamhill	410249	Do.

Issued: January 9, 1989.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 89-844 Filed 1-12-88; 8:45 am]

BILLING CODE 6718-21-M

FEDERAL MARITIME COMMISSION

46 CFR Part 581

[Docket No. 88-16]

Service Contracts; Correction of Clerical or Administrative Errors

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is adopting a Final Rule that will allow parties to service contracts filed with the Commission to correct clerical or administrative errors in the essential terms of such contracts. Parties seeking this relief must file their requests within 45 days of the contract's initial filing with the Commission and must include a supporting affidavit and other relevant documents. This procedure will enable contract parties to correct legitimate errors, something which had been previously precluded by Commission rule.

EFFECTIVE DATE: January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Robert G. Drew, Director, Bureau of Domestic Regulation, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573. (202) 523-5796.

SUPPLEMENTARY INFORMATION: The Federal Maritime Commission ("Commission" or "FMC") initiated this proceeding by publishing a Proposed Rule in the **Federal Register** on June 24, 1988 (53 FR 23776). The Proposed Rule would have amended § 581.7 of the Commission's existing service contract regulations (46 CFR Part 581) to allow corrections to the essential terms of a service contract in the event of a clearly demonstrated clerical or administrative error. Both parties to the service contract could request relief within 30 days of a contract being filed with the Commission. Such requests would have to include, *inter alia*, (1) a transmittal letter, (2) a corrected copy of the essential terms, (3) relevant documents, and (4) notarized affidavits from each party attesting with specificity to the circumstances giving rise to the clerical or administrative error. In addition, the Proposed Rule would have required that essential terms corrected pursuant to this procedure be made available to similarly situated shippers for a period of 30 days from the date the Commission approved a request.

Comments on the Proposed Rule were received from: (1) Sea-Land Service, Inc.; (2) U.S. Atlantic-North Europe Conference, North Europe-U.S. Atlantic Conference, Gulf-European Freight Association, and North Europe-U.S. Gulf Freight Association ("NEC"); (3) Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"); (4) Asia North America Eastbound Rate Agreement ("ANERA"), Mediterranean North Pacific Coast Freight Conference, and U.S. Atlantic & Gulf/Australia-New Zealand Conference ("Conferences"); (5) American President Lines, Ltd. ("APL"); (6) Atlantic & Gulf/West Coast of South America Conference ("AG/WCSAC"); (7) E. I. Du Pont De Nemours & Company ("Du Pont"); (8) EAC Transport Pacific Centre Ltd. A/S; (9) EAC Transpacific Service; and (10) Johnson ScanStar.

Summary of comments

Most commenters generally support the Proposed Rule, although several do so on the condition that certain changes be made. One carrier, Sea-Land, contends that the Proposed Rule is unnecessary, but also suggests certain changes, if the Commission decides to go forward and issue a final rule. Specific comments are addressed below.

Sea-Land's primary objection to the Proposed Rule is its alleged potential susceptibility to abuse. Sea-Land believes that there are too few clerical errors in service contracts to warrant a procedure that could be misused. Sea-Land questions the need for the Proposed Rule based upon its experience as a member of ANERA. It notes that out of approximately 600 ANERA service contracts, "only six involved problematic technical errors * * *." Sea-Land also expresses reservations about the Commission's ability to distinguish between genuine technical errors and disguised, commercially-motivated essential terms modifications.

The Japan Conferences, while recognizing the need for the Proposed Rule, express similar concerns. They suggest therefore that the final rule should contain sufficient safeguards to protect against its misuse. At a minimum, they propose that a copy of all requests for service contract corrections be directed to the Commission's Bureau of Trade Monitoring ("BTM") for review and, if warranted, investigation. In addition, they suggest that BTM should maintain a record of all requests so that it can

monitor trends and patterns in such filings which might indicate misuse of the correction process.

NEC contends that the provision of the Proposed Rule affording similarly situated shippers an opportunity to avail themselves of corrected essential terms not previously available to them should be deleted because it presents too great a potential for misuse of the service contract process. NEC argues that it could force conferences and carriers to offer shipping terms in a potentially different commercial context than when the contract terms were originally offered.

The Conferences also express strong opposition to the requirement that a corrected service contract be opened up to the shipping public for any further eligibility period, since the commercial circumstances "within which a contract is negotiated and signed may be radically different 90 or more days later." The Conferences contend that:

> * * * the only "winners" under a rule opening up a contract to a second "me-too" round because of clerical errors would be those shippers who would perceive a windfall by virtue of having an opportunity to "me-too" a contract which, although not originally attractive, becomes so because of changing market conditions.

Such a provision is viewed by the Conferences as a disincentive for carriers to correct errors in a service contract. The Conferences, NEC, and Sea-Land recommend that only those similarly situated shippers that have "me too'd" a service contract during its initial 30-day period of availability should be permitted to "me too" corrected essential terms during a second availability period.

Sea-Land suggests that, at the same time a technical correction is made in an original service contract, it should be required that it be made in an identical fashion to any "me too" contracts secured in the initial 30-day window. It also would expand the Proposed Rule to give "me too" shippers a unilateral option to terminate within the same period in the event that a "me too" shipper believes itself to be disadvantaged by an inadvertent error in the contract.

The Conferences argue that shipments that moved prior to such a cancellation should not be subject to re-rating or penalty. They propose that such a cancellation be treated as "a mutual termination of contract" rather than a unilateral decision by the shipper. The Conferences further recommend that the rule be generally clarified to address the treatment of "me too" shippers to the original contract.

With the exception of Sea-Land and Du Pont, all of the commenters express concern over the limited period of time allowed for the submission of requests to correct service contracts. Suggested alternative periods in which to submit requests range from 60 days to the duration of the contract. Several commenters cite practical experience with service contracts covering hundreds of points and commodities for which errors may not be detected until specific cargo moves and reveals an error, and possibly not until an accounting for a shipment is made. The commenters aver that there is a substantial likelihood that service contract errors covered by the Proposed Rule will not be detected within 30 days of the contract filing date and that the limited request period may therefore curtail the usefulness of the modification authority. Moreover, it is argued that the Proposed Rule's requirement of "extensive supporting documentation," combined with geographic and possible language problems, may make the 30-day request period even more unrealistic.

NEC contends that materials required to be submitted with a request for relief are "unnecessarily cumulative, overly formalistic, unduly burdensome and otherwise in need of repair." Sea-Land, APL and the Japan Conferences express similar views. Sea-Land suggests that one clear exposition of facts in the form of a detailed affidavit with appended supporting documents necessary to supplement the affidavit, corrected page(s), and a brief transmittal letter should fully satisfy the Commission's needs. APL questions the need for notarized affidavits, arguing that the procedure is "unduly formalistic." Rather than sworn statements from *each* party to the contract, the Japan Conferences propose that corrections be permitted "* * * upon the sworn statement of the designated official of a conference or carrier with a requirement that the statement be served upon shipper signatory at the time it is filed with the FMC." The Japan Conferences maintain that the difficulty in obtaining affidavits from foreign shippers coupled with language barriers, may potentially bar requests because a shipper signatory's affidavit may not be received in time. They further state that because the conference/carrier signatory is the responsible repository for the service contract records, it would be in the best position, in consultation with the shipper signatories, to explain the error. NEC also suggests that the requirements "should be overhauled and streamlined," and provides certain detailed suggestions for changes.

The Japan Conferences raise one additional issue that was not specifically contemplated by the Proposed Rule. In framing the Proposed Rule, the Commission assumed that the essential terms that are stated in a service contract would be mirrored in the essential terms publication and that consequently any clerical or administrative error in the essential terms of the service contract would be reflected in the essential terms publication. The Japan Conferences raise the possibility that although the service contract essential terms might contain clerical or administrative errors, the essential terms publication might accurately reflect the intentions of the parties. They suggest that corrections of such errors should be allowed at any time and that similarly situated shippers should not have a right to a new 30-day period of availability under such circumstances.

APL, Du Pont, and AG/WCSAC have proposed changes in the Proposed Rule to expand the scope of the proceeding. They suggest that parties to a contract be permitted to add additional commodities, ports and points, or make any other prospective modifications at any time during the contract term.

Discussion

In light of the fact that the essential terms of a service contract cannot generally be amended during the term of the contract,[1] the Commission continues to believe that a procedure which allows the parties to correct inadvertent errors is warranted. The Commission further believes that any such procedure should be structured to enable it to distinguish between legitimate requests and commercially motivated requests. The Commission will, therefore, adopt a Final Rule permitting the correction of clerical or administrative errors in service contracts, but modified as indicated below. These changes should result in an even more workable and efficient procedure for dealing with errors in service contracts.

The Proposed Rule required that the transmittal letter "explain with specificity the modified essential terms and the circumstances giving rise to the clerical or administrative error." In addition, notarized affidavits were required from each party also attesting to the circumstances surrounding the clerical or administrative error. The Commission agrees with certain commenters that the transmittal letter need not restate information already

[1] Those comments suggesting that the Proposed Rule be expanded to permit prospective modification of any terms of a service contract are beyond the scope of this proceeding.

required to be stated in affidavit form. Instead, it is sufficient for the transmittal letter to identify the purpose of the submission and provide information to identify the service contract in question. The Proposed Rule will be modified accordingly.

The Commission also agrees that notarizing already sworn statement may be legally redundant and unnecessary to the validity of the affidavit. Therefore, the Final Rule deletes any additional notary requirement.

Many commenters contend that 30 days is not a sufficient period within which to detect errors and meet the proposed filing requirements. The Commission notes that it is incumbent on the parties, particularly the contract filer, to ensure that a contract is error free prior to filing. Nevertheless, the Commission also recognizes that, despite the parties diligence, there may be a mistake that is not discovered immediately after filing. Moreover, the complexities of international transactions may delay the discovery of some mistakes. The Commission will therefore extend the filing period from 30 to 45 days. Given today's telecommunication and computer technologies, and particularly improved telefax capabilities, 45 days should be more than adequate. The more limited than requested 45-day filing period should also serve as an incentive for the parties to carefully review their contracts prior to filing them with the Commission.

Some of the commenters request that they be relieved from filing two affidavits, *i.e.*, one from the carrier and one from the shipper. This requirement had been initially proposed to limit potential abuses. If both shipper and carrier had to swear to the facts supporting the application, there would be less likelihood that one party could file or pressure another to file an application on grounds *other* than clerical or administrative error. However, after considering the comments, the Commission has determined that two fully detailed affidavits may not be absolutely necessary. The Commission also believes, however, that both parties to the contract, not just the filing party, should support the request. This can be accomplished simply if the non-filing party to the request submits a statement that it concurs in the filing party's application. Accordingly, the Final Rule will permit a single affidavit and a concurring statement from the other party to the contract.

The Proposed Rule would have provided a new, 30-day window for "me too" shippers to take advantage of the corrected service contract's essential terms. This was intended to afford an opportunity for a similarly situated shipper to avail itself of the corrected essential terms that were not publicly available during the initial 30-day "me too" period. Several commenters have opposed this second, 30-day period on the ground that the economic circumstances existing when the Commission approves a request, may be different than those that existed at the time of the negotiation and execution of the original service contract. Notwithstanding this concern, the Commission believes that the 1984 Act contemplates that the corrected essential terms be made available to shippers who may have availed themselves of the original contract, if its essential terms had been correctly published. However, given the fact that the contract's existence and general terms have already been made known to the public by the time the Commission grants a request for relief, the Commission does not find it necessary to provide the public an additional 30-day availability period. The Final Rule, therefore, provides a more limited 15-day window for "me too" shippers to take advantage of the corrected essential terms, except in the situation described below.[2]

The Japan Conferences have proposed the elimination of the second "me too" period where the clerical or administrative error in the confidentially filed service contract does not also appear in the essential terms' publication. As indicated above, the second "me too" period is intended to provide notice to shippers of the corrected essential terms that were made available to the original party to the contract but which were unavailable to the general shipping public during the initial, 30-day period because of clerical or administrative error. If the original essential terms publication somehow contains the correct essential terms, the shipping public originally received adequate notice of the essential terms given to the original shipper. Accordingly, there is no reason to provide for a second "me too" period, if the Commission subsequently approves a request to correct the essential terms as stated in the contract. Therefore, the Final Rule eliminates the second "me too" period where the error only appears in the contract and not also in the essential terms publication.

Some commenters also raise the issue of how shippers who previously "me too'd" an erroneous contract should be treated. The Commission believes that, at a minimum, an original, "me too" shipper should have the same opportunity to adopt the corrected essential terms as all other similarly situated shippers. However, if an original "me too" shipper is somehow disadvantaged by the correction, it should be able to elect not to adopt the changes and continue to operate under its original contract. The Proposed Rule will be modified accordingly.

In the interest of clarity, the Final Rule has been reorganized and reworded. In addition, the Commission is requiring all requests for relief to be submitted in duplicate in order to facilitate and expedite their processing.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, February 27, 1981, because it 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 government agencies, or geographic regions; or (3) significant adverse effect on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, that this Rule will not have a significant economic impact on a substantial number of small organization units, and small governmental jurisdictions.

This Rule will become effective in 15 days rather than 30 days because it relieves a restriction previously contained in the Commission's service contract regulations.

List of Subjects in 46 CFR Part 581

Administrative practice and procedure; Contracts; Maritime carriers; Rates and fares.

Therefore, pursuant to 5 U.S.C. 553 and sections 3, 8 and 17 of the Shipping Act of 1984, Part 581 of Title 46, Code of Federal Regulations, is amended as follows:

PART 581—[AMENDED]

The authority citation for Part 581 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714–1716 and 1718.

[2] As indicated in the Proposed Rule, the Commission intends to resolve requests for relief within 30 days of their receipt.

2. Section 581.7 is amended by redesignating paragraph (b) as (c), and by revising paragraph (a) and adding a new paragraph (b) to read as follows:

§ 581.7 Modification, termination or breach not covered by the contract.

* * * * *

(a) *Modifications.* The essential terms originally set forth in a service contract may not be amended but may be corrected pursuant to paragraph (b) of this section.

(b) *Corrections.* (1) Either party to a filed service contract may request permission to correct clerical or administrative errors in the essential terms of a filed contract. Requests shall be filed, in duplicate, with the Office of the Secretary within 45 days of the contract's filing with the Commission and shall include:

(i) A letter of transmittal explaining the purpose of the submission, and providing specific information to identify the service contract to be corrected;

(ii) A copy of the proposed correct essential terms. Corrections shall be indicated as follows:

(A) Matter being deleted shall be struck through; and

(B) Matter to be added shall immediately follow the language being deleted and be underscored;

(iii) An affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(iv) Documents supporting the clerical or administrative error; and

(v) A brief statement from the other party to the contract concurring in the request for correction.

(2)(i) If the request is granted, the carrier or conference shall file the corrected contract provisions and a corrected statement of essential terms and those corrected essential terms shall be made available to all other shippers or shippers' associations similarly situated for a specified period of no less than fifteen (15) days from the date of the filing of the corrected contract. The provisions of § 581.6(b)(2)–(4) shall otherwise apply.

(ii) Any shipper or shippers' association that has previously entered into a service contract that is corrected pursuant to this paragraph may elect to continue under that contract with or without the corrected essential terms.

(iii) The provisions of paragraph (b)(2)(i) of this section do not apply to clerical or administrative errors that appear only in a confidentially filed service contract but not also in the relevant essential terms publication.

* * * * *

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 89-845 Filed 1-12-89; 8:45 am]

BILLING CODE 6730-01-M

Proposed Rules

Federal Register
Vol. 54, No. 9
Friday, January 13, 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

Food Safety and Inspection Service

9 CFR Parts 307, 350, 351, 352, 354, 355, 362, 381, and 391

[Docket No. 88-017P]

Fee Increase for Inspection Services

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the Federal meat and poultry products inspection regulations to increase fees charged by FSIS to provide overtime and holiday inspection, voluntary inspection, identification, certification, or laboratory services to meat and poultry establishments. The fees would primarily reflect the increased costs of providing these services due to the increase in salaries of Federal employees allocated by Congress under the Federal Pay Comparability Act of 1970. In addition, as a "housekeeping" measure, the dollar amounts for the services currently specified in Parts 307, 350, 351, 352, 354, 355, 362, and 381 would be transferred to a new Part 391 (9 CFR Part 391).

DATE: Comments must be received by January 30, 1989.

ADDRESS: Send written comments to the Policy Office, Attention: Linda Carey, FSIS Hearing Clerk, Room 3171, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments as provided under the Poultry Products Inspection Act should be directed to Mr. William L. West, (202) 447-3367. (see also "Comments" under Supplementary Information.)

FOR FURTHER INFORMATION CONTACT: Mr. William L. West, Director, Budget and Finance Division, Administrative Management, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-3367.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

This proposed rule is issued in conformance with Executive Order 12291, and has been determined not to be a "major rule." It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or 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. The fee increases only reflect an increase in costs to establishments that elect to utilize certain inspection services.

Effect on Small Entities

The Administrator, Food Safety and Inspection Service, has determined that this action will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601) because the fees provided for in this document merely reflect a minimal increase in the costs currently borne by those entities which elect to utilize certain inspection services.

Comments

Interested persons are invited to submit written comments concerning this proposal. Written comments should be sent to the Policy Office and should refer to the docket number located in the heading of this document. Any person desiring an opportunity for oral presentation of views as provided under the Poultry Products Inspection Act must make such request to Mr. West so that arrangements may be made for such views to be presented. A record will be made of all views orally presented. All comments submitted in response to this action will be made available for public inspection in the Policy Office between 9:00 a.m. and 4:00 p.m., Monday through Friday.

Background

Each year, the fees for certain services rendered to operators of official meat and poultry establishments, importers, or exporters by FSIS are reviewed and a cost analysis is performed to determine if such fees are adequate to recover the cost of providing the services.[1] The analysis relates to fees charged in connection with overtime and holiday inspection, voluntary inspection, identification, certification, or laboratory services. The fees to be charged for these services have been determined by an analysis of data on the current cost of these services; anticipated costs associated with changes in operations of the program; and increases in those costs due to an increase in salaries of Federal employees allocated by Congress under the Federal Pay Comparability Act of 1970 and other increases affecting Federal employees, such as costs for travel and benefits.

Based on the Agency's analysis of the increased costs in providing these services, incurred as a result of a January 1989 pay raise of 4.1 percent for Federal employees, increased costs of the retirement system in 1989, and increased health insurance and travel costs, FSIS proposes to increase the fees relating to such services.

In addition, as a "housekeeping" measure, FSIS is proposing to transfer the dollar amounts currently specified in 9 CFR Parts 307, 350, 351, 352, 354, 355, 362, and 381 to a new Part 391 (9 CFR Part 391). However, the provisions for the fees to be charged by FSIS for the services specified herein would remain as currently codified in the Code of Federal Regulations. As the dollar amounts for the services provided herein may change at least annually, by consolidating these amounts into a separate Part 391, the Agency would only need to amend one Part instead of eight different Parts of the CFR each time the rates for such services are revised.

Mandatory inspection by Federal inspectors of meat and poultry slaughtered and/or processed at official establishments is provided for under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*). Such inspection is required to ensure the safety, wholesomeness, and proper labeling of meat and poultry products and the ordinary costs of providing it

[1] The cost analysis is on file with the FSIS Hearing Clerk. Copies may be requested from that office.

are borne by the U.S. Government. However, costs for these inspection services performed on holidays or on an overtime basis may be incurred to accommodate the business needs of particular establishments. Any or all of these costs, which are not a part of the mandatory inspection service, are recoverable by the Government.

Currently, § 307.5 (9 CFR 307.5) of the meat inspection regulations provides that FSIS shall be reimbursed for the cost of meat inspection on holidays or on an overtime basis at the rate of $24.68 per inspector hour. Similarly, § 381.38 (9 CFR 381.38) of the poultry products inspection regulations provides that FSIS will be reimbursed for the cost of poultry inspection on holidays or on an overtime basis at the rate of $24.68 per inspector hour. These fees would be increased to $25.88 per inspector hour.

FSIS also provides a range of voluntary inspection services, the costs of which are totally recoverable by the Government. These services, provided under Subchapter B—Voluntary Inspection and Certification Service, are provided under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*), to assist in the orderly marketing of various animal products and byproducts not subject to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

The basic hourly rate for providing such certification and inspection service is currently $21.16 per inspector hour (§§ 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, and 362.5). The overtime and holiday hourly rate is currently $24.68. The rate for laboratory services is currently $43.80 per hour. The hourly rates for these services would be revised to $23.60, $25.88, and $42.88, respectively. Also these dollar amounts would be transferred to a new Part 391 (9 CFR Part 391). In addition §§ 307.6(a), 354.107, and 381.39(a) would be amended to reference the fees contained in the new Part 391.

List of Subjects

9 CFR Part 307

Meat inspection, Reimbursable services.

9 CFR Part 350

Meat Inspection, Reimbursable services, Voluntary inspection; Certification service.

9 CFR Part 351

Meat inspection, Reimbursable services, Technical animal fats.

9 CFR Part 352

Meat inspection, Reimbursable services, Voluntary inspection.

9 CFR Part 354

Meat inspection, Reimbursable services, Voluntary inspection.

9 CFR Part 355

Meat inspection, Reimbursable services; Certified products.

9 CFR Part 362

Poultry products inspection, Reimbursable services; Voluntary poultry inspection.

9 CFR Part 381

Poultry products inspection, Reimbursable services.

9 CFR Part 391

Meat inspection, Poultry products inspection, Fees and charges.

Accordingly, the Federal meat and poultry products inspection regulations would be amended as follows:

PART 307—[AMENDED]

1. The authority citation for Part 307 continues to read as follows:

Authority: 7 U.S.C. 394, 21 U.S.C. 621, 695; 7 CFR 2.17 (g) and (i), 2.55.

2. Section 307.5(a) would be revised to read as follows:

§ 370.5 Overtime and holiday inspection service.

(a) The management of an official establishment, an importer, or an exporter shall reimburse the Program, at the rate specified in § 391.3, for the cost of the inspection service furnished on any holiday as specified in paragraph (b) of this section; or for more than 8 hours on any day, or more than 40 hours in any administrative workweek Sunday through Saturday.

* * * * *

3. Section 307.6(a) would be revised to read as follows:

§ 307.6 Basis of billing for overtime and holiday service.

(a) Each recipient of overtime or holiday inspection service, or both, shall be billed as provided for in § 307.5(a) and at the rates specified in § 391.3, in increments of quarter hours. For billing purposes, 8 or more minutes shall be considered a full quarter hour. Billing will be for each quarter hour of service rendered by each Program employee.

* * * * *

PART 350—[AMENDED]

4. The authority citation for Part 350 reads as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

5. Section 350.7(c) would be revised to read as follows:

§ 350.7 Fees and charges.

* * * * *

(c) The fees to be charged and collected for service under the regulations in this Part shall be at the rates specified in §§ 391.2, 391.3, and 391.4 respectively for base time; for overtime including Saturdays, Sundays, and holidays; and for certain laboratory services which are not covered under the base time, overtime, and/or holiday costs. Such fees shall cover the costs of the service and shall be charged for the time required to render such services. Where appropriate, this time will include, but will not be limited to, the time required for travel of the inspector or inspectors in connection therewith during the regularly scheduled administrative workweek.

* * * * *

PART 351—[AMENDED]

6. The authority citation for Part 351 reads as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

7. Section 351.8 would be revised to read as follows:

§ 351.8 Charges for surveys of plants.

Applicants for the certification service shall pay the Department for salary costs at the rates specified in §§ 391.2 and 391.3 respectively for base time, and for overtime, travel, and per diem allowances at rates currently allowed by the Federal Travel Regulations, and other expenses incidental to the initial survey of the rendering plants or storage facilities for which certification service is requested.

8. Section 351.9(a) would be revised to read as follows:

§ 351.9 Charges or examinations.

(a) The fees to be charged and collected by the Administrator for examination shall be at the rates specified in §§ 391.2, 391.3, and 391.4 respectively for base time; for overtime including Saturdays, Sundays, and holidays, as provided for in § 351.14; and for certain laboratory services which are not covered under the base time, overtime, and/or holiday costs and which are required to determine the eligibility of any technical animal fat for certification under the regulations in this part. Such fees shall be charged for the time required to render such service, including, but not limited to, the time

required for the travel of the inspector or inspectors in connection therewith.

* * * * *

PART 352—[AMENDED]

9. The authority citation for Part 352 reads as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

10. Section 352.5(c) would be revised to read as follows:

§ 352.5 Fees and charges.

* * * * *

(c) The fees to be charged and collected for service under the regulations in this part shall be at the rates specified in § 391.2, 391.3, and 391.4 respectively for base time; for overtime including Saturdays, Sundays, and holidays; and for certain laboratory services which are not covered under the base time, overtime, and/or holiday costs. Such fees shall cover the costs of the service and shall be charged for the time required to render such service, including, but not limited to, the time required for the travel of the inspector or inspectors in connection therewith during the regularly scheduled administrative workweek.

* * * * *

PART 354—[AMENDED]

11. The authority citation for Part 354 reads as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

12. Section 354.101 (b) and (c) would be revised to read as follows:

354.101 On a fee basis.

* * * * *

(b) The charges for inspection service will be based on the time required to perform such services. The hourly rates shall be as specified in §§ 391.2 and 391.3 respectively for base time and for overtime or holiday work.

(c) Charges for certain laboratory analysis or laboratory examination of rabbits under this Part related to inspection service shall be at the rate specified in §§ 391.4 for that part which is not covered under the base time, overtime, and/or holiday costs.

13. Section 354.107 would be revised to read as follows:

§ 354.107 Continuous inspection performed on a resident basis.

The charges for inspection of rabbits and products thereof shall be those provided for in § 354.101(b) and specified by hourly rates in §§ 391.2 and 391.3 when the inspection service is performed on a continuous year-round resident basis and the services of an inspector or inspectors are required 4 or more hours per day. When the services of an inspector are required on an intermittent basis, the charges shall be those provided for in § 354.101(b) and specified by hourly rates in §§ 391.2 and 391.3 plus the travel expense and other charges provided for in § 354.106.

PART 355—[AMENDED]

14. The authority citation for Part 355 reads as follows:

Authority: 7 U.S.C. 1622, 1624; 6 CFR 2.17(g) and (i), 2.55.

15. Section 355.12 would be revised to read as follows:

§ 355.12 Charge for service.

The fees to be charged and collected by the Administrator shall be at the rates specified in §§ 391.2, 391.3, and 391.4 respectively for base time; for overtime, including Saturdays, Sundays, and holidays; and for certain laboratory services which are not covered under the base time, overtime, and/or holiday costs. Such fees shall reimburse the Service for the cost of the inspection service furnished.

PART 362—[AMENDED]

16. The authority citation for Part 362 reads as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

17. Section 362.5(c) would be revised to read as follows:

§ 362.5 Fees and charges.

* * * * *

(c) The fees to be charged and collected for service under the regulations in this Part shall be at the rates specified in §§ 391.2, 391.3, and 391.4 respectively for base time; for overtime including Saturdays, Sundays, and holidays; and for certain laboratory services which are not covered under the base time, overtime, and/or holiday costs. Such fees shall cover the costs of the services and shall be charged for the time required to render such service, including, but not limited to, the time required for the travel of the inspector or inspectors in connection therewith during the regularly scheduled administrative workweek.

* * * * *

PART 381—[AMENDED]

18. The authority citation for Part 381 would be revised to read as follows:

Authority: 71 Stat. 441, 82 Stat. 791, as amended; 21 U.S.C. 451 *et seq.*; 76 Stat. 663 (7 U.S.C. 450 *et seq.*).

19. Section 381.38 (a) would be revised to read as follows:

§ 381.38 Overtime and holiday inspection service.

(a) The management of an official establishment, an importer, or an exporter shall reimburse the Program, at the rate specified in § 391.3, for the cost of the inspection service furnished on any holiday specified in paragraph (b) of this section; or for more than 8 hours on any day, or more than 40 hours in any administrative workweek Sunday through Saturday.

* * * * *

20. Section 381.39 would be revised to read as follows:

§ 381.39 Basis of billing for overtime and holiday service.

(a) Each recipient of overtime or holiday inspection service, or both, shall be billed as provided for in § 381.38(a) and at the rate specified in § 391.3, in increments of quarter hours. For billing purposes, 8 or more minutes shall be considered a full quarter hour. Billing will be for each quarter hour of service rendered by each Inspection Service employee.

* * * * *

21. A new Part 391 (9 CFR Part 391) would be added to Subchapter D to to read as follows:

PART 391—FEES AND CHARGES FOR INSPECTION SERVICES

Sec.
391.1 Scope and purpose.
391.2 Base time rate.
391.3 Overtime and holiday rate.
391.4 Laboratory services rate.

Authority: 21 U.S.C. 601 *et seq.*, 460 *et seq.*; 7 CFR 2.17(g) and (i), 2.55; 7 U.S.C. 394, 1622, and 1624.

§ 391.1 Scope and purpose.

Fees shall be charged by the Agency for certain specified inspection services provided on a holiday, on an overtime basis, and/or which are voluntary inspection services.

§ 391.2 Base time rate.

The base time rate for inspection services provided pursuant to sections 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, and 362.5 shall be $23.60 per hour, per Program employee.

§ 391.3 Overtime and holiday rate.

The overtime and holiday rate for inspection services provided pursuant to sections 307.5, 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, 362.5, and 381.38 shall be $25.88 per hour, per Program employee.

§ 391.4 Laboratory services rate.

The rate for laboratory services provided pursuant to sections 350.7, 351.9, 352.5, 354.101, 355.12, and 362.5 shall be $42.88 per hour, per Program employee.

Done at Washington, DC, on January 10, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-840 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-DM-M

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9 CFR Part 310

[Docket No. 88-012-P]

Use of Air During Slaughter Operations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the Federal meat inspection regulations to provide for the approval of several procedures which have been field tested and found acceptable for the inflation of carcasses and parts of carcasses with compressed air injected during dressing operations to facilitate head skinning and the removal of hides and foot hair. This proposal would permit the use of these methods in official establishments without requiring further testing or additional written approval.

DATE: Comments must be received on or before: March 14, 1989.

ADDRESS: Written comments to: Policy Office, Attention: Linda Carey, FSIS Hearing Clerk, Room 3171, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. (See also "Comments" under Supplementary Information.)

FOR FURTHER INFORMATION CONTACT: Dr. Douglas L. Berndt, Director, Slaughter Inspection Standards and Procedures Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-3219.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Administrator has determined that this proposed rule is not a "major rule" under Executive Order 12291. It will not result in an annual effect on the economy of $100 million or more. There will be no major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, and it will not have significant effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with the foreign-based enterprises in domestic or export markets. This proposal would provide official slaughtering establishments with voluntary alternate procedures for use during slaughter operations, by permitting approved methods of injecting compressed air to facilitate head skinning and the removal of hides and foot hair.

Effect on Small Entities

The Administrator has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act, Pub. L. 96-354 (5 U.S.C. 601). The proposal would relieve a current regulatory restriction with respect to the use of air injection into carcasses and parts of carcasses. If promulgated, it would provide all official slaughtering establishments with voluntary alternate procedures for use during slaughter operations, by permitting approved methods of compressed air injection without imposing additional requirements.

Paperwork Requirements

This proposal would require that establishments who wish to test new procedures for the use of air, submit requests to FSIS for approval. (This paperwork requirement will be submitted to the Office of Management and Budget for approval.)

Comments

Interested persons are invited to submit comments concerning this proposal. Written comments should be sent to the Policy Office. Please include the docket number that appears in the heading of this document. All comments submitted in response to this proposal will be made available for public viewing in the Policy Office between 9:00 a.m. and 4:00 p.m., Monday through Friday.

Background

Section 310.13 of the Federal meat inspection regulations (9 CFR 310.13) provides, in part, that carcasses or parts of carcasses shall not be inflated with air. The original intent in disallowing the use of air was to aid in the prevention of adulterated carcasses or parts of carcasses. In particular, the insanitary use of injected air may contaminate the carcass or part or mask abnormal conditions. Section 1(m)(4) of the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601(m)(4)) provides that any carcass, part thereof, meat or meat food product is adulterated "if it has been prepared * * * under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. * * *" If the air were unclean or if there were a contaminated injection procedure, the carcass might become contaminated. Additionally, it was felt that the presence of air in subcutaneous tissues could mask an abnormal condition such as a gas-producing bacterial infection. Section 1(m)(8) of the FMIA (21 U.S.C. 601(m)(8)) provides that any carcass, part thereof, meat or meat food product is adulterated "* * * if damage or inferiority has been concealed in any manner; * * *" Such adulteration could occur by filling out hollows in the animal carcass to make the animal appear of better quality. Thus, FSIS prohibited the use of air to inflate carcasses or parts of carcasses on the basis that the air may be used in an insanitary manner or may mask abnormal conditions, resulting in product adulteration under the FMIA.

Recently, several establishments requested permission to use injected air for hide removal. FSIS determined, at that time, that if establishments could demonstrate that the use of air would result in wholesome, unadulterated meat products, such additional procedures could allow more efficient dressing operations for slaughter establishments. Therefore, FSIS has permitted, on an experimental basis and under close FSIS monitoring, various uses of air during the dressing operations at several establishments. These uses included:

(1) Compressed air injected into cattle feet to facilitate the removal of hair from feet intended for human consumption.

(2) Compressed air injected into the skull of an animal in conjunction with a captive bolt stunner to aid in holding the animal still during the bleeding operation so that fewer injuries to establishment employees would occur.

(3) Compressed air injected under the skin of cattle heads to facilitate head skinning prior to the use of a down hide-puller.

(4) Compressed air injected into the abdominal cavity of swine to facilitate the skinning operation and to minimize the loss of body fat.

Many cattle slaughter establishments are currently requesting authorization to use air injection for hide removal. These establishments wish to accomplish three things: first, reduce equipment and carcass damage by reducing the amount of tension which must be applied to remove the hide from the head and neck

with a down hide-puller; second, prevent damage to the hide in the removal process; and third, reduce contamination of the head when the hide is removed intact.

The above described uses, after field testing, were found to be acceptable. The sanitary injection of air did not mask abnormal carcass conditions and did not contaminate carcasses or parts. Microbiological testing has proven that air injection can be sanitary. The Agency now believes that air injection can be performed in a sanitary manner by a procedure that includes air filtration and injection needle disinfection. Air filtration would consist of not less than two stages. An initial stage of filtration would occur at or near the use point and would consist of an aerosol or coalescing filter, capable of filtration to not more than 0.75 micron, for the removal of oil and water. A subsequent stage of filtration would occur at or near the point of needle hose attachment to the air line and would be a particulate filter, capable of filtration to not more than 0.3 micron. The injection needle would be disinfected by placement in water that is not less than 180 °F. for at least 10 seconds immediately prior to each injection. Therefore, the Administrator believes it is now appropriate to propose to amend the Federal meat inspection regulations to approve the use of injected air as listed in the cited examples.

The proposed rule would allow permanent approval of only the compressed air injection activities in the examples listed above. Any official establishment interested in the use of air for other than the proposed approved methods would be required to submit a request for experimental testing of any unapproved procedure to FSIS for approval, prior to its use. These requests must state the purpose of the use of air, a detailed description of the procedure, and evidence that the procedure can be performed in a sanitary manner. Final approval of an acceptable new proposed method would be obtained by modifying, through rulemaking procedures, the Federal regulations to include the new method.

List of Subjects in 9 CFR Part 310

Meat inspection, Post-mortem inspection.

For reasons set out in the preamble, Title 9, Part 310 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 310—POST-MORTEM INSPECTION

1. The authority citation for 9 CFR Part 310 continues to read as follows:

Authority: 34 Stat. 1260, 79 Stat. 903, as amended, 81 Stat. 584, 84 Stat. 91, 438; 21 U.S.C. 71 *et seq.*, 601 *et seq.*, 33 U.S.C. 1254(b).

2. Section 310.13 would be revised in its entirety to read as follows:

§ 310.13 Inflating carcasses or parts thereof; transferring caul or other fat.

(a)(1) Establishments shall not inflate carcasses or parts of carcasses with air, except as set forth in paragraph (a)(2) of this section.

(2)(i) Any establishment slaughtering livestock that wishes to inflate carcasses or parts thereof with air, using procedures other than the approved methods listed below, shall submit a request for approval for experimental testing to the Administrator. Such a request shall include the purpose of the use of air, a detailed description of the procedure for injecting the air and evidence that the procedure can be performed in a sanitary manner.

(ii) The Administrator shall evaluate newly submitted procedures for the use of air. If the Administrator determines that any such procedure will likely result in wholesome, unadulterated meat product, then the Administrator shall approve experimental testing of the new procedure. In any situation where the Administrator finds a submitted procedure to be unlikely to result in wholesome, unadulterated meat product, the Administrator shall send written notification to the establishment of the denial of such approval. The establishment may re-submit for evaluation a testing procedure that has been denied, provided that modifications have been made to address the original reason for denial. The estabishment also shall be afforded an opportunity to submit a written statement in response to the notification of denial. In those instances where there is a conflict of facts, a hearing, under applicable rules of practice, will be held to resolve the conflict.

(iii) Final approval of an acceptable new proposed method shall be effectuated by modifying, through rulemaking procedures, the Federal regulations to include the new method. Uses for which approval is granted are:

(A) Compressed air injection of cattle feet to facilitate removal of hair from feet intended for human consumption;

(B) Compressed air injection to facilitate hide removal, especially of the head; or

(C) Compressed air injection into the skull in conjunction with a captive bolt stunner to hold the animal still for dressing operations.

The method of compressed air injection shall be a sanitary procedure that includes air filtration and injection needle disinfection. Air filtration shall consist of not less than two stages. An initial stage of filtration shall occur at or near the use point and shall consist of an aerosol or coalescing filter, capable of filtration to not more than 0.75 micron, for the removal of oil and water. A subsequent stage of filtration shall occur at or near the point of needle hose attachment to the air line and shall be a particular filter, capable of filtration to not more than 0.3 micron. The injection needle shall be disinfected by placement in water that is not less than 180 °F for at least 10 seconds immediately prior to each injection.

(b) Transferring the caul or other fat from a fat to a lean carcass is prohibited.

Done in Washington, DC, on January 10, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-895 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-DM-M

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9 CFR Part 318

[Docket No. 80-019P]

Immersion Cured and Dry Cured Bacon

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule; withdrawal of previous proposed rule.

SUMMARY: The Food Safety and Inspection Service is proposing to amend the Federal meat inspection regulations to prohibit the use of nitrate in the preparation of immersion cured bacon and dry cured bacon. The proposed rule would limit nitrite to 120 parts per million (ppm) going into immersion cured bacon bellies and to 200 ppm going into dry cured bacon bellies. The principal effect of this proposed rule would be to reduce the formation of nitrosamines in bacon by prohibiting the use of nitrate in the production of immersion cured and dry cured bacon. The use of nitrate is already prohibited in pumped bacon. This proposed rule would also withdraw the previous proposal, published June 7, 1980 (45 FR 43425), on the same subject and correct two typographical errors in § 318.7(c)(4) concerning the quantitation of nitrite in cured products.

A recent innovation in bacon manufacturing has been the introduction of massaged bacon. In recognition of the similarity, FSIS proposes to apply the pumped bacon requirements to massaged bacon.

DATE: Comments must be received on or before March 14, 1989.

ADDRESS: Written comments may be sent to the Policy Office, Attn: Linda Carey, FSIS Hearing Clerk, Room 3171, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. (See also "Comments" under Supplementary Information.)

FOR FURTHER INFORMATION CONTACT: Mr. Bill F. Dennis, Director, Processed Products Inspection Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250; (202) 447-3840.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Agency has determined that this proposed rule is not a major rule under Executive Order 12291. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical regions; or 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.

Effect on Small Entities

The Administrator also has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act, Pub. L. 96-354 (5 U.S.C. 601). There are approximately 200 establishments now producing either dry cured, immersion cured or massaged bacon products. All of these establishments would be subject to this proposed rule. Of these 200 establishments, 5 produce either massaged or immersion cured bacon and the remaining 195 produce dry cured bacon. The majority of these 200 establishments can be considered as small entities, because they produce a low volume of bacon products per establishment. Preliminary information from an Agricultural Research Service survey begun in mid-1986 and not yet completed indicates that the majority of establishments which produce dry cured bacon no longer use nitrate in their cure. Thus, the majority of affected establishments are now operating in compliance with the proposed requirements on use of nitrate. The few establishments which are still using nitrate as part of their curing process would be required to eliminate its use but could substitute nitrite to achieve the same technical effect. There is no significant cost difference between the purchase of nitrate or nitrite. Limiting the amount of nitrite that may be used in the product is expected to have a positive affect on producers as they will be able to use less nitrite and thus save on the cost of purchasing nitrite.

Comments

Interested persons are invited to submit written comments concerning this proposed rule. Written comments should be sent to the Policy Office and should refer to the docket number that appears in the heading of this document. All comments submitted in response to this action will be made available for public inspection in the Policy Office between 9:00 a.m. and 4:00 p.m., Monday through Friday.

Background

The use of nitrate in the curing of meat can be traced back several hundred years. In the early 1900's, chemists and meat scientists began to understand some of the mechanisms of the nitrate curing process. Nitrate's principal role is as a source of nitrite which fixes the characteristic pink color in cured meat products. In recognition of this color fixing role played by nitrite [1] in the curing process, the Department approved its direct use to reduce dependence on the unreliable conversion of nitrate to nitrite. Subsequently, nitrite was found to have additional benefits which increased shelflife and safety of cured meats. Nitrite retards rancidity and inhibits the growth of some bacteria.

The use of nitrite and nitrate in the curing of meat has been an area of concern to the Department for several years since it was learned that nitrite, when combined with secondary and tertiary amines under appropriate conditions, can form nitrosamines.

Nitrosamines are formed during the high heat of some cooking processes such as frying. Bacon containing confirmable levels of nitrosamines is an adulterated product. Many of the nitrosamines, including those found in fried bacon, have been demonstrated to be carcinogenic to laboratory animals.[2] If confirmable levels of nitrosamines are verified by gas liquid chromotography/mass spectrometry analysis (GLC/MS), the entire lot is disposed of in a manner to assure that nitrosamines will not form when the product is cooked. This may include incorporation of the uncooked bacon as an ingredient in another food product, provided it is processed in a manner to preclude the formation of nitrosamines.

Bacon may be produced by any of three principal curing methods. Most bacon, about 98 percent, is prepared by injecting or tumbling a curing solution containing water, salt, flavorings and nitrite into pork bellies so that there is an immediate penetration of the cure into the muscle tissues. This is referred to as pumped bacon. The other two percent are divided between immersion cured and dry cured bacon. Immersion cured bacon is prepared by placing pork bellies in vats and then either covering them with the curing solution or permitting the natural tissue fluids extracted by the cure to cover the bacon. Dry cured bacon is produced by rubbing a dry mixture of salt, flavorings and nitrite onto the surface of each pork belly. The dry cure must be dissolved by the natural tissue fluids and allowed to diffuse throughout the meat. The curing time is shortest for pumped bacon and longest for dry cured bacon.

Under the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Secretary of Agriculture is responsible for assuring that meat and meat food products distributed to consumers are wholesome and not adulterated (21 U.S.C. 602). Section 6 of the FMIA (21 U.S.C. 606) directs the Secretary, through inspectors, to examine all meat food products prepared for distribution in commerce in any slaughtering, meat canning, salting, packing, rendering, or similar establishment. Inspectors shall mark or label as "Inspected and passed" all such products found to be not adulterated and "Inspected and condemned" all such products found to be adulterated within the meaning of section 1(m) of the FMIA (21 U.S.C. 601(m)).

Section 1(m) of the FMIA defines an adulterated product, in part, as product that " * * * bears or contains any poisonous or deleterious substance which may render it injurious to health * * * " (21 U.S.C. 601(m)(1)),

[1] As used in this document, the term "nitrite" refers to either sodium nitrite or potassium nitrite. However, unless specifically noted otherwise, quantity declarations are stated on the basis of the sodium salt. A conversion to approximate potassium salt equivalent is accomplished by multiplying by 1.23.

[2] Preussman, R., Schmohl, D. & Eisenbrand, G. (1977) Carcinogenicity of N-nitrosopyrrolidine: dose study in rats. *Z. Krebsforsh 90* 161-166.

In response to the finding of nitrosamines in bacon, the Department published a final regulation, in 1978, prohibiting the use of nitrate in pumped bacon, limiting the amount of ingoing nitrite in pumped bacon to 120 ppm, and requiring that sodium ascorbate or sodium erythorbate be used at 550 ppm (43 FR 20992) (9 CFR 318.7(b)). Sodium ascorbate and sodium erythorbate are considered to be nitrosamine inhibitors and thus, capable of decreasing nitrosamine formation in bacon. Since that time, an active sampling and nitrosamine testing program for pumped bacon has been in effect. In addition, the Department provided in 1986 two alternative procedures for controlling the levels of nitrite added to pumped bacon. First, as part of an FSIS approved quality control (QC) program, establishments are allowed to reduce ingoing sodium nitrite levels to 100 ppm (or 123 ppm potassium nitrite) and 550 ppm sodium ascorbate or sodium erythorbate. The second alternative, also as part of an FSIS approved QC program, allows establishments to add sodium nitrite at a level between 40 and 80 ppm (or 49 to 99 ppm potassium nitrite) with 550 ppm sodium ascorbate or sodium erythorbate plus sugar and starter cultures (lactic acid producing bacteria). In 1985 and 1986, the Department authorized the use of alpha-tocopherol as an additional nitrosamine inhibitor in pumped bacon (50 FR 27573, 51 FR 35630).

Although FSIS did not address the levels of nitrites and nitrates in dry cured products in the rulemaking proceedings concerning pumped bacon, FSIS did begin research on the issue of nitrosamines in dry cured products.

1. In a 1976 market basket survey, the Food and Drug Administration tested one sample of dry cured bacon. No nitrosamines were detected; however, formulation of the cure and processing procedures were unknown.

2. In October 1977, FSIS published a notice (42 FR 55626) requesting information as to whether carcinogenic nitrosamines are formed in cured meat products as a result of ordinary conditions of processing and/or preparation for consumption. The Nitrite Safety Council, an organization composed of representatives from several meat processor trade associations, submitted data [3] in response to this request. The data consisted of the analytical results from 15 samples of dry cured bacon collected and analyzed by the Nitrite Safety Council. Of these samples, 13 had been cured with nitrite, or nitrite and nitrate in combination. The ingoing range was from .027 ounces of nitrite alone per 100 pounds of meat to 3 ounces of nitrate plus 1 ounce of nitrite per 100 pounds of meat. One of the other two samples received the maximum allowable amount of sodium nitrate (3.5 ounces per 100 pounds of meat) but no nitrite. Nitrosamines were not found at confirmable levels in this sample. In the 13 samples in which nitrite had been used in processing, findings by the mineral oil vacuum distillation and thermal energy analyzer (TEA) screening test ranged from undetectable to 180 parts per billion (ppb) of nitrosopyrrolidine (a carcinogenic nitrosamine). Seven of the 13 findings indicated that carcinogenic nitrosamines were present at levels of 10 ppb or greater.

The Department monitored the collection and preparation of the samples analyzed by the Council. In addition, the Department analyzed companion samples to those tested by the Council. These monitoring results, including successful confirmation in all cases attempted, established the validity of the data submitted by the Council.

3. To get additional information on the occurrence of nitrosamines in bacon made with dry curing materials, the Department, in 1978, tested 39 additional bacon samples.[4] The results of the screening tests ranged from undetectable to 199 ppb. In 18 of the 39 samples, there were levels of carcinogenic nitrosamines widely recognized by scientists as confirmable. Three of these samples were selected as part of a nine-sample confirmation effort for TEA results. In all three cases, the presence of carcinogenic nitrosamines was confirmed.

4. Finally, in 1979, the Nitrite Safety Council reported additional data as part of a small study [5] to determine the effect of reducing ingoing nitrite to 120 ppm and adding sodium erythorbate as a nitrosamine inhibitor in pork bellies. The study was conducted in four cooperating processing establishments. Analyses of the samples were limited to a TEA screening of 10 individual pork bellies from one establishment and three 10-belly composite samples each from a different establishment. Analyses of these pork bellies revealed the presence of nitrosamines from 4 to 16 ppb in the individual bellies and 8 to 18 ppb in the composite belly samples. Although the Council reported that the results indicate that acceptable dry cured bacon with a very low potential for nitrosamine formation can be produced by using reduced levels of added sodium nitrite coupled with sodium erythorbate, the study was too small to permit the Department to draw any firm conclusions. However, nitrosamines were found in one of the composite samples.

As can be seen from the foregoing data, the incidence of confirmable levels of nitrosamines in bacon prepared with dry curing materials appeared high. Therefore, FSIS on June 27, 1980, published a proposed rule (45 FR 43425) to regulate production procedures for dry cured bacon. The proposal would have established a monitoring program and specific requirements for water activity and salt content. Most of the 117 commenters opposed the proposed rule because they believed the proposed water activity and salt content would make the product unsalable. Commenters also believe the monitoring program would result in many small processors closing. The commenters asserted that the cost of having a private laboratory test the product would exceed the value of the product. The alternative would be to have the Department perform the tests. It would take longer to get results, and the processors would not have enough storage capacity to continue production and remain in business.

Following publication of the proposal in 1980, FSIS formed an expert task force to study the manufacture of dry cured bacon. The task force initiated a survey [6] of dry cured bacon producers to gather information on the current production practices. Producers were asked to voluntarily submit formulations and samples of dry cured product for laboratory testing. Of the 143 samples which were submitted, 135 were tested by the Department. The samples were analyzed for residual nitrite and nitrate, salt, moisture, nitrosamines, pH, fat, protein, and water activity. As a result of these analyses, the Department determined that residual nitrite was the most important contributing factor to the presence of detectable nitrosamines. The task force prepared guidelines in 1983 for the manufacture of dry cured bacon. The guidelines recommend that manufacturers carefully control nitrite by (1) accurately measuring the amount added, (2) adding no more than 200 ppm

[3] A copy of this data is available for public inspection in the office of the FSIS Hearing Clerk.

[4] The 39 bacon samples were part of a larger survey conducted by the Department on dry cured hams, pork shoulders, and bacon.

[5] A copy of this study is available for public inspection in the office of the FSIS Hearing Clerk.

[6] A copy of this survey report is available for public inspection in the office of the FSIS Hearing Clerk

of nitrite and (3) adding no nitrate. In addition, the guidelines recommended that bellies should be sorted according to weight and thickness; that bellies should not be cured for more than 7 days per inch of thickness at 36–43 °F.; and that bellies should be cured with the skin off and not processed to excessive dryness.

Although the 1980 survey was not intended to include immersion cured bacon, six samples were received which had been cured by this method. Five of the six samples had nitrosopyrrolidine levels greater than 10 ppb, and three of these samples had levels greater than 20 ppb. These data indicate that immersion cured bacon also has a significant potential for nitrosamine formation. To verify these findings and assess the nitrosamine levels in immersion cured bacon an additional survey was done in 1980. This survey tested 59 samples of regular immersion cured bacon. Forty-nine percent of these samples had nitrosamine values equal to or greater than 17 ppb. This survey confirmed that immersion cured bacon has a potential for nitrosamine formation which is associated with residual nitrite in the raw product.

In 1986, FSIS requested research by the Agricultural Research Service (ARS) to evaluate processing practices that the task force survey identified as significantly affecting the nitrosamine levels. ARS selected establishments from the 1980 FSIS survey whose processes would be likely to produce detectable nitrosamines. However, this research was conducted after those establishments had received copies of the task forces' recommended guidelines. Preliminary information indicates that most of the establishments had amended their processes, no longer used nitrate, and had no detectable nitrosamines. The final report has been submitted for publication.

In view of the comments on the previous proposal and the information developed by the 1980 task force survey, FSIS is withdrawing the proposed rule published on June 27, 1980 (45 FR 43425), and is proposing to permit the manufacture of immersion cured and dry cured bacon made with accurately controlled reduced amounts of nitrite and no nitrate. It has been shown that nitrosamine formation in bacon is directly dependent on levels of residual nitrite left in the bacon after the curing process. By accurately controlling the amount of nitrite added during the curing process, the residual nitrite should be low enough to minimize any nitrosamine formation.

The Agency has decided not to propose a laboratory monitoring test system for immersion cured and dry cured bacon at this time. The production schedules of immersion cured and dry cured bacon producers can be intermittent and unpredictable. This makes the sample collection required by any statistical monitoring system difficult for these products. Instead, FSIS personnel will, through inplant observations and control of formulation, verify that immersion cured bacon and dry cured bacon are wholesome and are being produced in accordance with these regulations.

A recent innovation in bacon manufacturing has been the introduction of massaged bacon. In this process pork bellies are placed in drums with the curing solution and tumbled until the cure is absorbed. All of the curing solution is incorporated into the bacon. As such, it is similar to pumped bacon where the curing solution is injected into the pork belly. In recognizing the similarity between these two products, FSIS proposes to treat them the same and apply the pumped bacon requirements to massaged bacon.

Effect of This Proposal

This proposal would clarify § 318.7(b) of the Federal meat inspection regulations (9 CFR 318.7(b)) so that the provisions of the regulation which pertain only to pumped bacon (9 CFR 318.7(b)(1)) would be so designated because the requirements pertaining to bacon made with dry curing materials are different. Immersion cured bacon requirements would also be shown separately with the use of ingoing nitrite at 120 ppm, or an equivalent amount of potassium nitrite (148 ppm). These are the same amounts as for pumped bacon. Since the cure ingredients are already in solution surrounding the pork bellies, diffusion of the nitrite into the product is facilitated.

For dry cured bacon, the manner by which dry curing materials enter the pork bellies is essentially one of absorption. For dry cured bacon, nitrite would be limited to 200 ppm going into the product. To accurately control the amount of nitrite in the product and because of the variability of the conversion of nitrate to nitrite, the use of nitrate would be prohibited in both immersion cured bacon and dry cured bacon as it now is in pumped bacon.

In proposing this rule, FSIS is aware of the need to minimize economic disruption and, at the same time, meet consumer expectation. Therefore, it will continue to work with industry groups to assist in identifying those production methods and/or procedures that will result in a product in compliance with the Federal Meat Inspection Act; i.e., a product that does not contain confirmable levels of carcinogenic nitrosamines. If this proposal is issued as a final rule, as successful methods are identified, FSIS will provide technical guidance to those industry members who request help in instituting them.

Other Modifications: In the preparation of this proposal, two typographical errors were discovered in the chart in § 318.7(c)(4) of the regulations (9 CFR 318.7(c)(4)). In each instance the word "nitrate" should be "nitrite". Accordingly, this proposal would correct those errors.

Proposal

For reasons set forth in the preamble, Title 9, Subchapter A, Part 318, of the Code of Federal Regulations is proposed to be amended as set forth below:

List of Subjects in 9 CFR Part 318

Food additives, Meat inspection.

PART 318—ENTRY INTO OFFICIAL ESTABLISHMENTS: REINSPECTION AND PREPARATION OF PRODUCTS

1. The authority citation for Part 318 continues to read as follows:

Authority: 34 Stat. 1260, 81 Stat. 584, as amended (21 U.S.C. 601 *et seq.*), 72 Stat. 862, 92 Stat. 1069, as amended, (7 U.S.C. 1901 *et seq.*), 76 Stat. 663 (7 U.S.C. 450 *et seq.*) unless otherwise noted.

2. Section 318.7(b) would be amended by revising the introductory text and the beginning phrase of paragraph (b)(1), and by adding new paragraphs (b) (5) and (b) (6) to read as follows:

§ 318.7 Approval of substances for use in the preparation of products.

* * * * *

(b) Requirements for the use of nitrite and sodium ascorbate or sodium erythorbate (isoascorbate) in bacon. Nitrates shall not be used in curing bacon.

(1) *Pumped bacon.* with respect to bacon injected with curing ingredients and massaged bacon (pumped bacon):

* * *

* * * * *

(5) *Immersion cured bacon.* Immersion cured bacon may be placed in a brine solution containing salt, nitrite and flavoring material or in a container with salt, nitrite and flavoring material. Sodium nitrite shall not exceed 120 ppm ingoing or an equivalent amount of potassium nitrite (148 ppm ingoing) based on the actual or estimated skin-free green weight of the bacon bellies.

(6) *Bacon made with dry curing materials.* With respect to bacon made with dry curing materials, the product shall be cured by applying a premeasured amount of cure mixture to the bacon belly surfaces, completely covering the surfaces. Sodium nitrite shall not exceed 200 ppm ingoing or an equivalent amount of potassium nitrite (246 ppm ingoing) in dry cured bacon based on the actual or estimated skin-free green weight of the bacon belly.

§ 318.7 [Amended]

3. Section 318.7(b)(2) would be amended by changing each reference to the word "bacon" to read "pumped bacon".

4. In the chart in § 318.7(c)(4), the listing for the curing agent sodium or potassium nitrite for the purpose to fix color would be corrected by changing "nitrate" in the last sentence under "Substance" to read "nitrite" and by changing "sodium nitrate" in the next to last sentence under "Amount" to read "sodium nitrite."

Done at Washington, DC, on January 10, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-900 Filed 1-12-89; 9:45 am]

BILLING CODE 3410-DM-M

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9 CFR Parts 327 and 381

[Docket No. 88-013P]

Importation of Meat and Poultry Products; Refused Entry Product

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the Federal meat and poultry products inspection regulations regarding the handling of imported products which have been refused entry into the United States. The proposal would add a provisio to the regulations that any such products exported to another country and returned to the United States would be subject to detention in accordance with section 402 of the Federal Meat Inspection Act (FMIA) or section 19 of the Poultry Products Inspection Act (PPIA) and to seizure and condemnation in accordance with section 403 of the FMIA or section 20 of the PPIA. This proposed rule is necessary specifically to provide that such products are subject to administrative detention and judicial seizure and condemnation as authorized under the Acts.

DATE: Comments must be received on or before March 14, 1989.

ADDRESS: Written comments to: Policy Office, Attn: Linda Carey, FSIS Hearing Clerk, Room 3171—South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. (See also "Comments" under Supplementary Information.) Oral comments as provided under the PPIA to: Patrick J. Clerkin, (202) 447-5604.

FOR FURTHER INFORMATION CONTACT: Patrick J. Clerkin, Director, Field Operations Division, Compliance Program, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington DC 20250, (202) 447-5604.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Agency has determined that this proposed rule is not a "major rule" under Executive Order 12291. This proposed rule would not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographical regions; or have 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. Current regulations prevent the distribution into human food channels of those meat or poultry products offered for importation into the United States from foreign countries and subsequently refused entry. The regulations further prohibit the reimportation of such product into the United States. Although the regulations currently do not so state, FSIS has authority under the FMIA and the PPIA to take the necessary steps to preclude the distribution in the United States of any refused entry product that has been returned to the United States. This proposal would not adopt new policy, but would merely specify actions currently authorized under the Acts which provide for the administrative detention and the judicial seizure and condemnation of product, in commerce, which is adulterated or misbranded or otherwise in violation of the FMIA or PPIA. As such, no new requirements would be placed on foreign or domestic markets.

Effect on Small Entities

The Administrator has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). This proposed rule merely clarifies the regulations to reflect authority established under the Acts with respect to the administrative detention and judicial seizure and condemnation of meat or poultry products that are adulterated or misbranded or otherwise in violation of the FMIA or PPIA.

Comments

Interested persons are invited to submit written comments concerning this proposal. Written comments should be sent to the Policy Office specifying the docket number which appears in the heading of this document. Any person desiring opportunity for oral presentation of views as provided under the PPIA must make such request to Patrick J. Clerkin so that arrangements may be made for such views to be presented. A transcript will be made of all views orally presented. All comments submitted pursuant to this action will be made available for public inspection in the Policy Office between 9:00 a.m. and 4:00 p.m., Monday through Friday.

Background

Section 20(a) of the FMIA (21 U.S.C. 620) provides that "No carcasses, parts of carcasses, meat or meat food products * * * which are capable of use as human food, shall be imported into the United States if such articles are adulterated or misbranded and unless they comply with all * * * other provisions of the Act and regulations issued thereunder * * *." Section 20(b) of the FMIA further provides that "The Secretary may prescribe the terms and conditions for the destruction of all such articles which are imported contrary to this section unless (1) they are exported by the owner or consignee within the time fixed therefor by the Secretary, or (2) in the case of articles which are not in compliance with the Act solely because of misbranding, such articles are brought into compliance with the Act under supervision of authorized representatives of the Secretary." Section 17 (a) and (b) of the PPIA (21 U.S.C. 466) contains similar language for poultry and poultry products, except that no provision is made for poultry products that do not comply because of misbranding to be brought into compliance.

Section 402 of the FMIA (21 U.S.C. 672) provides that "Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any

dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any authorized representative of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce or otherwise subject to title I or II of this Act, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, in violation of the provisions of title I of this Act or of any other Federal law or the laws of any State or Territory, or the District of Columbia, or that such article or animal has been or is intended to be, distributed in violation of any such provisions, it may be detained by such representative for a period not to exceed twenty days, pending action under section 403 of this Act or notification of any Federal, State, or other governmental authorities having jurisdiction over such article or animal, and shall not be moved by any person, firm, or corporation from the place at which it is located when so detained, until released by such representative."

Section 403(a) of the FMIA (21 U.S.C. 673) provides that "Any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules or other equines, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine, that is being transported in commerce or otherwise subject to title I or II of this Act, or is held for sale in the United States after such transportation, and that (1) is or has been prepared, sold, transported, or otherwise distributed or offered or received for distribution in violation of this Act, or (2) is capable of use as human food and is adulterated or misbranded, or (3) in any other way is in violation of this Act, shall be liable to be proceeded against and seized and condemned, at any time, on a libel of information in any United States district court or other proper court as provided in section 404 of this Act within the jurisdiction of which the article or animal is found." Sections 19 and 20(a) of the PPIA (21 U.S.C. 467b) contain similar provisions for poultry and poultry products.

Part 327 of the Federal meat inspection regulations (9 CFR Part 327) and Subpart T of the poultry products inspection regulations (9 CFR Part 381, Subpart T) prescribe the requirements for meat and poultry products offered for importation into the United States as authorized by the FMIA and PPIA. Such products offered for importation from any foreign country are inspected by departmental inspectors before they are entered into the United States. The inspectors report their findings to the Director of Customs at the port of entry where such products were offered for admission into the United States.

If any such products are identified as "U.S. Refused Entry", the inspector requests the Director of Customs to refuse admission of the product and to direct the owner or consignee of the refused entry product to export such product within 45 days. The owner or consignee may opt not to reexport the product, but rather may, within the 45-day period, either destroy the product under departmental supervision or convert the product into animal food. As previously discussed, the FMIA contains an exception to this rule that provides that any meat food product which has been refused entry solely because of misbranding may be brought into compliance with the Act under departmental supervision. This exemption is also provided in § 327.13(a)(4) of the Federal meat inspection regulations (9 CFR 327.13(a)(4)).

If the owner or consignee does not take appropriate action within the specified time period, the Acts and regulations authorize the Secretary to destroy the product for human food purposes (9 CFR 327.13(a)(6) and 381.202(a)(5)). This is necessary to prevent adulterated or misbranded product from entering into U.S. commerce.

Section 327.13(a)(7) of the Federal meat inspection regulations and § 381.202(a)(6) of the poultry products inspection regulations prohibit the return to the United States of product which had been refused entry and exported to another country (9 CFR 327.13(a)(7) and 381.202(a)(6)). If such product is returned to the United States, FSIS is authorized under the FMIA and PPIA to administratively detain the product pursuant to section 402 of the FMIA or section 19 of the PPIA, to preclude its distribution in commerce and seek judicial seizure and condemnation of such product in accordance with section 403 of the FMIA or section 20 of the PPIA. The current regulations, however, do not specify that such refused entry product is subject to detention and judicial seizure and condemnation under the law. To clarify the regulations in this regard, FSIS is proposing to amend §§ 327.13 and 381.202 of the Federal meat and poultry products inspection regulations, specifically to provide that such returned, refused entry product shall be subject to administrative detention and judicial seizure and condemnation.

Proposed Rule

List of Subjects

9 CFR Part 327

Meat inspection, Imported products.

9 CFR Part 381

Poultry products inspection, Imported products.

For the reasons set out in the preamble, Title 9, Parts 327 and 381 of the Code of Federal Regulations are proposed to be amended as set forth below.

PART 327—[AMENDED]

1. The authority citation for Part 327 would continue to read as follows:

Authority: 34 Stat. 1260, 79 Stat. 903, as amended, 81 Stat. 584, 84 Stat. 91, 438; 21 U.S.C. 71 *et seq.*

2. Section 327.13 would be amended by adding a sentence at the end of paragraph (a)(7) to read as follows:

§ 327.13 Foreign products offered for importation; reporting of findings to customs; handling of articles refused entry.

(a) * * *

(7) * * * Any such product so returned to the United States shall be subject to administration detention in accordance with section 402 of the Act, and seizure and condemnation in accordance with section 403 of the Act.

* * * * *

PART 381—[AMENDED]

3. The authority citation for Part 381 would continue to read as follows:

Authority: 71 Stat. 441, 82 Stat. 791, as amended, 21 U.S.C. 451 *et seq.*; 76 Stat. 663 (7 U.S.C. 450 *et seq.*).

4. Section 381.202 would be amended by adding a sentence at the end of paragraph (a)(6) to read as follows:

§ 381.202 Poultry products offered for entry; reporting of findings to customs; handling of articles refused entry; appeals, how made; denaturing procedures.

(a) * * *

(6) * * * Any such product so returned to the United States shall be subject to administrative detention in accordance with section 19 of the Act, and seizure and condemnation in accordance with section 20 of the Act.

* * * * *

Done at Washington, DC, on January 10, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-898 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-DM-M

9 CFR Part 381

[Docket No. 87-016P]

Binder Consisting of Sodium Alginate, Calcium Carbonate, Lactic Acid and Calcium Lactate in Ground and Formed Poultry Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the poultry products inspection regulations to permit the use of a dry mixture of sodium alginate, lactic acid, calcium lactate, and calcium carbonate to produce an edible binder for addition to ground and formed poultry products. The Food and Drug Administration (FDA) has determined that these substances are generally recognized as safe (GRAS) for use in foods separately or in a dry mixture. FSIS has determined that it is now appropriate to propose to add sodium alginate, calcium carbonate, lactic acid, and calcium lactate as a binding mixture to the list of acceptable binders for use in ground and formed poultry products. This dry mixture would be used as a binder in ground and formed poultry products and would enable these poultry products to be marketed in a raw state as well as in a cooked state. Formed poultry products contained this binding mixture would be labeled to denote that they are "formed" and the binding mixture ingredients would be listed in the product name.

DATE: Comments must be received on February 13, 1989.

ADDRESS: Written comments to: Policy Office, Attn. Linda Carey, FSIS Hearing Clerk, Room 3171 South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments as provided by the Poultry Products Inspection Act should be directed to Ashland L. Clemons at Area Code (202) 447-6042.

FOR FURTHER INFORMATION CONTACT: Ashland L. Clemons, Acting Director, Standards and Labeling Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, Area Code (202) 447-6042.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Administrator has determined in accordance with Executive Order 12291 that this proposed rule is not a "major rule." It will not result in increased costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. It will not have a significant adverse effect on competition, employment, investment, productivity, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed rule provides for the use of a mixture consisting of sodium alginate, calcium carbonate, lactic acid, and calcium lactate as binders in raw or cooked poultry products. The added mixture may not exceed 1.55 percent of the product formulation. The mixture must be added in dry form as an edible binder in ground poultry products. This action will enable poultry producers to use a wider variety of binders, resulting in more variety of poultry products. The use of binder mixture in poultry products is voluntary.

Effect On Small Entities

The Administrator has determined that this proposed rule will not have a significant economic impact upon a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rulemaking will impose no new requirements on industry; rather, it will permit the poultry industry to use a new type of binder which allows raw or cooked pieces of ground poultry to cohere. Costs for equipment may be reduced due to elimination of usual freezing, tempering, and/or precooking prior to or after portioning. The formed poultry product containing this mixture as a binder can be conveniently portioned, packaged, and marketed as a refrigerated raw poultry food product, a frozen raw poultry food product, or precooked and marketed refrigerated or frozen. Use of the binding mixture in formed poultry is voluntary.

Background

The Agency has been petitioned by Colorado State University Research Foundation, Fort Collins, Colorado, to amend the poultry products inspection regulations to allow the use of a mixture consisting of sodium alginate, calcium carbonate, lactic acid, and calcium lactate in a dry binding mixture for addition to various raw or cooked formed poultry products.

Currently, poultry processors use advanced technology to produce formed poultry products from fresh ground poultry resembling fresh, intact muscles. These formed poultry products are marketed either frozen or pre-cooked to retain textural and structural integrity. The algin/calcium gelation mechanism, which results from the addition of the dry mixture to the formulation, allows formed poultry product to be processed without any further need for addition of sodium chloride or phosphate salts. These poultry products would possess binding properties in raw as well as in the cooked, refrigerated state. The process involves reducing poultry product pieces to the appropriate particle size, depending on desired product attributes. In the course of the process, dry non-poultry product ingredients are added during mixing of poultry product pieces. The mixed ingredients, including the mixture of sodium alginate, calcium carbonate, lactic acid, and calcium lactate, could then be formed by molding or stuffing in the desired shape. After the gel has set, the raw product may be portioned and packaged. Other options are precooking and freezing or freezing the raw product.

The petitioner has supplied analytical data at FSIS's request supporting its claims that wholesomeness is not affected when poultry products are processed with this binding mixture. The quantity of dry mixture required to bind poultry pieces is not more than 1.55 percent of the total product formulation. Analytical data are available free of charge from the Standards and Labeling Division at the address given under **"FOR FURTHER INFORMATION CONTACT."**

Sodium alginate (algin), which is the sodium salt of algenic acid, is listed in the poultry products inspection regulations and can be used at a level sufficient for purpose to extend and to stabilize various poultry products. FDA regulations list sodium alginate as an affirmed GRAS substance and it is used as a stabilizer and thickener at a 1.00 percent level in "other food" categories (21 CFR 184.1724).

Lactic acid is listed in the poultry products inspection regulations at a level sufficient for purpose as an acidifier when used in various poultry products. FDA regulations list lactic acid as an affirmed GRAS substance, and it is used in food with no limitation other than current good manufacturing practice (21 CFR 184.1061).

Calcium lactate, which is a calcium salt of lactic acid, presently is not listed in the poultry products inspection regulations, but it is listed as an affirmed GRAS substance in FDA regulations and could be used in the "all other" food categories with conditions of use limited to a stabilizer and thickener (21 CFR 184.1207).

Calcium carbonate is not listed in the poultry products inspection regulations, but it is listed as an affirmed GRAS substance in the FDA regulations, and could be used in food without limitation

other than good manufacturing practice (21 CFR 184.1191).

The use of sodium alginate, lactic acid, calcium lactate, and calcium carbonate to produce calcium alginate as a binder in formed meat food products has been permitted since September 17, 1986, in accordance with amendments to the Federal meat inspection regulations (9 CFR 318.7(c)(4)). Calcium alginate is also listed as an affirmed GRAS substance in the FDA regulations and could be used in the "all other" food categories as a stabilizer and thickener (21 CFR 184.1187). The added mixture for producing calcium alginate as a binder matrix in meat food products may not exceed 1.5 percent of the product at formulation. FSIS has determined after a review of the available data and information that the added mixture for poultry products should be increased to 1.55 percent of the product at formulation. This difference in use levels results from the fact that there are different soluble proteins in meat and poultry, that is, the soluble protein in poultry necessitates a slight increase in the total mixture level to achieve the same binding effect. The individual ingredient use levels in the matrix for poultry would be limited as follows: (1) Sodium alginate—not more than 0.8 percent; (2) calcium carbonate—not more than 0.15 percent; and (3) lactic acid and calcium lactate—not more than 0.6 percent.

FDA has advised FSIS that it considers the mixture of these substances as GRAS when the total mixture of such substances is dispersed in a dry form into the formulation and the mixture does not exceed 1.55 percent of the product formulation. At this level of use and under prescribed conditions, there will be only a minimal reaction to produce calcium alginate as a binding compound. If the dry mixture is dispersed in water prior to application to poultry food products, calcium alginate could be produced at a higher amount that could be in conflict with the FDA GRAS standard for its use level (21 CFR 184.1187). However, monitoring to assure that the mixture is only added in its dry form will be included as part of the inspector's routine duties.

The Administrator concurs with FDA's conclusions regarding the safety of these substances for their proposed use. He also finds that information provided by the petitioner and the research data available to the Agency indicate that (1) the proposed use of these substances as a dry mixture, as described, will be used at the lowest level necessary to accomplish the technical effect and will be in compliance with applicable FDA requirements, (2) the use of the mixture will be functional and suitable for the product intended, (3) the substances will be used at the lowest level necessary to accomplish their intended technical effects, and (4) the use of these substances will not render products in which they are used adulterated, misbranded, or otherwise not in accordance with the requirements of the Poultry Products Inspection Act.

Therefore, FSIS is proposing to amend the table of approved substances in the poultry products inspection regulations (9 CFR 381.147(f)(4)) to include the use of sodium alginate, calcium carbonate, lactic acid, and calcium lactate in a dry mixture to form an edible binder matrix in raw or cooked ground and formed poultry products.

FSIS is also proposing to amend the labeling provisions in the poultry products inspection regulations (9 CFR 381.129) to require a qualifying statement contiguous to the product name identifying the presence of these substances when they are used as a binding mixture. This is being done in order that the product will not be misbranded under the terms of the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*).

Proposed Rule

List of Subjects in 9 CFR Part 381

Food labeling, Poultry and poultry products, Food additives.

For the reasons explained in the preamble, Part 381 would be amended as set forth below.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for Part 381 continues to read as follows:

Authority: 71 Stat. 441, 82 Stat. 791, as amended, 21 U.S.C. 451 *et seq.*, Stat. 663 (7 U.S.C. 450 *et seq.*).

2. Section 381.129 would be amended by adding a new paragraph (d) to read as follows:

§ 381.129 False or misleading labeling or containers.

* * * * *

(d) When sodium alginate, calcium carbonate, lactic acid, and calcium lactate are used together in a dry binding matrix in ground and formed poultry products, as permitted in § 381.147 of this subchapter, there shall appear on the label contiguous to the product name, a statement to indicate the use of sodium alginate, calcium carbonate, lactic acid, and calcium lactate.

3. Section 381.147 would be amended by adding sodium alginate, calcium carbonate, lactic acid, and calcium lactate as one entry to Table 1. This entry is placed in alphabetical order under the class of substances entitled "Binders and Extenders."

§ 381.147 Restrictions on the use of substances in poultry products.

* * * * *

(f) * * *

(4) * * *

Class of substance	Substance	Purpose	Products	Amount
Binders and Extenders	A mixture of sodium alginate, calcium carbonate, lactic acid, and calcium lactate.	To bind poultry pieces	Ground and formed raw or cooked poultry pieces.	Sodium alginate not more than 0.8%, calcium carbonate not more than 0.15%, lactic acid and calcium lactate not more than 0.6% of product formulation. Added mixture may not exceed 1.55% of product at formulation. The mixture must be added in dry form.

* * * * *

Done at Washington, DC, on January 10, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-899 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-DM-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Part 563

[No. 88-1569]

Issuance and Use of Subordinated Debt Securities

Date: December 30, 1988.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC") or the "Corporation"), is proposing to amend its regulations relating to the issuance of subordinated debt securities by insured institutions 12 CFR 563.8-1. The proposed changes are intended primarily to codify certain interpretations of the rule and to make technical revisions in the rule to accommodate recent legislation. In addition, the Board proposes to modify the bases for supervisory objection to approval of a subordinated debt application now found at 12 CFR 563.8-1(b)(2) by authorizing the Office of Regulatory Activities of the Federal Home Loan Bank System ("Office of Regulatory Actitivies") to develop guidelines to specify the bases for supervisory objection to the issuance of subordinated debt. The Board would then expect to limit the imposition of non-standard conditions in subordinated debt approvals. Accordingly, the Board proposes to delete certain of the bases for supervisory objection currently specified in the regulation, some of which have become obsolete, and to direct the Office of Regulatory Activities to prepare and promulgate guidelines that would specify supervisory bases for objection to subordinated debt applications, in order to implement the general standards contained in the proposed regulation.

Further, the Board proposes to give the Principal Supervisory Agents ("PSAs") authority to deny as well as to approve subordinated debt applications. Coupled with this new authority, the regulation would include an appeal process designed to provide "final agency action."

Finally, the Board is proposing and soliciting comment on a set of standard conditions that would be applicable to approvals of applications to include subordinated debt in regulatory capital. Except in highly unusual circumstances or where supervisory objections are raised based on the guidelines developed by the Office of Regulatory Activities in effect at that time, the Board would expect that such standard conditions would be the only conditions imposed by the Board or its delegates on the approval of subordinated debt applications.

The Board is of the view that in the current regulatory and economic climate, subordinated debt is a viable and acceptable adjunct to regulatory capital under appropriate circumstances, and the Board reaffirms its intention to continue to allow subordinated debt issued pursuant to 12 CFR 563.8-1 to be included in the regulatory capital of an insured institution under 12 CFR 561.13.

DATE: Comments must be received on or before March 14, 1989.

ADDRESS: Send comments to: Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Comments will be available for public inspection at 801 17th Street, NW., Washington, DC 20552.

FOR MORE INFORMATION CONTACT: Paul D. Glenn, Attorney, (202) 377-6203, Corporate and Securities Division; Julie L. Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 377-6459, Office of General Counsel; Cindy Miller, Financial Analyst, (202) 377-7492, Office of District Banks, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552; Robyn Dennis, Financial Analyst, (202) 778-2660; or John F. Robinson, Director, Policy Analysis, (202) 778-2509, Office of Regulatory Activities, Federal Home Loan Bank System, 801 Seventeenth Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

A. Background

Since 1973, the Board, as operating head of the FSLIC, has permitted insured institutions to include as part of their regulatory capital the proceeds of the sale of subordinated debt securities issued pursuant to 12 CFR 563.8-1. Initially, insured institutions were permitted to include as regulatory capital the principal amount of such debt securities up to a limit of 20 percent of their capital requirements. In 1982, the Board amended its regulations to allow insured institutions to include the full amount of the proceeds of the sale of subordinated debt securities having a remaining maturity in excess of one year as part of their capital and statutory reserve requirements.[1] On April 18, 1985, the Board further amended §§ 563.8-1 and 561.13 of the Insurance Regulations (the definition of regulatory capital) to require that the amount of qualifying subordinated debt with a remaining period to maturity of less than seven years that may be included as regulatory capital must be reduced annually pursuant to an amortization schedule set forth in § 561.13.[2] The principal rationale underlying the Board's decision to allow the inclusion in regulatory capital of the proceeds of the sale of subordinated debt securities issued under 12 CFR 563.8-1 is that subordinated debt has some of the characteristics of other types of permanent capital and reduces the risks to the FSLIC. The Board continues to be of the view that subordinated debt may serve as a viable and acceptable component of regulatory capital under appropriate circumstances.

On August 10, 1987, the President signed into law the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. 100-86, 101 Stat. 552. The CEBA addresses a number of important issues relating specifically to the thrift industry, including the recapitalization of the FSLIC, emergency acquisitions of troubled thrift institutions, and potential areas for improvement in the examination and supervisory process. As required by CEBA, the Board on October 9, 1987 promulgated Applications Processing Guidelines as part of 12 CFR 571.12. The present regulatory proposal is necessitated in part of CEBA, the new guidelines (12 CFR 571.12), and also reflects an additional three years of experience with the subordinated debt regulation.

B. Discussion of the Proposals

1. Issuance of Guidelines

The Board desires to update and provide a mechanism to clarify and keep current the bases for supervisory objection to applications to include subordinated debt in regulatory capital of insured institutions, and to increase efficiency in approving applications to include subordinated debt issues as part of regulatory capital. Accordingly, the Board proposes to delegate additional authority to the PSAs to approve or

[1] *See* Resolution No. 82-581, (August 26, 1982). Under Generally Accepted Accounting Principles ("GAAP"), subordinated debt is treated as a liability.

[2] *See* Resolution No. 85-292, 50 FR 20550 (May 17, 1985).

deny subordinated debt applications and has directed the Federal Home Loan Bank System's Office of Regulatory Activities ("Office of Regulatory Activities") to establish and administer Guidelines to be applied by the PSAs in assessing supervisory considerations presented by subordinated debt applications under § 563.8–1.[3]

In keeping with the Board's desire to have uniform national supervisory policies, the Office of Regulatory Activities, under the Board's oversight, would establish Guidelines for the PSAs to apply in exercising authority to be delegated to them in considering subordinated debt applications. These Guidelines will identify supervisory factors that PSAs may use in considering whether to approve or deny an application. Some of the current bases for supervisory objections now set forth at CFR 563.8–1(b)(2) are obsolete and will be revised and/or expanded into Guidelines. These Guidelines will be illustrative but not exclusive bases for supervisory objection to subordinated debt applications. The format of Guidelines will allow for increased flexibility in future modifications, as needed. The Office of Regulatory Activities will be able in the future to change the Guidelines as circumstances warrant, without the necessity for notice and comment rulemaking.

2. Defaults and Other Events Providing for Mandatory Prepayment of Principal

One of the factors considered in the processing of a subordinated debt application is whether the issuance of the subordinated debt securities and any related transactions will result in a transfer of risk from the FSLIC to parties other than insured institutions. *See* 12 CFR 563.8–1(b)(3). The Board, on the basis of this provision, has objected to the inclusion in subordinated debt instruments of terms that provide for mandatory redemption of the debt or for events of default (which could give rise to acceleration of maturity of the principal of the debt) based on changes in control of the obligor (known in anti-takeover parlance as a "poisoned put"), or a failure of the obligor to comply with maintenance and operating convenants which were believed to be unreasonable in the circumstances. In this connection, the Board notes that one of the bases for permitting an insured institution to incluse an amount equal to the proceeds of the sale of subordinated debt securities in its regulatory capital is that the issuance of such securities represents a relatively long term commitment of capital to the insured institution. For this reason, the Board has not approved subordinated debt applications where the subordinated debt securities (or the indentures pursuant to which they were proposed to be issued) included provisions that might unduly accelerate payment of the debt prior to scheduled maturities, because such provisions could subject the FSLIC to a significant risk of precipitious decline in an institution's regulatory capital. The Board recognizes, however, that to effect a successful public offering of debt securities, the securities, or the indentures pursuant to which they are issued, must include provisions that the investment community has come to accept as customary in offerings of such type, to the extent such provisions can be included without frustrating the purpose of the subordinated debt regulation. Thus, although provisions that require acceleration of maturity (through declaration, mandatory prepayments, or otherwise) following a change of control of the obligor will continue to be objectionable, the Board will not object to subordinated debt applications solely because the terms of the securities (or related indentures) include events of default such as failure to make timely payment of interest and principal, failure to comply with reasonable and customary financial maintenance and operating covenants, and certain events of bankruptcy. Appropriate revisions to add clarifying language to 12 CFR 563.8–1(b)(3) will address this consideration.

3. Voluntary Prepayments

The subordinated debt regulation provides that payment of principal may not be accelerated without approval of the FSLIC, if, after giving effect to such accelerated payment, the insured institution obligor would fail to meet its regulatory capital requirement. 12 CFR 563.8–1(d)(1)(iv). The Board has consistently taken the position that if any mandatory prepayment (such as payment upon acceleration of maturity following an event of default) is restricted to this extent, *a fortiori* any voluntary prepayment should be similarly restricted. A revision in 12 CFR 563.8–1(d)(1)(iv) is proposed to reflect this long-standing interpretive position.

4. Issuance of Subordinated Debt Securities Pursuant to an Indenture

The Trust Indenture Act of 1939, as amended, ("TIA") 15 U.S.C. 77aaa–77bbbb, which, by its terms is inapplicable to securities issued by insured institutions, and the Rules nad Regulations under the TIA provide, generally, that any debt securities offered and sold to the public by a single obligor in an amount in excess of $2,000,000 in any consecutive twelve month period must be issued pursuant to an indenture and that debt securities which are publicly offered and sold by the same obligor in an amount exceeding $5,000,000 in any consecutive thirty-sixty month period must be issued pursuant to an indenture that is "qualified" under the TIA. See 17 CFR 260.4(a)(1) and 260.4(a)(2). Although the TIA specifies in considerable detail the provisions which must be included in a qualified indenture (which required provisions relate principally to the qualifications, duties and powers of the trustee, the duties of the obligor, and the rights of the holders of the debt securities) neither the TIA nor the rules promulgated thereunder set forth any requirements with respect to the provisions of a non-qualified indenture. The Securities and Exchange Commission, however, for many years, has taken the position that any indenture must, at a minimum, provide for the appointment of a trustee other than the obligor or an affiliate of the obligor and provide some reasonable procedures for the collective enforcement of the rights of the holders of the debt securities.

The Board's experience has been that most publicly offered issues of subordinated debt securities of any significant size by insured institutions are offered and sold through underwriters, and in such cases the securities are invariably issued pursuant to an indenture that includes all or substantially all of the provisions that would be required to be included in an indenture qualified under the TIA. The use of an indenture in connection with the issuance of subordinated debt securities can be beneficial, since certain of the terms included in such an indenture may provide a framework of financial discipline for the obligor, which in some cases may further the interests of the FSLIC. Further, it may be more efficient and workable for the insured institution obligor to deal with a trustee (whole actions may be subject to ratification by the holders of a specified majority in principal amount of the debt securities) if the debtor should desire to

[3] In its release No. 87–1298 dated December 22, 1987, the Board similarly authorized the Office of Regulatory Activities to develop guidelines for administering the Board's new rule providing for individual minimum capital requirements. *See* 12 CFR 563.14.

amend the terms of the securities or to obtain a waiver of any convenants provided therein, or in the related indenture, rather than to contend with a large number of individual security holders. Nevertheless, the Board is aware that the requirement to use an indenture will result in additional expense to certain issuing institutions.

The Board requests comments as to whether subordinated debt securities issued pursuant to 12 CFR 563.8–1 should be required to be issued pursuant to an indenture. In addition, the Board requests commenters to address whether it would be desirable to provide only for the appointment of a trustee other than the obligor or an affiliate of the obligor and for the collective enforcement of the rights and remedies of the security holders, if the aggregate amount of debt securities publicly offered and sold by a single obligor in any consecutive twelve month period exceeds $2,000,000 or whether the indenture should also include the provisions that would be required in an indenture to be qualified under the TIA if the aggregate amount of debt securities publicly offered and sold by the same obligor in any consecutive thirty-six month period exceeds $5,000,000.

5. Reports

The Board proposes to add another sentence to the requirement in 12 CFR 563.8–1(h) that an insured institution must file a report with the Board 30 days after completion of the sale of subordinated debt securities. This sentence would clarify that the amount to be included in regulatory capital is an amount *net* of all expenses incurred in connection with the sale of the subordinated debt securities. This revised provision will require the issuing institution to specify the actual amount of the proceeds from the sale of the subordinated debt securities that the institution intends to include in its regulatory capital.

6. Delegations of Authority to Principal Supervisory Agents

Presently, PSAs are authorized to approve applications filed pursuant to 12 CFR 563.8–1 unless such applications involve significant issues of law or policy upon which the Board has not taken a formal position, or unless an offering circular will be required in connection with the public offering and sale of the securities which are the subject of any such application. The Board now proposes to eliminate the requirement that an application be forwarded to Washington solely because an offering circular is involved and proposes further to give the PSAs authority to deny applications as well as to approve them, subject to an appeal process. Applicants must be aware, however, that even though the PSA under the proposed regulatory amendments could approve a subordinated debt application where securities are to be sold pursuant to an offering circular even if such offering circular has not yet been declared effective, PSA approval would be conditioned upon the offering circular in the form declared effective not disclosing any material adverse information concerning the applicant's business, operations, prospects, or financial condition not disclosed in the latest form of offering circular filed as an exhibit to the subordinated debt application.

To clarify further the regulation concerning delegations of authority in accordance with current practice, the Board proposes to delegate authority to exercise discretion to approve or deny requests for extensions of time requested pursuant to 12 CFR 563.8–1(g) to whomever is authorized to approve an application. Such extensions of time could be granted for a period of time of up to six months. All such extensions of time taken together may not exceed one year from the date of original approval of the subordinated debt application.

7. Appeals

In connection with the proposed delegation of authority to the PSAs to deny applications under 12 CFR 563.8–1, the Board proposes to institute an appeal process for the further consideration of denials of applications by the PSAs. This appeal process is modeled after the appeal process for applications relating to acquisitions of control of insured institutions found at 12 CFR 574.8(a)(4). In essence, the appeal process will require any applicant wishing to appeal a determination by the PSA to file with the Office of District Banks, within 30 days of the PSA's determination, a written request for review describing with specificity the action appealed from and the relief sought. The filing of such a request will be necessary to seek judicial review of an initial determination.

The Director of the Office of District Banks, with the concurrence of the Executive Director of the Office of Regulatory Activities, and the General Counsel or their designees shall consider appeals from denials by the PSAs unless the Director of the Office of District Banks in his or her sole discretion determines to refer the appeal to the Board on the basis that the appeal involves policy considerations that warrant resolution by the Board. In the event that the Director of the Office of District Banks fails to obtain the concurrence of the Executive Director of the Office of Regulatory Activities and the General Counsel, the Director of the Office of District Banks shall present the matter to the Board.

8. Standard Conditions of Approval

The Board is also proposing an Appendix to the proposed subordinated debt regulation. The Appendix contains a set of standard conditions that will be applicable to all approvals of subordinated debt applications. The Board anticipates that such conditions will, except in rare cases, be the only conditions applied to subordinated debt approvals. Other conditions would be imposed only where one or more of the bases for supervisory objection specified in the Guidelines to be developed by the Office of Regulatory Activities are present and where such non-standard conditions are necessary to address the areas of concern that would otherwise form a basis for denial of the application. These standard conditions of approval also will apply to any subordinated debt application that is approved automatically pursuant to the Board's Applications Processing Guidelines, 12 CFR 571.12.

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following regulatory flexibility analysis:

1. Reasons, Objectives, and Legal Basis Underlying the Proposed Rule

These elements are incorporated above in **SUPPLEMENTARY INFORMATION.**

2. Small Entities to Which the Proposed Rule Would Apply

The proposed rule would apply to all FSLIC-insured institutions without regard to size.

3. Impact of the Proposed Rule on Small Entities

The Board believes that the proposed revision to procedures for processing subordinated debt securities applications will not have a disparate effect on small entities. To the extent that under the revised regulations small entities will more likely be able to file their applications at their district Federal Home Loan Bank, the impact of the proposal will be liberalizing.

4. Overlapping or Conflicting Federal Rules

There are no known federal rules that duplicate, overlap, or conflict with this proposal.

5. Alternatives to the Proposed Rule

In the above **SUPPLEMENTARY INFORMATION**, the Board is soliciting comment on the rule as proposed.

List of Subjects in 12 CFR Part 563

Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby proposes to amend Part 563, Subchapter D, Chapter V, Title 12, Code of Federal Regulations, as set forth below.

Subchapter D—Federal Savings and Loan Insurance Corporation

PART 563—OPERATIONS

1. The authority citation for Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724—1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); sec. 1204, 101 Stat. 662 (12 U.S.C. 3806); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

2. Amend § 563.8–1 by revising paragraphs (b)(2), (b)(3), and (d)(1)(iv); by revising paragraphs (e), (h), and (i); and by adding new paragraphs (j) and (k), and an Appendix to § 563.8–1 to read as follows:

§ 563.8–1 Issuance of subordinated debt securities.

* * * * *

(b) *Eligibility requirements.*

* * * * *

(2) Whether in the opinion of the Corporation, the overall policies, condition, and operation of the applicant do not afford a basis for supervisory objection to the application. Under the Board's oversight, the Federal Home Loan Bank System's Office of Regulatory Activities ("Office of Regulatory Activities") shall establish Guidelines for the Principal Supervisory Agents to apply in exercising authority delegated to them in considering applications under this § 563.8–1. These Guidelines shall identify supervisory bases that Principal Supervisory Agents may use to object to the inclusion of specific subordinated debt issues as regulatory capital. Such Guidelines shall constitute illustrative but not exclusive bases for supervisory objection to subordinated debt applications. The Executive Director of the Office of Regulatory Activities may modify such Guidelines from time to time as he or she deems appropriate.

(3) Whether the issuance of such securities by the applicant in the transaction and any related transactions will result in a transfer of risk from the Corporation to parties other than insured institutions. In this connection, the issuance of subordinated debt securities shall not be deemed to result in a sufficient transfer of risk from the Corporation if such securities or any indenture or related agreement pursuant to which they are issued provide for events of default or include other provisions that could result in a mandatory prepayment of principal by declaration or otherwise, other than events of default arising out of the obligor's failure to make timely payment of interest and principal, its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures relating to publicly offered issues of debt securities, and events of default relating to certain events of bankruptcy.

* * * * *

(d) * * *

(1) * * *

(iv) State or refer to a document stating that no voluntary prepayment of principal shall be made and that no payment of principal shall be accelerated without the approval of the Corporation, if after giving effect to such payment the institution would fail to meet the regulatory capital requirements of § 563.13; and

* * * * *

(e) *Filing of Application.* The application for approval of the issuance of subordinated debt securities under this section is filed with the Corporation by transmitting the original and three copies of the application and all supporting documents to the institution's Principal Supervisory Agent.

* * * * *

(h) *Reports.* Within 30 days after completion of the sale of the subordinated debt securities issued pursuant to prior approval under this section, the institution shall transmit a written report to the Supervisory Agent stating the number of purchasers, the total dollar amount of securities sold, and the amount of net proceeds received by the institution. The institution's report shall clearly state the amount of subordinated debt, net of all expenses, that the institution intends to be counted as regulatory capital.

(i) *Delegation of authority.* Unless a subordinated debt application involves a significant issue of law or policy or would establish a precedent of national significance, the Principal Supervisory Agent is authorized:

(1) To approve an application filed pursuant to this section, if it is in compliance with regulatory requirements, and

(2) To deny a subordinated debt application.

Whoever is authorized to approve a subordinated debt application is also authorized to grant a request pursuant to paragraph (g) of this section for an extension of time for up to six months. All such approved extensions of time taken together may not exceed one year from the date of original approval of the subordinated debt application.

(j) *Appeals.* Denial of an application by a Principal Supervisory Agent pursuant to paragraph (i) of this section may be appealed to the Corporation under the following procedures: Within 30 days after notification of the Principal Supervisory Agent's decision as provided in this section, the applicant must file a written request for review with the Office of District Banks stating the applicant's desire to appeal the Principal Supervisory Agent's decision. The request for review must identify the party seeking review and describe with specificity the action taken for which review is sought and the reasons why the Principal Supervisory Agent's denial is contended to be erroneous. Three copies of such request for review must be submitted to the Office of District Banks, Applications Division, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. One copy of such request should be addressed to the attention of "Office of District Banks"; one copy to the attention of "Office of General Counsel, Corporate and Securities Division"; and one copy to the attention of "Office of Regulatory Activities, Corporate Activities Section". Also, one copy shall be sent to the appropriate Principal Supervisory Agent. The Principal Supervisory Agent shall thereupon forward to the Office of District Banks his record or a copy thereof used as a basis for his determination together with any other information believed by the Principal Supervisory Agent to be helpful in reviewing his determination. If an applicant does not file a request for review within the time permitted under this section, any objection to the initial determination by the Principal Supervisory Agent is waived. A timely

filing of a request for review with the Office of District Banks in accordance with the provisions of this section shall be mandatory for securing judicial review of an initial determination. With the concurrence of the Executive Director of the Office of Regulatory Activities, or his or her designee, and the General Counsel, and his or her designee, the Director of the Office of District Banks shall decide each appeal from a denial of an application under 12 CFR 563.8–1 by a Principal Supervisory Agent. With the concurrence of the Executive Director of the Office of Regulatory Activities, or his or her designee, and the General Counsel, or his or her designee, the Director of the Office of District Banks shall prepare and send to the applicant a written response to the applicant's request for review. Such written response shall be deemed to be a final agency action by the Corporation. If the Director of the Office of District Banks in his or her sole discretion is of the opinion that the appeal involves policy considerations that warrant resolution by the Corporation, the Director shall submit the application to the Corporation for its determination. In the event that the Director fails to obtain the concurrence of the Executive Director of the Office of Regulatory Activities, or his or her designee, and the General Counsel, or his or her designee, the Director shall present the matter to the Corporation for its determination.

(k) *Conditions of approval.* Approvals of subordinated debt applications shall be subject to the conditions set forth in the Appendix to this section.

Appendix A to § 563.8–1—Conditions of Approval of Subordinated Debt Applications

1. Where securities are to be sold pursuant to an offering circular required to be filed with the Corporation pursuant to 12 CFR 563g.2, and where such offering circular has not yet been declared effective prior to the date of approval of the subordinated debt application, the offering circular in the form declared effective shall not disclose any material adverse information concerning the applicant's business, operations, prospects, or financial condition not disclosed in the latest form of offering circular filed as an exhibit to the application;

2. The applicant shall submit to the Supervisory Agent, no later than 30 days from the completion of the sale of the securities, evidence of compliance with all applicable laws and regulations in connection with the offering, issuance, and sale of the subordinated debt securities;

3. The applicant shall submit to the Supervisory Agent no later than 30 days from the completion of the sale of the securities, the items required by § 563.8–1(h) of the Insurance Regulations and the following additional items:

(a) Three copies of an executed form of the securities issued pursuant to the subject application and a copy of any related agreement governing the issuance of the securities; and

(b) A certificate from the principal executive officer of the applicant which states that to the best of his knowledge none of the securities issued pursuant to the subject application were sold to any institution whose accounts are insured by the FSLIC, or a corporate affiliate thereof, except as permitted by § 653.8–1 of the Insurance Regulations;

4. That as of the date of approval, there have been no material changes with respect to the information disclosed in the application as submitted to the Federal Home Loan Bank.

5. The applicant shall submit an application and receive prior written approval of the Principal Supervisory Agent for any post-approval amendment to the subordinated debt securities or any related indenture if:

(a) The proposed amendment modifies or is inconsistent with any provision of the securities, or the indenture, which is required to be included therein by the Insurance Regulations as may then be in effect or would result in a transfer of risk to the applicant or the FSLIC; and

(b) All or a portion of the proceeds from the issuance and sale of the securities would continue to be included in the regulatory capital of the applicant following adoption of the amendment.

6. The applicant shall submit to the Supervisory Agent promptly after execution, one copy of each post-approval amendment to the securities or the related indenture, and if prior approval of such amendment was not obtained, shall also state the reason(s) such prior approval was not required.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89–522 Filed 1–12–89; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–NM–179–AD]

Airworthiness Directives; Boeing Model 727 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes, which would require inspection of the fuselage lap joints for cracks, corrosion, and/or delamination, and repair, if necessary; and modifications. This proposal is prompted by reports of cracking along the upper fastener row of certain longitudinal lap joints that incorporate a cold metal bonding process. This condition, if not corrected, could result in rapid decompression of the airplane.

DATES: Comments must be received no later than March 15, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–103, Attention: Airworthiness Rules Docket No. 88–NM–179–AD, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Stanton R. Wood, Airframe Branch, ANM–120S; telephone (206) 431–1924. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM)

by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-179-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

On October 27, 1988, the FAA issued AD 88-22-11, Amendment 39-6059 (53 FR 44156; November 1, 1988), which requires inspection for cracks, corrosion, and delamination of the fuselage lap joints on certain Boeing Model 737 airplanes. Early Model 727 airplanes used the same cold bonding technique for the fuselage lap joints and have experienced the same delamination as has occurred on the Model 737 (which was addressed in AD 88-22-11). This delamination, when it occurs in fuselage skin below a certain thickness, can result in fatigue cracking initiating at the fastener countersink hole. Disbonded lap joints are also vulnerable to corrosion, which increases the probability of skin cracking. This condition, if not corrected, could result in rapid decompression of the airplane.

Other design differences, however, make the Model 727 much more tolerant of cold bonding failures. The Model 727's outer skin is thicker than the Model 737, making it less susceptible to fatigue cracking. In addition, the size and spacing of the tearstraps differ, reducing the potential for widespread fuselage cracking. As with the Model 737, later Model 727 airplanes incorporated design changes which eliminated this failure mode. A doubler was added to the upper skin with a much improved bonding process and a non-bonded sealant was used in the skin splice. Also, detail design of the Boeing Model 727 airplane fuselage structure below the floor has resulted in less cracking and, when cracks are found, the cracks have been shorter than the cracking experienced at the lap joints in the crown of the fuselage at stringers S-4 and S-10.

Since this condition is likely to exist or develop on other airplanes of this same type design, this proposed rule would require eddy current inspection and terminating preventative modifications only on the S-4 and S-10 upper stringers. The remaining lap splices would be required to be visually inspected at intervals of 15 months and repaired as necessary.

The proposed terminating preventative modification consists of installation of protruding head fasteners in the upper fastener row of the lap splice at stringers S-4 and S-10. The FAA may consider further rulemaking to require modification of other fastener rows on stringers S-4 and S-10. With the exception of the lap splice limitations, this modification is identical to the modification proposed in NPRM docket 88-NM-160-AD (53 FR 44163; November 1, 1988), for Model 737 airplanes. In that Notice, the FAA stated that the modification was required because the continued airworthiness of airplanes with widespread cracking could not be assured over the long term by inspection because of the large number of required inspections and the human factor difficulties associated with the repetitious nature of the inspections. Since fatigue is a progressive phenomenon it tends to be more severe in airplanes with a larger number of pressurization cycles. The modification compliance schedule was, therefore, proposed to prioritize airplanes with a larger number of pressurization cycles.

The FAA has determined that terminating preventative modifications are necessary on the Model 727 for the same reasons, and that Model 727 airplanes with more advanced cracking and corrosion should be modified first. Model 727 service experience, however, does not clearly show that cracking severity is directly related to pressure cycles. The FAA, therefore specifically requests comments on the proposed modification schedule which would require that all airplanes be modified within 4 years after the effective date of the final rule. The FAA is proposing a 4-year modification requirement because service experience and the more fatigue-tolerant design of the Model 727 would not require the same type of graduated schedule proposed in NPRM Docket 88-NM-160-AD for the Model 737. The FAA requests comments regarding the need for an aggressive modification schedule which prioritizes airplanes with more advanced cracking and corrosion, and, in conjunction with this prioritization, will further consider relaxing the modification deadline for airplanes that exhibit minimal damage.

The visual and eddy current inspections proposed in this Notice must be conducted in an environment that does not inhibit clear view of the fastener head. Accordingly, this proposed rule would require that, prior to inspection, paint be removed using an approved chemical stripper, or that the fasteners be clearly visible through the paint and no more than two coats of paint are on the airplane. This proposal is equivalent to the requirements of AD 88-22-11, issued for similar inspections on the Model 737 series airplanes. The two-coat paint criteria was developed by the FAA as a reliable objective standard to minimize improper use of inspection equipment and enhance detection of cracks. However, the FAA specifically requests comments intended to develop other inspection standards that would reliably define acceptable surface conditions and assure the most accurate possible inspection results, without requiring unnecessary paint stripping.

The FAA has reviewed and approved Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974, which describes the inspection for delamination, corrosion, or cracking and repair, if necessary, of all fuselage lap joints between body station (BS) 259 and BS 1183 and modification of the fuselage skin longitudinal lap joints S-4 and S-10. This Notice cites this revision to the service bulletin for the instructions for accomplishing the proposed inspection and repair/modification requirements. The service bulletin is currently being revised by the manufacturer; the FAA will review the new revision, and if approved, may also include it in the final rule as a reference for accomplishment instructions.

There are approximately 813 Model 727 series airplanes of the affected design in the worldwide fleet. It is estimated that 623 airplanes of U.S. registry would be affected by this AD, that it would take approximately 1,432 manhours per airplane to accomplish all of the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $35,700,000.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0056.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is

further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 727 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation Safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration porposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to Model 727 series airplanes, listed in Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974, certified in any category. Compliance required as indicated, unless previously accomplished.

To prevent rapid decompression of the airplane, accomplished the following:

A. Within the next 2,500 landings or 1 year after the effective date of this AD, whichever occurs first, or prior to the accumulation of 28,000 landings, whichever occurs later, unless previously accomplished within the last 2,000 landings or 2 years; and thereafter at intervals not to exceed 4,500 landings or 3 years, whichever occurs sooner; perform a high frequency eddy current (HFEC) inspection for cracks of the skin at fuselage lap joints S-4 and S-10 from body station (BS) 259 to BS 1183, in accordance with Part II of the Accomplishment Instructions in Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974. If any cracks are detected, repair prior to further flight in accordance with paragraph C. of Part II of the Accomplishment Instructions of the service bulletin.

B. Within the next 6 months after the effective date of this AD, unless accomplished within the last 9 months, or prior to the accumulation of 28,000 landings, whichever occurs later; and thereafter at intervals not to exceed 15 months; perform a detailed external visual inspection of the lap joints listed in paragraph A., above, and all other fuselage lap joints between BS 259 and BS 1183, for cracks and evidence of corrosion or delamination. Inspect for small cracks, bulging skin between fasteners, blistered paint, dished or popped rivet heads, and loose fasteners. Adequate lighting must be used for this inspection, and, if necessary, inspection aids such as a mirror and 10X glass. Repair cracks, corrosion, and delamination in accordance with paragraph C., below.

C. 1. If cracks or corrosion are detected at lap splices, prior to further flight, perform a HFEC inspection for cracks in the affected lap joint along the complete panel length. Repair cracks prior to further flight in accordance with paragraph C. of Part II of Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974. If delamination is found at any lap joint, repair prior to further flight, in accordance with Part IV of the Accomplishment Instructions of the service bulletin.

2. If corrosion is found as a result of the visual external inspection required by paragraph B., above, prior to further flight, conduct a low frequency eddy current (LFEC) inspection, in accordance with Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974, of the lap joint along the complete panel length to determine corrosion depth. If corrosion does not exceed 10% of the skin thickness, repeat the LFEC inspection at intervarls not to exceed 2,000 landings for 6 months, whichever occurs first, until repair is accomplished. If corrosion exceeds 10% of skin thickness, repair prior to further flight, in accordance with Part I, paragraph B., of the Accomplishment Instructions of Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974.

D. To conduct the inspections required in this AD:

1. Remove the paint, using an approved chemical stripper; or

2. Ensure that the fastener head is clearly visible and that no more than two coats of paint are on the airplane skin.

E. Within the next 4 years after the effective date of this AD, or within 4 years after the accumulation of 28,000 landings, whichever occurs later, modify fuselage skin lap joints at S-4 and S-10 by replacing the upper row of fasteners with protruding head fasteners, in accordance with Part IV, One Row Standard Fastener Repair, of Boeing Service Bulletin 727-53-72, Revision 4, dated February 8, 1974. After oversizing holes and before fastener installation, perform a HFEC inspection of the hole to assure it is crack free. This constitutes termination action for the repetitive HFEC inspections required by paragraph A., above, at S-4 and S-10.

F. Blind fasteners installed in the lap joints are to be used as an interim repair only, and replaced with protruding head solid fasteners within 3,000 landings following installation. Repairs installed with blind fasteners prior to the effective date of this AD must be inspected for loose or missing fasteners within 1,000 landings after the effective date of this AD, and all upper row fasteners in the affected panel must be replaced with standard protruding head solid fasteners within 3,000 landings after the effective date of the AD.

G. Within 10 days after the completion of any inspection required by the AD, report a complete description of the location and size of all cracks and corrosion found, along with aircraft serial number and the number of flight cycles, to the Manager, Seattle Aircraft Certification Office, ANM-100S, FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington, 98168.

H. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

I. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received with the appropriate service document from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on January 4, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-797 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-187-AD]

Airworthiness Directives; Boeing Model 737 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 737 series airplanes, which would require installation of a placard, inspection of the aft right lavatory partition beam to ensure structural integrity, and repair, if necessary. This proposal is prompted by reports of an inadvertent saw cut made in an aft right lavatory partition beam during the production installation of a ceiling panel. This condition, if not corrected, could lead to failure of the

partition beam to provide adequate strength for the lavatory-mounted occupied flight attendant seat when subjected to flight or emergency landing conditions.

DATES: Comments must be received no later than February 28, 1989.

ADDRESSES: Sent comments on the proposal in duplicate to Federal Aviation Administation, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-187-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Pliny Brestel, Airframe Branch, ANM-120S; telephone (206) 431-1931. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-187-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

The manufacturer reported that, during the production installation of a ceiling panel on certain Boeing Model 737 series airplanes, an inadvertent saw cut has been made in some of the aft right lavatory partition beams. This partition beam is a critical support of the occupied flight attendant seat installed on the lavatory and, if cut, may not meet the structural requirements for flight or emergency landing conditions.

The FAA has reviewed and approved Boeing Service Bulletin 737-25-1231, dated July 7, 1988, which describes procedures for the inspection of the aft right lavatory partition beam for an inadvertent saw cut within specific limits, and repair, if necessary.

Since this condition is likely to exist on other airplanes of this same type design, an AD is proposed which would require installation of a placard, inspection of the aft right lavatory partition beam within specific limits, and repair, if necessary, in accordance with the service bulletin previously mentioned. If the saw cut exceeds the limit specified in the service bulletin previously mentioned, repair would be required in a manner approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

There are approximately 80 Model 737 series airplanes of the affected design in the worldwide fleet. It is estimated that 15 airplanes of U.S. registry would be affected by this AD, that it would take approximately two manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The placard may be manufactured locally and the cost is expected to be negligible. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $1,200.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0056.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 737 series airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to Model 737 series airplanes, as identified in Boeing Service Bulletin 737-25-1231, dated July 7, 1988, certificated in any category. Compliance required as indicated, unless previously accomplished.

To ensure structural integrity of the occupied flight attendant seat mounted on the aft right lavatory during flight and emergency landing conditions, accomplish the following:

A. Within 30 days after the effective date of this AD, install a placard on the aft right lavatory-mounted flight attendant seat, stating: "NO OCCUPANCY". This placard may be removed once the terminating action of paragraph B. of this AD has been accomplished.

B. Within 6 months after the effective date of this AD, inspect the aft right lavatory partition beam for an inadvertent saw cut, and repair, if necessary, in accordance with Boeing Service Bulletin 737-25-1231, dated July 7, 1988; or if the saw cut exceeds the limit specified in the service bulletin, repair in a method approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

C. Report all inadvertent saw cuts detected during the inspection required by paragraph B., above, to the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, within seven days after completion of the inspection.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on December 23, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-800 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-184-AD]

Airworthiness Directives; Boeing Model 737-300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 737-300 series airplanes, which would require repetitive inspections for chafing between the number two engine throttle cable and an adjacent right wing front spar bracket. This proposal is prompted by one report of a throttle cable failure and additional reports of a significant number of the cables inspected and found to be worn or frayed. This condition, if not corrected, could result in throttle cable separations and subsequent loss of engine throttle control.

DATES: Comments must be received no later than March 7, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-184-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen S. Bray, Propulsion Branch, ANM-140S; telephone (206) 431-1969. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-184-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

One operator of a Boeing Model 737-300 series airplane reported a separation of the number two engine throttle cable after 4,215 flight hours. This report prompted Boeing to conduct a survey of control cable wear on Model 737-200 and 737-300 airplanes. During the course of this survey, several incidents of wear on the number two throttle cable were found on Boeing Model 737-300 airplanes. Sixteen operators responded to the Boeing survey, with the inspection results of 96 airplanes. Number two engine throttle cable wear was reported on 20 Model 737-300 airplanes, and 9 cables were within acceptable wear limits. The remaining 76 airplanes showed no cable wear, although 11 airplanes were reported as showing evidence of contact/wear on the adjacent right wing front spar bracket.

It has been determined that chafing between the number two throttle cable and adjacent right wing front spar bracket (Station 124) is caused by air flow between the right leading edge flaps and front spar on Model 737-300 airplanes. This airflow produces a narmonic disturbance that excites the number two engine throttle cable. This condition, if not corrected, could eventually result in throttle cable separation and subsequent loss of throttle control.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require inspection for chafing between the number two engine throttle cable and adjacent right wing front spar bracket every 1,000 hours, and replacement of the cable, if necessary. Boeing Commercial Airplanes is preparing a service bulletin which will contain a structural design change to the number two engine throttle cable system. If this service bulletin is approved and available subsequent to the issuance of this NPRM, the FAA may consider referencing it in the final rule as an approved method of compliance.

There are approximately 500 Model 737-300 series airplanes of the affected design in the worldwide fleet. It is estimated that 175 airplanes of U.S. registry would be affected by this AD, that it would take approximately 2 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $14,000.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 737 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to Model 737-300 series airplanes, equipped with CFM International CFM56-3 series engines, certificated in any category. Compliance required as indicated, unless previously accomplished.

To minimize the potential for cable separation due to the number two engine throttle cable chafing against the right wing front spar bracket, accomplish the following:

A. Prior to the accumulation of 150 flight hours after the effective date of this AD and thereafter at intervals not to exceed 1,000 flight hours, again access to the fuel shut-off cable pulley bracket near the right wing front spar station 124 and inspect the number two engine throttle cable for wear. Replace the cable, before further flight, if cable wear exceeds acceptable wear limits specified in Section 20-30-31 of the Model 737 Maintenance Manual.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

Issued in Seattle, Washington, on December 28, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-799 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-146-AD]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to all Boeing Model 747 series airplanes, which would require periodic inspections and cleaning of the cavity over the wing center section. This proposal is prompted by reports of inadequate drainage which apparently is caused by an inordinate quantity of debris and foreign material collecting in the cavity area. This situation has lead to accumulated water leaking from the wing center section onto portions of the aileron control system and subsequently freezing. Ice in the aileron control system can result in reduced lateral control capability.

DATES: Comments must be received no later than March 9, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-146-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

FOR FURTHER INFORMATION CONTACT: Mr. Dan R. Bui, Airframe Branch, ANM-120S; telephone (206) 431-1919. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-146-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

This proposal is prompted by reports of numerous occurrences of binding in the aileron control system on Model 747 series airplanes. The cause of the binding is the accumulation of ice on the aileron control system in the wing landing gear wheel well area. This ice is caused by water condensing and accumulating in the wing center section as a result of obstructed drains. Water then leaks onto the aileron control system and freezes. This ice on the aileron control system has resulted in reduced aileron control capability.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require periodic inspections and cleaning of the cavity over the wing center section and its drains on all Model 747 series airplanes.

There are approximately 700 Model 747 series airplanes in the worldwide fleet. It is estimated that 260 airplanes of U.S. registry would be affected by this AD, that it would take approximately 9 manhours per airplane to accomplish the

required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $93,600.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, of promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 747 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to all Model 747 series airplanes certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent reduced lateral control caused by icing of the aileron control cables, accomplish the following:

A. Within the next 12 months after the effective date of this AD, unless already accomplished within the last 3 months, and thereafter at intervals not to exceed 15 months, perform the following:

1. Gain access to wing center section cavity.

2. Remove all debris and foreign material, clean the wing center section cavity, and verify all drains are open and clean.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

Issued in Seattle, Washington, on December 30, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-796 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-188-AD]

Airworthiness Directives; Boeing Model 757 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 757 airplanes, which would require modifications to the Takeoff Configuration Warning System (TOCWS) to provide redundant Flap/Slat Electronic Unit (FSEU) inputs. This action is prompted by reports of false warnings which have occurred during application of takeoff power and during takeoff roll. This condition, if not corrected, could lead to aborted takeoffs at high speed due to a takeoff configuration false warning.

DATES: Comments must be received no later than February 28, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-188-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Victor F. Sokoloski, Systems and Equipment Branch, ANM-130S; telephone (206) 431-1937. Mailing address: Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 17900, Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-188-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

The Takeoff Configuration Warning System (TOCWS) for the Boeing 757 is incorporated in circuitry within the Warning Electronics Unit (WEU) and utilizes data from the Flap/Slat Electronics Unit (FSEU). The WEU receives a trailing edge (TE) flap input from FSEU #1 and a leading edge (LE) slat input from FSEU #2. There have been reports of false warnings issued by the TOCWS as a result of random intermittent loss of either of these signals. The false warnings have resulted in aborted takeoffs, in at least

one instance with ground speeds in excess of 100 knots. This condition, if not corrected, could lead to aborted takeoffs at high speeds, as a result of a takeoff configuration false warning.

The FAA has reviewed and approved Boeing Alert Service Bulletin 757-27A0063 dated March 20, 1985, and Revision 1, dated May 17, 1985, which describes the modification procedures necessary to provide redundant FSEU inputs to the TOCWS on certain Boeing 757 series airplanes. This input redundancy will prevent the interruption of a signal from one FSEU causing a false takeoff warning.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require modification of the FSEU wiring of the TOCWS, in accordance with the service bulletin previously mentioned.

There are approximately 58 Model 757 series airplanes of the affected design in the worldwide fleet. It is estimated that 28 Model 757 series airplanes of U.S. registry would be affected by this AD, that it would take approximately 20 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The cost of parts is estimated to be $50 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $23,800.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; Feburary 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 757 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 89.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to Model 757 series airplanes specified in Boeing Alert Service Bulletin 757-27A0063, Revision 1, dated May 17, 1985, certificated in any category.

Compliance required within the next 12 months after the effective date of this AD, unless previously accomplished.

To prevent the occurrence of takeoff configuration false warnings, accomplish the following:

A. Modify the circuitry of the Takeoff Configuration Warning Systems (TOCWS) in accordance with the Boeing Alert Service Bulletin 757-27A0063, Revision 1, dated May 17, 1985.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on December 23, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-802 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-168-AD]

Airworthiness Directives; British Aerospace Model BAC 1-11 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to supersede an existing airworthiness directive (AD), applicable to certain British Aerospace Model BAC 1-11 series airplanes, which currently requires eddy current and ultrasonic inspections of the main landing gear support beams (manacle beam), and repair, if necessary. That action was prompted by a report of the collapse of a right main landing gear in service, attributed to stress corrosion cracking. This proposal would require additional maintenance actions and changes to some of the repetitive inspection intervals, and would provide an alternate means of compliance which terminates the need for the repetitive inspections. This action is prompted by further assessment of components associated with the main landing gear support beams, which identified the need for additional maintenance requirements. This condition, if not corrected, could lead to collapse of the main landing gear.

DATES: Comments must be received no later than March 7, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-168-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from British Aerospace PLC, Librarian for Service Bulletin, P.O. Box 17414, Dulles International Airport, Washington, DC 20041. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. William Schroeder, Standardization Branch, ANM-113; telephone (206) 431-1565. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington, 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-168-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

On June 15, 1987, FAA issued AD 87-13-03, Amendment 39-5654 (52 FR 23943; June 26, 1987), applicable to Model BAC 1-11 series airplanes, which requires eddy current and ultrasonic inspections of the main landing gear support beams (manacle beam), and repair, if necessary. That action was prompted by a report of the collapse of a right main landing gear. That failure was attributed to stress corrosion cracking.

Since issuance of that AD, the manufacturer has conducted further assessment of the production characteristics of the beams and has identified the necessity for additional and more frequent inspections of the main landing gear support beams in order to identify and correct stress corrosion cracking in a more timely manner.

British Aerospace has issued Alert Service Bulletin 57-A-PM6000, Issue Number 2, dated February 17, 1988, which describes additional procedures for inspection of the main landing gear support beam on which BAe Modification PM3070 has been accomplished, and changes the repetitive inspection intervals. The service bulletin introduces a new main support beam (Modification PM5928), which, if installed, terminates the need for the repetitive inspections. The United Kingdom Civil Aviation Authority (CAA) has classified this service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and type certificated in the United States under the provisions of section 21.29 of the Federal Aviation Administration and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of this same type design registered in the United States, an AD is proposed which would supersede AD 87-13-03 to require additional maintenance actions relating to the inspection of the main landing gear support beam, and repair, if necessary, in accordance with the service bulletin previously described. This action would also provide for an optional terminating action as installation of a new support beam.

It is estimated that 2 airplanes of U.S. registry would be affected by this AD, that it would take approximately 60 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $4,800. (The cost for the optional new main support beam is estimated to be $90,000 per airplane.)

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model BAC 1-11 series airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By superseding AD 87-13-03, Amendment 39-5654 (52 FR 23943; June 26, 1987), with the following new airworthiness directive:

British Aerospace: Applies to all Model BAC 1-11 200 and 400 series airplanes, on which British Aerospace (BAe) main landing gear support structure Modification PM3070 is installed and Modification PM5928 has not been installed, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent collapse of a main landing gear, accomplish the following:

A. Perform initial and repetitive ultrasonic and eddy current inspections of the main landing gear support beams at initial times and repetitive intervals shown in Table I of this AD using procedures in BAe Alert Service Bulletin 57-A-PM6000, Issue 2, dated February 17, 1988.

TABLE I

Airplane identification	Modification PM6000 accomplishment status	Initial inspection compliance time	Repetitive compliance time interval after initial inspection
Serial numbers up to and including 402	Not accomplished	Whichever occurs later: —within 300 landings after July 30, 1987, (the effective date of AD 87-13-03, Amendment 39-5654; or —within 3 years since installation of new left and right main support beams	Ultrasonic Inspection: at intervals not to exceed 12 months. Eddy current inspections: at intervals not to exceed 36 months.
Serial numbers 403 and subsequent	Not accomplished	Whichever occurs later: —Within the next 300 landings after July 30, 1987 (the effective date AD 87-13-03, Amendment 39-5654); or —within 6 years since new; or —within 6 years since installation of new left and right main support beams	Ultrasonic inspections: at intervals not to exceed 12 months. Eddy current inspection: at intervals not to exceed 36 months.
For all A/P's on which Mod. PM6000 is accomplished prior to assembly of main support beam into wing.	Accomplished	Whichever occurs later: —Within 8 years since new; or —Within 8 years since new right and left main support beams are installed	ULtrasonic inspection: at intervals not to exceed 2 years.
For all A/P's on which Mod. PM6000 is accomplished after assembly of main support beam into wing.	Accomplished	Within 2 years after installation of Modification PM6000	Ultrasonic inspection: at intervals not to exceed 2 years.

B. Cracks in the main landing gear main support beam must be repaired, prior to further flight, in a manner approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

C. Installation of main support beam, part number ED03-5007/8 (Modification PM5928) constitutes terminating action for the requirements of this AD.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Standardization Branch, ANM-113.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to British Aerospace PLC, Librarian for Service Bulletins, P.O. Box 17414, Dulles International Airport, Washington, DC 20041. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on December 28, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-798 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 88-NM-171-AD]

Airworthiness Directives; McDonnell Douglas Model DC-8 Series Airplanes equipped with LH or RH Nose Landing Gear Upper Drag Link Assembly, Part Numbers (P/N) 5716882-1, -501, -503, 5717011-1, -501, or -503

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to McDonnell Douglas Model DC-8 series airplanes, which would require inspection of the LH and RH nose landing gear (NLG) upper drag link assembly for fatigue cracking and undersized drag link lower lug stiffening web, and modification or replacement, if necessary. This proposal is prompted by three reported failures of the link assembly which resulted in the collapse of the nose landing gear and damage to the nose landing gear and adjacent structure. This condition, if not corrected, could result in collapse of the nose landing gear during ground handling, takeoff, or landing.

DATES: Comments must be received no later than March 7, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-171-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, CL-100 (54-60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. David Y.J. Hsu, Aerospace Engineer, Airframe Branch, ANM-122L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (213) 988-5323.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

this proposal will be filed in the Rules Docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-171-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

Three operators of McDonnell Douglas DC-8 series airplanes have reported three instances of failure of the nose landing gear (NLG) left upper drag link assembly. All three failures occurred on push-back from the gate prior to flight and resulted in the collapse of the NLG and damage to the NLG and adjacent structure. These airplanes had logged between 15,498 and 45,690 flight hours. Investigation by the manufacturer revealed that all three failures were due to metal fatigue, and that two of the failures involved undersized drag link lower lug stiffening web. Fatigue cracking of the NLG left or right upper drag link assembly, if left undetected, could propagate and cause the assembly to fail, resulting in collapse of NLG during ground handling, takeoff, or landing.

The FAA has reviewed and approved McDonnell Douglas DC-8 Service Bulletin 32-178, dated May 22, 1987, which describes procedures for inspection of the upper drag link assemblies for cracks and possible undersized drag link lower lug stiffening web, and modification or replacement, if necessary.

Since this condition is likely to exist or develop on other airplanes of this same type design, and AD is proposed which would require inspection of both LH and RH drag link assembly (P/N(s) 5716882-1, -501, or -503, and 5717011-1, -501, or -503) for cracks and possible undersized drag link lower lug stiffening web, and modification or replacement, if necessary, in accordance with the service bulletin previously mentioned.

There are approximately 350 Model DC-8 series airplanes in the worldwide fleet. It is estimated that 256 airplanes of U.S. registry would be affected by this AD, that it would take approximately 7.6 manhours per airplane to inspect for undersized nose landing gear upper drag link lower lug stiffening web and cracks, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $77,824 for the initial inspection cycle.

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 warranting the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane ($304). A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

McDonnell Douglas: Applies to Model DC-8 series airplanes, equipped with LH or RH nose landing gear (NLG) upper drag link assembly, P/N(s) 5716882-1, -501, -503, 5717011-1, -501, or -503, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent collapse of nose landing gear during ground handling, takeoff, or landing, due to fatigue failure of the LH or RH nose landing gear (NLG) upper drag link lower lug, accomplish the following:

A. Within the next 400 landings after the effective date of this AD, unless already accomplished within the last 400 landings, conduct a magnetic particle or dye penetrant inspection of the LH and RH nose landing gear upper drag link assembly, and measure the lower lug stiffening web for minimum thickness, in accordance with McDonnell Douglas DC-8 Service Bulletin 32-178, dated May 22, 1987.

1. If cracks are found, or if the minimum web thickness measures .100" or less, before further flight, remove and replace the assembly in accordance with paragraph B. or D. of this AD.

2. If no cracks are found and the minimum web thickness measures greater than .100", repeat the inspection in accordance with paragraph A. of this AD at intervals not to exceed 200 landings, unless reworked in accordance with paragraph C. of this AD, or replaced in accordance with paragraph B. or D. of this AD.

B. If the drag link assembly is replaced with a new assembly not modified in accordance with McDonnell Douglas Service Bulletin 32-178, dated May 22, 1988, upon the accumulation of 4,000 landings on the new assembly, perform the initial inspections in accordance with paragraph A. of this AD, and repeat these inspections at intervals not to exceed 200 landings.

C. If the drag link assembly is modified in accordance with McDonnell Douglas DC-8 Service Bulletin 32-178, issued May 22, 1987, upon the accumulation of 800 landings on the modified assembly, perform the initial inspection in accordance with paragraph A. of this AD, and repeat these inspections at intervals not to exceed 200 landings.

D. Replacement of both LH and RH nose landing gear upper drag link assemblies with P/N 5716882-505 and 5717011-505, or modification of the drag link assembly in accordance with McDonnell Douglas DC-8 Service Bulletin 32-178, dated May 22, 1987, and reidentification of the drag link assembly as SR08328002-3, -5, -7, -9, -11, or -13, as applicable, constitutes terminating action for the inspection requirements of this AD.

E. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

F. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1-L00 (54-60). These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle,

Washington, or at 3229 East Spring Street, Long Beach, California.

Issued in Seattle, Washington, on December 28, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-801 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-165-AD

Airworthiness Directives; McDonnell Douglas Model DC-8 Series Airplanes Equipped With Main Landing Gear Attach Fitting, Part Numbers 5611425-1 Through -508

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to McDonnell Douglas Model DC-8 series airplanes, which would require visual inspections of the left and right main landing gear (MLG) attach fittings for cracks, and, as necessary, rework and replacement. This proposal is prompted by two incidents where cracks were not detected and grew beyond the allowable crack length. This condition, if not corrected, could result in collapse of the MLG during takeoff or landing.

DATES: Comments must be received no later than March 13, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-165-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1-L00 (54-60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. David Y.J. Hsu, Aerospace Engineer, Airframe Branch, ANM-122L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (213) 988-5323.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-165-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

Fifteen operators of McDonnell Douglas Model DC-8 series airplanes have reported numerous instances of cracking found in both the left (LH) and right (RH) main landing gear (MLG) attach fittings. Cracks have been reported on airplanes having logged between 15,910 and 40,427 flight hours, and have been attributed to stress corrosion. Two recent incidents have been reported where stress corrosion cracks have led to failure of the main landing gear fittings.

Stress corrosion cracking of the LH or RH MLG attach fitting, if undetected, could propagate and cause the fitting to fail. This condition, if not corrected, could result in severe structural damage, and lead to collapse of a MLG during takeoff or landing.

The FAA has reviewed and approved McDonnell Douglas DC-8 Service Bulletin 57-94, Revision 1, dated June 23, 1987, which describes procedures for inspection for cracks, and, as necessary, rework and replacement of the MLG attach fittings, P/Ns 5611425-1 through -508.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require inspection for cracks, and, as necessary, rework and replacement of both the LH and RH MLG attach fittings in accordance with the McDonnell Douglas service bulletin previously described. Replacement of any cracked fitting with the appropriate replacement fitting would constitute terminating action for the inspection requirements of the AD.

There are approximately 350 McDonnell Douglas Model DC-8 series airplanes in the worldwide fleet. It is estimated that 256 airplanes of U.S. registry would be affected by this AD, that it would take approximately 2.0 manhours per airplane to inspect both the LH and RH MLG attach fittings for cracks, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $20,480 for the required initial inspection.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane ($80). A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

McDonnell Douglas: Applies to Model DC-8 series airplanes, equipped with left (LH) or right (RH) main landing gear (MLG) attach fitting, P/N(s) 5611425-1 through -508, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent severe structural damage to the airplane during takeoff or landing due to stress corrosion failure of the MLG attach fittings, accomplish the following:

A. Within the next 12 calendar months after the effective date of this AD, unless already accomplished within the last 12 calendar months, and thereafter at intervals not to exceed 24 calendar months, except as provided below, perform a visual inspection of the MLG attach fittings for cracks at locations in accordance with Figure 1. of McDonnell Douglas DC-8 Service Bulletin 57-94, Revision 1, dated June 23, 1987 (hereafter referred to as the Service Bulletin).

B. If no cracks are found, apply LPS-3 corrosion inhibiting oil to the fitting in accordance with the Service Bulletin, and repeat inspections for cracks in accordance with paragraph A. of this AD.

C. If cracks are found, accomplish the following:

1. If cracks are located in area 1 or 3, as defined in Figure 1. of the Service Bulletin, before further flight, replace the fitting, P/N(s) 5611425-1, -2, -501, -502, -503, -504, -505, -506, -507, or -508, with respective P/N(s) 5893930-1, -2, -1, -2, -509, -510, -507, -508, -505, or -506.

2. If cracks are located in area 2, as defined in Figure 1. of the Service Bulletin, accomplish the following:

a. If cracks are within limits as prescribed by Figure 1. of the Service Bulletin, apply LPS-3 corrosion inhibiting oil to the fitting in accordance with the Service Bulletin, and repeat visual inspections for crack development at intervals not to exceed 7 calendar days, in accordance with the Service Bulletin.

b. If cracks exceed limits as prescribed by Figure 1. of the Service Bulletin, replace the fitting in accordance with paragraph C.1. of this AD before further flight.

D. Replacement of the fittings in accordance with paragraph C.1. of this AD constitutes terminating action for the inspection requirements of this AD.

E. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office.

F. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to the McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publication, CL-100 (54-60).

These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or 3229 East Spring Street, Long Beach, California.

Issued in Seattle, Washington, on Janaury 3, 1989.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-804 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-186-AD]

Airworthiness Directives; McDonnell Douglas Model DC-9 Series, Model DC-9-80 Series, Including Model MD-88, and C-9 (Military) Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airwothiness directive (AD), applicable to McDonnell Douglas Model DC-9 series, Model DC-9-80 series, including Model MD-88, and C-9 (Military) series airplanes, equipped with hinged evacuation slide covers, which would require replacement of the evacuation slide girt bar forward stowage clip on forward emergency exit doors. This proposal is prompted by reports of the evacuation slide girt inadvertently catching on the evacuation slide girt bar forward stowage clip. This condition, if not corrected, could prevent the emergency exit from being opened, which could jeopardize the safe evaucation of the airplane.

DATES: Comments must be received no later than March 9, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-186-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Stacho, Aerospace Engineer, Systems and Equipment Branch, ANM-131L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (213) 988-5338.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-186-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

Three instances have been reported where the emergency exit evacuation slide girt on McDonnell Douglas DC-9 series airplanes became entrapped during evacuation slide deployment at the forward emergency exit door. The evacuation slide girt deflected upward upon initial movement of the exit door and wrapped over the top of the evacuation slide girt bar forward

stowage clip, which is located o the hinged evaucation slide cover. This prevents the evacuation slide cover from opening and, in the worst case, could prevent the emergency exit door from being opened. This condition, if not corrected, could result in an unusable emergency exit, which could jeopardize the safe evacuation of the airplane.

The FAA has reviewed and approved McDonnell Douglas Alert Service Bulletin A25-299, Revision 1, dated September 23, 1988, which describes replacement of the evacuation slide girt bar forward stowage clip with a newly-designed evacuation slide girt bar stowage clip that will eliminate the possibility of the emergency exit being unusable due to the evacuation slide girt catching on the evacuation slide girt bar stowage clip.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require replacement of the evacuation slide girt bar forward stowage clip in accordance with the service bulletin previously described.

There are approximately 1,500 Model DC-9 series, Model DC-9-80 series, including Model MD-88, and C-9 (Military) series airplanes in the worldwide fleet. It is estimated that 160 airplanes of U.S. registry would be affected by this AD, that it would take approximately 2 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The cost of parts is estimated to be $100 per aircraft. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $28,800.

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.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model DC-9 series airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

2. By adding the following new airworthiness directive:

McDonnell Douglas: Applies to McDonnell Douglas Model DC-9 Series, Model DC-9-80 series, including Model MD-88, and C-9 (Military) series airplanes, equipped with hinged evacuation slide cover assemblies, as listed in McDonnell Douglas Alert Service Bulletin A25-299, Revision 1, dated September 23, 1988, certificated in any category. Compliance required as indicated, unless previously accomplished.

To minimize the possibility of an unusable emergency exit, accomplish the following:

A. Within 6 months after the effective date of this AD, replace the evacuation slide girt bar forward stowage clip in accordance with the Accomplishment Instructions of McDonnell Douglas Alert Service Bulletin A25-299, Revision 1, dated September 23, 1988.

B. Alternate means of compliance which provide an equivalent level of safety may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, CL-100 (54-60). These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

Issued in Seattle, Washington, on December 30, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directive, Aircraft Certification Service.

[FR Doc. 89-803 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. 9204]

PPG Industries, Inc.; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, a Pittsburgh, Pa. manufacturer and seller to obtain prior approval before acquiring any interest in a company that makes aircraft transparencies, if that company does more than $750,000 in sales in the U.S., and to provide the FTC prior notice before making other acquisitions.

DATE: Comments must be received on or before March 14, 1989.

ADDRESS: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue, NW. Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: James C. Egan, Jr., FTC/S-2308, Washington, DC 20580. (202) 326-2886.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 3.25(f) of the Commission's Rules of Practice (16 CFR 3.25(f)), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

List of Subjects in 16 CFR Part 13

Aircraft transparencies, Windows, Windshields, Trade practices.

Agreement Containing Consent Order

The agreement herein, by and between PPG Industries, Inc. ("PPG"), a corporation, by its duly authorized officer, and their attorney, and counsel for the Federal Trade Commission ("the Commission"), is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agreeing that:

1. PPG is a corporation organized under the laws of Pennsylvania with its executive office at One PPG Place, Pittsburgh, Pennsylvania 15272.

2. Respondent has been served with a copy of the complaint issued by the Federal Trade Commission charging it with violations of Section 7 of the Clayton Act, as amended, and has filed an answser to said complaint denying said charges.

3. PPG admits all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. PPG waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise challenge or contest the validity of the Order entered pursuant this agreement; and,

d. All rights under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the complaint issued by the Commission, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify PPG in which event it will take such action as it may consider appropriate, or the Commission may enter this Order as final disposition of this matter.

6. This agreement is for settlement purposes only and does not constitute an admission by PPG that the law has been violated as alleged in said copy of the complaint issued by the Commission.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 3.25(f) of the Commission's Rules, the Commission may, without further notice to PPG, (1) issue its decision containing this Order in disposition of the proceeding, and (2) make information public with respect thereto. When so entered, this Order shall have the same force and effect as, and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. This Order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed to Order to PPG's address as stated in this agreement shall constitute service. PPG waives any right it may have to any other manner of service. The complaint may be used in construing the terms of this Order, and no agreement, understanding, representation or interpretation not contained in the Order or this agreement may be used to vary or contradict the terms of the Order.

8. PPG has read the Order contemplated hereby. PPG understands that it may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

Order

I.

For purposes of this Order, the following definitions shall apply:

"PPG" means PPG Industries, Inc., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the officers, employees and agents of its parents, divisions and subsidiaries.

II.

It is ordered that for a period commencing on the date this Order becomes final and continuing for ten (10) years from the date this Order becomes final, PPG shall not acquire, without the prior approval of the Commission, directly or indirectly, the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the manufacture or sale of aircraft transparencies, and which has sold more than $750,000 of aircraft transparencies in the United States in the twelve months ending on the date of the offer or agreement to acquire the stock, share capital, equity interest, or assets of such company.

III.

It is further ordered that any successor corporation to PPG shall be bound by this Order to the same extent as PPG; further PPG shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of such subsidiaries or any other change that may affect compliance obligations arising out of the Order.

IV.

It is further ordered that for so long as this Order is in effect, PPG shall notify the Commission at least sixty (60) days in advance of any proposed acquisition by it of the stock, share capital, equity interest or assets of any company engaged in the manufacture or sale of aircraft transparencies and having direct sales of such aircraft transparencies in the United States for which prior Commission approval is not required; *provided*, however, that this provision shall not require PPG to notify the Commission of any acquisition that must be reported pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. 18a.

V.

It is further ordered that PPG shall within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement containing a proposed consent order from PPG Industries, Inc., concerning PPG's proposed acquisition of Swedlow, Inc., its competitor in the aircraft transparency business. The proposed order requires PPG to seek prior approval for certain mergers or acquisitions for a period of ten (10) years.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or issue and serve the agreement's proposed order.

In August of 1985, PPG proposed to acquire Swedlow and merge the two companies' transparency operations. On January 6, 1986, the Federal Trade Commission filed a preliminary injunction action against PPG in the United States District Court for the

District of Columbia to enjoin the proposed merger. Ultimately, the Commission won an injunction in the United States Court of Appeals for the District of Columbia Circuit.

On January 29, 1986, the Commission issued a complaint against PPG Industries, Inc. and Swedlow, Inc. which alleges that PPG's proposed acquisition of Swedlow violates Section 7 of the Clayton Act, 15 U.S.C. 18, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended. The complaint alleges that both PPG and Swedlow are actual and potential competitors in the United States and the free world in the various aircraft transparency markets. The complaint alleges that the markets are highly concentrated and that the barriers to entry into the manufacture and sale of the products are significant. The complaint alleges that the effects of the proposed acquisition would be to: (1) Eliminate actual and potential competition between PPG and Swedlow and between Swedlow and others in the markets; (2) significantly increase the already high levels of concentration in the markets; (3) create a firm whose share of the markets is so high as to lead to dominant firm status; and (4) enhance the possibility of collusion or interdependent coordination among the remaining firms in the markets. The complaint charges that the proposed acquisition, if consummated, constitutes violations of section 7 of the Clayton Act, 15 U.S.C. 18, as amended, and section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended.

The first paragraph of the proposed order defines PPG assets covered by the order. Paragraph II bans PPG from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any stock, share capital, or assets of any manufacturer or seller of aircraft transparencies that has annual sales of transparencies of more than $750,000 in the United States. The federal courts found that the relevant geographic market in which to assess the competitive effects of the proposed acquisition was the United States; thus, the order is appropriately limited to the acquisition of firms selling in the United States. Coverage under the order is also limited to firms with annual sales in the United States in excess of $750,000. Within the context of the markets at issue, the acquisition of a firm with sales below this level would be unlikely to lessen competition. This provision lasts ten (10) years from the date the order becomes final.

Paragraph III of the proposed order requires that any successor corporation to PPG shall be bound by this order to the same extent as PPG, and that PPG is required to notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of such subsidiaries or any other change that may effect compliance obligations arising out of the order.

Paragraph IV of the proposed order requires PPG to notify the Commission at least sixty (60) days in advance of any proposed acquisition by PPG of the stock, share capital, equity interest or assets of any manufacturer or seller of aircraft transparencies for which prior Commission approval would not be required. Paragraph V of the proposed order requires PPG to file with the Commission within sixty (60) days of service of the order a written report setting forth the manner and form in which they have complied with the proposed order.

The agreement is for settlement purposes only and does not constitute an admission by PPG that the law has been violated as alleged in said copy of the complaint issued by the Commission.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of agreement and proposed order or to modify in any way their terms.

Donald S. Clark,

Secretary.

[FR Doc. 89-830 Filed 1-12-89; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 206

Revision of Valuation Regulations Governing Gas Sales Under Percentage-of-Proceeds Contacts

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of proposed rulemaking, extension of public comment period.

SUMMARY: The Minerals Management Service (MMS) hereby gives notice that it is extending the public comment period on its Notice of Proposed Rulemaking for a revision of a valuation regulations governing gas sales under percentage-of-proceeds contracts which was published in the **Federal Register** on December 15, 1988 (53 FR 50422). In response to requests for additional time, the MMS will extend the comment period from January 17, 1989, to February 3, 1989.

DATES: Comments must be received by 4:00 p.m. m.s.t. February 3, 1989.

ADDRESS: Written comments should be sent to: Minerals Management Service, Building 85, Denver Federal Center, P.O. Box 25165, Mail Stop 662, Denver, Colorado 80225, Attention: Dennis C. Whitcomb.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch, telephone (303) 231-3432, (FTS) 326-3432.

Date: January 10, 1989.

Jerry D. Hill,

Associate Director for Royalty Management.

[FR Doc. 89-928 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-MR-M

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 904

Arkansas Permanent Regulatory Program; Public Comment Period and Opportunity for Public Hearing on Proposed Amendment

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: OSMRE is announcing receipt of a proposed amendment to the Arkansas permanent regulatory program (hereinafter, referred to as the "Arkansas program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment pertains to restriction on financial interest of State employees, fish and wildlife information, individual civil penalties, the replanting of trees and shrubs as a normal husbandry practice, and measurement of revegetation success on prime farmland. The amendment is intended to revise the State program to be consistent with the corresponding Federal standards and to incorporate the additional flexibility afforded by the revised Federal regulations.

This notice sets forth the times and locations that the Arkansas program and proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that

will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received by 4:00 p.m., c.s.t. February 13, 1989. If requested, a public hearing on the proposed amendment will be held on February 7, 1989. Requests to present oral testimony at the hearing must be received by 4:00 p.m., c.s.t. on January 30, 1989.

ADDRESSES: Written comments should be mailed or hand delivered to Mr. James H. Moncrief at the address listed below.

Copies of the Arkansas program, the proposed amendment, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSMRE's Tulsa Field Office.

Mr. James H. Moncrief, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 550, Tulsa, OK 74135, Telephone: (918) 581-6430.

Office of Surface Mining Reclamation and Enforcement, Administrative Record Office, Room 5131, 1100 L Street NW., Washington, DC 20240, Telephone: (202) 343-5492.

Arkansas Department of Pollution Control and Ecology, Mining Reclamation Division, 8001 National Drive, Little Rock, AR 72209, Telephone: (501) 562-7444.

FOR FURTHER INFORMATION CONTACT: Mr. James H. Moncrief, Director, Tulsa Field Office, (918) 581-6430.

SUPPLEMENTARY INFORMATION:

I. Background on the Arkansas Program

On November 21, 1980, The Secretary of the Interior conditionally approved the Arkansas program. General background information on the Arkansas program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Arkansas program can be found in the November 21, 1980, **Federal Register** [45 FR 77003]. Subsequent actions concerning Arkansas' program and program amendments can be found at 30 CFR 904.12, 904.15, and 904.16.

II. Proposed Amendment

By letter-dated December 22, 1988, (administrative record No. 346) Arkansas submitted a proposed amendment to its program pursuant to SMCRA. Arkansas submitted a portion of the proposed amendment in response to an August 18, 1988, letter that OSMRE sent in accordance with 30 CFR 732.17(c). The regulations that Arkansas proposes to amend in response to this letter are: Arkansas Surface Coal Mining and Reclamation Code 705.11, 705.13, 705.15, 780.16, 784.21, 816.97, 817.97, 846.1, 846.5, 846.12, 846.14, 846.17, and 846.18. The remaining portion of the proposed amendment was submitted in response to an April 17, 1985 letter that OSMRE sent in accordance with 30 CFR 732.17(c), and to satisfy required program amendments at 30 CFR 904.12(b), 904.16(a), and 904.16(b). The regulations that Arkansas proposed to amend are: Arkansas Surface Coal Mining and Reclamation Code 816.116, 816.117, and 1000(50).

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSMRE is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Arkansas program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "**DATES**" or at locations other than the Tulsa Field Office will not be considered in the final rulemaking or included in the administrative record.

Public Hearing

Persons wishing to testify at the public hearing should contact the person listed under "**FOR FURTHER INFORMATION CONTACT**" by 4:00 p.m., c.s.t. on January 30, 1989. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to testify at the public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to testify have been heard. Persons in the audience who have not been scheduled to testify, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to testify and persons present in the audience who wish to testify have been heard.

Public Meeting

If only one person requests an opportunity to testify at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSMRE representatives to discuss the proposed amendment may request a meeting by contacting the person listed under "**FOR FURTHER INFORMATION CONTACT.**" All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under "**ADDRESSES.**" A written summary of each meeting will be made a part of the administrative record.

List of Subjects in 30 CFR Part 904

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Raymond L. Lowrie,

Assistant Director, Western Field Operations.

Date: January 6, 1989.

[FR Doc. 89-864 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-05-M

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30 CFR Part 950

Wyoming Permanent Regulatory Program; Public Comment Period and Opportunity for Public Hearing on Proposed Amendment

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: OSMRE is announcing receipt of a proposed amendment to the Wyoming permanent regulatory program (hereinafter, the "Wyoming program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment is intended to allow the construction of bluffs as final reclamation features where such features will enhance post-mining land uses for the benefit of wildlife and livestock.

This notice sets forth the times and locations that the Wyoming program and proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received by 4:00 p.m., m.s.t. February 13,

1989. If requested, a public hearing on the proposed amendment will be held on February 7, 1989. Requests to present oral testimony at the hearing must be received by 4:00 p.m., m.s.t. on January 30, 1989.

ADDRESSES: Written comments should be mailed or hand delivered to Mr. Jerry R. Ennis at the address listed below.

Copies of the Wyoming program, the proposed amendment, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSMRE's Casper Field Office.

Mr. Jerry R. Ennis, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 100 East B Street, Room 2128, Casper, WY 82601-1918, Telephone: (307) 265-5776.

Office of Surface Mining Reclamation and Enforcement, Administrative Record Office, Room 5131, 1100 L Street, NW., Washington, DC 20240, Telephone: (202) 343-5492.

Department of Environmental Quality, Land Quality Division, Herschler Building—Third Floor West, 122 West 25th Street, Cheyenne, WY 82002, Telephone: (307) 777-7756.

FOR FURTHER INFORMATION CONTACT: Mr. Jerry R. Ennis, Director, Casper Field Office, (307) 265-5776.

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Program

On November 26, 1980, the Secretary of the Interior conditionally approved the Wyoming program. General background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Wyoming program can be found in the November 26, 1980 **Federal Register** (45 FR 78637). Subsequent actions concerning Wyoming's program and program amendments can be found at 30 CFR 950.12, 950.15, and/or 950.16.

II. Proposed Amendment

By letter dated December 13, 1988, (administrative record No. WY 11-1), Wyoming submitted a proposed amendment to its program pursuant to SMCRA. The proposed amendment defines and provides for approval of bluffs as final reclamation features if it is determined that the bluff-type features will enhance the post-mining land use. Governmental agencies and the public would be provided the opportunity for review of and comment on any applicant's bluff proposal prior to Wyoming approving or disapproving it. Approved bluff-type features would have to be designed and constructed to meet safety, stability, reclamation, and land use planning criteria specified in the proposed amendment.

The proposed amendment requires that approval of bluff-type features be made in accordance with the fish and wildlife protection performance standards of the approved State program.

The regulations that Wyoming proposes to amend are: Wyoming Department of Environmental Quality, Land Quality Division, Rules and Regulations, September 1, 1986.

Chapter I. Section 2. Definitions.

Chapter II. Section 3(b)(i)(B)(VIII) Permit Applications. Special application content requirements for surface coal mining operations.

Chapter IV. Section 2(b)(ii)(A). General environmental protection performance standards. Soft rock surface mining.

Chapter IV. Section 3(a)(v). Special environmental protection performance standards applicable to surface coal mining and reclamation operations. Backfilling, grading, and contouring.

Chapter IV. Section 3(a)(x). Special environmental protection performance standards applicable to surface coal mining and reclamation operations. Backfilling, grading, and contouring.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSMRE is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Wyoming program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "**DATES**" or at locations other than the Casper Field Office will not be considered in the final rulemaking or included in the administrative record.

Public Hearing

Persons wishing to testify at the public hearing should contact the person listed under "**FOR FURTHER INFORMATION CONTACT**" by 4:00 p.m., m.s.t. on January 30, 1989. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to testify at the public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to testify have been heard. Persons in the audience who have not been scheduled to testify, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to testify and persons present in the audience who wish to testify have been heard.

Public Meeting

If only one person requests an opportunity to testify at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSMRE representatives to discuss the proposed amendment may request a meeting by contacting the person listed under "**FOR FURTHER INFORMATION CONTACT.**" All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under "**ADDRESSES.**" A written summary of each meeting will be made a part of the administrative record.

List of Subjects in 30 CFR Part 950

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Raymond L. Lowrie,

Assistant Director, Western Field Operations.

Date: January 5, 1989.

[FR Doc. 89-832 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-05-M

Notices

Federal Register
Vol. 54, No. 9
Friday, January 13, 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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Advisory Committee on Procedures Under the U.S.-Canada Free Trade Agreement; Public Meeting

Summary: Pursuant to the Federal Advisory Committee Act (Pub. L. No. 92-463), notice is hereby given that the Advisory Committee on Administrative Procedures under the U.S.-Canada Free Trade Agreement of the Administrative Conference of the United States has scheduled a seminar to discuss certain administrative and procedural issues arising from implementation of the proposed Free Trade Agreement.

The Administrative Conference has undertaken a project on implementing certain dispute resolution procedures under the proposed U.S.-Canada Free Trade Agreement ("FTA"). The FTA, which is intended to reduce tariffs and other trade barriers between the two nations, establishes several new dispute resolution mechanisms, including binational panelists for binding review of actions by federal agencies relating to antidumping and countervailing duty disputes.

The seminar will deal with procedural issues in implementing these dispute resolution systems under the FTA, rather than the merits of the Agreement. It will focus on procedure issues affecting the fairness or efficiency of the process, useful approaches to operating rosters of panelists, and operation of the FTA Commission and U.S. Secretariat. The Conference plans to have two panels, a morning panel exploring issues in implementing Chapter 19's antidumping/countervailing duty binational panels and an afternoon panel looking at disputes under Chapter 18 and establishment of administrative dispute handling processes. Panelists will include representatives of serveral agencies, the bar, academia, and other experts.

Date: Friday, February 10, 1989, from 9:00 a.m. until 5:00 p.m.

Location: U.S. Department of State, Loy Henderson Room, First Floor, 2201 C Street NW., Washington, DC 20520.

Public Participation: While the seminar is open to the interested public, security requirements necessitate that we furnish a list of attendees to the Department of State well before the actual seminar date. *Persons wishing to attend must notify the contact person at least ten days prior to the seminar; i.e., no later than January 31, 1989.* The committee chairman or panel moderators may permit members of the public to present very brief oral statements. Any member of the public may file a written statement with the committee before, during, or after the meeting. Minutes of the meeting will be available on request.

For Further Information Contact: Charles Pou, Jr., Office of the Chairman, Administrative Conference of the United States, 2120 L Street NW., Suite 500, Washington, DC 20037 (202) 254-7020.

Jeffrey S. Lubbers,
Research Director.
January 11, 1989.
[FR Doc. 89-1012 Filed 1-12-89; 8:45 am]
BILLING CODE 6110-01-M

DEPARTMENT OF AGRICULTURE

Office of the Secretary

National Plant Genetic Resources Board Meeting

According to the Federal Advisory Committee Act of October 1972 (Pub. L. 92-463, 86 Stat. 770-776), the USDA, Science and Education, announces the following meeting:

Name: National Plant Genetic Resources Board.

Date: March 28-29, 1989.

Time: 8:30 a.m.-5 p.m., March 28. 8:30 a.m.-Noon, March 29.

Place: Room 104-A, Williamsburg Room, Administration Building, Department of Agriculture, Washington, DC.

Type of Meeting: Open to the public. Persons may participate in the meeting as time and space permits.

Comments: The public may file written comments before or after the meeting with the contact person below.

Purpose: To review matters that pertain to plant germplasm in the United States and possible impacts on related national and international programs; and discuss other initiatives of the Board.

Contact Person: C.F. Murphy, Executive Secretary, National Plant Genetic Resources Board, U.S. Department of Agriculture, BARC-West, Room 239, Building 005, Beltsville, Maryland 20705. Telephone: (301) 344-1560. Done at Beltsville, Maryland, this 3rd day of January 1989.

Charles F. Murphy,
Executive Secretary, National Plant Genetic Resources Board.
[FR Doc. 89-841 Filed 1-12-89; 8:45 am]
BILLING CODE 3410-03-M

Forest Service

Western Livestock Grazing Fees

AGENCY: Forest Service, USDA.

ACTION: Notice of 1989 grazing fees.

SUMMARY: The fee for grazing livestock on certain specified National Forest System lands in the 16 contiguous Western States will be $1.86 per head month for the 1989 grazing year.

EFFECTIVE DATE: March 1, 1989.

FOR FURTHER INFORMATION CONTACT: Edward R. Frandsen, Natural Resource Specialist, Range Management Staff, Forest Service, U.S. Department of Agriculture, P.O. Box 96090, Washington, DC 20090-6090, (703) 235-8141.

SUPPLEMENTARY INFORMATION: Grazing fees for the use and occupancy of the National Forests and Land Utilization Projects in the 16 Western States, and the Crooked River and Curlew National Grasslands are established and collected annually by the Forest Service under the authority of the Organic Act of June 4, 1897, (16 U.S.C. 473-475, 477-482, 551), the Bankhead-Jones Farm Tenant Act of July 22, 1937, (7 U.S.C. 1010-1012), and Executive Order 12548 of February 14, 1986. The 16 contiguous Western States are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.

The formula for establishing the annual grazing fee for these lands is set

forth in regulations at 36 CFR 222.51. Fee adjustments are based on three indexes-private grazing land lease rates added to the price livestock producers receive for the sale of beef cattle less the cost of livestock production. Based on the application of these combined indices to a 1966 base fair market value of $1.23 per head month, the agency will issue bills to grazing permittees in the affected States for 1989 grazing fees at a rate of $1.86 per head month, an increase of thirty-two cents. The increase results from an increase in the prices farmers and ranchers received for beef cattle in 1988, as well as an increase in private grazing land lease rates in most of the States involved.

Date: January 10, 1989.

George M. Leonard,

Associate Chief.

[FR Doc. 89-859 Filed 1-12-89; 8:45 am]

BILLING CODE 3410-11-M

ARMS CONTROL AND DISARMAMENT AGENCY

General Advisory Committee; Renewal

Pursuant to the Federal Advisory Committee Act, Pub. L. 92-463, it has been determined that the renewal of the General Advisory Committee is necessary and is in the public interest. This determination follows consultation with the General Services Administration (GSA) pursuant to section 14(a) of the Federal Advisory Committee Act and the GSA Final Rule on Federal Advisory Committee Management.

Authority for this advisory committee shall expire January 5, 1991 unless continuance is formally determined to be in the public interest.

Dated: January 5, 1989.

William F. Burns,

Director.

[FR Doc. 89-901 Filed 1-12-89; 8:45 am]

BILLING CODE 6820-32-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: The 1990 Census of the United States.
Form Numbers: Agency—D-1, 1(s), 2, 2(s), 1A, 2A, 3, 3(s), 4, 4(s), 14, 20A, 20B, 20A(s), 20B(s), 21, 23, 25, 25(s), 31; OMB—0607-0628.
Type of Request: Revision of a currently approved collection.
Burden: 106,000,000 respondents; 27,432,032 reporting hours.
Average Time Per Response: 14 to 43 minutes.
Needes and Uses: OMB approved this survey in July 1988. The revision is in response to two legislative actions that directed Census to use prelisted response categories with check boxes for Asian and Pacific Islander population groups.
Affected Public: Individuals or households.
Frequency: One time.
Respondent's Obligation: Mandatory.
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) 377-3171, 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 20530.

Dated: January 10, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89-910 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-01-M

Agency Form Under Review by the Office of Management and Budget

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: 1990 Census: Developmental Research on the Enumeration of the Homeless Population.
Form Number: S-592 through S-599.
Agency Approval Number: None.
Type of Request: New.
Burden: 246 hours.
Number of Respondents: 1,220.
Avg Hours Per Response: 12 minutes.
Needs and Uses: This survey is a component of the Research on Homelessness project and involves interviewing homeless individuals and gathering information on facilities that provide services to the homeless. A series of small-scale tests and a full-scale experimental test of two alternative methods for counting the homeless against a control method will be used.
Affected Public: Individuals or households State or local governments Non-profit institutions.
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 10, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89-911 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-07-M

International Trade Administration

[C-614-503]

Lamb Meat From New Zealand; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on lamb meat from New Zealand. We preliminarily determine the total bounty or grant to be NZ$0.30/lb. during the period April 1, 1986 through March 31, 1987. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: January 13, 1989.

FOR FURTHER INFORMATION CONTACT: Cynthia Sewell or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-3337.

SUPPLEMENTARY INFORMATION:

Background

On June 10, 1988, the Department of Commerce ("the Department") published in the **Federal Register** (53 FR 21882) the final results of its last countervailing duty administrative review of lamb meat from New Zealand. On September 29, 1987, the New Zealand Meat Producers Board requested in accordance with 19 CFR 355.10 an administrative review of the order. We published the initiation on October 20, 1987 (52 FR 38952). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

The United States, under the auspices of the Customs Cooperation Council, has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS) as provided for in section 1201 et seq. of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s).

Imports covered by this review are shipments of lamb meat from New Zealand. During the review period, such merchandise was classifiable under item 106.3000 of the Tariff Schedules of the United States Annotated. This merchandise is currently classifiable under HTS items 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20.

The review covers the period April 1, 1986 through March 31, 1987 and eight programs. Three companies exported lamb meat to the United States during the period of review.

Analysis of Programs

(1) *Export Market Development Taxation Incentive (EMDTI)* Under the EMDTI, established in the 1979 Amendment to the Income Tax Act of 1976, exporters may receive tax credits for a certain percentage of their export market development expenditures. Qualifying expenditures include those incurred principally for seeking and developing new markets, retaining existing markets, and obtained market information. An exporter who takes advantage of this tax credit may not deduct the qualifying expenditures as ordinary business expenses in calculating taxable income. During the period of review, the tax credit was 69 percent of the total qualifying expenditures, and the normal corporate tax rate in New Zealand was 48 percent. Because the program is limited to exporters, we preliminarily determine that it confers an export bounty or grant. Two exporters claimed EMDTI tax credits for lamb meat exports to the United States on their tax returns filed during the review period.

Since exporters may claim a tax credit equal to 69 percent of the qualifying expenditures but may not deduct these expenditures from income, which is taxable at 48 percent, the net benefit to the exporters is 21 percent of the qualifying expenditures. To calculate the benefit, we took 21 percent of each exporter's qualifying expenditures relating to lamb meat exports to the United States and allocated that amount over its total volume of lamb meat exports to the United States during the period of review. We then weight-averaged the resulting benefits by each company's proportion of total lamb meat exports to the United States during the period of review. On this basis, we preliminarily determine the benefit from this program to be NZ$0.14/lb. for the period of review.

For the fiscal year ending March 31, 1988, the New Zealand Government decreased the tax credit to 64 percent. Consequently, the net benefit to exporters is 16 percent of qualifying expenditures relating to lamb meat exports. Therefore, for purposes of cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be 5.40 percent *ad volorem*. (For an explanation of the change to collecting cash deposits of estimated countervailing duties on an *ad valorem* basis *see, Final Results of Countervailing Duty Administrative Review: Lamb Meat from New Zealand* (53 FR 21882, June 10, 1988)).

(2) Export Performance Taxation Incentive (EPTI)

Under the EPTI, exporters were entitled to receive a tax credit based on the f.o.b. value of qualifying goods exported under Section 156A of the Income Tax Act of 1976. Credits are available as a deduction against income tax payable. If the tax credit exceeds the income tax payable, the taxpayer receives the difference in cash.

The rate of the tax credit depends on the predetermined value-added category into which the product falls. Lamb meat falls under category D, for which the corresponding rate was 1.925 percent for the fiscal year ending March 1987. All three exporters claimed EPTI credits on their tax returns filed during the review period. Because this program is limited to exporters, we preliminarily determine that it confers an export bounty or grant.

We calculated the benefit from this program on a credit-as-earned basis, using the applicable EPTI rate on exports made during the review period. *See, Final Affirmative Countervailing Duty Determination: Certain Steel Wire Nails from New Zealand* (52 FR 37196, October 5, 1987). We multiplied the EPTI rate by each company's corresponding export sales of lamb meat to the United States and divided that result by each company's total volume of lamb meat exports to the United States during the period of review. We then weight-averaged the resulting benefits by each company's proportion of total lamb meat exports to the United States during the period of review. On this basis, we preliminarily determine the benefit from this program to be NZ$0.03/lb. for the review period.

In our last review, we determined that the EPTI rate on exports shipped since April 1, 1987 is zero. Therefore, for purposes of cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be zero.

(3) Livestock Incentive Scheme

The Livestock Incentive Scheme was introduced in 1976 and is administered by the Rural Banking and Finance Corporation. The program was set up to encourage farmers to increase permanently their number of livestock. Under the scheme, a farmer engaged in a stock increase program, for a minimum of one and a maximum of three years, may opt for one of two incentives: (1) An interest-free suspensory loan of NZ$12 for each additional stock unit carried; or (2) a deduction of NZ$24 from taxable income for each additional stock unit carried. If the livestock increase was met, farmers who elected to take out loans wrote the loans off as tax-free grants. For farmers electing the tax option, the provisional tax deduction could be applied toward tax liability in any of the three years after completion of the development program.

Because benefits under this program are available only to farmers with livestock herds, we preliminarily determine that it is limited to a specific enterprise or industry, or group of enterprises or industries, and therefore confers a bounty or grant.

To calculate the benefit received from the loan option portion of the program, we treated the loan amounts forgiven as grants and allocated those benefits over five years, the average useful life of breeding stock. The discount rate

chosen was the average interest rate on overdrafts during the review period. For the loans that have not yet been forgiven, we treated the loan amounts as one-year, interest-free loans and measured the benefit using the interest rate described above as our benchmark. The benefit from the tax option was determined by multiplying the amount of the tax deduction used during the review period by the corporate tax rate. We added the value of the benefits from the loan and tax portions of the program and multiplied the result by a factor determined to represent the value of lamb as a percentage of total livestock production. We then divided that result by the total value of lamb products sold during the review period. On this basis, we preliminarily determine the benefit from this program to be NZ$0.006/lb. during the period of review. For purposes of cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be 0.69 percent *ad valorem*.

(4) Meat Producers Board Price Support Scheme (MPBPS)

The MPBPS was established to insulate meat producers from fluctuations in market prices and to guarantee them a minimum return on export sales of their products. The scheme was administered by the Meat Producers Board ("the Board") and the Meat Export Prices Committee. It was financed through the Meat Income Stabilization Account ("MISA"), an overdraft account maintained by the Board at the Reserve Bank of New Zealand.

The Board had four primary sources of funds: (1) A levy set by the Board and collected by processors from lamb, sheep, and cattle growers at the time of slaughter; (2) return on investments; (3) short-term borrowings from commercial lenders in New Zealand and overseas; and (4) advances from the Meat Industry Reserve Account ("MIRA"). However, during the review period, disbursements from the MISA account were funded by advances from the government's MIRA account.

The Board had two methods for supporting the price of meat if the market price fell below the schedule price: (1) The Board could purchase meat at the schedule price; or (2) the farmer could sell lamb meat at the market price and then receive a deficiency payment equal to the difference between the market price and the schedule price. In both cases, the funds used to support the price were drawn from the MISA.

We do not consider funds for minimum price support payments provided by producer levies to constitute a bounty or grant within the meaning of the countervailing duty law. However, this program also provides government funds to the Board to guarantee producers a minimum return on export sales on terms that are not available from commercial sources. Therefore, we preliminarily determine that the portion of the payments represented by government funds confers an export bounty or grant within the meaning of the countervailing duty law.

We calculated the benefit from this program by dividing the value of the government's contributions to the MISA account attributable to lamb meat during the period of review by the total volume of lamb exported. On this basis, we preliminarily determine the benefit from this program to be NZ$0.12/lb. during the period of review.

In our last review, we determined that the Meat Producers Board Price Support Scheme was terminated effective March 30, 1987. Therefore, for purposes of cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be zero.

(5) Other Programs

We also examined the following programs and preliminarily determine that lamb meat exporters did not use them:

(a) Export Programme Suspensory Loan Scheme

(b) Export Suspensory Loan Scheme

(c) Regional Development Suspensory Loan Scheme

(d) Supplementary Minimum Prices Scheme (SMP)/Lump-Sum Scheme

Preliminary Results of Review

As a result of our review, we preliminarily determine the total bounty or grant to be NZ$0.30/lb. during the period of April 1, 1986 through March 31, 1987.

The Department intends to instruct the Customs Service to assess countervailing duties of NZ$0.30/lb. on all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after April 1, 1986 and exported on or before March 31, 1987.

Because of the termination of the EPTI and the MPBPS, and changes to the EMDTI program, the rate for cash deposit purposes decreased from NZ$0.30/lb. (equivalent to 15.99 percent *ad valorem*) to 6.09 percent *ad valorem*. Therefore, the Department intends to instruct the Customs Service to collect a cash deposit of estimated countervailing duties of 6.09 percent of the f.o.b. invoice price on all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. This deposit requirement will remain in effect until publication of the final results of the next administrative review.

Interested parties may submit written comments on these preliminary results within 30 days of the date of publication of this notice, and may request disclosure and/or a hearing within 7 days of the date of publication. Any hearing, if requested, will be held 30 days from the date of publication or the next workday following. Any request for an administrative protective order must be made no later than five days after the date of publication. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any such written comments or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.10.

Jan W. Mares,

Assistant Secretary for Import Administration.

Date: January 6, 1989.

[FR Doc. 89-865 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-DS-M

Export Trade Certificate of Review

AGENCY: Department of Commerce.

ACTION: Notice of Application for an Amendment to an Export Trade Certificate of Review.

SUMMARY: The Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, has received an application for an amendment to an Export Trade Certificate of Review. This notice summarizes the amendment and requests comments relevant to whether the Certificate should be amended.

FOR FURTHER INFORMATION CONTACT: Thomas H. Stillman, Director, Office of Export Trading Company Affairs, International Trade Administration, 202/377-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (Pub. L. 97-290) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from

private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether a Certificate should be issued. An original and five (5) copies should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1223H, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Comments should refer to this application as "Export Trade Certificate of Review, application number 88-AE015."

OETCA has received the following application for an amendment to Export Trade Certificate of Review #88-00015, which was issued on December 12, 1988 (53 FR 51294, December 21, 1988).

Applicant: The Ferrous Scrap Export Association ("FSEA") Contact: Richard G. Slattery, legal counsel Telephone: 202/662-6000.

Application #: 88-AE015.

Date Deemed Submitted: January 9, 1989.

Summary of Application

FSEA seeks to amend its certificate to:

1. Add "financing" to Export Trade Facilitation Services.

2. Add "the United States Internatioanl Trade Commission" to the list of administrative agencies appearing in paragraph 1 (j) of Export Trade Activities and Methods of Operation.

Date: January 10, 1989.

Thomas H. Stillman,

Director, Office of Export Trading Comapny Affairs.

[FR Doc. 89-985 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-DR-M

National Oceanic and Atmospheric Administration

Coastal Zone Management; Federal Consistency Appeal by the Bank of Ponce From an Objection by the Puerto Rico Planning Board

AGENCY: National Oceanic and Atmosphere Administration, Commerce.

ACTION: Notice of dismissal.

On January 27, 1988, the Bank of Ponce (Appellant) filed with the Department of Commerce (Department) a notice of appeal under section 307(c)(3)(A) of the Coastal Management Act of 1972, as amended, 16 U.S.C. 1456(c)(3)(A), and implementing regulations, 15 CFR Part 930, Subpart H. The appeal rose from an objection by the Puerto Rico Planning Board (PRPB) to the Appellant's certification that its proposal to deposit fill material to build new parking facilities in San Juan, Puerto Rico would be consistent with Puerto Rico's management program.

By a letter dated November 9, 1988, the PRPB informed the Department that the Appellant has revised the project such that the PRPB now concurs in its consistency with Puerto Rico's coastal management program. Accordingly, the Department dismissed the appeal on December 19, 1988 for good cause pursuant to 15 CFR 930.128. That dismissal bars the Appellant from filing another appeal from the PRPB's objection to the aforementioned activities.

FOR ADDITIONAL INFORMATION CONTACT: Sydney Anne Minnerly, Attorney-Adviser, Office of the Assistant General Counsel for Ocean Services, National Oceanic and Atmosphere Administration, U.S. Department of Commerce, 1825 Connecticut Avenue NW., Suite 603, Washington, DC 20235, (202) 673-5200.

(Federal Domestic Assistance Catalog No. 11.429 Coastal Zone Mangement Program Assistance)

Date: January 6, 1989.

B. Ken Burton,

Assistant Secretary for Oceans and Atmosphere.

FR Doc. 89-828 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-08-M

National Marine Fisheries Service, Marine Fisheries Advisory Committee; Public Meeting

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

Time and Date: Meeting will convene at 1:00 p.m, January 31, 1989, and adjourn at 12:00 noon, February 2, 1989.

Place: Capitol Holiday Inn, 550 C Street, SW., Washington, DC.

Status: As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1982), notice is hereby given of a meeting of the Marine Fisheries Advisory Committee (MAFAC). MAFAC was established by the Secretary of Commerce on February 17, 1971, to advise the Secretary on all living marine resource matters which are the responsibility of the Department of Commerce. This Committee ensures that the living marine resource policies and programs of this Nation are adequate to meet the needs of commercial and recreational fishermen, environmental, state, consumer, academic, and other national interests.

Matters to be Considered: January 31, 1989, 1:00-5:15 p.m., priorities for NOAA Fisheries, Marine Mammal Protection Act Amendments of 1988, king mackerel, North Pacific fisheries management issues, and reports from the Interstate Fisheries Commissions.

February 1, 1989, 8:30 a.m.-5:30 p.m., enforcement activities, National Audubon Society report on NOAA Fisheries, marine recreational fisheries action plan, interjurisdictional fishery policy, seafood inspection, litigation report, and budget review. February 2, 1989, 8:30 a.m.-12:00 noon, budget review and review of committee recommendations.

FOR FURTHER INFORMATION CONTACT: Ann Smith, Executive Secretary, Marine Fisheries Advisory Committee, Constituent Affairs Staff-Fisheries, Office of Legislative Affairs, NOAA, 1335 East-West Highway, Silver Spring, MD 20910. Telephone: (301) 427-2259.

Date: January 9, 1989.

William Matuszeski,

Executive Director, National Marine Fisheries Service, NOAA.

[FR Doc. 89-822 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-01-M

[Modification No. 1 to Permit No. 520]

Marine Mammals; Modification of Permit; Northeast Fisheries Center, NMFS (P77 #14)

Notice is hereby given that pursuant to the provisions of § 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216), Scientific Research Permit No. 520 issued the Northeast Fisheries Center, National Marine Fisheries Service, Woods Hole, Massachusetts 02543, on August 28, 1985 (50 FR 36133) is modified in the following manner:

Section B.5. is added:

5. Notwithstanding the restrictions in General Condition C.2.a., the marine mammals authorized in section A above may be collected during the period between the enactment of Pub. L. 100-711 and the date the

exemption system required by that law becomes effective.

Because the Permit Holder has waived the right to a hearing, this modification becomes effective upon date of publication in the **Federal Register.**

This modification is necessary in order to allow continued research on marine mammals taken incidentally in foreign fishing and joint venture operations in the Exclusive Economic Zone between the period after the enactment of Pub. L. 100-711 and the date the exemption system required by that law becomes effective. This authorization is in keeping with the National Marine Fisheries Service Enforcement Policy for Takings of Marine Mammals Incidental to Commercial Fishing (53 FR 49214). Only animals taken and killed incidental to fishing operations will be sampled, enabling research to be conducted without adversely affecting the population.

Documents in connection with the above modification are available for review in the following offices:

Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East West Highway, Room 7324, Silver Spring, Maryland 20910.

Regional Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702; and Regional Director, Northeast Region, National Marine Fisheries Service, Federal Building, 14 Elm Street, Gloucester, Massachusetts 01930-3799.

Nancy Foster,

Director, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service.

Date: January 9, 1989.

FR Doc. 89-783 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-22-M

National Technical Information Service

Intent to Grant Exclusive Patent License; Polysciences, Inc.

The National Technical Information Service (NTIS), U.S. Department of Commerce, intends to grant to POLYSCIENCES, Inc., having a place of business in Warrington, PA 18976, an exclusive license in the United States to practice the invention entitled "*Simple and Rapid Method for Detection of Virulent Yersinia enterocoliticia*" U.S. Patent Application Serial Number 7-140,501. The patent rights in this invention have been assigned to the United States of America, as represented by the Secretary of Commerce.

The intended exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The intended license may be granted unless, within sixty days from the date of this published Notice, NTIS receives written evidence and argument which establishes that the grant of the intended license would not serve the public interest.

Inquiries, comments, and other materials relating to the proposed license must be submitted to Charles A Bevelacqua, Director, Office of Federal Patent Licensing, NTIS, Box 1423, Springfield, VA 22151.

A copy of the instant patent application may be purchased from the NTIS Sales Desk by telephone (703) 487-4650 or by writing to the Order Department, NTIS, 5285 Port Royal Road, Springfield, VA 22161.

Douglas J. Campion,

Associate Director, Office of Federal Patent Licensing, National Technical Information Service, U.S. Department of Commerce.

[FR Doc. 89-884 Filed 1-12-89; 8:45 am]

BILLING CODE 3510-04-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement list 1989; Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to procurement list.

SUMMARY: This action adds to Procurement List 1989 commodities to be produced by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: February 13, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman, (703) 557-1145.

SUPPLEMENTARY INFORMATION: On November 18, 1988, the Committee for Purchase from the Blind and Other Severely Handicapped published notice (53 FR 46645) of proposed additions to Procurement List 1989, which was published on November 14, 1988 (53 FR 46018).

No comments were received concerning the proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified workshops to produce the commodities at a fair market price and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities listed.

c. The actions will result in authorizing small entities to produce the commodities procured by the Government.

Accordingly, the following commodities are hereby added to Procurement List 1989:

Table Leg
7110-00-NSH-0023
Binder, Looseleaf, Flight Crew
7510-00-240-6012

Beverly L. Milkman,

Executive Director.

[FR Doc. 89-853 Filed 1-12-89; 8:45 am]

BILLING CODE 6820-33-M

Procurement List 1989; Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received a proposal to add to Procurement List 1989 commodities to be produced and a service to be provided by workshops for the blind or other severely handicapped.

DATE: Comments must be received on or before February 13, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman, (703) 557-1145.

SUPPLEMENTARY INFORAMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51-2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the

Federal Government will be required to procure the commodities and service listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities and service to Procurement List 1989, which was published on November 15, 1988 (53 FR 46018):

Commodities

Wrench, Pipe

5120-00-277-1485
5120-00-277-1486
5120-00-277-1461
Stone, Artificial Dental
6520-00-116-1472 (Requirements for Department of Defense only)
6520-00-557-7015

Folder, File

7530-00-205-3613
7530-00-290-2009
7530-00-634-1785
7530-00-985-7009
7530-00-985-7010

Towel, Paper

7920-00-823-9772 (GSA Regions 2, 8, 9 and 10)
Decoration Set, Air Force Achievement Medal
8455-01-122-0120
Decoration Set, Commendation Medal, Navy and Marine Corps
8455-00-680-0617

Service

Laundry Service (Excluding Dry Cleaning and Rental), Uniformed Services, University of the Health Sciences, F. Edward Hebert School of Medicine, Bethesda, Maryland

Beverly L. Milkman,

Executive Director.

[FR Doc. 89-854 Filed 1-12-89; 8:45 am]

BILLING CODE 6820-33-M

CONSUMER PRODUCT SAFETY COMMISSION

Approval of Voluntary Standard for All-Terrain Vehicles

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of Commission approval of a draft voluntary standard for all-terrain vehicles ("ATVs").

SUMMARY: On April 28, 1988, the United States District Court for the District of Columbia approved consent decrees between the Commission and the major members of the ATV industry. One of the provisions of the decrees was that the industry parties to the decrees would attempt in good faith to reach agreement on voluntary standards for ATVs, satisfactory to the Commission, within four months of the Court's approval of the final consent decrees.

In this notice, the Commission announces that it has considered the voluntary standard drafted by a committee consisting of the five major distributors of ATVs pursuant to the terms of the consent decrees. Because 3-wheel ATVs are excluded from this standard, the prohibition on marketing of 3-wheel ATVs provided in the consent decrees will continue. The standard includes configuration requirements for service brakes, mechanical suspension, parking brakes, engine stop switch, clutch controls, throttle control, gear shift control, neutral indicator, reverse indicator, carry bar, flag pole bracket, manual fuel shutoff control, handlebars, operator foot environment, lighting equipment, spark arrestor, tire labeling, tire pressure gauge, vehicle security, and owner's manual. In addition, the standard contains pitch stability requirements and performance requirements for service and parking brakes. With respect to two categories of youth vehicles, the standard provides for maximum speeds in both limited and unlimited modes of operation. The industry, through the Specialty Vehicle Institute of America ("SVIA") submitted this standard for canvass ballot approval as an American National Standards Institute ("ANSI") American National Standard by letter dated December 15, 1988.

While the voluntary standard submitted to ANSI does not directly address the issue of lateral stability, each of the five distributors agreed separately not to market ATVs in the future that have lateral stability coefficients lower than the lowest value in that distributor's current production. In addition, the industry has indicated that it will engage in an 18-month effort to develop a dynamic performance standard to address the lateral stability characteristics of ATVs.

These actions by the industry are in addition to the other detailed provisions of the consent decrees, which will regulate the ATV industry's actions for at least ten years with respect to age recommendations, labels, manuals, point-of-purchase materials, advertising, training, and other subjects. Together, the draft voluntary standard and the separate industry agreements concerning lateral stability constitute the "voluntary standard" envisioned by the consent decrees. After considering these proposals by the industry, the Commission concluded [1] that the "voluntary standard" submitted by the industry is satisfactory. In making this determination, the Commission specifically reserved its rights under the consent decrees to institute certain enforcement or rulemaking proceedings in the future.

The Commission encourages interested members of the public to comment on the ATV standard as the standard undergoes ANSI consideration and to send copies of such comments to the Commission's staff so that the Commission can be alerted if any unforeseen problems arise.

DATES: Comments on the ATV voluntary standard are due to SVIA by March 15, 1989.

ADDRESSES: To participate in the consideration of this standard under the ANSI process, contact Mr. J.C. DeLaney, Manager, Technical Programs, SVIA, 2 Jenner Street, Suite 150, Irvine, CA 92718-3820.

Copies of comments that have been sent to SVIA on the ATV voluntary standard may be sent, for the information of the Commission's staff, to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Carl Blechschmidt, Program Manager, Office of Program Management and Budget, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 492-6554.

SUPPLEMENTARY INFORMATION:

Background

The Commission for some time has been concerned with safety issues associated with the operation of all-terrain vehicles, which are 3- and 4-wheeled motorized vehicles, generally characterized by large, low pressure tires, a seat designed to be straddled by the operator, and handlebars for steering and which are intended for off-road use by an individual rider on various types of unpaved terrain.

On May 31, 1985, the Commission published an advance notice of proposed rulemaking ("ANPR") in the **Federal Register.** 50 FR 231139. In the ANPR, the Commission announced that it was considering a wide range of possible regulatory alternatives to address the safety concerns about ATVs

[1] Chairman Terrence Scanlon and Commissioner Carol Dawson voted to find the voluntary standard satisfactory. Commissioner Anne Graham dissented. Each Commissioner filed one or more statements concerning his or her vote that are available from the Office of the Secretary.

and solicited comments on a number of issues.

On December 30, 1987, The Commission and the major members of the ATV industry filed preliminary consent decrees in *United States v. American Honda Motor Co., Inc., et al.*, Civil Action No. 87-3525, in the United States District Court for the District Court of Columbia. The preliminary consent decrees contained provisions intended to satisfy the Commission's concerns about ATVs and provided that the parties would file proposed fnal consent decrees, which are filed on March 14, 1988. Both the preliminary consent decrees and the final consent decrees, which were approved by the Court on April 28, 1988, provide that the industry members will attempt in good faith to reach agreement on voluntary standards satisfactory to the Commission, within four months of the Court's approval of the final consent decrees. A summary of the extensive provisions of the consent decrees is included as Appendix 2 to this notice.

In order to expedite the development of a voluntary standard by the industry, the Commission staff forwarded, on January 27, 1988, proposed provisions that could be considered for inclusion in the voluntary standard. The staff noted, however, that these were to be considered merely as a starting point for the development of a standard and that one acceptable to the Commission would need to address additional areas. In the discussion below of the standard that was ultimately developed by the industry, the instances where the standard set forth in this notice differs significantly from the staff's proposed standard are noted.

The Specialty Vehicle Institute of America ("SVIA") had been accredited in 1985 by the American National Standards Institute (ANSI) as a sponsor to use the ANSI canvass procedures for consensus development of a voluntary standard for ATVs, and SVIA was chosen by the five companies that are party to the consent decrees to coordinate the development of the standard provided for in the consent decrees. The standard was developed by a voluntary standards committee consisting of representatives from each of the five companies involved. All of the voluntary standards committee working group meetings and plenary sessions were open to the public, in keeping with the Commission's regulations on voluntary standards participation and public meetings.

The first meeting of the voluntary standards committee after the signing of the consent decrees was on May 4, 1988. Five technical working groups were formed under the committee to address various sections of the standard. The working group meetings were held in California, with technical representatives from each manufacturer attending. Working group meetings took place on May 19-20, June 15-16, July 20-21, and August 24-25. There were also plenary meetings of the voluntary standards committee in Washington, DC, to report on progress of the technical working groups. Voluntary standards committee plenary meetings (in addition to the May 4 meeting) were held on June 2, June 30, July 28, and September 14. As indicated above, all meetings were open to the public; the meetings also were listed in the CPSC Public Calendar, and the voluntary standards committee plenary meetings were announced by **Federal Register** notices. The standard developed by the industry was submitted to the Commission on September 26, 1988, and is reproduced below as Appendix 1 to this notice.

Although the text of the document submitted to the ANSI canvass procedure does not contain an provision addressing the important area of lateral stability, the industry did submit a plan to develop criteria and dynamic testing procedures during the next 18 months. The Commission's staff originally had proposed that the standard contain a provision for lateral stability requiring that ATVs have a lateral stability coefficient ("K_{st}"), developed to reflect the lateral stability characteristics of the ATV, of at least [−] 1.0. The staff prefers the lateral stability coefficient provision to a steady-state turn performance test, which the staff believes is an inappropriate methodology for determining the lateral stability characteristics of an ATV because the rider can influence the results of the test. The industry, on the other hand, contends that the rider-active nature of ATV operation, the broad range of terrain over which ATVs are intended to operate, and the lack of accident data that are sufficient to detemine whether there is a correlation between accident rate and lateral stability coefficient for current production vehicles do not permit a conclusion that the lateral stability coefficient is an appropriate measure of an ATV's safety in this regard.

In order to arrive at an agreement in this area, the industry proposed that each of the distributors would not market any ATVs with a lateral stability coefficient (K_{st}) lower than the K_{st} embodied in the model of the manufacturer that has the lowest K_{st} in current production. This in effect would ensure that all ATVs produced in the future will have a K_{st} of about 0.89 or greater. This proposal would be considered interim, pending either the development of a test acceptable to the Commission or the acqusition of data to show whether different or more stringent criteria are appropriate. The issue of lateral stability is discussed further in the following section of this notice, which discusses the requirements agreed to by the industry.

The Commission considers that the draft voluntary standard that has been submitted to ANSI, together with the separate agreements with the distributors concerning minimum lateral stability coefficients, constitute the "voluntary standard" developed by the industry pursuant to the consent decrees. On October 28, 1988, the Commission met and voted to find the voluntary standard and agreement on lateral stability satisfactory. In reaching this determination, the Commission considered only the substantive agreements reached; the Commission did not necessarily agree with the ratioale or disclaimers stated by the industry for certain provisions of the voluntary standard. (See the discussion of pitch stability and mechanical suspension in the Foreword to the industry's standard in Appendix 1 for examples of statements with which the Commission disagrees.)

The estimated number of ATV-related injuries treated in hospital emergency rooms increased between 1982 and 1985 and peaked at 86,000 in 1986. It decreased to 77,000 in 1987. Estimates based on current predictions of shipments show that injuries are likely to continue to decline, to 33,000 in 1992. This figure does not include any injury reduction that may occur due to the implementation of the voluntary standard and the consent decree.

For the period from 1982 to September of 1988, the Commission received reports of 1186 deaths from ATV-related incidents; 301 of these occurred in 1986, and 264 occurred in 1987. Although there has been no discernible change in the fatality rate with the introduction of the 4-wheel ATVs over the past several years, the predicted decrease in shipments should result in a 33 percent decrease in the number of ATVs in use by 1992, with a corresponding reduction in deaths. Again, this figure does not include any reduction in deaths that may occur as a result of the implementation of the voluntary standard and the consent decrees. The effect of the voluntary standard on injuries and deaths, to the extent current data permit such estimates, is discussed in Section I of this notice.

Provisions of the Voluntary Standard

The voluntary standard (Appendix 1) is composed of major sections on Equipment and Configuration Requirements, Youth Vehicle Requirements, Service Brake Performance, Parking Brake Performance, and Pitch Stability. This draft standard includes requirements for all areas the staff has identified as important for ATV safety and for which requirements can be formulated at this time, except for lateral stability (resistance to sideways tipover). Industry has offered an interim way to insure a specified minimum level of lateral stability. These items are discussed in more detail below.

A. Equipment and Configuration Requirements

The 20 items specified in this section place certain constraints on specific components of the vehicle. A few of the items are not related to safety concerns of CPSC, but are felt by industry to be necessary. Most of these requirements are already being met in current production.

1. *Service brake.* This requirement specifies that all ATVs will have both front and rear brakes and standardizes their controls. Some previously-manufactured ATVs lacked front brakes and, therefore, had very poor braking performance. In addition, it is unsafe to stop an ATV from rolling backward on a hill be using only the rear brake. It is necessary that the vehicle has front brakes for this purpose.

2. *Parking brake.* This provision requires a parking brake. Parking brakes are necessary for emergency operation of ATVs on steep slopes.

3. *Engine stop switch.* This provision standardizes the operation and location of the engine stop switch. CPSC originally had some concerns about the possibility of inadvertent actuation of the switch, but the industry believes this is no longer a concern; currently available data do not show that additional requirements for this are needed.

4. *Clutch control.* This provision specifies certain operational, location, and labeling requirements for the clutch control.

5. *Throttle control.* This provision specifies location and operational characteristics for the throttle control and contains special requirements for certain utility operations.

6. *Gear shift control.* This provision specifies location and operation of the gear shift control. CPSC staff had asked for an additional requirement for the shift pattern intended to prevent inadvertent selection of neutral under hazardous conditions. The industry believes this to be unnecessary, mechanically complex, and likely to introduce other problems, including hazards under some conditions of utility use. While the Commission's staff still views having neutral at a half position between first and second as a desirable feature, it concluded that this requirement was not essential for an adequate standard.

7. *Neutral indicator.* This provision requires an indicator to show when the vehicle's transmission is in neutral. This should help prevent inadvertent acceleration should the operator start the vehicle while it is in gear or leave the vehicle idling in gear. The original CPSC staff proposal required that all ATVs except those with manual clutches have a readily visible indicator to tell the operator when the machine is in neutral. A further exception was made for vehicles that have an interlock to prevent them from being started in gear. This exclusion is appropriate for the problem of starting while in gear, but it does not address the possibility of inadvertent acceleration of a vehicle idling in gear. This was accepted nevertheless, because it is not clear how prevalent this latter problem is or how effective the neutral indicator actually would be to prevent it.

8. *Reverse indicator.* This is a requirement for a device to indicate to the operator that the vehicle is in reverse gear.

9. *Carry bar.* This consists of design requirements for a handle located at the rear of the seat, which industry included to allow lifting or moving of the vehicle. CPSC recognizes a further safety function of this device in that it may prevent or lessen rearward overturn of the vehicle because it provides an additional support point at the rear. The carry bar is required to be located so that it does not allow the vehicle to rotate rearward beyond the vertical position. This reflects the current design practice, which CPSC staff believes significantly reduces the extent of rear pitchover.

10. *Flag pole bracket.* This provision standardizes a fitting for installation of a conspicuity flag.

11. *Manual fuel shutoff control.* This provision standardizes operation of the fuel shutoff valve.

12. *Handlebars.* This provision specifies certain requirements for the handlebars to reduce impact and cutting injuries should the operator strike this area of the ATV. CPSC staff had asked for further requirements to reduce protrusions above the level of the handlebars and to require handlebar mounted controls to deflect out of the way readily if impacted. Industry argued that such restrictions were vaguely defined and that adequate protection is currently provided. CPSC staff has accepted the current requirement as satisfactory but believes that further improvements should be pursued in the future.

13. *Operator foot environment.* This provision controls the presence, location, and extent of shielding to reduce the possibility of the operator's feet coming into contact with the rear tire. Such contact, both of operators' and passengers' feet, is not uncommon, resulting in leg and foot injuries.

14. *Lighting equipment.* This provision requires a headlight and taillight for all but Youth model ATVs. Youth ATVs may not be equipped with lights, because operation of ATVs by children at night is discouraged for safety reasons. CPSC staff had argued for lighting performance (such as brightness) requirements, but the industry argued that such requirements are complex, not currently available, and not needed.

15. *Spark arrestor.* This provision meets United States Department of Agriculture requirements for exhaust spark arrestors.

16. *Tires.* This provision contains labeling requirements for ATV tires to provide information concerning air pressure and other designations. Staff had raised concerns that the existing warning message concerning maximum air pressure to be used in installing the tire on the wheel rim may be misconstrued by operators as indicating the recommended operational pressure. Since the "bead-seating" pressure referred to is substantially higher than safe operational pressure, such confusion could result in a hazardous vehicle condition. The industry responded to these concerns and has worked with the Rubber Manufacturers Association for appropriate requirements. While there are still some concerns over possible labeling misinterpretation, the requirement is acceptable.

17. *Tire pressure gauge.* The special low-pressure tires used on ATVs require a special tire pressure gauge, and this provision requires that the vehicle comes with a gauge and a place for carrying it.

18. *Security.* This provision requires a key and lock, or some equivalent device, to prevent unauthorized use of the vehicle.

19. *Owner's manual.* The owner's manual contains numerous safety messages in addition to other

information, and this provision requires that the manufacturer provide the manual and a place on the ATV to carry it.

20. *Mechanical suspension.* Inadequate suspension can result in excessive bounce and pitch of the vehicle, and excessive pitch, particularly at lower speeds, can readily result in the rider being thrown forward off the vehicle. This design requirement specifies that all ATVs will have mechanical suspension components (*i.e.*, springs and shock absorbers) for all wheels, and that at least two inches of suspension movement will be provided. CPSC engineers argued for a performance requirement instead of the two-inch travel design requirement, because a performance requirement could dictate a given amount of energy-absorbing capability regardless of other variables. A large and heavy vehicle with only two inches of suspension movement (or travel) could be inadequate in its ability to absorb shocks from hitting bumps and ditches.

The industry argued that, in fact, the design requirement resulted in sufficient performance capability. They argued that once they have made the decision to include mechanical suspension, there is no reason for them to produce one with inadequate levels of performance. Furthermore, the injury data did not appear to support the argument for a minimum level of suspension performance. The Commission believes that the industry's rationale for this provision, which states that mechanical suspension is provided to increase operator comfort and to assist in reducing fatigue, is inadequate because it does not identify any safety rationale.

B. Service Brake Performance

This section ensures that the vehicle is capable of generating at least a 0.6g deceleration due to the application of the brakes. This level of braking is consistent with the maximum capability of the tires on concrete and results in a high level of braking capability. The procedures and criterion are essentially identical to the CPSC proposal and are satisfactory. Because related braking standards for other vehicles, such as the Federal Motor Vehicle Safety Standards for motorcycles, contain a number of additional specifications, including thermal fade (effectiveness of the brakes under sustained use) and wet fade (effectiveness of the brakes when wet), the CPSC staff felt that such provisions should be included. The industry has provided a rationale stating that the additional requirements are unnecessary due to the properties of contemporary brake materials and the different usage patterns of the vehicles.

C. Parking Brake Performance

This section specifies the test procedure and acceptance criterion of parking brake performance. The parking brake must be capable of restraining a fully-loaded vehicle while parked on a 30-percent slope facing both the uphill and downhill directions.

The parking brake is considered necessary to the safe operation of the vehicle on very steep slopes where the operator must dismount to regain control of the vehicle. As the vehicles are capable of climbing hills of 30°–35°, CPSC had proposed a requirement that the parking brake be capable of holding the vehicle at that level. Therefore, the CPSC proposal was for a performance test on a 60-percent slope (equivalent to approximately 31°). The industry argued that this requirement was too stringent and was unrealistic. Although the test slope employed is much less steep than that proposed by CPSC staff, the requirement to perform the test facing both uphill and downhill increases the severity of the test, but not to the level of the CPSC staff proposal. This test will require some improvements in currently produced vehicles. Since inadequate parking brakes cannot be shown by available data to cause a significant number of injuries, the Commission concluded that insisting on still more stringent criteria is not justified at this time.

D. Pitch Stability

This requirement assures a minimum resistance to rearward overturn. CPSC staff has been aware of a high number, and apparently high severity, of injuries resulting from rearward overturn, particularly during operation on hills. Vehicles with higher stability characteristics are less likely to overturn, and CPSC had proposed a calculated pitch stability coefficient value (K_p) of 1.1, which was related to static stability on a typically steep slope. The proposal was ultimately accepted by the industry in essentially the form proposed by CPSC, with two key modifications. The industry engineers proposed adoption of a simplified procedure for determining the height of the test vehicle's center of gravity, which is a major variable in the computation of the stability coefficient. The proposed method requires less elaborate equipment than the procedure proposed by CPSC, which was based on a practice recommended by the Society of Automotive Engineers. The industry also lowered the pitch coefficient, K_p, to 1.0. This value was accepted by CPSC because the minimum lateral stability coefficient, or K_{st}, accepted by CPSC would force the actual levels of K_p above the $K_p=1.0$ value. This is based on the relationship that exists between lateral stability and pitch stability. Thus, the pitch stability criterion will in fact be exceeded in practice. As a practical matter, this criterion is higher than the K_p values exhibited by machines that previously had been of concern, and, in addition, actual K_p values are commonly above 1.1. Therefore, while the standard did not adopt the value CPSC staff proposed, the level accepted should be adequate to address safety concerns.

E. Lateral Stability

The standard contains no procedure or criterion for determining adequate levels of lateral stability, or resistance to sideways rollover. The CPSC position has been that increasing the stability of the vehicle is critical to the safety of the operator, because rollover is the typical result of loss of control and there is no secondary rollover protection available to the operator.

The stability coefficient, K_{st}, is a generalized measure of the vehicle's resistance to sideways rollover. To give an analogy, it is a calculation that indicates that a low, wide table is harder to knock over than a tall, narrow one. K_{st} provides a measure of one of the several factors that determine the limits of control when making a turn on an ATV. The standard proposed by CPSC specified a requirement of $K_{st}=1.0$. This is not to say that lateral stability is the only factor involved in determining the control limits, nor that setting $K_{st}=1.0$ would eliminate rollover injuries. It is one factor which gives better control to the operator, and it is directly related to the most prevalent pattern of injury.

The industry position has been that K_{st} is a static measure that is not related to safety and that does not account for all the other factors that determine whether a vehicle will turn over. They have proposed several tests that they claim represent real-life conditions and are thus more accurate in determining lateral control limits. The difficulty with this, from the CPSC staff's point of view, is that the "dynamic" tests proposed by the industry include significant effects or rider control and other factors which mask the effects of vehicle stability characteristics.

As explained above, the industry did not agree that this measure of stability (K_{st}) was relevant to a dynamic accident scenario on highly rider-active vehicles. The industry believes that only a dynamic test can adequately address lateral stability performance; however,

no dynamic test acceptable to CPSC staff exists at this time. In an attempt to achieve an agreement with the Commission in this area, however, the industry offered to address lateral stability on an interim basis in the following manner:

1. The standard will apply to 4-wheel ATVs only; 3-wheel ATVs therefore will continue to be precluded from the marketplace under the provisions of the consent decrees.

2. Each of the five companies, while disagreeing on the appropriateness of a static criterion in defining lateral stability, agreed not to manufacture in the future any ATV with a stability factor (K_{st}) less than the lowest factor in that company's current production models.

3. Each manufacturer supplied the Commission staff with information relevant to a determination of what this agreement would mean with respect to K_{st} values as to that manufacturer.

The Commission staff tested currently marketed ATVs and, based on all available information, concluded that current ATVs will meet or exceed a K_{st} of 0.89. In the context of the limited data currently available on the relationship between K_{st} and lateral-stability-related accident rates, the Commission determined that a K_{st} level of 0.89 or higher provides an acceptable interim minimum level of stability. Currently available injury data do not permit reliable estimates of any injury reductions that could result from K_{st} values higher than 0.89, which was an important consideration in the Commission's acceptance of the interim minimum level of lateral stability.

The present draft standard will be processed under the ANSI canvass procedures for a consensus American National Standard. As discussed above, it is the stated intent of the industry Voluntary Standards Committee to pursue the research and testing necessary to develop a dynamic test for lateral stability, acceptable to the Commission, that could be added to the standard at some future date. Although, as explained above, the Commission's staff has doubts about the probable success of this effort, it will monitor this work.

Commission staff also will proceed with the injury data collection and analysis and technical work necessary to issue a notice of proposed rulemaking (NPR) for lateral stability, if that should become necessary.

In evaluating the adequacy of this interim proposal to address lateral stability, the Commission considered the following additional factors. First, the voluntary standard submitted applies only to 4-wheel ATVs. Therefore, the provision of the final consent decrees that the industry will not make 3-wheel ATVs unless they meet a voluntary standard acceptable to the Commission continues to prevent the marketing of 3-wheel ATVs, which present a risk of injury about twice that of 4-wheelers. Data from 1985 available to the Commission indicate that 3-wheel ATVs are approximately twice as likely to be involved in accidents than are 4-wheel ATVs and that this difference in accident rates can be correlated to the difference in K_{st} between these two classes of vehicles. Thus, the fact that 3-wheel ATVs will not be on the market will go part way toward satisfying the concern that motivated the staff's proposal for a minimum K_{st} of 1.0.

Also, as explained above, the information available to the Commission shows that the lowest K_{st} for any model ATV produced currently is 0.89. The lowest K_{st} models produced by the four other manufacturers have coefficients higher than that figure. Furthermore, these are minimum figures; the manufacturers currently produce other models with K_{st} values higher than their respective minimums, and there is no reason to believe that this will not continue in the future. Thus, it appears that the typical ATV now on the market would have a K_{st} approaching 1.0. The range for the 1985 or earlier model four-wheelers tested by CPSC staff was 0.87 to 1.08.

In 1985, most ATVs being used by consumers, and therefore most ATVs involved in the high numbers of injuries and deaths at that time, were 3-wheelers. The 3-wheelers tested by CPSC staff typically had stability factors of between 0.54 to 0.59. This is a substantial difference from the 0.89 mininum stability factor for 4-wheelers required by the interim agreement.

The Commission's staff has measured the K_{st} for machines that it believes have the lowest values. The results of these tests have been communicated to each company, and the Commission expects each company, as a condition of the approval of the voluntary standard and the agreement on lateral stability, to make no ATV with a K_{st} below that of the example of the manufacturer's model tested by the staff.

As to transient handling quality, the Commission agrees that an adequate test to measure the transient handling of an ATV could not have been developed during the four-month period envisioned by the final consent decrees. The Commission, however, encourages the industry to pursue the development of criteria to ensure that ATVs have adequate transient handling characteristics as part of the industry effort to develop a standard for lateral stability.

While further deaths and injuries with 4-wheeled ATVs should be, and are, a matter of concern, the Commission currently lacks sufficient data to establish clearly that these injuries and deaths are due to any deficiency in the design of the vehicles that is not already addressed in the standard and agreement the industry has submitted.

In view of this lack of data on the benefit of a more stringent standard, it is reasonable to consider the proffered agreement as satisfactory unless and until additional data establish that another course is preferable. However, the Commission could later proceed with mandatory requirements for lateral stability if it obtains the additional data required to support such a requirement.

There have been suggestions that the Commission could require that ATVs be labeled with their K_{st} values and an explanation be provided of how that value compares to the values for other available ATVs. However, the Commission concludes that this would not achieve the intended result. Such labeling might even mislead consumers into believing that they were purchasing a safer vehicle, when with other factors taken to consideration (i.e., steering, engine size, suspension, etc.), it is possible that a vehicle with a slightly lower numerical lateral stability factor might be the safer one. In addition, describing K_{st} accurately on a tag or label would be highly technical and difficult for consumers to understand. Also, current data do not demonstrate a significant difference in risk of injury between K_{st} values of 0.89 and 1.00, and such labeling would dilute the other important safety messages on the vehicles that are required by the consent decrees.

F. Youth Vehicle Requirements

The draft standard defines four categories of all-terrain vehicles, including two subcategories of youth model ATVs. These are the Y-6 Category ATV, intended for use by children age 6 and older, and the Y-12 Category ATV, intended for use by children age 12 and older. The Commission previously had found that children under age 12 lack the cognitive and physical development to operate a motorized vehicle safely.

While the Y-6 and Y-12 ATVs are subject to all the provisions of the standard, the Youth Vehicle Requirements contain some additional specifications regarding speed limitations for these vehicles. The draft

ATV standard specifies restricted maximum speeds of 10 mph for Y-6 and 15 mph for Y-12, with unrestricted maximum speeds (with any restrictor or limiter removed or adjusted for maximum) of 15 mph for Y-6 and 30 mph for Y-12 ATVs. These requirements are less stringent than the speed limitations imposed by the Society of Automotive Engineers Recommended Practice for children's snowmobiles, the only comparable vehicle voluntary standard known to CPSC. (The snowmobile standard limits maximum speeds to 8 mph for Group 1—ages 6 and older—and 15 mph for Group 2—ages 10 and older.)

The consent decree specifically reserves the Commission's right to proceed with mandatory action against youth model ATVs. However, the Commission's data base contains little information on the injuries sustained by children riding these vehicles, due to the small number of such vehicles in the sample. It is possible that if child-size ATVs are not available, more children will ride larger ATVs, an option known to be dangerous. More important, however, is the fact that the industry presently is not making these vehicles. For these reasons, it is not feasible for the Commission to take mandatory action regarding youth model ATVs at this time.

G. Effective Date

Industry compliance with the lateral stability factor agreement begins with current production. Therefore, the industry agreement on lateral stability is effective now and for all future production. The CPSC staff's experience shows that the higher lateral stability values currently in production produce correspondingly higher pitch stability values. Therefore, the staff believes that the pitch stability criteria are also currently met. Service brake requirements and most of the configuration requirements also are met by currently-produced vehicles.

A few ATV models will need added suspension systems, neutral indicators, improved parking brakes, added or changed tire sidewall labeling, or operator foot environment changes. While some of these can be incorporated rather quickly, like the improved parking brakes or neutral indicator, the labeling requirements for tires and footguard design and tooling will take much longer. Industry's stated compliance goal is December 31, 1989.

H. Areas Not Addressed by the Standard

The consent decrees bind the five companies to take actions in the areas of labels on the ATVs, owner's manuals, operator training, and advertising. Since these areas are covered by the court order, they are not subject to any changes, without further judicial action, either as a result of consideration of the voluntary standard or subsequent consensus deliberations by ANSI. Therefore, these areas were not addressed in the voluntary standard, to the extent they are included in the consent decrees.

I. Injury Reduction Attributable to the Standard

Currently available data indicate that the injury rate of 4-wheel ATVs is about half that of the previously manufactured 3-wheel ATVs. The death rates for accidents with 4-wheelers and with 3-wheelers appear to be approximately the same. While no 3-wheel ATVs are manufactured by the five companies that are party to the consent decrees, adoption of the voluntary standard by ANSI could discourage other companies from manufacturing 3-wheel ATVs. Also, the agreement ensures that 4-wheel ATVs with a K_{st} lower than that of current production will not be produced in the future by the five companies.

The additional footguards or shields required by the standard to prevent the foot from being caught under the rear wheel should result in an additional reduction in injuries of about 5 percent.

Currently available data do not permit estimates of the effectiveness of the remainder of the provisions of the standard. Similarly, the available data do not permit any estimate of the extent to which more stringent requirements in the standard might result in any additional reduction in injuries.

How the Voluntary Standard Relates to the ANPR

As discussed earlier, the voluntary standard and lateral stability agreement that the Commission accepted are part of several important measures taken by the Commission during the past few years to address risks of injury associated with ATVs. On May 31, 1985, the Commission published an advance notice of proposed rulemaking ("ANPR") setting forth a proposed course of action aimed at reducing risks from ATVs. 50 FR 23139. On December 12, 1986, the Commission recommended that the Department of Justice file a lawsuit against the ATV industry under Section 12 of the Consumer Product Safety Act, 15 U.S.C. 2061. That action led to the entry of two final consent decrees, which were approved by the United States District Court for the District of Columbia on April 28, 1988. These consent decrees include detailed provisions (outlined in Appendix 2 to this notice) that will regulate the ATV industry's actions for at least ten years with respect to age recommendations, labels, manuals, point-of-purchase materials, advertising, training, and other subjects. The requirements in the decrees can be changed only by further judicial action, and violations of the consent decrees can be addressed by the civil contempt power exercised by the Federal courts. The Commission will carefully monitor the industry's compliance with the terms of the consent decrees.

As discussed above, the final consent decrees and the voluntary standard both contain provisions addressing ATV risks in ways that had not been agreed upon when the Commission issued its advance notice of proposed rulemaking ("ANPR"). Accordingly, the Commission explains below how it views the applicability of the ANPR to the current situation.

In view of the comprehensive regulatory requirements imposed by the final consent decrees, and based on the industry's compliance record to date, the Commission has concluded that the final consent decrees have contributed toward the reduction of the unreasonable risks of injury identified in the ANPR that are addressed in the decrees, that there will be substantial compliance by the industry with the standards or requirements in the final consent decrees, and that such compliance will continue to reduce risk of injury in the future. Accordingly, with respect to the specific subjects regulated by the final consent decrees, the Commission concludes that mandatory rulemaking is no longer necessary, since requirements relating to ATVs in the area covered by the decrees are now fully enforceable by the courts and can be changed only by further judicial action. The Commission specifically reserves its rights under the decrees to institute certain enforcement or rulemaking proceedings in the future and intends to refrain, for a reasonable time, from publishing a notice of proposed rulemaking with respect to the lateral stability of ATVs.

With respect to ATV voluntary standards, the Commission will defer rulemaking in the areas now covered by the voluntary standards, except for lateral stability and youth models, for a period sufficient for the ANSI canvassing process to be conducted. If the voluntary standards are approved as an ANSI standard in substantially the same form as that considered by the Commission, the Commission anticipates it will then determine that no

further rulemaking in those areas will be necessary. Whether further rulemaking activity by the Commission will be necessary in the area of lateral stability depends on whether a satisfactory voluntary standard is developed or whether additional data will show that some other type of action would adequately address this risk.

Conclusion

The Commission encourages the public to comment on the ATV standard as it undergoes ANSI consideration and to send copies of such comments to CPSC staff so that the Commission can be alerted if any unforeseen problems arise.

Dated: January 10, 1989.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

Appendix 1—Four Wheel All Terrain Vehicles (ANSI/SVIA 1-1988)

December, 1988.

Foreword

This Foreword is for information and clarification only. It is not part of American National Standard (insert standard number).

This standard for four wheel all-terrain vehicles (ATVs) has been developed by members of the Specialty Vehicle Institute of America (SVIA) and Polaris Industries in fulfillment of their commitment to "attempt in good faith to reach agreement on voluntary standards satisfactory to the Consumer Product Safety Commission within four months" of April 28, 1988, the effective date of the final consent decree in *United States v. American Honda Motor Co., et al.* and *United States v. Polaris Industries, L.P.*

Although much of the final work in developing this standard has been accomplished in the above time period, work on the standard commenced in 1985. An initial draft of the standard, which dealt primarily with vehicle equipment and configuration, was developed later that year. Substantial work was devoted thereafter to revising this draft and to developing a second phase of the standard to deal with the more complex area of performance-related vehicle characteristics.

As a result of these efforts, this voluntary standard addresses a wide range of design, configuration and performance aspects of ATVs, including, among other items, requirements for service and parking brakes, mechanical suspension, clutch and gearshift controls, engine and fuel cutoff devices, throttle controls, lighting, tires, operator foot environment, service and parking brake performance, and pitch stability. Additional requirements, which address maximum speed capability and speed limiting devices, are included for youth-sized vehicles.

The industry members are not aware of any comparably extensive effort having ever been successfully made with respect to any other off-road vehicle. The breadth and complexity of this voluntary standards undertaking, the absence of reliable accident data and analysis, and the existence of substantial differences of opinion over difficult technical issues, particularly with regard to performance-related criteria, created substantial difficulties in drafting a standard. The participating industry members and the CPSC had to reach negotiated, compromise positions with regard to a number of items, which are discussed in more detail below. The industry members believe that resolution of these issues, despite the above constraints, reflects the high degree of government-industry cooperation that was essential to development of this standard.

With respect to pitch stability, the participating industry members believe that use of static procedures to test and establish criteria is not representative of actual operating conditions. Nor has there been any analysis which indicates that static stability criteria have any significant relation to ATV accident or injury causation or frequency. Nonetheless, in an effort to reach a satisfactory resolution of this issue and notwithstanding the industry's reservations regarding use of static stability criteria with respect to pitch stability, the participating industry members have agreed with the CPSC to adopt a static stability measurement and value which reflects current model production.

The suspension standard also represents a negotiated position. Most industry members view suspension primarily as a matter involving rider comfort. Moreover, there was an absence of accident data and analysis correlating accidents and injuries to the presence or absence of mechanical suspension. The parties were unable to generate appropriate dynamic tests to evaluate the advantages or disadvantages of mechanical suspension on the wide range of vehicle models subject to the standard. As a result of the absence of a suitable dynamic test procedure with respect to suspension, the participating industry members and the CPSC staff have agreed to implement a simple mechanical suspension design criterion as part of the vehicle configuration section of the standard.

Suggestions for improvement of this standard will be welcome. They should be addressed to the Specialty Vehicle Institute of America, No. 2 Jenner Street, Suite 150, Irvine, California 92718-3800.

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1. Scope

This standard establishes requirements for equipment, configuration, and performance of four wheel all terrain vehicles.

2. Definitions

All terrain vehicle (ATV). Any motorized off-highway vehicle 50 in (1270 mm) or less in overall width, with an unladen dry weight of 600 lb (275 kg) or less, designed to travel on four low pressure tires, having a seat designed to be straddled by the operator and

handlebars for steering control, and intended for use by a single operator and no passenger. Width and weight shall be exclusive of accessories and optional equipment. ATVs are subdivided into four categories as follows:

Category G (General Use Model) ATV: An ATV intended for general recreational and utility use;

Category S (Sport Model) ATV: An ATV intended for recreational use by experienced operators only;

Category U (Utility Model) ATV: An ATV intended primarily for utility use.

Category Y (Youth-Model) ATV: An ATV intended for recreational off-road use under adult supervision by operators under age 16. Youth model ATVs can further be categorized as follows:

Category Y-6 ATV: A Category Y-6 ATV is a youth model ATV which is intended for use by children age 6 and older.

Category Y-12 ATV: A Category Y-12 ATV is a youth model ATV which is intended for use by children age 12 and older.

Accessory. An object or device that is affixed to the vehicle after its manufacture. It is not essential to the vehicle's basic operation, but it changes its styling, convenience, utility, or effectiveness.

Brake lever or handle. A hand-operated control which, when actuated, causes the brakes to be applied.

Brake pedal. A foot-operated control which, when actuated, causes the brakes to be applied.

Carry bar. A rigid fixture mounted at the rear of the ATV. It can be used for lifting or moving the vehicle.

Clutch lever. The hand control that engages and disengages a manual clutch.

Deceleration. The rate of change of vehicle speed from the point of initial brake application to the point where the vehicle stops.

Electric starter. The electric motor of a vehicle that cranks the engine for starting. Also called the engine starter.

Engine displacement. The volume swept by a piston moving from bottom dead center to top dead center, multiplied by the number of cylinders.

Engine stop switch. A device used to interrupt engine ignition.

Flag pole. A long, thin, semirigid, vertical pole with a brightly colored pennant, usually red or orange, on the top end, which attaches at the rear of the vehicle.

Flag pole bracket. A rigid attachment point for mounting a flag pole.

Footrest. A structural support for the operator's foot. Footrests include footpegs and footboards.

Gearshift control. A control for selecting among a number of sets of transmission gears. Also called a shift lever.

Handlebar. A device used for steering and rider support and as a place to mount hand-operated controls.

Handlebar crossbar. A rigid member which attaches to and connects the left and right sides of the handlebar.

Ignition system. The system in a spark-ignited internal combustion engine that ignites the mixture by producing a spark.

Key-operated security system. A method of rendering an ATV inoperable unless the correct key is used.

Left hand. This designation refers to the orientation of the vehicle relative to the operator when seated in the operator's position facing forward.

Low pressure tire. A tire designed for off-road use on all terrain vehicles, and having a recommended tire pressure of no more than 10 psi (0.7 kgf/cm^{2}2).

Manual clutch. A device activated by the operator to disengage the engine from the transmission. See clutch lever definition.

Manual fuel shutoff control. A manual device designed to turn the fuel flow from the fuel tank on and off.

May. This word is understood to be permissive.

Mechanical suspension. A system which permits vertical motion of an ATV wheel relative to the chassis and provides spring and damping forces.

Neutral. A designated position where there is no direct mechanical connection between transmission input and output.

Neutral indicator. A light or other means of indicating when an ATV transmission is in the neutral position.

Operator. The person who is exercising control over the motion of the vehicle. Also called the rider.

Owner's manual. A publication, supplied by the manufacturer as part of the vehicle, which provides information and instruction regarding use, operation, care, and maintenance of the vehicle.

Parking brake. A brake system which, after actuation, holds one or more brakes continuously in an applied position without further action.

Power take-off (PTO). An external drive mechanism on an ATV to provide rotational power to accessories or for other purposes.

Right hand. This designation refers to the orientation of the vehicle relative to the operator when seated in the operator's position facing forward.

Service brake. The primary brake system used for slowing and stopping a vehicle. ATVs may have more than one service brake.

Shall. This word is understood to be mandatory.

Should. This word is understood to be advisory.

Spark arrester. Any device which is designed to trap or destroy exhaust particles.

Speed limiting device. A device intended to limit the maximum speed of a vehicle.

Stopping distance (S). The straight line distance, measured along the ground, from the point of actuation of the brake to the final stopping point of the vehicle, as measured from the same point on the vehicle.

Test operator. The person who is exercising control over the ATV under test. The test operator shall be skilled at ATV operation and shall be familiar with the ATV under test and the test being conducted.

Throttle control. A control which is located on the handlebar and is used to control vehicle speed.

Transmission. A device for transmitting power at more than one set of speed and torque ratios.

Vehicle load capacity. The highest load, including the operator's weight, recommended by the manufacturer to be carried by a vehicle in its "as manufactured" condition. This does not include the vehicle weight.

Wheelbase (L). The longitudinal distance from the center of the front axle to the center of the rear axle.

Wheel travel. The total displacement of the wheel between full droop and full bump.

3. Vehicle Equipment and Configuration

3.1 Service brakes. All ATV shall have either independently-operated front and rear brakes, or front and rear brakes that are operated by a single control, or both. These brakes shall meet the requirements of 5.3.

3.1.1 Independently-operated front brakes. Independently-operated front brakes shall be operated by a level which is located on the right side of the handlebar and is operable without removing the hand from the handlebar.

3.1.2 Independently-operated rear brakes. Independently-operated rear brakes shall be operated by either a pedal which is located near the right footrest and is operable by the right foot or by a lever which is located on the left side of the handlebar and is operable without removing the hand from the handlebar, or by both.

3.1.3 Simultaneously-operated front and rear brakes. Simultaneously-operated front and rear brakes shall be

operated by either a pedal which is located near the right footrest and is operable by the right foot or by a lever which is located on the left side of the handlebar and is operable without removing the hand from the handlebar, or by both.

3.2 Parking brake. All ATVs shall have a parking brake or device capable of holding the vehicle stationary under prescribed conditions. The parking brake or device shall meet the requirements of 6.3.

3.3 Mechanical suspension. All ATVs shall have mechanical suspension for all wheels. Each wheel shall have a minimum wheel travel of 2 in (50 mm). Springing and damping properties shall be provided by components other than the tire.

3.4 Engine stop switch. All ATVs shall have an engine stop switch which is mounted on the left handlebar and is operable by the thumb without removing the hand from the handlebar.

3.4.1 Operation. This switch shall not require the operator to hold it in the off position to stop the engine.

3.4.2 Color of device. The switch operating device shall be orange or red.

3.5 Manual clutch control. All ATVs equipped with a manual clutch shall have a clutch lever which is located on the left side of handlebar and is operable without removing the hand from the handlebar.

3.6 Additional clutch control for utility vehicles. All ATVs of Category U ("Utility") that have a power take-off (PTO) or other device requiring fixed engine or vehicle speed, and a clutch control for engagement and disengagement of the PTO or other device, shall have the control located convenient to the oeprator. Control movement shall be forward or upward, or both, for engagement, and rearward or downward, or both, for disengagement. A durable label clearly identifying the positions for engagement and disengagement for the PTO or other device shall be provided.

3.7 Throttle control. All ATVs shall be equipped with a means of controlling engine speed through a throttle control. The throttle control shall be located on the right side of the handlebar and shall be operable without removing the hand from the handlebar.

3.7.1 Operation. The throttle control shall be self-closing to an idle position upon release of the operator's hand from the control.

3.7.2 Options for utility vehicles with PTO or other device. All ATVs of Category U ("Utility") that have a power take-off (PTO) or other device requiring fixed engine or vehicle speed, and a clutch control for engagement and disengagement of the PTO or other device, may be equipped with a throttle control which does not meet the location requirements of 3.7 or the return to-idle requirement of 3.7.1 provided that it meets the requirements of 3.7.2.1 through 3.7.2.4.

3.7.2.1 Operation of engine speed control. An engine speed control for the PTO or other device shall be operable only when the PTO or other device is in operation.

3.7.2.2 Direction of motion. The direction of motion for such throttle control for the PTO or other device shall be forward or upward, or both, to increase speed, and rearward or downward, or both, to decrease speed or to stop.

3.7.2.3 Automatic stopping. A means shall be provided to automatically stop the PTO or other device, or to stop the engine, when the operator leaves the normal seated operating position of the ATV while the PTO or other device is operating and the transmission is in gear.

3.7.2.4 Stationary operation. A means may be provided to allow use of the PTO or other device while the ATV is stationary and the operator is not in the normal seated operating position. Such means shall automatically return to the operational mode of 3.7.2.3 when the transmission is placed in gear.

3.8 Gear shift control.

3.8.1 Location of gear shift control. All ATVs equipped with a gearshift control shall have the control located so as to be operable by the operator's left foot. Controls for selecting only the neutral position, for selecting reverse gears, or for selecting alternative overall transmission ranges may be located differently.

3.8.2 Operation of gear shift control. An upward motion of the operator's toe shall shift the transmission towards higher (lower numerical gear ratio) gears, and a downward motion towards lower gears. If three or more gears are provided it shall not be possible to shift from the highest gear directly to the lowest gear, or vice versa. Controls for selecting only the neutral position, for selecting reverse gears, or for selecting alternative overall transmission ranges may be operated differently.

3.9 Neutral indicator. All ATVs with a neutral position, except those equipped with a manual clutch, shall have either a neutral indicator readily visible to the operator when seated on the vehicle or a means to prevent starting of the vehicle unless the transmission is in the neutral position. The indicator, if provided, shall be activated whenever the ignition system is on and the transmission is in neutral.

3.10 Reverse indicator. All ATVs with a reverse position shall have a reverse indicator readily visible to the operator when seated on the vehicle. The indicator shall be activated whenever the engine is running and the transmission is in reverse.

3.11 Carry bar. All ATVs shall be equipped with a carry bar or equivalent device located at the rear of the seat to facilitate manual lifting or moving of the ATV. The carry bar shall be designed and located such that when the ATV is standing on its rear wheels and the carry bar, on level ground, the plane defined by the centers of the front and rear wheels shall not pass beyond an angle 90 degrees to the ground.

3.12 Flag pole bracket. All ATVs shall have a flag pole bracket at the rear of the vehicle that provides a rigid mounting location for a flag pole having a 0.5 in (13 mm) diameter mounting shaft.

3.13 Manual fuel-shutoff control. If an ATV is equipped with a manual fuel-shutoff control, the device shall be operable as follows:

(1) "On"—control downward.

(2) "Off"—control forward (if control rotates around a transverse axis) or horizontal—left or right (if control rotates around a longitudinal axis).

(3) "Reserve on"—control upward (if provided).

3.14 Handlebars. The handlebar and its mounting shall present no rigid materials with an edge radius of less than 0.125 in (3.2 mm) that may be contacted by a probe in the form of a 6.5 in (165 mm) diameter sphere. The probe shall be introduced to the handlebar mounting area. It shall not be possible to touch any part of any edge which has a radius of less than 0.125 in (3.2 mm) with any part of the probe. Handlebar cross bars, if provided, shall be padded.

3.15 Operator foot environment. All ATVs shall have a structure or other design feature wich meets the requirements below.

3.15.1 Test procedure. Compliance shall be determined by introduction of a probe, whose end is a rigid flat plane surface 3 in (75 mm) in diameter, in the prescribed direction to the zones as described in 3.15.2 and 3.15.3 and as shown in Figures 1 and 2 respectively.

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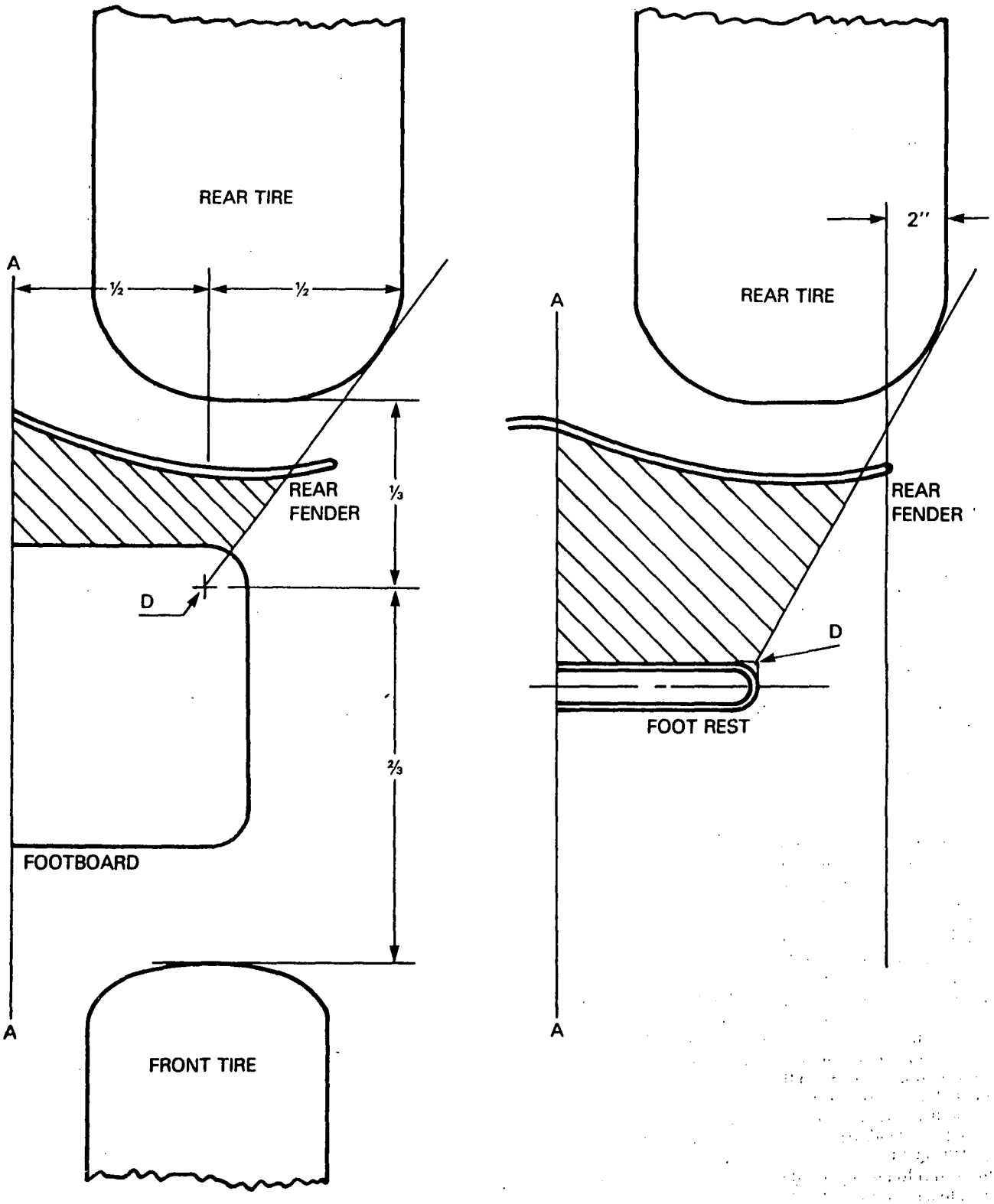

FIGURE 1
PLAN VIEW
(SECTION 3.15 OPERATOR FOOT ENVIRONMENT)

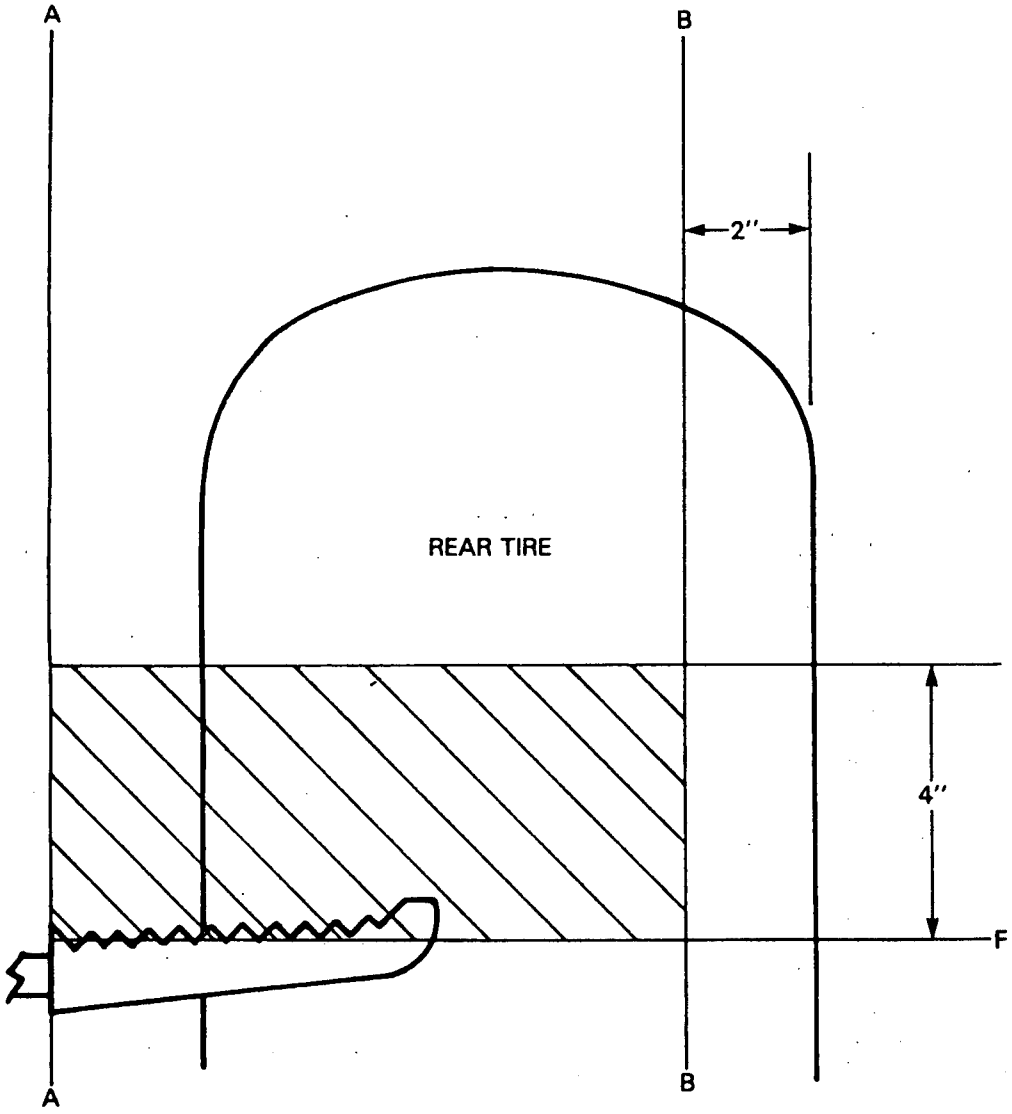

FIGURE 2
FRONT VIEW
(SECTION 3.15 OPERATOR FOOT ENVIRONMENT)

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3.15.1.1 Inserting probe vertically and downward. The probe shall be introduced end first in a vertical and downward direction to the zone described in 3.15.2 and shown by the shaded portion of Figure 1. The end of the probe in its entirety shall remain within the limits of the zone. It shall not penetrate the zone sufficiently to touch the ground when applied with a force of 100 lbf (445 N)

3.15.1.2 Inserting probe horizontally and rearward. The probe shall be introduced end first in a horizontal and rearward direction to the zone described in 3.15.3 and shown by the shaded portion of Figure 2. The end of the probe in its entirety shall remain within the limits of the zone. It shall not penetrate the zone sufficiently to touch the rear tire when applied with a force of 20 lbf (90 N).

3.15.2 Zone in Figure 1. The zone shown in Figure 1 is defined as bounded by:

(1) The vertical projection of the rear edge of the footrest.

(2) The vertical plane (line AA), parallel to the vehicle's longitudinal plane of symmetry, that passes through the inside edge of the footrest.

(3) The vertical projection of the intersection of a horizontal plane passing through the top surface of the footrest, and the rear fender or other structure.

(4) The vertical plane passing through point D and tangent to the outer front surface of the rear tire.

(a) For footages, Point D is defined as the intersection of the lateral projection of the rearmost point and the longitudinal projection of the outermost point of the footpeg.

(b) For footboards, Point D is defined as the intersection of 2 lines. The first is a line perpendicular to the vehicle longitudinal plane of symmetry and one-third of the distance from the front edge of the rear tire to the rear edge of the front tire. The second is a line parallel to the vehicle longitudinal plane of symmetry and one-half the distance between the inside edge of the footboard and the outside surface of the rear tire.

3.15.3 Zone in Figure 2. The shown in Figure 2 is defined as bounded by:

(1) The horizontal plane passing through the lowest surface of the footrest on which the operator's foot (boot) rests (plane F).

(2) The vertical plane (line AA), parallel to the vehicle longitudinal plane of symmetry, that passes through the inside edge of the footrest.

(3) The horizontal plane 4 in (100 mm) above plane F.

(4) The vertical plane (line BB), parallel to the vehicle longitudinal plane of symmetry and 2 in (50 mm) inboard of the outer surface of the rear tire.

3.15.4 Requirements for vehicles with non-fixed structure. In the case of vehicles equipped with a non-fixed type (i.e. foldable, removable or retractable) structure intended to meet the requirements of this section, such vehicles shall be equipped with one of the following:

3.15.4.1 Warning device. A warning device (i.e. buzzer or indicator) to indicate that the structure is not in the position needed to comply with these requirements, or

3.15.4.2 Device to prevent operation of vehicle. A device to prevent the vehicle from being operated under its own power if the structure is not in the position needed to comply with these requirements, or

3.15.4.3 Structure that prevents normal use of footrest when structure is folded, retracted, or removed. A structure that can be folded, retracted, or removed, such that when the structure is folded, retracted, or removed, the ATV can not be operated using the footrest in the normal manner.

3.16 Lighting Equipment.

3.16.1 Headlights and taillights. All ATVs except Category Y vehicles shall have at least one headlight projecting a white light to the front of the vehicle, and at least one taillight projecting a red light to the rear of the vehicle.

3.16.2 Requirements for category Y vehicles. Category Y vehicles shall not have a headlight or a taillight.

3.17 Spark arrester. All ATVs shall have a spark arrester of a type that is qualified according to the United States Department of Agriculture Standard 5100.1a.

3.18 Tire marking. All ATV tires shall carry the following markings:

3.18.1 Inflation pressure. Both tire sidewalls shall be marked with the operating pressure or the following statement, or an equivalent message: "SEE VEHICLE LABEL OR OWNER'S MANUAL FOR OPERATING PRESSURE." The messages required by this section shall be in capital letters not less than 0.156 in (4 mm) in height.

3.18.2 Bead seating pressure. Both tire sidewalls shall be marked with the following statement, or an equivalent message: "Do Not Inflate Beyond ** psi (**kPa) When Seating Bead).

3.18.3 *Other markings.* Both tire sidewalls shall have the following information, except where noted.

(1) The manufacturer's name or brand name.

(2) On one tire sidewall, the three digit week and year of manufacture in accordance with 49 CFR, Chapter V, § 574.5(d) fourth grouping.

(3) The size nomenclature of the tire (e.g. AT 22/10–9*) as standardized by the Tire and Rim Association, Inc. or Japan Automobile Tire Manufacturers Association, Inc.

(4) The word "tubeless" for a tubeless tire.

(5) The phrase or abbreviations "Not For Highway Use," "Not For Highway Service," or "NHS."

3.18.4 *Letter sizes.* The information required by 3.18.2 and 3.18.3 shall be in letters or numerals no less than .078 in (2 mm) in height.

3.19 *Tire pressure gauge.* All ATVs shall be provided with a tire pressure gauge appropriate for the recommended operating tire pressure for the vehicle. All ATVs shall have a means of carrying the tire pressure gauge.

3.20 *Security.* All ATVs shall have a means to deter unauthorized persons from using the ATV. A key-operated or equivalent system (with a minimum of 300 exclusive combinations) shall be provided for all ATVs except Category Y vehicles, which may use a security system without multiple exclusive combinations.

3.21 *Owner's manual.* All ATVs shall be provided with a manual at the point of sale. All ATVs shall be equipped with a means of carrying the owner's manual that protects it from destructive elements while allowing reasonable access.

4. Youth Vehicle Requirements

4.1 *Speed limiting devices.* All Category Y ATVs shall be equipped with a means of limiting the maximum speed attainable by the ATV.

4.1.1 *Tools must be needed to adjust or remove device.* The means of limiting maximum speed may be adjustable or removable or both, but shall have means to prevent adjustment or removal without the use of tools.

4.1.2 *Maximum speeds.* Speed limiting devices for Category Y–6 ATVs shall be capable of limitimg maximum speed to 10 mph (16 km/h) or less when tested according to 4.3. Speed limiting devices for Category Y–12 ATVs shall be capable of limiting maximum speed to 15 mph (24 km/h) or less when tested according to 4.3.

4.1.3 *Delivery of vehicle from manufacturer.* All Category Y ATVs shall be delivered from the manufacturer or its designee with the speed limiting device adjusted to limit maximum vehicle speed as specified in 4.1.2.

4.2 *Maximum unrestricted speed capability.* When tested according to the procedure specified in 4.3, with any

removable speed limiting devices removed and with any adjustable speed limiting devices adjusted to provide the vehicles maximum speed capability, the maximum speed capability of Category Y-6 ATVs shall be 15 mph (24 km/h) or less and the maximum speed capability of Category Y-12 ATVs shall be 30 mph (48 km/h) or less.

4.3 *Maximum speed capability measurement.*

4.3.1 *Test conditions.* Test conditions shall be as follows:

(1) ATV test weight shall be unloaded vehicle weight plus the vehicle load capacity (including test operator and instrumentation), with any added weight secured to the seat or carrier (if equipped).

(2) Tires shall be inflated to the pressures recommended by the vehicle manufacturer for the vehicle test weight.

(3) The test surface shall be clean, dry, smooth and level concrete, or equivalent.

4.3.2 *Test procedure.* Measure the maximum speed capability of the ATV using a radar gun or equivalent method. The test operator shall accelerate the ATV until maximum speed is reached, and shall maintain maximum speed for at least 100 ft (30.5 m). Speed measurement shall be made when the ATV has reached a stabilized maximum speed. Two test runs shall be made, in opposite directions, and the maximum speed capability of the ATV shall be considered to be the average of these two runs.

5. Service Brake Performance

5.1 *Test conditions.* Test conditions shall be as follows:

(1) The ATV shall be tested at the appropriate test weight described below:

(a) If the vehicle load capacity specified by the manufacturer is 200 lb (91 kg) or more, the ATV test weight shall be the unloaded vehicle weight plus 200 lb (91 kg) (including test operator and instrumentation), with any added weight secured to the seat or carrier (if equipped).

(b) If the vehicle load capacity specified by the manufacturer is less than 200 lb (91 kg), the ATV test weight shall be the unloaded vehicle weight plus the vehicle load capacity (including test operator and instrumentation), with any added weight secured to the seat or carrier (if equipped).

(2) Tires shall be inflated to the pressures recommended by the vehicle manufacturer for the vehicle test weight.

(3) Engine idle speed and ignition timing shall be set according to the manufacturer's recommendations.

(4) Ambient temperature shall be between 32 °F (0 °C) and 100 °F (38 °C).

(5) The test surface shall be clean, dry, smooth and level concrete, or equivalent.

(6) Any removable speed limiting devices shall be removed. Any adjustable speed limiting devices shall be adjusted to provide the vehicle's maximum speed capability.

5.2 Test procedure. The test procedure shall be as follows:

(1) Measure the maximum speed capability of the ATV using a radar gun or equivalent method. The test operator shall accelerate the ATV until maximum speed is reached, and shall maintain maximum speed for at least 100 ft (30.5 m). Speed measurement shall be made when the ATV has reached a stabilized maximum speed. Two test runs shall be made, in opposite directions, and the maximum speed capability of the ATV shall be considered to be the average of these two runs. Determine the braking test speed. The braking test speed is the speed that is the multiple of 5 mph (8 km/h) which is 4 mph (6 km/h) to 8 mph (13 km/h) less than the maximum speed capability of the ATV.

(2) Burnish the front and rear brakes by making 200 stops from the braking test speed or 30 mph (48 km/h), whichever is lower. Stops shall be made by applying front and rear service brakes simultaneously, and braking decelerations shall be from 0.2g to 0.5g.

(3) After burnishing, adjust the brakes according to the manufacturer's recommendation.

(4) Make six stops from the braking test speed or 30 mph (48 km/h), whichever is lower. Stops shall be made by applying front and rear service brakes simultaneously, and braking decelerations shall be from 0.2g to 0.5g.

(5) Make four stops from the braking test speed, applying the front and rear service brakes. Measure the speed immediately before the service brakes are applied. Measure the stopping distance.

(a) For all ATVs other than youth model ATVs, hand lever brake actuation force shall be not less than 5 lbf (22N) and not more than 55 lbf (245 N), and foot pedal brake actuation force shall be not less than 10 1bf (44 N) and not more than 90 1bf (400 N).

(b) For youth model ATVs, hand lever brake actuation force shall be not less than 5 lbf (22 N) and not more than 30 1bf (133 N) and foot pedal brake actuation force shall be not less than 10 and not more than 50 1bf (222 N).

(c) For all ATVs other than youth model ATVs, the initial application of lever force shall be 1.2 in (30 mm) from the end of the brake lever. For youth model ATVs, the point of initial application of lever force shall be 1 in (25 mm) from the end of the brake lever. The direction of lever force application shall be perpendicular to the handle grip in the plane in which the brake lever rotates. The point of application of pedal force shall be the center of the foot contact pad of the brake pedal, and the direction of force application shall be perpendicular to the foot contact pad and in the plane in which the brake pedal rotates.

5.3 Performance requirements.

5.3.1 *ATVs with lower maximum speed capability.* During the four stops of 5.2(5), all ATVs with a maximum speed capability of 18 mph (29 km/h) or less shall be capable of making at least one stop that complies with the relationship $S \leqq V$ where S equals the stopping distance (in feet) and V equals the braking test speed (in miles per hour).

5.3.2 *ATV with higher maximum speed capability.* During the four stops of 5.2(5), all ATVs with a maximum speed capability greater than 18 mph (29 km/h) shall be capable of making at least one stop that demonstrates an average deceleration of 0.6g or greater. Average deceleration can be determined according to the following formula: $D = (0.033) \times V^2/S$; where D is deceleration (in g), V is vehicle speed immediately before the service brakes are applied (in miles per hour), and S is stopping distance (in feet).

6. Parking Brake performance

6.1 *Test conditions.* Test conditions shall be as follows:

(1) ATV test weight shall be the unloaded vehicle weight plus weight secured to the seat or carrier (if equipped), which is equal to the vehicle load capacity.

(2) Tires shall be inflated to the pressures recommended by the vehicle manufacturer for the vehicle test weight.

(3) The test surface shall be clean, dry, smooth concrete or equivalent, having a 30 percent grade.

6.2 Test procedure. The test procedure shall be as follows:

(1) Burnish the service brakes according to the procedure specified in 5.2(2)

(2) Adjust the parking brake or other device according to the procedure recommended by the vehicle manufacturer.

(3) Position the ATV facing downhill on the test surface, with the longitudinal axis of the ATV in the direction of the grade. Apply the parking brake or other device and place the transmission in

neutral or park (if equipped), and leave the ATV undisturbed for 5 minutes. Repeat the test with the ATV positioned facing uphill on the test surface.

6.3 Performance requirements. When tested according to the procedure specified in 6.2, the parking brake shall be capable of holding the ATV stationary on the test surface, to the limit of fraction of the tires, for 5 minutes in both uphill and downhill directions.

7. Pitch Stability

7.1 Test conditions. Test conditions shall be as follows:

(1) The vehicle shall be in standard condition, without accessories. The vehicle and components shall be assembled and adjusted according to the manufacturer's instructions and specifications.

(2) Tires shall be inflated to the vehicle manufacturer's recommended settings for normal operation. If more than one pressure is specified, the lowest value shall be used.

(3) All fluids shall be full (oil, coolant, etc.) except that fuel shall be not less than ¾ full. Vehicles shall be unladen; no rider, cargo, or accessories.

(4) Steerable wheels shall be held in the straight ahead position.

(5) Adjustable suspension components shall be set to the values specified at the point of delivery to the dealer.

(6) Suspension components shall be fixed by means of a locking procedure such that they remain in the same position and displacement as when the unladen vehicle is on level ground, and in the conditions specified in 7.1(1) through 7.1(5).

7.2 Test procedure. The test procedure shall be as follows:

(1) Measure and record the wheelbase (L). The measurement of this length shall be done with an accuracy of ± 0.2 in (5mm) or ± 0.5%, whichever is greater.

(2) Measure and record the front and rear weights, (W_f and Wr, respectively). W_f is the sum of the front tire loads; and W_r is the sum of the rear tire loads, with the vehicle level and in the condition specified in 7.1. The measurements of these weights shall be done, with an accuracy of ± 1.1 lb (0.5 kg) or ± 0.5%, whichever is greater.

(3) Using the values obtained in 7.2(1) and 7.2(2), above, compute and record the quantity:

$$L_r = \frac{W_f}{W_f + W_r} L$$

(4) Measure and record the vertical height between the rear axle center and the ground (Rr). This measurement shall be done on level ground, with the vehicle in the conditions specified in 7.1, with an accuracy of ± 0.1 in (3 mm) or ± 1.5%, whichever is greater.

(5) Measure and record the balancing angle alpha. The procedure for obtaining this value is as follows: With the vehicle initially on a level surface, the front of the vehicle shall be rotated upward about the rear axle without setting the rear parking brake or using stops of any kind, until the vehicle is balanced on the rear tires. The balancing angle alpha through which the vehicle is rotated shall be measured and recorded with an accuracy of ± 0.5 degrees. If an assembly protruding from the rear of the vehicle, such as a carry bar or trailer hitch or hook interferes with the ground surface, so as to not allow a balance to be reached, the vehicle shall be placed on blocks of sufficient height to eliminate the interference.

(6) Repeat the measurement in 7.2(5) and determine if the two individual measurements are within 1.0 degree of each other. If they are not, repeat the measurements two more times and compute the average of the four individual measurements, and use that as the value.

7.3 Performance requirement.

7.3.1 Computation. Using the values obtained in 7.2(3), 7.2(4), and 7.2(6), compute the pitch stability coefficient:

$$K_p = \frac{L_r \tan \text{alpha}}{L_r + R_r \tan \text{alpha}}$$

7.3.2 Requirement. The pitch stability coefficient calculated according to 7.3.1 above, shall be at least 1.0.

Appendices (These Appendices are not part of the voluntary standard but are included for information only.)

Appendix A—Rationale

This appendix gives the rationale behind various requirements of this voluntary standard. The section numbers in this appendix correspond to those used in the body of the standard.

2. Definitions

All terrain vehicle (ATV). The definition of all terrain vehicle was arrived at after considering the important aspects of the configurations of vehicles that currently exist in the marketplace. The size and weight limits are those determined to be suitable for the kinds of uses intented for these vehicles. ATVs are subdivided into four categories, depending on the type of use intended by the manufacturer or its designee, in order to specify what requirements are important to the user or type of use.

3. Vehicle Equipment and Configuration

3.1 Service Brakes. It is important that the location and method of operation of the brake control be standardized. The specified control locations are consistent with current motorcycle and ATV practice.

3.2 Parking brake. The parking brake is intended to prevent rolling movement of an ATV when it is parked and left unattended.

3.3 Mechanical suspension. Mechanical suspension is provided to increase operator comfort and should also assist in reducing operator fatigue.

3.4 Engine stop switch. An engine stop switch shall be provided in a common location, be easily identified, and be of a type which does not require the operator to hold the switch in the off position. The following reasons were considered in making the location determination:

(1) Most current and prior model year ATVs are equipped with switches on the left side.

(2) This location is consistent with the prevailing practice for off-road motorcycles.

(3) The front brake control is on the right handlebar.

(4) The right hand typically operates both throttle and brake controls, while the left hand may have a clutch control or rear brake control, but not both, and sometimes neither.

(5) The left thumb is not used to operate any major control.

In sum, it was determined that prevailing practice in ATV and off-road motorcycle construction dictates that the engine stop switch be located on the left handlebar.

3.5 Manual clutch control. Location of a manual clutch control lever on the left side handlebar is dictated by the fact that this control is used in conjuction with the throttle and must be on the handlebar opposite from the throttle control. The location of this control is consistent with current motorcycle and ATV practices.

3.6 Additional clutch control. ATVs may be equipped with a power take off or other device which uses drive or propulsion provided by the ATV engine. A standardized method of operation is provided is such device is controlled through a clutch.

3.7 Throttle control. A common location and certain aspects of operation of the throttle control are important. The selection of the right side location and the requirement that the throttle be self-closing to idle are

consistent with common practice on motorcycles and snowmobiles, as well as on ATVs.

3.8 Gear shift control. A common location and method of operation of the gearshift control will standardize this control. The left foot location and the upward motion to select higher gears was chosen to provide consistency with motorcycle practice.

3.9 Neutral indicator. A neutral indicator may help prevent inadvertent starting in gear of an ATV equipped with a centrifugal clutch. The indicator is not needed on an ATV equipped with a manual clutch control. It is difficult to start the engine of such an ATV except when the transmission is in neutral, unless the manual clutch is disengaged.

3.10 Reverse indicator. A reverse indicator informs and reminds the operator that reverse has been engaged.

3.11 Carry bar. The ATV operator can encounter situations requiring manual lifting or maneuvering of the ACV. The carry bar at the rear of the seat facilitates such action, when necessary. Some ATVs may be stored or transported by standing them on end and securing them in this position so that they take up less space. The carry bar can provide support for this purpose, and the requirement that the wheel centers not pass beyond a 90 degree angle is intended ot facilitate this purpose.

3.12 Flag pole bracket. Flag poles are required by law in certain areas. The device used for this purpose usually is a long, thin pole with a brightly colored flag at the top. The requirement for a flag pole bracket is intended to ensure that a secure location is provided for the installation of the pole.

3.13 Manual fuel shutoff. Specified operation of this control is consistent with current motorcycle practice. These requirements do not apply to non-manual fuel shut off methods; i.e., electric, vacuum, or other means not requiring direct operator action.

3.14 Handlebars. The intention is to help minimize the risk of injury due to contact with the handlebar mounting area. The purpose of the specific test procedures provided is to determine which parts can be contacted by the operator's head. The minimum edge radius specified will preclude the use of sharp edges that might contribute to injury. Handlebar crossbars should be padded to reduce the potential for facial injury in the event of an accident.

3.15 Operator foot environment. The operator foot environment configuration is intended to reduce the possibility of inadvertent contact between the operator's boot and the ground immediately in front of the rear tire, or the rear tire itself. Differing zones are defined for vehicles equipped with footpegs (designed to support the operator's foot with a relatively narrow bar), and footboards (designed to support the operator's foot with a platform-type structure).

3.16 Lighting. ATVs of Category G, S, and U can be expected to be used at night or under low visibility conditions. In the case of recreational ATVs this might be because the operator elects to ride under those conditions, or because, after participating in some activity, it may not be possible to return to base during daylight. In the case of a Category U ATV, the utility purposes for its operation may not coincide with daylight hours or the unit may be used in an area where artificial lighting is needed. For these ATVs, there are occasions when lighting equipment is required or desirable for the purpose of illumination or identification or both. The use by young operators of Category Y ATVs under nighttime and low visibility conditions is to be discouraged by proscribing the installation of lighting equipment. Moreover, proper supervision of youthful operators is necessary and would be difficult under those conditions.

3.17 Spark arrester. Performance requirements for spark arresters, and requirements that certain vehicles be equipped with a qualified spark arrester when used in certain areas, are enforced by state and federal authorities.

3.18 Tire marking. ATV tires operate at pressures substantially below those common for other powered vehicles. Information concerning these low pressures is provided on/with the vehicles. The intent of this section is to emphasize the low-pressure nature of these tires, direct the operator to appropriate sources of specific operating pressure recommendations, and to provide other valuable information.

3.19 Tire pressure gauge. Maintenance of the correct tire pressure is important to the handling characteristics of the ATV. A special gauge is needed because ATV tires use a much lower tire pressure than other vehicles.

3.20 Security. The intention is to permit the person in control of an ATV to retain control and regulate the use of the vehicle. A security system with 300 exclusive combinations is typically used for on-road motorcycles.

3.21 Owner's manual. An owner's manual is required because it is necessary that certain information be available to the owner/operator and it is not possible to provide all this material on labels affixed to the vehicle.

4. Youth Vehicle Requirements.

This section requires that all Category Y ATVs be equipped with an adjustable or removable speed limiter. The intent is to provide a means by which the supervising adult can limit the ATV's maximum speed capability according to the skill and experience of the young rider. By further requiring that Category Y ATVs be delivered with the speed limiter adjusted to provide the specified slow maximum speeds, it is expected that higher speeds will not be used unless the supervising adult has determined that the young rider has the skill and experience to operate the ATV at higher speeds.

This section also includes a requirement that the maximum unrestricted speed capability of Category Y ATVs be limited. It was decided to include this requirement even though no evidence could be found to indicate that the requirement is needed.

5. Service Brake Performance

This section establishes minimum braking performance requirements which are intended to help ensure that ATVs are equipped with brake systems that are adequate for stopping the vehicle. The requirements in this section are patterned after the requirements in Federal Motor Vehicle Safety Standard No. 122 (FMVSS 122), Motorcycle Brake Systems.

The pertinent elements of FMVSS 122 were selected for inclusion in this standard, based on the knowledge and experience of the manufacturers. Certain requirements which appear in FMVSS 122 were not included, because they were determined to be inappropriate, or because it was thought that they would add complexity without providing any benefit. After deciding which elements of FMVSS 122 to include, some of the specific provisions were changed to accommodate (1) physical differences between ATVs and motorcycles, and (2) differences between the off-road operating environment of ATVs and the on-road operating environment of motorcycles.

6. Parking Brake Performance

The parking brake performance requirements are intended to help ensure that ATV parking brakes are adequate to prevent rolling movement of an ATV when it is parked and left unattended. The requirements were patterned after similar requirements which appear in existing standards for vehicles such as motorcycles, multi-purpose passenger vehicles, riding lawn mowers, and golf carts.

Appendix 2—Consent Decree Provisions Mandatory Warnings and Training

Background

On April 28, 1988, a final Consent Decree was approved by the four major Japanese All-Terrain Vehicle (ATV) manufacturers, one U.S. ATV manufacturer, and the U.S. Consumer Product Safety Commission (CPSC). The Consent Decree resolves a lawsuit brought by the Department of Justice on behalf of the CPSC against the principal manufacturers of All Terrain Vehicles. While the decree is binding only on the five manufacturers who are parties to the suit, the CPSC encourages all ATV manufacturers to comply with the decree's requirements.

This Appendix explains three requirements of the decree: these requirements concern labeling, owner's manuals, and training. (There are variations between the explanations given below and the language of the Consent Decree. If any inadvertent inconsistencies exist, the language of the Consent Decree should be followed.)

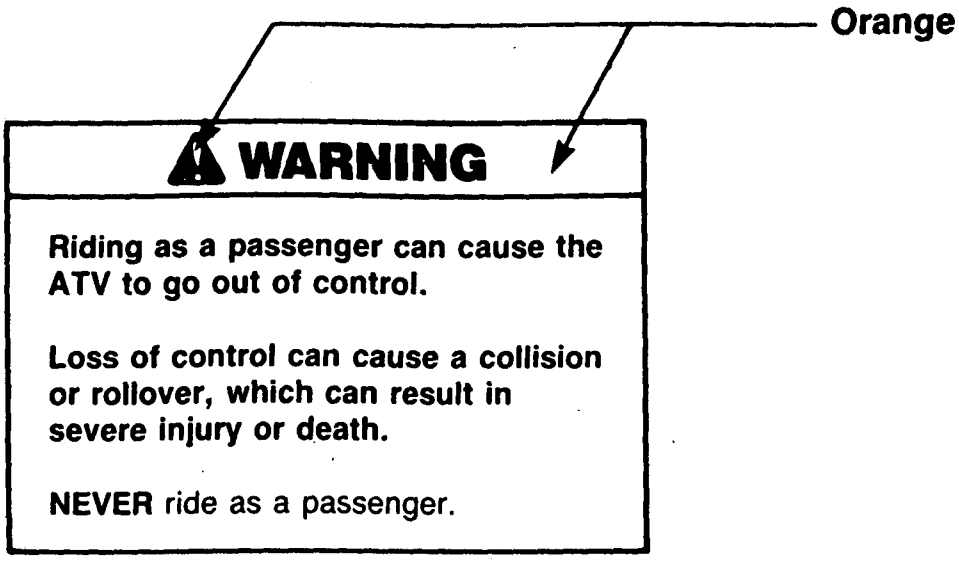
I. Labeling

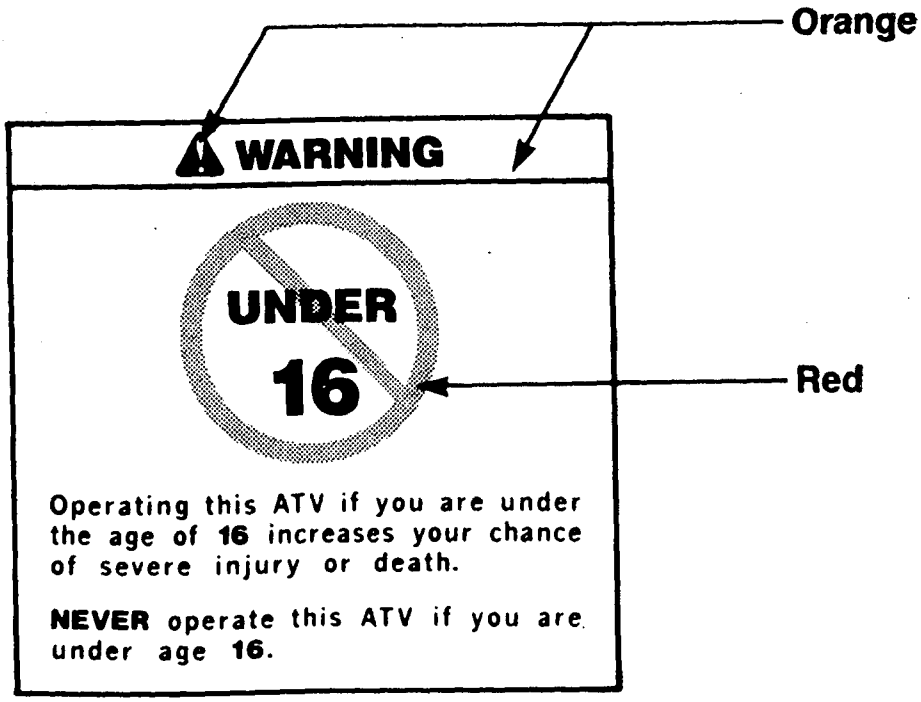
The labeling provision requires four labels on every ATV manufactured after 1988. Each label must conform to the following requirements for text, color scheme, format, durability, and placement.

A. *Text:* The warning labels are shown in Figure 1. The labels concern the following topics: (1) General warning label, (2) age recommendation warning label, (3) passenger warning label, and (4) tire pressure recommendations. With the exception of the tire pressure label, the text of each label must be identical to that of the examples shown in Figure 1.

BILLING CODE 6355-01-M

Figure 1


Orange
WARNING
Riding as a passenger can cause the ATV to go out of control.
Loss of control can cause a collision or rollover, which can result in severe injury or death.
NEVER ride as a passenger.


Orange
WARNING
UNDER
16
Red
Operating this ATV if you are under the age of 16 increases your chance of severe injury or death.
NEVER operate this ATV if you are under age 16.

Orange

⚠ WARNING

THIS VEHICLE CAN BE HAZARDOUS TO OPERATE. A collision or rollover can occur quickly, even during routine maneuvers such as turning and driving on hills or over obstacles, if you fail to take proper precautions.

SEVERE INJURY OR DEATH can result if you do not follow these instructions:

- **BEFORE YOU OPERATE THIS ATV, READ THE OWNER'S MANUAL AND ALL LABELS.**
- **NEVER OPERATE THIS ATV WITHOUT PROPER INSTRUCTION.** Beginners should complete a certified training course.
- **NEVER CARRY A PASSENGER.** You increase your risk of losing control if you carry a passenger.
- **NEVER OPERATE THIS ATV ON PAVED SURFACES.** You increase your risk of losing control if you operate this ATV on pavement.
- **NEVER OPERATE THIS ATV ON PUBLIC ROADS.** You can collide with another vehicle if you operate this ATV on a public road.
- **ALWAYS WEAR AN APPROVED MOTORCYCLE HELMET,** eye protection, and protective clothing.
- **NEVER CONSUME ALCOHOL OR DRUGS** before or while operating this ATV.
- **NEVER OPERATE THIS ATV AT EXCESSIVE SPEEDS.** You increase your risk of losing control if you operate this ATV at speeds too fast for the terrain, visibility conditions, or your experience.
- **NEVER ATTEMPT WHEELIES, JUMPS, OR OTHER STUNTS.**

Orange

⚠ WARNING

Red

Operation of this ATV by children under the age of **12** increases the risk of severe injury or death.

Adult supervision required for children under age **16**.

NEVER permit children under age **12** to operate this ATV.

BILLING CODE 6355-01-C

The text requirement for the tire pressure label allow some discretion for additional information to be placed on the label and give manufacturers the option of using one or two labels, depending on the amount of information they need to transmit to the user. If a manufacturer elects to use only one label, the label must contain at least the following statements:

"Improper tire pressure or overloading can cause loss of control."

"Loss of control can result in severe injury or death."

If a manufacturer elects to use two labels, the labels shall contain at least the following statements:

Label #1: "Improper tire pressure can cause loss of control."

"Loss of control can result in severe injury or death."

Label #2: "Overloading can cause loss of control."

"Loss of control can result in severe injury or death."

Every label warning about improper tire pressure shall contain a statement indicating the recommended tire pressure(s). The recommended tire pressure information may be stated on the label itself or provided by a reference on the label to either the owner's manual, the tires, or both the owner's manual and the tires. Every label that warns against overloading shall state on the label itself the maximum weight capacity for the ATV model. Any other information appearing on either the tire pressure label or the overloading label must be safety-oriented and shall not detract from or contradict the required statements.

B. *Letter typeface and size:* The typeface to be used for each of the required labels and all other warning labels shall be Helvetica Bold or New Gothic Bold, sans serif. The size of the type face to the uppercase lettering in the text of the warnings shall be at least 0.10 inches in height, and the size of the type face of the signal word "Warning" and safety alert symbol shall be at least 0.15 inches in height.

C. *Format:* The Society of Automotive Engineers (SAE) safety alert symbol shall precede the signal word "Warning" on a single line, which shall be separated from the warning text by a horizontal line. The hazard statement shall appear first in the text of the warning, followed by the consequence statement, and concluded by the avoidance statement. Each of the statements shall be separated by a line of space. The label shall be completely framed with a margin of white space outside a black line forming a rectangle.

D. *Color scheme:* The rectangular background of the signal word, "Warning" shall be orange. The signal word "Warning" shall be in black lettering. The SAE safety alert symbol shall be a black triangle (apex up) enclosing an orange exclamation mark. The remainder of the label shall be in black lettering on a white background. The entire label shall be surrounded by a narrow, white border. The circle and the diagonal slash on the age label shall be red. The color scheme of the rest of the age label shall be as specified for the other labels.

E. *Durability:* All labels shall meet DOT/EPF standards for durability. These standards may be found at 49 CFR 567.4(b) and 40 CFR 86.087-35(c)(1).

F. *Placement:* Each label shall be affixed to the ATV in the following locations:

General Warning Label: This label shall be on the left front fender in a location where it can be easily read by an operator seated on the vehicle in the proper operating position. If this location is not appropriate for a particular vehicle, the label shall be on the right front fender in a location where it can be easily read by an operator seated on the vehicle in the proper operating position.

Age-recommendation warning label: This label shall be on the fuel tank in a location where it can be easily read by the operator seated on the vehicle in the proper operating position. If this location is not appropriate, the label shall be placed on the top portion of the headlight or on the vehicle body immediately forward of the seat so as to be easily read by the operator when seated on the vehicle in the proper operating position.

Passenger warning label: This label shall be on either (1) the body of the vehicle to the rear of the seat, on a flat surface and toward the center of the vehicle, or (2) the seat of the vehicle at the rear of the seat. If neither of these locations is appropriate for a particular vehicle, the label shall be on the left rear fender on the left side of the body in a location where it can be easily read by a potential passenger.

Tire pressure and overloading warning: The label (or labels) warning about improper tire pressures and overloading shall be on the left rear fender above the axle, facing outward in such a position that it (they) can be read by the operator when mounting the vehicle.

II. Owner's Manuals

There are a number of requirements in the final consent decree which concern owner's manuals. The following specific requirements are to be considered a minimum, and each manufacturer is encouraged to provide the reader with the fullest amount of safety information that is feasible and practical.

Each owner's manual is required to have at least the following:

A. A statement on the outside front cover that advises the reader that the manual contains important safety information which should be read carefully.

B. A statement on the outside front cover stating the age recommendation for that particular ATV model.

C. Definitions for "Warning" and Caution" that are consistent with, and not weaker than, the definitions for those terms contained in the current standards proposed by the American National Standards Institute (ANSI), along with an introductory statement alerting the reader to the significance of the SAE safety alert symbol and the signal words. If a manufacturer uses a definition which is stronger than that contained in the current standards proposed by ANSI, the statements at D. and E. below shall be consistent with the stronger definition.

D. The following reminder shall immediately precede the table of contents and be repeated at the beginning and end of the section describing proper operating procedures, on the last page before the outside back cover (or the inside back cover), and at least in 5 more places, appropriately spaced, within sections containing warnings:

! WARNING

Indicates a potential hazard that could result in serious injury or death.

The reminder shall be prominently displayed, segregated from other text on the page, in typeface at least 0.10 inches high, and with the signal word in typeface at least 0.15 inches high.

E. An introductory safety message emphasizing the importance of and availability of the training course described in Section III and the importance of the age recommendation for the particular model. This introductory message shall contain at least the following statement:

"Failure to follow the warnings in this manual can result in SERIOUS INJURY or DEATH."

F. For ATVs with engine sizes 90 cc and less, an introductory notice to parents emphasizing that an ATV is not a "toy," the importance of children completing the training course described in Section III, and the importance of children understanding and following the instructions and warnings in the manual. This introductory notice shall also contain the following statement:

"Children differ in skills, physical abilities, and judgment. Some children may not be able to operate an ATV safely. Parents should supervise their child's use of the ATV at all times. Parents should permit continued use *only* if they determine that the child has the ability to operate the ATV safely."

G. An introductory safety section which contains the safety messages set forth below:

AN ATV IS NOT A TOY AND CAN BE HAZARDOUS TO OPERATE. An ATV handles differently from other vehicles, including motorcycles and cars. A collision or rollover can occur quickly, even during routine maneuvers such as turning and driving on hills or over obstacles, if you fail to take proper precautions.

SEVERE INJURY OR DEATH can result if you do not follow these instructions:

• Read this manual and all labels carefully and follow the operating procedures described.

• Never operate an ATV without proper instruction. *Take a training course.* Beginners should receive training from a certified instructor. Contact an authorized ATV dealer or call 1-800-447-4700 to find out about the training courses nearest you.

• Always follow these age recommendations:

—A child under 12 years old should never operate an ATV with engine size 70 cc or greater.

—A child under 16 years old should never operate an ATV with engine size greater than 90 cc.

• Never allow a child under age 16 to operate an ATV without adult supervision, and never allow continued use of an ATV by a child if he or she does not have the abilities to operate it safely.

• Never carry a passenger on an ATV.

• Never operate an ATV on any paved surfaces, including sidewalks, driveways, parking lots, and streets.

• Never operate an ATV on any public street, road, or highway, even a dirt or gravel one.

• Never operate an ATV without wearing an approved motorcycle helmet that fits properly. You should also wear eye protection (goggles or face shield), gloves, boots, a long-sleeved shirt or jacket, and long pants.

• Never consume alcohol or drugs before or while operating an ATV.

• Never operate at excessive speeds. Always go at a speed that is proper for the terrain, visibility, and operating conditions and your experience.

• Never attempt wheelies, jumps, or other stunts.

• Always inspect your ATV each time you use it to make sure it is in safe operating condition. Always follow the inspection and maintenance procedures and schedules described in this manual.

• Always keep both hands on the handlebars and both feet on the footpegs of the ATV during operation.

• Always go slowly and be extra careful when operating on unfamiliar terrain. Always be alert to changing terrain conditions when operating an ATV.

• Never operate on excessively rough, slippery, or loose terrain until you have learned and practiced the skills necessary to control the ATV on such terrain. Always be especially cautious on these kinds of terrain.

• Always follow proper procedures for turning as described in this manual. Practice turning at low speeds before attempting to turn at faster speeds. Do not turn at excessive speed.

• Never operate the ATV on hills too steep for the ATV or for your abilities. Practice on smaller hills before attempting larger hills.

• Always follow proper procedures for climbing hills, as described in this manual. Check the terrain carefully before you start up any hill. Never climb hills with excessively slippery or loose surfaces. Shift your weight forward. Never open the throttle suddenly or make sudden gear changes. Never go over the top of any hill at high speed.

• Always follow proper procedures for going down hills and for braking on hills, as described in this manual. Check the terrain carefully before you start down any hill. Shift your weight backward. Never go down a hill at high speed. Avoid going down a hill at an angle that would cause the vehicle to lean sharply to one side. Go straight down the hill where possible.

• Always follow proper procedures for crossing the side of a hill as described in this manual. Avoid hills with excessively slippery or loose surfaces. Shift your weight to the uphill side of the ATV. Never attempt to turn the ATV around on any hill until you have mastered the turning technique described in this manual on level ground. Avoid crossing the side of a steep hill if possible.

• Always use proper procedures if you stall or roll backwards when climbing a hill. To avoid stalling, use the proper gear and maintain a steady speed when climbing a hill. If you stall or roll backwards, follow the special procedure for braking described in this manual. Dismount on the uphill side or to the left side if pointed straight uphill. Turn the ATV around and remount, following the procedure described in this manual.

• Always check for obstacles before operating in a new area. Never attempt to operate over large obstacles, such as large rocks or fallen trees. Always follow proper procedures when operating over obstacles, as described in the manual.

• Always be careful when skidding or sliding. Learn to safely control skidding or sliding by practicing at low speeds and on level, smooth terrain. On extremely slippery surfaces, such as ice, go slowly and be very cautious in order to reduce the chance of skidding or sliding out of control.

• Never operate an ATV in fast-flowing water or in water deeper than that specified in the manual. Remember that wet brakes may have reduced stopping ability. Test your brakes after leaving water. If necessary, apply them several times to let friction dry out the linings.

• Always be sure there are no obstacles or people behind you when you operate in reverse. When it is safe to proceed in reverse, go slowly.

• Always use the size and type tires specified in this manual. Always maintain the proper tire pressure described in this manual.

• Never modify an ATV through improper installation or use of accessories.

• Never exceed the stated load capacity for an ATV. Cargo should be properly distributed and securely attached. Reduce speed and follow the instructions in this manual for carrying cargo or pulling a trailer. Allow greater distance for braking.

FOR MORE INFORMATION ABOUT ATV SAFETY, call the Consumer Product Safety Commission at 1-800-638-2772, or the ATV Distributors' Safety Hotline at 1-800-447-4700.

H. An appropriate table of contents identifying the major portions of the manual.

I. Descriptions of the location of warning labels on the ATV and an introductory statement emphasizing the importance of understanding and following the labels and the importance of keeping the labels on the ATV. The introductory statement shall also contain instructions on how to obtain a replacement label in the event any label becomes difficult to read or comes off.

J. A description of pre-operating inspection procedures and a statement emphasizing the importance of these procedures.

K. A description of the proper operating procedures and of the potential hazards associated with

improper operation of the vehicle. In the section of each manual devoted to describing proper operating procedures, the manufacturer shall include material addressing, in narrative text form and in appropriate detail, all of the topics in the following list. This material is in addition to the introductory safety section described in Section II(G) above. Those topics marked with an asterisk shall be accompanied by an illustration that clearly reflects the intent of the text.

- Operation without proper instruction
- Age recommendation
- * Carrying passengers
- * Operating ATV on paved surfaces
- * Operating ATV on public streets, roads, or highways
- * Operating ATV without wearing an approved motorcycle helmet, eye protection, and protective clothing
- Operating ATV after consuming alcohol or drugs
- Operating ATV at excessive speeds
- Attempting wheelies, jumps, and other stunts
- Failure to inspect ATV before operating
- Failure to properly maintain ATV
- Removing hands from handlebars or feet from footpegs during operation
- * Failure to use extra care when operating ATV on unfamiliar terrain
- * Failure to use extra care when operating ATV on excessively rough, slippery, or loose terrain
- Turning improperly
- Operating on excessively steep hills
- * Climbing hills improperly
- * Going down hills improperly
- * Improperly crossing hills or turning on hills
- * Stalling, rolling backwards, or improperly dismounting while climbing hills
- Improperly operating ATV over obstacles
- Skidding or sliding improperly
- Operating ATV through deep or fast-flowing water
- Improperly operating ATV in reverse
- Operating ATV with improper tires or with improper or uneven tire pressure
- Operating ATV with improper modifications
- Overloading ATV or carrying or towing cargo improperly

Such narrative text shall identify particular potential hazards associated with the types of operation or behavior in question and the possible consequences of such operation or behavior and shall describe how the vehicle should be operated to avoid or reduce the risk associated with such hazards.

The language of the narrative sections accompanying each warning shall not contradict any information contained in the warning section and shall be written to draw attention to the warning.

L. Description of proper maintenance, storage, and transportation procedures.

M. On the outside back cover, the contents of the general warning label shown in Figure 1.

III. Training

Each manufacturer of ATVs who signed the consent decree has agreed to provide each ATV purchaser and members of their immediate families with a free training course. Outlines 1 and 2 below, reflect the content of the training courses developed by the Specialty Vehicle Institute of America and Polaris Industries, Inc. The outlines are provided as a guide for the contents of a comprehensive ATV training course. Other ATV manufacturers may use these outlines to develop their own training courses.

Outline 1

The ATV Rider's Course Outline is based upon the curriculum contained in the existing Specialty Vehicle Institute of America (SVIA) Instructor's Guide (8/86 revision). It reflects the modifications agreed upon by the Japanese parties signing the Consent Decree with respect to a reordering of exercises, the addition of an evasive, swerve maneuver, and the expanded lecture. Those and other modifications are noted in the outline.

The exercises marked by an asterisk refer to cognitive lessons to be held away from the vehicles. Equipment and supplies that should be available to students during these sessions include folding stools, clipboards, and pencils. Unmarked exercises are to be conducted on the vehicles. The instructor will evaluate the performance of each student during the last session.

A. Section 1—*Introduction**

This section shall include at least a discussion of the following material:

—Purpose of Training and Safety Alert
—Rider Safety Awareness
—Introduce SIPDE
—Riding Responsibilities
—Riding Gear

This section shall also include at least a discussion of the following material:

—CPSC accident and injury data (updated every 12 months to reflect statistics for the preceding five years, as provided by the CPSC),
—Risk awareness and how to reduce the risks,
—Safety awareness on where to ride and the proper size vehicle to ride,
—Riding practices, such as: do not carry passengers, do not ride alone, etc.,
—The use of alcohol/drugs and the loss of motor skills,
—The need for protective headgear and clothing to reduce injury severity,
—Local laws and regulations,
—Why the training is offered and what it means to the student.

B. Section 2—*Introduction Part II*

—Familiarization with controls
—Pre-ride inspection list (T-CLOC), Tires and Wheels, Controls and Cables, Lights and Electrical Switches, Oil and Fuel, Chain and Chassis
—Physical Warm-up
—Range Signals—(Hand signals for field use)*
—Pre-start Routine—(BONE-C), Brake set, Fuel and Ignition on, Transmission in neutral, Engine stop switch on, Choke
—Initial lesson shifting into forward gear and braking
—Stopping—in a straight line and in a curve.

C. Section 3—*Hands-on Practice*

—an oval course
—a circular course
—a figure 8 course

D. Section 4, *Terrain—Riding Strategies*

—Importance of scanning terrain*
—Identifying hazards*
—Evaluating and predicting the outcome of a potential maneuver*
—How to decide on the best course of action*
—Carrying out the Decision*
—Use of the acronym *SIPDE* (Scanning, Identifying, Predicting, Deciding, Executing)*
—Terrain Strategies*
—Terrain Specific Discussion*

E. Section 5—*Turns*

—Sharp Turns
—Quick Turns—Weave

F. Section 6—*Braking and Obstacles*

—Warm-up/Stretching*
—Quick Stops—Straight/Evasive Maneuvers
—Emergency Stops—Swerving Maneuvers
—Quick Stops—Turns
—Obstacles

G. Section 7—*Riding Behavior*

—Safety Behavior
—Environmental Concerns/SIPDE*
—Local Laws/Regulations*
—Locating Places To Ride*

H. Section 8

—Climbing, Turning, and Descending Hills, Stopping on Hills,
—Climbing, Stopping, Descending in the middle of a hill, (Moving K-Turn)
—Traversing a Hill

I. Section 9—*Trail Ride*

—Trail Ride/Practical Application
—SIPDE Reinforcement

—Environmental Concerns
J. Section 10—*Review*
—Wrap-up Review, Course Completion Certificates, and Distribution of SVIA Student Handbook*

Outline 2

A. Section 1—*Vehicle Introduction*
This section shall include at least a discussion of the following material:
• CPSC accident and injury data (updated every twelve months to reflect statistics for the preceding five years, as provided by the CPSC)
• Risk awareness and how to reduce the risks
• Safety awareness on where to ride and the proper size of vehicle to ride
• Unsafe riding practices, *e.g.*, carrying passengers, riding on paved surfaces, riding alone, avoiding low-visibility conditions, etc.
• Danger associated with removing feet from foot rests
• The use of alcohol or drugs and the loss of motor skills
• The need for protective clothing to reduce injury severity
• Local laws and regulations
• Why this course is offered and what it means to the student.
B. Section 2—*Safety*
The following topics should be covered:
• ATV controls
• Riding strategies on various terrains, including hills
• a basic methodology to reach the student how to recognize hazards, assess the risks involved, and decide what action to take
• Proper riding techniques, including weight shifting, surmounting obstacles, etc.
• Environmental concerns
• Protective clothing
• The importance of heeding the operation instructions and the consequences of failing to do so could be severe injury or death
• The concept that a person operating an ATV should know his or her limitations and not attempt to perform any maneuver or traverse any terrain if performing the maneuver or operating on the terrain is beyond that person's capabilities and experience
• The concept that no person should encourage, urge, or otherwise pressure another person to attempt to perform any maneuver or attempt to traverse any terrain if performing the maneuver or operaton on the terrain might be beyond the other person's capabilities and experience
• The importance of practicing and gradually progressing from basic to more complex maneuvers
• The importance of keeping alert at all times and the concept that even a momentary distraction can cause loss of conrol resulting in a fatal or severe accident
• The hazard of operating an ATV on unfamiliar terrain; terrain with obstacles, rough, slippery or loose terrain, steep hills, and deep or fast-flowing water
• The importance of maintaining a safe distance from other off-road vehicles.
C. Section 3—*Vehcile Familiarization and Owner's Manual Review*
The following topics should be covered:
• Safety warning and operation lables
• Vehicle nomenclature
• Control and parts functions
• Design characteristics, such as the vehicle's solid rear axle, large low-pressure tires; rider-interactive nature; etc. This will include a discussion about how these characteristics affect the vehicle's handling, such as the requirement for weight shifting on hills, for turning, etc.
• Periodic and annual maintenance
• Importance of a pre-ride inspection of the vehicle's tire pressure, tire and wheel condition, levers and cables (for breakage and fraying), chain and chassis (for breakage or free play), etc.
• Transporting the vehicle
D. Section 4—*Operation of the Vehicle*
The following topics should be covered:
1. Owner's ATV pre-ride checkoff
2. Re-emphasizing safe operation, protective clothing, control, function, and as appropriate, a demonstation of each riding maneuver described in paragraph 3 below
3. Riding maneuvers and operation
a. Starting and stopping the ATV
b. Principles of turning, making gradual and tight turns, and performing figure 8's
c. Sharp turns and quick direction changes
d. Slalom maneuvers (emphasize weight shifting)
e. Quick stops—straight-evasive maneuvers including emergency stopping or swerving, quick stops and quick turns
f. Surmounting obstacles (both by a single wheel and by two wheels simultaneously)
g. Climb, turn, descent on a hill including "U" turns and so-called "K" turns (to be used on ascending hills when stalling or loss of traction occurs)
h. Traversing slopes
i. Trail or circuit ride which permits the student to demonstrate under the guidance of the instructor the required skills and which allows the instructor to complete a scoring chart.

In those instances where it is not possible to conduct the hill maneuvers because of a lack of access to a hill, the instructor shall explain and perform the operation of these maneuvers on the available terrain and provide the operator with written instructional materials on the maneuvers.

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DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Defense Industrial Cooperation with Pacific Rim Nations; Meetings

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on Defense Industrial Cooperation with Pacific Rim Nations will meet in closed session on February 24, March 6, April 3, May 1, and June 5, 1989 at the Hughes Corporation, Rosslyn, 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 these meetings the Task Force will examine the potential for achieving US security objectives in the Pacific Rim area through defense industrial cooperation with the nations of that area.

In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. No. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that these DSB Task Force meetings, concern matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly these meetings will be closed to the public.

Linda M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.
January 10, 1989.

[FR Doc. 89-887 Filed 1-12-89; 8:45 am]
BILLING CODE 3810-01-M

Department of the Air Force

Air Force Academy Board of Visitors Meeting

Pursuant to section 9355, Title 10, United States Code, the Air Force Academy Board of Visitors will meet at

the Air Force Academy, Colorado Springs, Colorado, March 3–5, 1989. The purpose of the meeting is to consider morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy.

A portion of the meeting will be open to the public on March 4, 1989, from 9:15 a.m. to 10:45 a.m. and on March 5, 1989, from 8:30 a.m. to 9:30 a.m. Other portions of this meeting will be closed to the public to discuss matters analogous to those listed in subsections (2), (4), and (6) of section 552b(c), Title 5, United States Code. These closed sessions will include: attendance at cadet classes and panel discussions with groups of cadets and military staff and faculty officers involving personal information and opinions, the disclosure of which would result in a clearly unwarranted invasion of personal privacy. Closed sessions will also include executive sessions involving discussions of personal information, including financial information, and information relating solely to internal personnel rules and practices of the Board of Visitors and the Academy. Meeting sessions will be held in various facilities throughout the cadet area.

In addition to the open meeting sessions, the public is welcome to attend a press conference scheduled for 11:00 a.m. to 11:20 a.m. on March 5, 1989, in the Air Force Academy Officers Club.

For further information, contact Lieutenant Colonel Jim Geyer, Headquarters, US Air Force (DPPA), Washington, DC 20330–5060, at (202) 697–2919.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 89–893 Filed 1–12–89; 8:45 am]

BILLING CODE 3910–01–M

Defense Logistics Agency

Cooperative Agreements Revised Procedures

AGENCY: Defense Logistics Agency, DoD.

ACTION: Cooperation agreements; proposed revised procedures.

SUMMARY: This proposed revised procedure implements Chapter 142, Title 10, United States Code, as amended, which authorizes the Secretary of Defense, acting through the Director, Defense Logistics Agency (DLA), to enter into cost sharing Cooperative Agreements to support procurement technical assistance programs established by state and local governments and private non-profit organizations. Subpart III of this issuance establishes the administrative procedures proposed to be implemented by the DLA to enter into such agreements for this purpose.

DATES: Comments will be accepted until February 13, 1989. Proposed effective date: February 20, 1989.

FOR FURTHER INFORMATION CONTACT: Sim Mitchell, Program Manager, Office of Small and Disadvantaged Business Utilization (DLA–UM), Defense Logistics Agency, Alexandria, VA 22304–6100, Telephone (202) 274–6471.

Ray W. Dellas,

Staff Director, Small and Disadvantaged Business Utilization.

I. Background Information

The Department of Defense (DoD) has developed programs designed to expand its industrial base and increase competition for its requirements for goods and services, thereby reducing the cost of maintaining a strong national security. Its efforts to increase competition among the private sector have been supplemented by many state and local governments and other entities where their interest in improving the business climate and economic development in their communities is compatible with these DoD objectives. To assist in furthering this mutual interest, a Cooperative Agreement Program has been established by which the DoD can share the cost of supporting existing procurement technical assistance programs (PTA) being conducted by state and local governments and private non-profit entities and can encourage the establishment of similar programs in their communities.

The Fiscal Year (FY) 1985 DoD Authorization Act, Pub. L. 98–525, amended Title 10, United States Code, by adding a Chapter 142 which authorizes the Secretary of Defense, acting through the Director, Defense Logistics Agency (DLA), to enter into cost sharing cooperative agreements with state and local governments, and other non-profit entities (hereinafter referred to as eligible entities as defined in Section 3 of this procedure) to establish and conduct PTA programs during FY 85. The program continues under Title 10, United States Code, as amended.

The Congress has authorized a total of $7 million to support the program during FY 89. Of this total, $500,000 is available for an Indian program only and such program will be executed centrally by Headquarters (HQ) DLA. Accordingly, each of the nine Defense Contract Administration Services Regions (DCASRs) within DLA will be authorized to award approximately $700,000 of the remaining $6.5 million authorized for FY 89 as its share of program costs to applicants within the geographical area under its cognizance.

In cases where the area being or to be serviced by the eligible entity encompasses more than one DCASR's area of geographic cognizance, eligible entities are to submit their proposals to the one DCASR having cognizance over the preponderant part of the area being or to be serviced. Only one proposal will be accepted from a single eligible entity. The addresses and geographic areas under the cognizance of each of the DCASRs, together with the name of the Associate Director of Small Business who is designated the Procurement Technical Assistance Cooperative Agreement Program Manager, is at Encl 1.

Additional Limitations placed on these funds follow:

(a) DoD cost sharing shall not exceed 50% of the net cost of a single program, excluding any Federal funds and other income, except that the DoD share may be increased up to 75% for an existing program or new start that qualifies solely as a distressed area. In no event, shall the DoD share of the net program cost exceed $300,000 for programs providing state-wide coverage and $150,000 for all other programs.

(b) Eligible entities are not to subcontract more than 10% of their total program costs for private consulting services to support the program.

(c) These limitations may be modified by the HQs DLA Policy Council as necessary to comply with legislative or other requirements.

The DoD presently provides procurement and technical assistance to business firms through its network of Small Business Specialists located in industrial centers around the country. the DCASR Associate Directors of Small Business, located in these industrial centers, will be available to provide eligible entities such assistance as necessary to explain and interpret the solicitation requirements when issued, to provide general guidance in preparing proposals, and to provide training and other technical assistance to recipients of cooperative agreements.

Procurement technical assistance given to clients for marketing their goods and services to other Federal Agencies and/or state and local governments will not be considered when evaluating proposals. However, eligible entities are encouraged to consider supplementing their DoD program to include those marketing

opportunities for business firms located in the area being or to be serviced.

The purpose of this proposed revised procedure is to make available to all eligible entities the prerequisite requirements, policies and procedures which will govern the award of cooperative agreements by the DLA. Also, this procedure establishes the guidelines which will govern the administration of cooperative agreements.

Although this procedure will affect all eligible entities desiring to enter into a cooperative agreement with the DLA, the DLA has determined that this rule does not involve a substantial issue of fact or law, and that it is unlikely to have a substantial or major impact on the Nation's economy or large numbers of individuals or businesses. This determination is based on the fact that this proposed Cooperative Agreement Procedure implements policies already published by the Office of Management and Budget pursuant to Chapter 63, Title 31, United States Code, Using Procurement Contracts and Grant and Cooperative Agreements. In addition, DLA Cooperative Agreements will be entered into pursuant to the authorities and restrictions contained in the annual DoD Authorization and Appropriation Acts.

II. Other Information

The language contained in the current Cooperative Agreement Procedure limited the period of coverage to the FY 88 Program in that it addressed the FY 88 Authorization Act requirements in specific terms, including the exact dollar amounts of funding applicable to the Program. This proposed revision to the procedure will provide general guidance for cooperative agreements entered into by the DLA and will become a permanent document for the duration of the FY 89 programs.

The DLA has determined that the proposed procedure does not involve substantial issues of fact or law and the procedure is unlikely to have a substantial or major impact on the Nation's economy or large numbers of individuals or businesses. Therefore, public hearings were not conducted.

Since this is the DLA's permanent procedure covering cooperative agreements pursuant to 31 U.S.C. 6301 *et seq*, using Procurement Contracts and Grant and Cooperative Agreements, additional comments are invited on the procedures and are to be submitted to the Defense Logistics Agency, ATTN: DLA-UM, Cameron Station, Alexandria, VA 22304-6100. All comments received by 13 February 1989 will be evaluated to determine if any revisions should be made to Subpart III.

COOPERATIVE AGREEMENT REGULATION GENERAL PROGRAM

III. Proposed Revision to DLA Procedure—Cooperative Agreements

1. Scope

(a) This procedure implements Chapter 142 of Title 10, United States Code, as amended, and establishes requirements for the award and administration of Cost Sharing Cooperative Agreements entered into between the Defense Logistics Agency (DLA) and eligible entities. Under these agreements Department of Defense (DoD) financial assistance provided to recipients will cover the DoD share of the cost of establishing new and/or maintaining existing Procurement Technical Assistance (PTA) Programs for furnishing PTA to business entities.

(b) A cooperative agreement is a binding legal instrument which reflects a relationship between the DLA and a cooperative agreement recipient for the purpose of transferring money, property, services or anything of value to the recipient for the accomplishment of the requirements described therein. The requirement shall be authorized by Federal statute and substantial involvement shall be anticipated between the DLA and the recipient during performance of the agreement.

2. Policy

(a) When proposals for cooperative agreements are obtained through the issuance of a DLA Solicitation for Cooperative Agreement Proposals, hereinafter referred to as a SCAP, the contents of this procedure shall be incorporated, in part or in whole, into the program solicitation for the purpose of establishing administrative requirements for the execution and administration of DLA Cooperative Agreements. Program solicitations may include additional administrative requirements when such requirements are required by program legislation or are not included in this procedure.

(b) It is the DLA policy to encourage and maximize open and fair competition when awarding cooperative agreements for establishing or maintaining existing PTA programs. Cooperative agreements will be awarded on a competitive basis as a result of the issuance of a SCAP. However, the DoD, through the DLA, reserves the right to make or deny an award to an applicant whose application is competitive pursuant to the other factors detailed in paragraph 5(e) below if competition for DoD goods and services would be enhanced. For example, an award may be denied to reduce or eliminate overlapping or duplicate coverage in selected geographic areas or where the best interest of the government will not be served.

(c) SCAPs inviting the submission of proposals shall be given the widest practical dissemination to all known eligible entities and to those that request copies subsequent to its issuance. All eligible entities that have advised the DCASR of their interest in submitting a proposal, under the SCAP, will be invited to participate in a presolicitation conference to be held at a location to be designated by the DCASR approximately 30 calendar days prior to the SCAP closing date.

(d) Any solicitation issued in accordance with this procedure shall not be considered to be an offer made by the DoD and will not obligate the DLA to make any awards under this program. The DoD is also not responsible for any monies expended or expense incurred by applicants prior to the award of a cost sharing cooperative agreement.

(e) The DoD share of an eligible entity's proposal and award recipient's net program cost (NPC) shall not exceed 50%, except in the case of a distressed area (as defined in paragraph 3(g) below) the DoD share may be increased to an amount not to exceed 75%. However, in no event is the DoD share of any single net program cost to exceed $300,000 for programs providing state-wide coverage (defined in paragraph 3(x) below) and $150,000 for all other programs.

(f) During each fiscal year (FY) for which funding is authorized for the PTA program at least one cooperative agreement for either an existing program or a new start shall be awarded within the geographic cognizance of each of DLA's nine Defense Contract Administration Services Regions (DCASRs). In cases where the area being or to be serviced by an eligible entity encompasses more than one DCASR's area of geographic cognizance, the eligible entity should submit its application to the one DCASR having cognizance over the majority of the area being or to be serviced. Only one application will be accepted from a single eligible entity.

(g) The award of a cooperative agreement shall not in any way obligate the DoD to enter into a contract or give preference for the award of a contract to a concern or firm which becomes a client of the award recipient.

(h) The award of a cooperative agreement under this program shall

cover a twelve month performance period.

(i) To assist the DoD in achieving its socio-economic goals, applicants and cooperative agreement recipients are to give special emphasis to assisting small disadvantaged business firms participating in DoD contracting opportunities. A concerted effort will be made by each cooperative agreement recipient to identify small disadvantaged business firms and provide them with marketing and technical assistance, particularly where such firms are referred to a recipient for assistance by a DoD component.

(j) The Federal Acquisition Regulation (FAR) contains numerous clauses and provisions which provide operational guidance and spell out the rights and obligations of parties in Federal Procurement transactions. Although the regulation is not applicable per se to cooperative agreements, some of the provisions contained in the Regulation may be suitable for inclusion in cooperative agreement solicitation and award documents. Therefore, the clauses and provisions contained therein may be made a part of all cooperative agreement solicitations and award documents if not otherwise covered under the Office of Management and Budget (OMB) Circulars A-102 (Grants and Cooperative Agreements with State and Local Governments) and A-110 (Grants and Agreements with Institutions of Higher Education, Hospitals and other Non-profit Organizations). Where appropriate, the language of the clause(s) may be changed and will be modified to change "contract" to "cooperative agreement" and "contractor" to "participant" as necessary. Clauses and provisions specified as mandatory will not be subject to negotiations. Such clauses and provisions will only be used if the applicable FAR dollar threshold(s) are met. For example, if there is a prerequisite $100,000 threshold for applying the clause, that particular clause will only be used in the cooperative agreement solicitation or award document if the total program cost of the project (including both the applicant's and DoD's share of total program costs) equals or exceeds the $100,000 threshold.

(k) The addition of any clauses and provisions not identified in the solicitation or the modification of clauses and provisions included in the solicitation which are not designated as being mandatory may be negotiated.

(l) Award recipients are not required to obtain or retain private consulting services for any extended period of time. Accordingly, any costs being proposed for such services are not to exceed 10% of the total program cost. Costs in excess of 10% included in the eligible entity's proposal will cause the proposal to be rejected.

(m) Reasonable quantities of government publications, such as "Selling to the Military" may be furnished to award recipients at no cost, subject to availability.

(n) For the purpose of executing cooperative agreements, the HQs DLA Cooperative Agreement Program Manager and DCASR Associate Director of Small Business are delegated the authority to execute cooperative agreements and shall not require appointment as a contracting officer.

(o) Each cooperative agreement recipient's area of performance will be limited to the geographical area specified in its proposal.

(p) To the extent that the annual DoD Authorization and Appropriation Acts provide for restricting some part of the total funds authorized to accommmodate special socio-economic requirements, any specific requirements related to the restricted funds which differ from the requirements of this regulation will be identified in the solicitation for cooperative agreement proposals.

3. Definitions

The following definitions apply for the purpose of this procedure.

(a) *Civil Jurisdiction*—All cities with a population of at least 25, 000 and all counties. Townships of 25,000 or more population are also considered as civil jurisdictions in four states (Michigan, New Jersey, New York, and Pennsylvania). In Connecticut, Massachusetts, Puerto Rico and Rhode Island where counties have very limited or no government functions, the classifications are done for individual towns.

(b) *Client*—A recognized business entity, including corporations, partnerships, or sole proprietorships organized for profit, which are small and other than small, that have the potential or are seeking to market their goods or services to the DoD.

(c) *Cooperative Agreement Offer/ Application/Proposal*—An eligible entity's response to the Solicitation for Cooperative Agreement Proposals describing their Procurement Technical Assistance program being operated or being planned. The offer binds the eligible entity to perform the services described therein if selected for an award, and upon the proposal being incorporated into the cooperative agreement award document.

(d) *Cost Sharing*—A generic term denoting any situation wherein the Government does not fully fund the participant's total allowable costs required to accomplish the defined project or effort. The term encompasses concepts such as cost participation, cost matching, cost limitatioins (direct or indirect), and participation in kind.

(e) *Direct Cost*—Any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any costs, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective.

(f) *Distressed Area*—The geographic area being or to be serviced by an eligible entity in providing procurement technical assistance to business firms physically located within that area:

(1) Has a per capita income of 80% or less of that State's average, or

(2) Has an unemployment rate of at least 1% above the national average for the most recent 24-month period in which statistics are available from the U.S. Department of Labor in all of the geographic areas being or to be serviced. A distressed area cannot include any areas that do not meet this criteria.

(3) Is a "Reservation" which includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act.

(g) *DoD Cooperative Agreement Program*—Provides assistance to eligible entities (defined by paragraph (g) below) in establishing or maintaining procurement technical assistance activities to help businss firms market their goods and services to the DoD and other government activities.

(h) *Eligible Entities*—include:

(1) *State Government*—a State of the United States, the District of Columbia, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-state, regional, or interstate entity having governmental duties and powers.

(2) *Local Government*—a unit of government in a State, or local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, an interstate entity, or another instrumentality of a local government.

(3) *Private, Non-profit Organization*—any corporation, trust, foundation, or institution which is entitled to

exemption under section 501(c)(3)-(6) of the Internal Revenue Code, or which is not organized for profit and no part of the net earnings of which inure to the benefit of any private shareholder or individual.

(4) *Special Program Organizations*—Those organizations authorized by legislation to participate in programs set-aside for specifically designated groups. Such entities will be identified in the solicitation specifically issued therefor.

(i) *Existing Program*—Includes any Procurement Technical Assistance type program that is the recipient of a cooperative agreement(s) with the Defense Logistics Agency during FY 87 or later.

(j) *Indian*—A person who is a member of an Indian tribe.

(k) *Indian Economic Enterprise*—Any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: provided, that such Indian ownership shall constitute not less than 51 per centum of the enterprise.

(l) *Indian Tribe*—Any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) which is recognized by the Federal Government as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(m) *Indirect Cost*—Any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. It is not subject to treatment as a direct cost.

(n) *In-Kind Contributions*—Represent the value of noncash contributions provided by the eligible entity and non-Federal parties. Only when authorized by Federal legislation may property or services purchased with Federal funds be considered as in-kind contributions. In-kind contributions may be in the form of charges for real property and nonexpendable personal property and the value of goods and services directly benefitting and specifically identifiable to the project or program.

(o) *Net Program Cost*—Total program cost (including all authorized sources) less any program income and/or other federal funds not authorized to be shared.

(p) *Net Start*—An eligible entity that is not an existing program (see paragraph 3(i) above for definition) to include those recipients of cooperative agreement with the DLA during FY 86 and prior years.

(q) *Private Consultant Services*—Services offered by private profit seeking individuals, organizations or otherwise qualified business entities to provide marketing and technical assistance to cooperative agreement recipients or business firms seeking contracts with Federal, State and local government organizations.

(r) *Procurement Technical Assistance*—Program organized to generate employment in and improve the general economy of a locality by assisting business firms in obtaining defense and other government contracts. It's purpose is to provide detailed counseling assistance, information and personal instructions to business firms in increasing their opportunities to sell their products or services to the Defense Department either directly as prime contractors or indirectly as subcontractors under DoD contracts, other government agencies and the private sector.

(s) *Reservation*—Includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

(t) *Solitication for Cooperative Agreement Proposals (SCAP)*—A document issued by DLA containing provisions and evaluation criteria applicable to all applicants that apply for a PTA cooperative agreement.

(u) *Special Program*—A program by which funds are targeted by legislation for the purpose of sharing the cost of providing procurement technical assistance to specifically designated groups.

(v) *State-wide Coverage*—a procurement technical assistance program which proposes to service at least 50% of a State's civil jurisdictions and 75% of a state's labor force.

(w) *Total Program Cost*—Includes all funds from all sources to include in-kind contributions and all income received from all sources as a result of operating the program. Any federal funds proposed for use in establishing or conducting the program must have prior approval for such use.

(x) *Tribal organization*—The recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, that in any case where a cooperative agreement is awarded to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the award.

4. Program Description

The objective of the PTA Program is to assist eligible entities in providing marketing and technical assistance to businesses, hereinafter referred to as clients, in selling their goods and services to the DoD, thus assisting the DoD in its acquisition goals and at the same time enhancing the business climate and economies of the communities being served. Specific program requirements to accomplish this objective will vary depending on locations, the types of industries and business firms within the community, the level of economic activity in the community, and many other factors. However, the SCAP will describe the following minimum features that a comprehensive PTA Program should generally include:

(a) *Personnel*—Professional personnel qualified to counsel and advise clients regarding DoD procurement policies and procedures. The areas of consideration should relate to marketing techniques and strategies, pricing policies and procedures, preaward procedures, postaward contract administration, quality assurance, production and manufacturing, financing, subcontracting requirements, bid preparation, and specialized acquisition requirements for such things as construction, research and development, and data processing.

(b) *Marketing Tools*—Should include, as a minimum, the Commerce Business Daily, Federal Acquisition Regulation, DoD FAR Supplement, commodity listings from DoD contracting activities, Federal and military specifications and standards, and other Federal Government publications.

(c) *Networking*—Techniques for providing assistance throughout the area being or to be serviced by locating assistance offices in areas of industrial concentration, arrangements with other entities or organizations, establishing data links, and through other appropriate means.

(d) *Fees and Service Charges*—In the event the applicant presently charges or plans to charge clients a fee or service charge, details as to the basis for the amount of the fee to be charged must be described. Any fees earned under the program are to be included as part of the total program cost.

(e) *Performance Measurement*—Should include a means of periodically measuring program effectiveness in achieving the objective described above.

Factors to consider in establishing time phased goals and techniques for measuring progress in its achievement should include the number and types of assistance rendered, such as marketing and accounting; the number of clients added to the DoD and other Federal Agency bidders mailing lists, the Minority Vendor Profile System of the Minority Business Development Agency, the Procurement Automated Source System (PASS) of the Small Business Administration and the value of prime and subcontract awards received by clients resulting from the program.

5. Procedures for Processing SCAPs and Award of Cooperative Agreements

(a) The cooperative agreement program manager will develop and prepare the SCAP(s). Also, he/she will be responsible for assuring that adequate funds are made available to the DCASR and for considering other factors in the selection process necessary to fully protect the interests of the government.

(b) The SCAP(s) will be approved by the HQ DLA Cooperative Agreement Policy Council and will be issued by HQ DLA or through each DCASR. The Policy Council will be comprised of representatives from the HQ DLA Offices of General Counsel, Contracting, Comptroller, Congressional Affairs and Small Business. The Staff Director, Small and Disadvantaged Business Utilization shall serve as the Policy Council Chairman and final appeal authority for disagreements between the Cooperative Agreement Program Manager, DCASR Associate Director of Small Business and the eligible entity and/or Cooperative Agreeement recipient. The Council will be responsible for reviewing the evaluations and recommendations of the Cooperative Agreement Program Manager and the evaluation panel.

(c) For special program, the HQs DLA Cooperative Agreeemnt Policy Council will be the review and approval authority for award selections.

(d) The evaluation of proposals submitted in response to the SCAP and the selection of award recipients will be conducted as detailed below:

(1) Proposals will be evaluated by a specially constituted evaluation panel established at HQ DLA. The panel will be comprised of representatives from the DCASR offices of small business, contract management, comptroller, and other offices deemed appropriate by the HQ DLA Cooperative Agreement Program Policy Council. However, the DCASR Associate Director of Small Business, who is delegated the authority to execute the cooperative agreements, shall not serve as panel member. A member of the Office of Counsel, HQ DLA, will be appointed to the panel, but will serve in an advisory capacity only.

(2) Prior to making a comprehensive evaluation of a proposal, the DCASR Associate Director of Small Business will make an initial evaluation to determine if each proposal contains sufficient technical, cost and other information, has been signed by a responsible official authorized to bind the eligible entity and generally meets all requirements of the SCAP. If the proposal does not meet those requirements, it will be rejected and a comprehensive evaluation will not be made. In such case, a prompt reply will be sent to the proposer by the DCASR Associate Director of Small Business indicating the reason for its proposal not being accepted. Otherwise acceptable proposals with the DCASR Associate Director of Small Business recommendations will be forwarded to the Cooperative Agreement Program Manager at HQs DLA. Under existing programs only, in the event the applicant's Procurement Technical Assistance Performance Report (RCS Number DLA (Q) 2545) is missing, the missing report will be attached to the proposal by the cognizant DCASR Associate Director of Small Business.

(3) Revised proposals will not be accepted from applicants whose proposals are rejected after the initial evaluation unless the revised proposals is postmarked or is hand delivered prior to the closing date of the SCAP. Any proposal received which is unsigned or otherwise rejected will not be given additional review consideration and will be retained with other unsuccessful applications by the DCASR Associate Director of Small Business.

(4) For an otherwise acceptable proposal the DCASR Associate Director of Small Business will include a review to verify the accuracy of the classification of the proposal concerning the entity's stated program status as existing or a new start. In the event the DCASR Associate Director of Small Business considers the proposal status misclassified, he/she will review the matter with the applicant. If there is disagreement, the Associate Director of Small Business' determination of the application's classification will be final and not subject to further review.

(5) Proposals which pass the initial evaluation will be subjected to a comprehensive evaluation by the HQs DLA evaluation panel. The basic purpose of the comprehensive evaluation is to assess the relative merits of the proposals to determine which offer the greatest likelihood of achieving the stated program objectives, considering technical, quality, personnel qualifications, estimated cost, and other relevant factors. Each proposal will be evaluated by the panel in accordance with stated criteria and ranked in order of excellence to determine which will best further specific program goals. All findings and recipient selections will be documented, signed by the panel members, and retained to provide an adequate record to support the panel's decisions. Upon completion of its review, the evaluation panel will submit the panel results and its recommendations to the Cooperative Agreement Program Manager.

(6) The Cooperative Agreement Program Manager will determine whether sufficient funds have been allocated to the DSASR to cover the DoD share of costs and will review the panel recommendations and results for completeness. Upon completion of the fund analysis and review of the panel results, the Cooperative Agreement Program Manager will forward the panel results with recommendations and comments (if any) to the HQ DLA Policy Council for review.

(e) The HQ DLA Policy Council will review the Cooperative Agreement Program Manager and evaluation panel's recommendations. The results of its review and its recommendations will be submitted to the appropriate DCASR Commander for approval. In developing its recommendations the Council may consider additional factors necessary to fully protect the interest of the Government. These factors may include, but are not limited to, economic downturns that effect national security in selected geographic areas; terminations of major DoD contracts; availability of funds; the potential for increasing competition for selected goods and services required by the DoD; the existence of other procurement technical assistance programs in the area; and compliance with any legislative requirement imposed on program funds.

(f) After approval of the award selections by the DCASR Commander and congressional notification provided, the cooperative agreements(s) will be executed by the DCASR Associate Director of Small Business.

6. Evaluation Criteria

(a) The evaluation factors for new starts and existing programs, with their relative importance, will be specified in the SCAP.

(b) The following evaluation factors (which may be subject to change) will

be considered as the evaluation criteria for new starts:

(1) The types of qualifications of personnel assigned or to be assigned to the program.

(2) The quality of the PTA Program in existence or being planned for:

a. Developing new clients.

b. Assisting existing clients.

c. Any program established or to be established to identify and provide extraordinary assistance to small disadvantaged business firms.

(3) The number of clients in the geographic areas being or to be serviced. This includes carrying out the DoD policy described in paragraph 2(i) above for which the socio-economic status of clients should be estimated.

(4) The amount and percentage of net program costs to be shared by DoD.

(5) The level of unemployment in the area being or to be serviced.

(c) The evaluation criteria for existing programs (which may be subject to change) will include all of the above factors, as well as the following:

(1) The eligible entity's development, peformances and effectiveness in conducting the PTA Programs, including achievements against established goals and any special achievements relative to small disadvantaged business firms.

(2) The amount of subcontracting to private consultants.

(d) As this program applies both to existing PTA Programs and to those being planned, certain of these evaluation factors will be evaluated based upon stated implementation policy for programs being planned. For example, the types and qualifications of personnel assigned will require applicants that do not presently have established but are planning programs to identify the standards to be used in selecting the personnel.

(e) The amount of subcontracting to private consultants is limited to no more than 10% of total program costs for both existing programs and new starts. In evaluating this factor for existing programs the smaller the amount of such subcontracting the greater the weight that will be given. However, in the case of new starts, equal weight will be given to all offers, subject only to the 10% limitation.

7. DoD Funding

(a) Any funds authorized for the PTA program will be allocated equitably among the nine DCASRs to cover the DoD share of the PTA program cost for existing programs and for new starts. The SCAP will identify the total amounts of funds authorized for the related fiscal year.

(b) If there is an insufficient number of satisfactory proposals in a DCASR to allow effective use of the funds allocated, the Cooperative Agreement Program Manager will reallocate the funds among the DCASRs based upon the award recommendations made by the HQs DLA evaluation panel and Cooperative Agreement Policy Council.

8. Cost Sharing Criteria and Limitations

(a) The DoD share of net program costs shall not exceed 50%, except in a case where an eligible entity meets the criteria of a distressed area. When the prerequisite conditions to quality as a distressed areas are met, the DoD share may be increased to an amount not to exceed 75%.

(b) In no event shall the DoD share of net program costs exceed $300,000 for programs providing state-wide coverage and $150,000 for all other programs.

(c) Cost contributions may be to either direct or indirect costs, provided such costs are otherwise allowable in accordance with the cost principles applicable to the award. Allowable costs which are absorbed by the eligible entity as its share of costs may not be charged directly or indirectly or may not have been charged in the past to the Federal Government under other contracts, agreements, or grants.

(d) The SCAP will require applicants to submit an annualized estimated budget, which may include cash contributions, in-kind contributions, any fees and service charges to be earned under the program, and any other Federal Agency funding (including grants, loans, and cooperative agreements) authorized to be used for this program.

(e) The type and value of any in-kind contribution will be limited to no more than 25% of the total program cost.

(f) Any fees, service changes or Federal funds provided under another Federal financial assistance award, including loans (but not including loan guarantee agreements since these do not provide for disbursement of Federal funds) are not acceptable for calculating cost contributions of the eligible entity. Although the fees, service charges and other authorized federal funds must be included in the annualized estimated budget, they cannot be included for cost sharing purposes. Inclusion of other Federal funds in the program is subject to the terms of the award instrument containing such funds or written advice beging obtained from the awarding Agency(s) authorizing such use. Any method used by the eligible entity in providing the required funds which relies upon Federal funds must be disclosed and identified in the eligible entity's proposal.

(g) In submitting its budget, and eligible entity that services, or plans to service clients exclusively in areas that qualify as distressed areas may submit a single budget and request a maximum of 75% as the DOD share of net program costs (NPC), subject to paragraphs 8(a and b) above. An entity that services or plan to service clients exclusively in non-distressed areas or in areas that include both distressed and non-distressed areas may submit a single budget and request a maximum of 50%. In those cases where the geographic area being or to be serviced includes both distressed areas and non-distressed areas, the budget may be divided based on a reasonable and logical distribution of total program costs between these two discrete areas, and submitted as a single proposal. In such case, the recipients accounting system must be capable of segregating and accumulating cost for each of the two budget areas.

(h) Recipients of cooperative agreements will be required to maintain records adequate to reflect the nature and extent of their costs and to insure that the required cost participation is achieved.

(i) The SCAP will also provide that indirect costs are not to exceed 100% of direct costs.

(j) In the event the applicant charges or plans to charge a fee or service charge for PTA given to clients, or to receive any other income as a result of operating the PTA Program, the estimated amount of such reimbursement is to be clearly identified in the proposed budget and shall be included as part of the total program costs.

(k) The Federal cost principles as stated in the OMB Circulars listed below will be used as guidelines to determine allowable costs in performance of the program:

(1) OMB Circular No. A-21, Cost Principles for Educational Institutions.

(2) OMB Circular No. A-87, Cost Principles for State and Local Governments.

(3) OMB Circular No. A-122, Cost Principles for Non-profit Organizations.

9. Administration

(a) Cooperative Agreements will be assigned to the cognizant DCASR for postaward administration.

(b) The Associate Director of Small Business at the cognizant DCASR will be responsible for reviewing recipients performance at least twice during the effective period of each cooperative

agreement, to include a review of budgeted versus actual expenditures, and other performance factors. The results of the periodic reviews will be furnished to the recipient and a copy will be provided to the HQs DLA Cooperative Agreement Program Manager no later than 30 calendar days after completion of each review.

(c) For eligible entities covered by OMB Circular No. A-102, Grants and Cooperative Agreements with State and Local Governments, or OMB Circular No. A-110, Grants and Agreements with Institutions of Higher Education, Hospitals and other Non-profit Organizations, the administrative requirements specified in those circulars will apply.

PROCUREMENT TECHNICAL ASSISTANCE COOPERATIVE AGREEMENT PROGRAM MANAGERS

(Addresses and geographic areas under the cognizance of each of the DCASRs, together with the name of the Associate Director for Small Business who is designated the Procurement Technical Assistance Cooperative Agreement Program Manager follow:)

State or area	DCASR	Associate Director
Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico.	DCASR Atlanta, 805 Walker Street, Marietta, GA 30060-2789.	Mr. Harold O. Watson, Telephone (404) 429-6195, Toll Free: 1-800-331-6415, (GA Only): 1-800-551-7801 Room Number 104.
Connecticut (except Fairfield County), Maine, New Hampshire, Massachusetts, New York (all counties except Bronx, Dutchess, Kings, New York, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester), Rhode Island, Vermont.	DCASR Boston, 495 Summer Street, Boston, MA 02210-2184.	Mr. Edward J. Fitzgerald, Telephone (617) 451-4318, Toll Free: 1-800-321-1861, Located on 8th Floor.
Illinois, Indiana, Wisconsin	DCASR Chicago O'Hare Int'l Airport, P.O. Box 66475, Chicago, IL 60666-0475.	Mr. James L. Kleckner, Telephone (312) 694-6020, Toll Free: 1-800-637-3848, (IL Only): 1-800-826-1046, Room Number 107.
Kentucky, Michigan, Ohio, Pennsylvania (Crawford, Erie, and Mercer Counties only).	DCASR Cleveland Federal Office Building, 1240 East 9th Street, Cleveland, OH 44199-2063.	Ms. Wilma R. Combs, Telephone (216) 522-5122, Toll Free 1-800-551-2785, Room Number 1849.
Arizona, Arkansas, Louisiana, New Mexico, Oklahoma, Texas.	DCASR Dallas, 1200 Main Street, Dallas, TX 75202-4399.	Mr. Kenneth E. Strack, Telephone (214) 670-9205, Room Number 640.
Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington.	DCASR Los Angeles, 222 N. Sepulveda Boulevard, El Segundo, CA 90245-4320.	Ms. Renee Deavens, Telephone (213) 335-3260; Toll Free 1-800-624-7372 (Alaska, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington); (CA Only): 1-800-251-5285; Room Number 302.
Connecticut (Fairfield County only), New Jersey (Northern 12 Counties), New York (Bronx, Dutchess, Kings, New York, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Ulster, and Westchester Counties only).	DCASR New York, 201 Varick Street, New York, NY 10014-4811.	Mr. John E. Mulreany, Telephone (212) 807-3050, Toll Free 1-800-251-6969, Room Number 1061.
Delaware, District of Columbia, Maryland, New Jersey (except for Northern 12 counties), Pennsylvania, (all counties except Crawford, Erie and Mercer), Virginia, West Virginia.	DCASR Philadelphia, 2800 South 20th St., P.O. Box 7478, Philadelphia, PA 19101-7478.	Mr. Joseph Saracino (acting), Telephone (215) 952-4006, Toll Free 800-258-9503 (New Jersey, Delaware, Maryland, Virginia, West Virginia, and District of Columbia), (PA Only) 800-843-7694, Room Number 129.
Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Utah, Wyoming.	DCASR St. Louis, 1136 Washington Ave., St. Louis, MO 63101-1194.	Mr. Thomas Moore, Telephone (314) 263-6617, Toll Free: 800-325-3419, Third Floor.

[FR Doc. 89-835 Filed 1-12-89; 8:45 am]

BILLING CODE 3620-01-M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before February 13, 1989.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Margaret B. Webster, Department of Education, 400 Maryland Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster (202) 732-3915.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: January 10, 1989.

Carlos U. Rice,

Director for Office of Information Resources Management.

Office of Postsecondary Education

Type of Review: New.
Title: Institutional Quality Control Measurement Project.
Frequency: One-time.
Affected Public: Businesses or other for-profit; Non-profit institutions; small businesses or organizations
Reporting Burden:
Responses: 42.
Burden Hours: 126.
Recordkeeping:
Recordkeepers: 0.
Burden Hours: 0.
Abstract: The Department will use this survey to examine and collect information on Federal aid programs and work-study programs from institutions, lenders, parents and students to determine whether error persists in Title IV Student Financial Aid Programs, and to conduct Management Assessment of the effectiveness of the Institutional Quality Control Pilot Project.

[FR Doc. 89-906 Filed 1-12-89; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Economic Regulatory Administration

[ERA Docket No. 88-53-NG]

American Central Gas Marketing Co.; Order Granting Blanket Authorization To Import and Export Natural Gas From and to Canada

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of order granting blanket authorization to import and to export natural gas.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice that it has issued an order granting American Central Gas Marketing Company (American Central) blanket authorization to import and export natural gas from and to Canada. The order issued in ERA Docket No. 88-53-NG authorizes American Central to import up to 73 Bcf of Canadian natural gas and to export up to 73 Bcf of U.S. natural gas over a two-year period beginning on the date of first import or export.

A copy of this order is available for inspection and copying in the Natural Gas Division Docket Room, 3F-056-C Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. 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 10, 1989.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 89-909 Filed 1-12-89 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. CP89-507, et al.]

ANR Pipeline Co., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. ANR Pipeline Company

[Docket No. CP89-507-000]

January 6, 1989.

Take notice that on December 29, 1988, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48242, filed in Docket No. CP89-507-000, a request for authorization pursuant to §§ 157.205 and 157.212 of the Federal Energy Regulatory Commission's (Commission) Regulations under the Natural Gas Act and ANR's blanket certificate issued in Docket No. CP82-480-000 pursuant to section 7 of the Natural Gas Act, for authorization to add an additional sales delivery point for an existing customer, Wisconsin Natural Gas Company (Wisconsin Natural), in Winnebago County, Wisconsin (Winchester Meter Station), all as more fully set forth in the application on file with the Commission and open to public inspection.

ANR states that sales to Wisconsin Natural are made pursuant to a Service Agreement between the parties dated December 14, 1987, and that the maximum daily deliveries through the new sales delivery point will be within Wisconsin Natural's currently existing peak day and annual entitlements from ANR. Further ANR states that Wisconsin Natural has requested the additional meter station in order to provide operational flexibility and reliability on Wisconsin Natural's distribution system.

Comment date: February 21, 1989, in accordance with Standard Paragraph G at the end of this notice.

2. Paiute Pipeline Company

[Docket No. CP87-309-006, RP88-208-002]

January 6, 1989.

Take notice that on December 16, 1988, Paiute Pipeline Company (Paiute), pursuant to Part 154 of the Commission's Regulations under the Natural Gas Act, tendered for filing First Revised Sheet No. 63 and First Revised Sheet No. 64 to be part of its FERC Gas Tariff, Original Volume No. 1, in compliance with the Commission's May 17 and July 29, 1988 orders in this proceeding.

Paiute indicates that it is submitting the proposed revised tariff sheets in an effort to resolve any remaining matters at issue and to conclude this proceeding. Paiute states that on July 1, 1988, Paiute filed in this proceeding its initial FERC Gas Tariff, consisting of Original Volume No. 1, which Paiute proposed to be effective on August 1, 1988. By order issued July 29, 1988, according to Paiute, the Commission accepted Paiute's July 1, 1988 tariff filing and suspended it to become effective August 1, 1988, subject to refund. The Commission also directed that an informal technical conference be conveyed to address the concerns of Sierra Pacific Power Company, one of Paiute's customers, over various tariff language matters.

Paiute states that the technical conference was held on September 9, 1988. Paiute asserts that, based on discussions with the active participants in this proceeding, Paiute believes that only one item remains to be dealt with in these dockets. That matter, according to Paiute, involves clarifying Paiute's purchased gas cost adjustment (PGA) provision to provide for the appropriate flow-through by Paiute of purchased gas demand and commodity charges incurred from its various suppliers, in accordance with the Commission's Regulations and policies. Paiute states that its proposed First Revised Sheet No. 63 and First Revised Sheet No. 64 reflect changes to the language of Paiute's PGA provision that are designed to clarify Paiute's intention to pass through supplier demand and commodity charges in accordance with the Commission's Regulations and related orders.

Paiute requests that its proposed tariff sheets be permitted to become effective August 1, 1988. Paiute further requests waiver of the notice requirements of § 154.22 of the Commission's Regulations and of any other applicable rules and regulations as may be necessary so as to implement the tendered tariff sheets in the manner proposed.

Comment date: January 17, 1989, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

3. National Fuel Gas Supply Corporation

[Docket No. CP89-509-000]

January 9, 1989.

Take notice that on December 29, 1988, National Fuel Gas Supply Corporation (National Fuel), 10 Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP89-509-000, an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon a firm sales service provided to Cook Forest Gas Company (Cook), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

It is stated that National Fuel currently provides Cook with sales service under National Fuel's general service Rate Schedule RQ, pursuant to an open requirements service agreement dated November 1, 1977. It is alleged that under the terms of the service agreement, National Fuel is obligated to sell and deliver, on a firm basis, and Cook is obligated to receive and pay for a minimum monthly demand of 123 dekatherm and a minimum monthly winter requirement quantity of 9,077 dekatherm.

It is asserted that Cook has tendered partial payment for one monthly invoice and has not made any payment whatsoever in connection with another 35 monthly invoices over a period beginning April of 1985. Cumulative past due amounts for gas sales made prior to National Fuel's 1987 fiscal year total $37,929.28. Cook also owes an additional $33,583.21 and $59,506.63, respectively, for gas sold and delivered to Cook by National Fuel during fiscal years 1987 and 1988. It is alleged that as of December 9, 1988, Cook's past due obligations total approximately $161,169.16.

National Fuel states that it has made numerous efforts to resolve Cook's payment deficiencies and to bring the payment account current, but to no avail. It is further stated that on August 1, 1986, Cook executed a promissory note in favor of National Fuel in the amount of $86,506.11 representing amounts then past due and agreed to a payment schedule. After Cook failed to maintain the agreed upon payment schedule, National Fuel received a judgement in Pennsylvania State Court for the amount of the promissory note, plus interest. It is claimed that such judgement has not yet been satisfied, and may never be satisfied due to the relative state of Cook's assets.

It is alleged that there appears no reasonable likelihood that Cook would render timely and complete payment to National Fuel for National Fuel's current and future sales and deliveries of gas to Cook. Under these circumstances, National Fuel proposes to permanently abandon its sales to Cook, to terminate its service obligation under the Commission's certificate authorization, and to abandon in place a related sales tap and meter.

National Fuel asserts that Cook's system appears to be physically interconnected with the system of North Penn Gas Company and with local production from several wells. Cook in its 1986 annual report to the Pennsylvania Public Utilities Commission identified 40 percent of its gas purchases from National Fuel and 60 percent as from a combination of other sources. Cook's other supply sources as identified in its 1986 annual report are: North Penn Gas Company, Halls Well Service, and Cook Oil & Gas Production. National believes that Cook's payment accounts with its other gas suppliers are current. National Fuel claims that upon the Commission's approval of the abandonment request, Cook should be able to maintain adequate service to its customers through its purchases of natural gas under current arrangements with one or more of its other suppliers.

Comment date: January 30, 1989, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

4. Texas Gas Transmission Corporation

[Docket No. CP89-499-000]

January 9, 1989.

Take notice that on December 29, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-499-000 a request pursuant to § § 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to provide an interruptible transportation service for Ladd Gas Marketing, Inc. (Ladd), under Texas Gas's blanket certificate issued in Docket No. CP88-686-000 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.

Texas Gas proposes to transport on a peak day up to 400,000 MMBtu equivalent of natural gas for Ladd, with an estimated average daily quantity of 100,000 MMBtu equivalent of natural gas. On an annual basis, it is stated that Ladd estimates a volume of 36,500,000 MMBtu equivalent of natural gas. Texas Gas states that the transportation service is being rendered through the use of Texas Gas's existing facilities, and, pursuant to a gas transportation agreement dated November 7, 1988, the location of the points of receipt and delivery are specified in Exhibits B and C, respectively, of the agreement. It is further stated that the ultimate consumers of the gas have been identified in the request as General Electric, RCA, Morton Salt, Alcan Aluminum, Owens-Illinois, Hope Gas and Mobay Corp. Texas Gas states that transportation service for Ladd commenced November 18, 1988, under the 120-day automatic provisions of § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1284.

Comment date: February 23, 1989, in accordance with Standard Paragraph G at the end of this notice.

5. Southern Natural Gas Company

[Docket No. CP89-197-001]

January 9, 1989.

Take notice that on December 21, 1988, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 25202-2563, filed in Docket No. CP89-197-001 an application pursuant to section 7(c) of the Commission's Regulations under the Natural Gas Act to amend its request filed in Docket No. CP89-197-000 on November 14, 1988, so as to authorize its contribution in aid of construction for the installation of certain compression and pipeline loop facilities that were the subject of an application filed August 15, 1988, in Docket No. CP88-683-000 by East Tennessee Natural Gas Company (East Tennessee), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

In Docket No. CP89-197-000, Southern proposes to render firm, long term transportation service of up to 30,000 Mcf per day on behalf of East Tennessee. It is indicated that East Tennessee requires 30,000 Mcf per day to meet the current need for an increase in contract demand service for certain of its customers named in East Tennessee's application for certificate filed in Docket No. CP88-683-000.

Southern proposes to provide the firm transportation service on behalf of East Tennessee so that East Tennessee can serve its customers with increased contract demand on a more economical basis.

Southern, in its application filed in Docket No. CP89-197-000, proposes to perform the firm transportation service to provide East Tennessee's customers with increased contract demand service instead of East Tennessee constructing additional facilities on its system as set forth in its application filed in Docket No. CP88-683-000 on August 15, 1988. Southern indicates that it intervened in Docket No. CP88-683-000 requesting a hearing to compare Southern's proposal to East Tennessee's proposal. It is stated in an answer to Southern's intervention that if East Tennessee accepted the firm transportation service proposed by Southern, it would still need to construct facilities on its system to deliver the increase in construct demand to its customers. Specifically, East Tennessee states that it will be required to construct up to an estimated $5,077,000 worth of facilities in order to provide the additional services specified in Docket No. CP88-683-000, which includes pipe, looping, new compression and the restaging of specified compressors.

In the amendment to the application, Southern proposes to make a contribution in aid of construction to East Tennessee in an amount that would cover the actual cost of the facilities which the Commission may authorize in East Tennessee's proceeding in Docket No. CP88-683-000. No other changes are proposed to Southern's proposal in Docket No. CP89-197-000.

Comment date: January 30, 1989, in accordance with Standard Paragraph F at the end of the notice.

6. Arkansas Oklahoma Gas Corporation

[Docket No. CP89-465-000]

January 9, 1989.

Take notice that on December 21, 1988, Arkansas Oklahoma Gas Corporation (AOG), P.O. Box 17004, Fort Smith, Arkansas 72917, filed in Docket No. CP89-465-000 an application pursuant to section 7(b) of the Natural Gas Act for authorization to abandon compression facilities, all as more fully set forth in the application on file with the Commission and open to public inspection.

AOG proposes to abandon a 525 horsepower compressor unit at the Spiro Compressor Station in LeFlore County, Oklahoma. AOG states that the unit is oversized and obsolete in view of declining reserves and wellhead pressures, and has been replaced with a 330 horsepower compressor unit. AOG proposes that the abandonment authorization be made effective October 26, 1988. AOG further states that the estimated salvage value of the compressor unit is $48,300. AOG explains that the construction cost of the replacement unit is $120,800.

Comment date: January 30, 1989, in accordance with Standard Paragraph F at the end of this notice.

7. National Fuel Gas Supply Corporation

[Docket No. CP89-467-000]

January 9, 1989.

Take notice that on December 21, 1988, National Fuel Gas Supply Corporation (National Fuel), Ten Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP89-467-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act for authorization to construct and operate seventeen sales taps, to add six delivery points, and to construct and operate a sales tap facility to enable gas delivery to Highland Land & Minerals, Inc. (Highland) under the blanket certificate issued in Docket No. CP83-4-000 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.

National Fuel proposes to construct sales tap facilities in Washington Township, Erie County; Worth Township, Mercer County; Heath Township, Jefferson County; Wayne Township, Erie County; Clarion Township, Clarion County; Glade Township, Warren County; Greenfield Township, Erie County; Hamilton Township, McKean County; and Lafayette Township, McKean County, Pennsylvania, in order to serve additional customers of National Fuel Gas Distribution Corporation (Distribution).

National Fuel also proposes the addition of delivery points with respect to Distribution in Wayne Township, Erie County; Rose Township, Jefferson County; Clarion Township, Clarion County; Keating Township, McKean County; and Eldred Township, Jefferson County, Pennsylvania and the Town of Genesee, Allegany County, New York. Additionally, National Fuel proposes to construct and operate a sales tap for gas deliveries to Highland in Highland Township, McKean County, Pennsylvania.

National Fuel states the proposed deliveries will have minimal impact on its peak and annual deliveries.

Comment date: February 23, 1989, in accordance with Standard Paragraph G at the end of this notice.

8. Texas Gas Transportation Corporation

[Docket No. CP89-501-000]

January 9, 1988.

Take notice that on December 29, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-501-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to provide an interruptible transportation service for Industrial Energy Services Company (Industrial Energy), under Texas Gas's blanket certificate issued in Docket No. CP88-686-000 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.

Texas Gas proposes to transport on a peak day up to 30,000 MMBtu equivalent of natural gas for Industrial Energy, with an estimated average daily quantity of 15,000 MMBtu equivalent of natural gas. On an annual basis, it is stated that Texas Gas could transport up to 5,475,000 MMBtu equivalent of natural gas. Texas Gas states that the transportation service is being rendered through the use of Texas Gas's existing facilities, and, pursuant to a gas transportation agreement dated October 26, 1988, the location of the points of receipt and delivery are specified in Exhibits B and C, respectively, of the agreement. It is further stated that the ultimate consumers of the gas have been identified as those parties listed on Attachment No. 4 of Texas Gas's application. Texas Gas states that transportation service for Industrial Energy commenced November 17, 1988, under the 120-day automatic provisions of § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1276.

Comment date: February 23, 1989, in accordance with Standard Paragraph G at the end of this notice.

9. Texas Gas Transmission Corporation

[Docket No. CP89-503-000]

January 9, 1989.

Take notice that on December 29, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-503-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to provide an interruptible transportation service for Bishop Pipeline Corporation (Bishop), under Texas Gas's blanket

certificate issued in Docket No. CP88-686-000 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.

Texas Gas proposes to transport on a peak day up to 15,000 MMBtu of natural gas for Bishop, with an estimated average daily quantity of 5,000 MMBtu. On an annual basis, it is stated that Texas Gas could transport up to 1,825,000 MMBtu. Texas Gas states that the transportation service is being rendered through the use of Texas Gas's existing facilities, and, pursuant to a gas transportation agreement dated October 26, 1988, the location of the points of receipt and delivery are specified in Exhibits B and C, respectively, of the agreement. It is further stated that the ultimate consumers of the gas have been identified as Reelfoot Packing and Pennwalt Corporation. Texas Gas states that transportation service for Bishop commenced November 14, 1988, under the 120-day automatic provisions of § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1279.

Comment date: February 23, 1989, in accordance with Standard Paragraph G at the end of this notice.

10. Texas Gas Transmission Corporation

[Docket No. CP89-502-000]

January 9, 1989.

Take notice that on December 29, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-502-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to provide an interruptible transportation service for Consolidated Fuel Corporation (Consolidated Fuel), under Texas Gas's blanket certificate issued in Docket No. CP88-686-000 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.

Texas Gas proposes to transport on a peak day up to 120,000 MMBtu of natural gas for Consolidated Fuel, with an estimated average daily quantity of 60,000 MMBtu. On an annual basis, it is stated that Consolidated Fuel estimates a volume of 21,900,000 MMBtu. Texas Gas states that the transportation service is being rendered through the use of Texas Gas's existing facilities, and, pursuant to a gas transportation agreement dated October 21, 1988, the location of the points of receipt and delivery are specified in Exhibits B and C, respectively, of the agreement. It is further stated that the ultimate end-users of the gas have been identified in the request as those parties listed on Attachment No. 4 of Texas Gas's application. Texas Gas states that transportation service for Consolidated Fuel commenced November 10, 1988, under the 120-day automatic provisions of § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1213.

Comment date: February 23, 1989, in accordance with Standard Paragraph G at the end of this notice.

11. Texas Gas Transmission Corporation

[Docket No. CP89-500-000]

January 9, 1989.

Take notice that on December 29, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-500-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to provide an interruptible transportation service for Centran Corporation (Centran), under Texas Gas's blanket certificate issued in Docket No. CP88-686-000 pursuant to seciton 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.

Texas Gas proposes to tranpsort on a peak day up to 30,000 MMBTU equivalent of natural gas for Centran, with an estimated average daily quantity of 8,500 MMBtu equivalent of natural gas. On an annual basis, it is stated that Centran estimates a volume of 3,650,000 MMMBtu equivalent of natural gas. Texas Gas states that the tranpsortation service is being rendered through the use of Texas Gas's existing facilities, and, pursuant to a gas transportation agreement dated September 23, 1988, the location of the points of receipt and delivery are specified in Exhibits B and C, respectively, of the agreement. It is further stated that the ultimate consumer of the gas have been identified as those parties listed on Attachment No. 4 of Texas Gas's application. Texas Gas states that transportation service for Centran commenced November 9, 1988, under the 120-day automatic provisions of § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1214.

Comment date: February 23, 1989, in accordance with Standard Paragraph G at the end of this notice.

12. Exxon Corporation

Docket No. CI89-182-000]

January 10, 1989.

Take notice that on December 16, 1988, Exxon Corporation (Exxon) of P.O. Box 2180, Room 208, Houston, Texas 77252-2180, filed an application pursuant to section 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for an unlimited-term, blanket certificate with pregranted abandonment authorization to authorize sales of uncommitted gas, all as more fully set forth in the application whcih is on file with the Commission and open to public inspection. Exxon also requests that such certificate cover gas which has been permanently abandoned or has been released from a gas sales contract and which has not otherwise been abandoned udner Order Nos. 490 and 490-A.

Comment date: January 24, 1989, in accordance with Standard Paragraph J at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commisison on its own review of the matter finds that a grant of necessity. If a motion for leave to intervene is timely

filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

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.

J. Any person desiring to be heard or make any protest with reference to said filings should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426 a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 peson 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 the applicant to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 89-839 Filed 1-12-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD89-02898T]

Designation of Tight Formation; Hidalgo County, TX, Texas-44; Tight Formation Determination

December 23, 1988.

Take notice that on December 12, 1988, the Railroad Commission of Texas (Texas) submitted to the Commission its determination that the McAllen Ranch (Guerra, E.) Field located in Hidalgo County, Texas, qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978. The application includes the Railroad Commission's order issued November 21, 1988, finding that the formation meets the requirements of the Commission's regulations set forth in 18 CFR Part 271.

Any person desiring to be heard or to protest Texas' determination should file comments 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, 385.214 (1988)). All such comments should be filed within 20 days after publication of this notice in the **Federal Register.** 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.

Lois D. Cashell,

Secretary.

[FR Doc. 89-838 Filed 1-12-89; 8:45 am]

BILLING CODE 6717-01-M

New England Power Pool; Public Meeting

January 10, 1989.

Representatives of the New England Power Pool and the Mid-American Power Pool will meet with FERC Commissioners at 9:00 a.m., on Friday, January 27, 1989, to discuss the operations of these two systems.

The meeting will take place at the Commission's offices at 825 North Capitol Street, Washington, DC in a room to be posted the day of the meeting.

Lois D. Cashell,

Secretary.

[FR Doc. 89-837 Filed 1-12-89; 8:45 am]

BILLING CODE 6717-01-M

Southern Co. Services, Inc.; Initiation of Proceeding and Refund Effective Date

January 9, 1989.

Take notice that on January 6, 1989, the Commission issued an order in this proceeding initiating a proceeding under section 206 of the Federal Power Act, as amended by the Regulatory Fairness Act of 1988.

Refund effective date: March 14, 1989.

Lois D. Cashell,

Secretary.

[FR Doc. 89-836 Filed 1-12-89; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[AD-FRL-3505-6]

Assessment of Sodium Hydroxide As a Potentially Toxic Air Pollutant

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of sodium hydroxide assessment results and solicitation of information.

SUMMARY: This notice announces the results of EPA's assessment of sodium hydroxide under the Clean Air Act (CAA). The EPA initiated this assessment based on the production volume of sodium hydroxide and the potential for adverse health effects associated with exposure to sodium hydroxide. The results of EPA's preliminary analysis indicate that currently available data are insufficient to establish that emissions of sodium hydroxide to the ambient air pose a significant threat to public health. Based on this information, the EPA has determined that regulation of sodium hydroxide under the CAA is not warranted at this time.

Given the limited opportunity for prior public review of the health and exposure information incorporated in this notice, the Agency is soliciting comment on its determination. This finding has no effect on the regulation of sodium hydroxide to attain the national ambient air quality standards for particulate matter. In addition, this notice does not preclude any State or local air pollution control agency from specifically regulating emission sources of sodium hydroxide.

DATE: Written comments pertaining to this notice must be received on or before April 13, 1989.

ADDRESSES: Submit comments (duplicate copies are preferred) to: Central Docket Section (A-130), U.S. Environmental Protection Agency, Attn: Docket No. A-88-20, 401 M Street SW., Washington, DC 20460. Docket No. A-88-20, which contains information relevant to this notice, is located in the Central Docket Section of the EPA, South Conference Center, Room 4, 401 M Street SW., Washington, DC 20460. The Docket may be inspected between 8:00 a.m. and 3:30 p.m. on weekdays, and a reasonable fee may be charged for copying.

Availability of Related Information

Information on the availability of the health assessment summary document for sodium hydroxide, "Summary

Review of Health Effects Associated with Sodium Hydroxide: Health Issue Assessment" (EPA 600/8-88-081), can be obtained from ORD Publications, CERI-FR, U.S. Environmental Protection Agency, Cincinnati, Ohio 45268 (Telephone: (513) 569-7562 commercial/684-7562 FTS). The document is available through the U.S. Department of Commerce, National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. The Sodium Hydroxide Preliminary Source Assessment (EPA-450/3-88-002) is also available from NTIS. The NTIS accession number is PB88-174545. The above document and other information on the sources, emissions, and atmospheric degradation are summarized in several reports which are found in the docket.

FOR FURTHER INFORMATION CONTACT: Robert Schell, Pollutant Assessment Branch (MD-13), Emission Standards Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (Telephone: (919) 541-5519 commercial/629-5519 FTS).

SUPPLEMENTARY INFORMATION: The EPA initiated an assessment of sodium hydroxide based on the large production volume and the potential for adverse health effects associated with exposure to sodium hydroxide in the ambient air. In the course of this assessment, the Agency collected the available relevant information and today's notice provides a summary of this information on the following topics: chemical characterization, production and uses, sources and emissions, atmospheric degradation, health effects, monitored ambient air concentrations, exposure estimation, risk characterization, and existing regulations and guidelines.

Chemical Characterization

Sodium hydroxide (CAS No. 131-07-32) is a white deliquescent, crystalline solid at room temperature (U.S. EPA, 1988a). Sodium hydroxide is very soluble in water and is often used in 45 to 75 percent in acqueous solutions (U.S. EPA, 1987a). Sodium hydroxide has a melting point of 318 degrees centigrade and a boiling point of 1390 degrees centigrade (U.S. EPA, 1988a).

Production and Uses

Sodium hydroxide is produced in large quantities in the United States. There are more than 40 production facilities which in 1985 produced approximately 11 million short tons of sodium hydroxide. Most sodium hydroxide is produced as a 50 percent solution in water. Sodium hydroxide is produced by the electrolysis of sodium chloride via the diaphragm, mercury, or membrane cell process (U.S. EPA 1988a).

Sodium hydroxide is one of the most widely used chemicals in the United States. In 1982, the total United States' consumption of sodium hydroxide was slightly greater than 8 million metric tons which was 20 percent below the record consumption of 10.1 million metric tons in 1979. The largest market for sodium hydroxide is in the chemical industry (48 percent of total demand) where it is used in the production of alumina from bauxite, and also used for pH control and in the neutralization of waste acids. The next largest market is the pulp and paper industry with 26 percent of total demand (U.S. EPA, 1988a).

Sources and Emissions

Routine emissions of sodium hydroxide into the environment occur via aerosol emissions, aqueous waste streams and consumer uses. There are numerous industries which emit sodium hydroxide. The major industries that emit sodium hydroxide to the atmosphere are the kraft pulp industry, the brewing industry, auto carburetor manufacturing, plating, industrial organic chemical manufacturing, soap manufacturing and metal partitions. The largest source of sodium hydroxide emissions to the atmosphere is the kraft pulp industry. For a more complete discussion of the industrial process which emit sodium hydroxide to the atmosphere the reader is referred to the sodium hydroxide preliminary source assessment (U.S. EPA, 1988a).

Atmospheric Degradation

Sodium hydroxide is very short lived in the atmosphere. Sodium hydroxide released to the atmosphere as an aerosol in solution with water will be neutralized as a result of its reaction with carbon dioxide.

The principal reaction products are sodium carbonate and water. The atmospheric half life of sodium hydroxide has been estimated at 13 seconds (U.S. EPA, 1988c). In the short-term modeling analysis described below, this rate of degradation results in only 0.4 percent of the sodium hydroxide released remaining at a point 200 meters from the site of release. For a more complete discussion of analysis of the atmospheric fate of sodium hydroxide the reader is referred to the public docket for this action, specifically the entry entitled "Estimation of the Half-Life of Sodium Hydroxide Aerosol in the Atmosphere" (U.S. EPA, 1988c).

Health Effects

The Agency has prepared a document entitled "Summary Review of the Health Effects Associated with Sodium Hydroxide: Health Issue Assessment" (U.S. EPA, 1987a). This document discusses the relevant data available for assessing the health effects associated with exposure to sodium hydroxide in the ambient air. This information is summarized briefly below.

Carcinogenicity and Mutagenicity

No *in vivo* animal studies of sodium hydroxide carcinogenicity were found in the literature (U.S. EPA, 1988b). There are some data, however, which suggest that the incidence of carcinoma of the esophagus is greatly increased following accidental or intentional ingestion of sodium hydroxide (lye) in humans (Lansing et al., 1969; Kiviranta, 1952). The National Institute for Occupational Safety and Health (NIOSH), however, points out that these carcinomas were the result of tissue destruction and possibly scar formation and were not caused by the direct carcinogenic potential of sodium hydroxide itself. In an epidemiological study of workers chronically exposed to sodium hydroxide dust, no relationship between malignancies or mortality was observed (Ott et al., 1977).

Sodium hydroxide has not been adequately tested for mutagenic potential. Two bacterial assays have suggested sodium hydroxide is not mutagenic. However, an *in vitro* deoxyribonucleic acid (DNA) synthesis study and an *in vivo* study of insect spermatocytes suggested sodium hydroxide may be mutagenic. Based on EPA's "Guidelines for Carcinogenic Risk Assessment" (51 FR 33992), sodium hydroxide has been classified in the weight of evidence category "D," meaning it is not classifiable as to human carcinogenicity.

Developmental and Reproductive Toxicity

Only one study exists on the developmental toxicity of sodium hydroxide. This study (Dostal, 1973) indicated increased mortality in the fetuses of mice when the dams were treated intraamniotically with a weak sodium hydroxide solution. Although this study suggests an embryotoxic effect, it is difficult to envision such an exposure resulting from sodium hydroxide in the ambient air.

Other Toxic Effects

The adverse health effects associated with exposure to sodium hydroxide result from its extreme alkalinity. In

evaluating the toxicity of sodium hydroxide, therefore, it is important to consider the pH of the solution to which individuals may be exposed. Furthermore, because sodium hydroxide is a solid or liquid at room temperature, the size of the particles to which individuals may be exposed is important for evaluating toxicity resulting from inhalation exposure. Larger particles tend to settle out faster and thus have a greater effect on the upper respiratory tract, whereas smaller particles tend to affect the lower regions.

Contact with sodium hydroxide in either solid, liquid or aerosol form has resulted in severe eye injuries, damage to the skin and injury of the mucous membranes (U.S. EPA, 1988b). Most of the case histories of injuries resulting from exposure to sodium hydroxide involve the liquid or solid form. There are very few cases of health effects resulting from airborne exposure documented in the literature (NIOSH, 1975). Sax (1984) reports that inhalation of sodium hydroxide dust or concentrated mist can cause damage to the upper respiratory tract and to lung tissue, depending on the extent of the exposure. The effects associated with inhalation exposure to sodium hydroxide may thus range from mild irritation to severe pneumonitis. In a study (Lewis, 1974) of the effects of aerosol oven cleaners containing sodium hydroxide, respiratory irritation was perceived in healthy human volunteers at concentrations of 0.24 to 1.8 mg/m^3. Unfortunately, this study did not take into account other potentially irritating ingredients of the aerosol.

Acute exposures of animals have produced similar results to those of humans. Frank damage of the respiratory system was observed in rats following exposures to aerosols generated from a 20 percent sodium hydroxide solution. The sodium hydroxide concentration in the exposure chambers was not given.

The only data regarding effects associated with chronic exposures come from an epidemiological study (Ott et al., 1977) of workers chronically exposed to sodium hydroxide dust ranging from 0.5 to 2.0 mg/m^3. This study reported no statistically significant increased mortality in the exposed group.

Monitored Ambient Concentrations

No data on monitored ambient levels of sodium hydroxide could be found in the available literature.

Exposure Estimation

The exposure assessment for sodium hydroxide relied upon dispersion modeling to estimate ambient concentrations near emission sources. However, given the extremely short atmospheric half-life of sodium hydroxide in the atmosphere, estimation of long-term ambient concentrations are not applicable. Consequently, the focus of this assessment was on short-term exposures.

In order to assess the potential for adverse noncancer health effects from short-term exposure to sodium hydroxide, a conservative screening modeling analysis was performed (U.S. EPA, 1985). The model employs a point source Gaussian air dispersion model and applies several reasonable worst-case assumptions for source location, emissions, meteorology and terrain. Although the short-term screening model is designed to produce conservative estimates of ambient concentrations, the emission rates used in this analysis are derived from estimates of annual releases and may not be representative of short-term release rates. For this assessment, the largest emitting sources were selected and the maximum levels of sodium hydroxide that could occur near each plant were calculated. These results reflect the extremely rapid atmospheric degradation of sodium hydroxide. The maximum concentrations were estimated to be 0.02 and 0.01 mg/m^3 for average times of 15 minutes and 24 hours respectively (U.S. EPA, 1988c).

Risk Characterization

Due to the paucity of data regarding health effects resulting from inhalation exposure to sodium hydroxide, it is difficult to derive a concentration level below which no significant health effects would be expected in the general population. For acute exposures, data from the study of oven cleaner aerosols containing sodium hydroxide would suggest that respiratory irritation could be perceived at levels as low as 0.24 to 1.8 mg/m^3. This study, however, is flawed due to the other potentially irritating ingredients of the aerosol. The occupational exposure ceiling level developed by the American Council of Governmental Industrial Hygienists (ACGIH) is 2.0 mg/m^3. A ceiling level is a level not to be exceeded at any time in work place air. The ACGIH documentation (ACGIH, 1986) referencing Patty (1949) states that 2 mg/m^3 sodium hydroxide in air "represents a concentration that is noticeably, but not excessively irritant." The NIOSH also cite Patty (1949) and recommend a 2 mg/m^3 limit as a 15 minute ceiling. In addition, the Occupational Safety and Health Administration (OSHA) has adopted an exposure level of 2 mg/m^3 as an 8 hour time weighted average.

Although sodium hydroxide is produced in great quantities in the United States, exposure to high concentrations in the ambient air is unlikely due to its rapid atmospheric degradation (the atmospheric half life is 13 seconds). The maximum modeled ambient sodium hydroxide concentration is 0.02 mg/m^3 (15 minute averaging period).

Given the paucity of data regarding systemic or acute health effects and the low potential for exposure to high concentrations of sodium hydroxide (due to its rapid atmospheric degradation), it is unlikely that routine emissions of sodium hydroxide pose a public health risk.

Existing Regulations and Guidelines

The NIOSH, OSHA, and ACGIH recommended ceiling level of 2 mg/m^3 is discussed above. Six other nations have also recommended workplace standards, for airborne sodium hydroxide (NIOSH 1975). All of these standards are equal to or near the NIOSH and ACGIH recommended level.

Sodium hydroxide has been removed (53 FR 49688) from the list of compounds subject to the reporting requirements of the Toxic Chemical Release Reporting, Community Right-to-Know rule (53 FR 4500), under section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986. Section 313 requires that owners and operators of certain facilities that manufacture, import, process, or otherwise use certain toxic chemicals report annually their releases of those chemicals to each environmental medium. In addition, certain suppliers of toxic chemicals must notify recipients of such chemicals in mixtures and trade name products.

Conclusions

The Agency concludes that the currently available data are insufficient to indicate health concerns that warrant specific Federal regulation of routine sodium hydroxide emissions under the CAA at this time. A number of uncertainties, however, are associated with this conclusion. With regard to the health assessment, the health data are inadequate to judge sodium hydroxide's carcinogenic potential in humans. Furthermore, there are virtually no dose-response data for noncancer health effects in humans, and the available inhalation data from animals are minimal. Regarding the exposure assessment, EPA's techniques for estimating short-term concentrations resulting from routine emissions are

based on screening models rather than on extensive site-specific modeling. The concentrations estimated from the short-term modeling exercise do not account for emissions resulting from intermittent or batch operations, thus providing a potential for underestimation of short-term concentrations. The rapid atmospheric half life of sodium hydroxide, however, has been incorporated into the exposure assessment. Ambient monitoring data for sodium hydroxide were unavailable, in part due to its rapid atmospheric degradation and the confounding effect of other sodium compounds in the atmosphere.

Although EPA considers today's action appropriate in view of the current health and exposure information, the Agency will continue to evaluate new data as they become available.

Furthermore, emissions of sodium hydroxide to the ambient air will also be evaluated in the context of multiple pollutant emissions from categories of related emission sources (source categories).

The EPA invites comments and submission of information pertinent to the determination made today. A further notice will be published if public comments or other additional information suggest a need to reevaluate today's findings and revise EPA's conclusions.

Date: January 6, 1989.

Don R. Clay,

Acting Assistant Administrator for Air and Radiation.

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U. S. EPA (Environmental Protection Agency) (1988e). Sodium Hydroxide; Toxic Chemcial Release Reporting; Community Right to Know. **Federal Register** 53:49688-49690.

[FR Doc. 89-856 Filed 1-12-89; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3505-5]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared December 26, 1988, through December 30, 1988, 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-L65106-WA, Rating EC2, Olympic National Forest, Land and Resource Management Plan, Additional Information Concerning Management Requirements in the Current Direction Alternatives and all Forest Plan Alternatives, Implementation, Clallam, Grays Harbor, Jefferson and Madison Counties, WA.

Summary: EPA feels this document evaluates Alternatives NC (No Charge), which is essentially a continuation of timber resource plans previously developed. Alternative NC does not incorporate all the provisions of the National Forest Management Act of 1976 and would not include the specific standards and guidelines for water quality protection. As such, EPA could not support the implementation of this alternative. EPA understands that the purpose of this document was not to address public comments on the draft EIS. Since EPA's comments on the draft EIS remain outstanding, the rating on the draft EIS and the supplemental draft EIS are the same.

ERP No.: DR-BLM-J61052-WY, Rating LO, Rock Springs District Wilderness Study Areas (WSAs), Wilderness Recommendations, Designation or Nondesignation, Fremont, Lincoln, Sublette and Sweetwater Counties, WY.

Summary: EPA's request for clarification of pre-FLPMA oil and gas leaks affecting the Wilderness Study Areas (WSAs), which was missing from the previous draft EIS was addressed in this document. However, additional water quality information related potential salinity increases from proposed graying and recreation management practices on two of the WSA's is requested in the final EIS.

ERP No.: D-IBR-J31021-WY, Rating LO, Westside Irrigation Project, Water Resource Development and Land Transfer of Public Land, Implementation, Big Horn and Washakie Counties, WY.

Summary: EPA has no objections to the proposed project, and does not anticipate any significant adverse impacts. Although, EPA requests additional selenium concentration information and recommended

expansion of the proposed trace element monitoring program.

Final EISs

ERP No.: F-FRC-D05122-00, Upper Ohio River Basin Hydroelectric Development, Construction, Operation and Maintenance, Licenses, Belmont, Gallia, Jefferson, Mohoning and Washington Cos., OH; Hancock Co., WV and Butler, Beaver, Allegheny, Armstrong, Fayette, Washington and Westmoreland Cos., PA.

Summary: EPA does not believe that the final EIS thoroughly addresses our comments to the draft EIS or presents a conclusive analysis of the potential impacts of the project. EPA has several objections pertaining to alternatives and alternative analyses, wetland and riparian area descriptions, water quality, impacts to fisheries resources, economic analysis, and cumulative impacts. EPA strongly recommends that FERC undertake a supplemental draft EIS to address these issues and produce a secondary set of environmental documents specific to each of the proposed projects. EPA also suggests the formation of a technical advisory committee to formulate a planned approach for supplemental draft EIS/tiering process.

Regulations

ERP No.: R-FHW-A42428-00, 23 CFR Part 770 and 49 CFR Part 623; Air Quality Procedures for use in Federal Aid Highway and Federally Funded Transit Programs (FHWA Docket No. 88-13) (53 FR 35178).

Summary: As currently proposed, EPA believes that this regulation would have environmentally unacceptable results. This regulation would allow FHWA/UMTA to put into place procedures that EPA believes are not consistent with section 176(a) and 176(c) of the Clean Air Act and thereby allow transportation projects that may have significant air quality impacts to proceed. EPA requested that the rulemaking be delayed until the issues are resolved.

Dated: January 10, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

FR Doc. 89-877 Filed 1-12-89; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3504-4]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5076 or (202) 382-5075. Availability of Environmental Impact Statements Filed January 2, 1989 Through Janaury 6, 1989 Pursuant to 40 CFR 1506.9.

EIS No. 890000, LDraft, AFS, AR, Ozark National Forest Wild and Scenic River Study for Thirteen Rivers, Designation or Nondesignation into the National Wild and Scenic River System, Baxter, Newton, Franklin, Pope, Johnson, Searcy and Stone, AR, Due: April 14, 1989, Contact: Don Hurlbut (501) 968-2354.

EIS No. 89001, Final, AFS, AZ, Mount Graham Astrophysical Area Development, Approval and Management, Pinaleno Mountains, Coronado National Forest, Graham County, AZ, Due: February 13, 1989, Contact: R. B. Tippeconnic (602) 629-6483.

EIS No. 890002, Final, CDB, MI, Ambassador Bridge Border Station Expansion and Hubbard-Richard Housing Project Development, Urban Development Action and Community Development Block Grants, Wayne County, MI, Due: February 13, 1989, Contract: Rober Davenport (313) 224-0343.

EIS No. 890003, Final, AFS, WA, Colville National Forest, Land and Resource Management Plan, Implementation, Perry, Pend Oreille and Stevens Counties, WA, Due: February 13, 1989, Contact: Warren Current (509) 684-3711.

Amended Notices

EIS No. 880397, Final, COE, CA, Marathon Industrial/Commercial Business Park Development, Section 10 and 404 Permits, City of Hayward, Alameda County, CA, Due: February 23, 1989, Contact: Scott Miner (415) 974-0446.

Published FR 12-9-88—Review period extended.

EIS No. 880404, Draft, CDB, NY, Steeplechase Amusement Park Development, Construction and Operation, UDAG, Brooklyn, Kings County, NY, Due: January 31, 1989, Contact: Garrett Thelander (212) 619-5000.

Published FR 12-16-88—Review period extended.

Dated: January 10, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 89-878 Filed 1-12-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Senior Performance Review Board Members

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Listing names of the members of the Senior Executive Service Performance Review Board.

DATE: December 1, 1988.

FOR FURTHER INFORMATION CONTACT: Denise R. Yachnik, Programs Division, Office of Personnel and Equal Opportunity, 500 C Street, SW., Washington, DC 20742, 202-646-3040.

The names of the members of the FEMA Senior Executive Service Performance Review Board established pursuant to 5 U.S.C. 4341(c) are:

Members: William C. Tidball, Richard W. Krimm, Homer V. Hervey, George H. Orrell, John W. McKay, Laura A. Buchbinder, Katherine H. Shannon

George W. Watson,

Acting General Counsel.

[FR Doc. 89-846 Filed 1-12-89; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL HOME LOAN BANK BOARD

Charter Savings and Loan Association, Corpus Christi, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in Section 406(c)(1)(B)(i)(I) of the National Housing Act, as amended, 12 U.S.C. 1729(c)(1)(B)(i)(I) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Charter Savings and Loan Association, Corpus Christi, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-912 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

First Federal Savings and Loan Association, Luling, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(6)(A) of the Home Owners; Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for First

Federal Savings and Loan Association, Luling, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-913 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

Independence Savings and Loan Association, Gonzales, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 406(c)(1)(B)(i)(I) of the National Housing Act, as amended, 12 U.S.C. 1729(c)(1)(B)(i)(I) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Independence Savings and Loan Association, Gonzales, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-914 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

Keystone Savings and Loan Association, Lampasas, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 406(c)(1)(B)(i)(I) of the National Housing Act, as amended, 12 U.S.C. 1729(c)(1)(B)(i)(I) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Keystone Savings and Loan Association, Lampasas, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-915 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

Appointment of Receiver; Bloomfield Savings and Loan Association, F.A.

Notice is hereby given that, pursuant to the authority contained in section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, a amended, 12 U.S.C. 1464(d)(6)(A) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Bloomfield Savings and Loan Association, F.A., Birmingham, Michigan December 15, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-880 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

Sequin Savings Association, Sequin, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 406(c)(1)(B)(i)(I) of the National Housing Act, as amended, 12 U.S.C. 1729(c)(1)(B)(i)(I) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Sequin Savings Association, Sequin, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-916 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

Union Savings Association, San Antonio, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 406(c)(1)(B)(i)(I) of the National Housing Act, as amended, 12 U.S.C. 1729(c)(1)(B)(i)(I) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Union Savings Association, San Antonio, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-917 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

United Savings Bank of Wyoming, Cheyenne, WY; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for United Savings Bank of Wyoming, F.S.B., Cheyenne, Wyoming on December 15, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-918 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

Yoakum Federal Savings and Loan Association, Yoakum, TX; Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Yoakum Federal Savings and Loan Association, Yoakum, Texas, on December 29, 1988.

Dated: January 10, 1989.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Assistant Secretary.

[FR Doc. 89-919 Filed 1-12-89; 8:45 am]

BILLING CODE 6720-01-M

FEDERAL RESERVE SYSTEM

Barnett Banks, Inc.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23 (a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23 (a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound

banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 3, 1989.

A. Federal Reserve Bank of Atlanta (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. Barnett Banks, Inc., Jacksonville, Florida, and Barnett Brokerage Service, Inc., West Palm Beach, Florida; to acquire Barnett Bond Service, Inc., Jacksonville, Florida, and thereby engage in acting as agent for its customers in buying and selling units in unit investment trusts and shares in mutual funds solely at the request of and for the account of its customers pursuant to § 225.25(b)(15) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, January 9, 1989.

Barbara R. Lowrey,

Associate Secretary of the Board.

[FR Doc. 89-817 Filed 1-12-89; 8:45 am]

BILLING CODE 6210-01-M

CitNat Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than February 3, 1989.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. CitNat Bancorp, Inc., Urbana, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of The Citizens National Bank of Urbana, Urbana, Ohio.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Illini Community Bancorp, Inc., Springfield, Illinois; to acquire 86.32 percent of the voting shares of First Security Bank of Mackinaw, Mackinaw, Illinois.

C. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Reliable Community Bancshares, Inc., Perryville, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Perryville, Perryville, Missouri.

D. Federal Reserve Bank of Kansas City (Thomas M. Hoenig, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Colwich Financial Corporation, Colwich, Kansas; to become a bank holding company by acquiring 86.1 percent of the voting shares of State Bank of Colwich, Colwich, Kansas.

2. First National Bancshares of Winfield, Inc., Winfield, Kansas; to acquire 100 percent of the voting shares of Butler County Financial Corp., Inc., Douglass, Kansas, and thereby indirectly acquire Exchange State Bank, Douglass, Kansas.

E. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. Golden Gate Bancor, San Francisco, California; to become a bank holding company by acquiring 99.82 percent of the voting shares of Golden Gate Bank, San Francisco, California.

Board of Governors of the Federal Reserve System, January 9, 1989.

Barbara R. Lowrey,

Associate Secretary of the Board.

[FR Doc. 89-818 Filed 1-12-89; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies; Sam K. Kendrick Testamentary Trust

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 3, 1989.

A. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. Sam K. Kendrick Testamentary Trust, Dallas, Texas, to acquire 50 percent of the voting shares of Pedernales Investment Corporation, Johnson City, Texas, and thereby indirectly acquire Johnson City Bank, Johnson City, Texas.

Board of Governors of the Federal Reserve System, January 9, 1989.

Barbara R. Lowrey,

Associate Secretary of the Board.

[FR Doc. 89-819 Filed 1-12-89; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL TRADE COMMISSION

Disclosure Requirements And Prohibitions Concerning Franchising And Business Opportunity Ventures

AGENCY: Federal Trade Commission.

ACTION: Grant of petition for exemption.

SUMMARY: On February 1, 1988 (53 FR 2784), the Commission published a request for public comment on a petition for exemption from the requirements of its trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" that had been filed by the Saturn Corporation. The Commission now grants the petition and determines that the provisions of 16 CFR Part 436 shall not apply to the advertising, offering,

licensing, contracting, sale or other promotion of motor vehicle dealerships by the Saturn Corporation.

EFFECTIVE DATE: January 13, 1989.

FOR FURTHER INFORMATION CONTACT: Craig Tregillus, Attorney, PC-H-238, Federal Trade Commission, Washington, DC 20580 (202) 326-2970.

SUPPLEMENTARY INFORMATION: Before The Federal Trade Commission.

Order Granting Exemption

In the Matter of a Petition for Exemption from the Trade Regulation Rule Entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" filed by the Saturn Corporation.

On February 1, 1988, the Commission published a notice in the **Federal Register** soliciting comments on a petition filed by the Saturn Corporation, a General Motors Corporation subsidiary, that will be engaged in distribution of the new "Saturn" line of motor vehicles. The petition sought an exemption, pursuant to section 18(g) of the Federal Trade Commission Act, from coverage under the Commission's Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures."

In accordance with section 18(g), the Commission conducted an exemption proceeding under section 553 of the Administrative Procedures Act, 5 U.S.C. 553, and invited public comment during a 60-day period ending April 1, 1988. After reviewing the petition and the two comments received, the Commission has concluded that the Petitioner's request should be granted.

The statutory standard for exemption requires the Commission to determine whether application of the Trade Regulation Rule to the person or class of persons seeking exemption is "necessary to prevent the unfair or deceptive act or practice to which the rule relates." If not, an exemption is warranted.

The abuses that the disclosure remedy of the Franchise Rule is designed to prevent are most likely to occur, as the Statement of Basis and Purpose of the Rule notes, in sales where three factors are present:

(1) A potential investor with a relative lack of business experience and sophistication;

(2) Inadequate time for the investor to review and comprehend the unique and often complex terms of the franchise agreement before making a major financial commitment; and

(3) A significant information imbalance in which the franchisee is unable to obtain essential and relevant facts about the investment known to the franchisor.

The pre-sale disclosures required by the Franchise Rule are designed to negate the effect of any deceptive acts or practices where these conditions are present. The Rule provides investors with the material information they need to make an informed investment decision in circumstances where they might otherwise lack the resources, knowledge or ability to obtain it, and thus to protect themselves from any deception.

Where the conditions that create a potential for deception in the sale of franchises are not present, however, a regulatory remedy designed to prevent deception is hardly necessary. Our review of the record in this proceeding persuades us that an exemption is warranted for that reason. The Petitioner has convincingly shown that the conditions that create a potential for abuse in the sale of franchises are absent, and that there is no likelihood of unfair or deceptive acts or practices in the sale of its automobile dealer franchises for that reason.

The petition and public comment demonstrate that potential Saturn dealers will be a select group of highly sophisticated and experienced businessmen and women; that they will be making very significant investments; and that they will have more than adequate time to consider the dealership offer and obtain information about it before investing. We note in particular that just 300 dealers are to be selected from over 2000 applicants; that only applications from established automobile dealers have been and will be considered; that total investments will range from almost $2 million to more than $13 million; and that applicants will participate in a six-month selection process that contemplates extensive information gathering and exchange by the parties.

As a practical matter, investments of this size and scope typically involve knowledgeable investors, the use of independent business advisors, and an extended period of negotiation that generates the exchange of information necessary to ensure that investment decisions are the product of an informed assessment of the potential risks and benefits. The Commission has reviewed the potential for unfair or deceptive acts or practices in connection with the sale of motor vehicle franchises on three prior occasions since 1980, and found no evidence or likelihood of significant abuse by any of the Petitioners. If any such evidence exists, it has not yet been brought to the Commission's attention in this or any of the prior proceedings.

Thus, both the record in this proceeding and all prior experience to date with other Franchise Rule exemptions for automobile dealerships support the conclusion that Petitioner's proposed sales will accomplish what the Rule was intended to ensure. The conditions most likely to lead to abuses will not be present in Petitioner's sales of motor vehicle dealerships, and the sales process will generate sufficient information to ensure that applicants will be able to make an informed investment decision. For these reasons, the Commission finds that the application of the Franchise Rule to Petitioner's sale of motor vehicle dealer franchises is not necessary to prevent the unfair or deceptive acts or practices to which the Rule relates.

The record does not provide an adequate basis for exemption of all motor vehicle manufacturers, distributors and dealerships as a class. The Commission will continue to review exemption petitions on a case-by-case basis in light of the statutory standard for exemption pursuant to section 18(g) of the Federal Trade Commission Act.

Accordingly, the Commission has determined that the provisions of 16 CFR Part 436 shall not apply to the advertising, offering, licensing, contracting, sale or other promotion of motor vehicle dealerships by the Saturn Corporation.

The Commission hereby rescinds, as moot, the temporary stay of Franchise Rule compliance previously granted to Petitioner (53 FR 2784) pending a final decision on the exemption request.

It is so ordered.

By the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 89-834 Filed 1-12-89; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Managment and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those

packages submitted to OMB since the last list was published on January 6, 1989.

Public Health Service

(Call Reports Clearance Officer on 202-245-2100 for copies of packages.)

1. Community Health Representative Activity Reporting Sample—NEW—The proposed information collection will obtain Indian Health Service (IHS) Community Health Representative program data on: Service category, health area, setting, patient's age and sex, referred from, referred to, and minutes providing service or in travel. This information will be collected during one week per month, reported to IHS quarterly and used for program planning, allocation of resources, management and evaluation purposes. Respondents: State or Local Governments (Tribal); Number of Respondents: 1,411; Number of Responses Per Respondent: 4; Average Burden Per Response: 1.5; Estimated Annual Burden: 8,466.

2. 1987 National Medical Expenditure Survey (Revision-Health Insurance Plans Survey)—0937-0187—This is a revision for contacting employers as a part of the National Medical Expenditure Survey (NMES) Health Insurance Plan Survey so that characteristics of all employers are included in the sample allowing national estimates to evaluate current and proposed health policy decisions; Respondents: Individuals or households, Businesses or organizations; Number of Respondents: 30,290; Number of Responses Per Respondent: 1; Average Burden Per Response: .5808; Estimated Annual Burden: 17,593.

OMB Desk Officer: Jim Scanlon.

Social Security Administration

(Call Reports Clearance Officer on 301-965-4149 for copies of package.)

1. Farm Self-Employment Questionnaire—0960-0061—The information will be used to determine the existence of an agricultural trade or business and subsequent covered earnings for Social Security entitlement purposes. Respondents: Individuals or households, farms; Number of Respondents: 50,000; Frequency of Response: 1; Estimated Annual Burden: 8,333.

2. Processed Workloads—NEW—The information is used to prepare annual, national and disability determination services' budget requests and resource needs projections for 2 future years. Respondents: The respondents are the 54 State agency disability determination services; Number of Respondents: 54; Annual Frequency: 1; Average Burden Per Response: 1 hour; Estimated Annual Burden: 54.

3. Personnel Costs—NEW—The information is used to prepare annual national disability determination services' budget requests and resource needs projects for 2 future years. Respondents: The respondents are the 54 State agency disability determination services; Number of Respondents 54; Annual Frequency: 1; Average Burden Per Response: 1 hour; Estimated Annual Burden: 54.

OMB Desk Officer: Ron Compston.

Office of the Secretary

(Call Reports Clearance Officer on 202-245-0141 for copies of package.)

Governmentwide Requirements for Drug-Free Workplace (Grants)—NEW—This information collection presents the governmentwide standard requirements for public comments. HHS has asked for expedited OMB approval by January 30, 1989, due to the statutory deadline for implementing the Drug-Free Workplace Act and the fact that the entire information collection being requested follows statutory language without elaboration. The Act requires grantees of Federal agencies to certify, as a condition of the grant, that they will provide drug-free workplaces. The Act also requires employees to notify employers of drug offense convictions and employers/grantees to notify Federal agencies of such convictions. Respondents: Individuals or Households; Businesses; State or Local Governments; Non-profit institutions.

OMB Desk Officer: Cynthia Bauer.

As mentioned above, copies of the information collection clearance packages can be obtained by calling the Reports Clearance Officer, on one of the following numbers:

PHS: (202) 245-2100
HCFA: (301) 966-2088
FSA: (202) 252-5605
SSA: (301) 965-4149
OS: (202) 245-6511
OHDS: (202) 472-4415

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Date: January 10, 1989.

James E. Larson,

Acting Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 89-861 Filed 1-12-89; 8:45 am]

BILLING CODE 4150-04-M

Delegation of Authority

Notice is hereby given that based on the authority delegated to me by the memorandum from the Secretary, dated January 24, 1983, regarding delegation of administrative management authorities, which included authority to direct and oversee this Department's responsibilities to implement the Paperwork Reduction Act of 1980, Pub. L. 96-511, as amended, I am,

1. Redelegating to the Deputy Assistant Secretary for Information and Resources Management authority for all matters related to:

a. The review and approval, prior to the submission to the Office of Management and Budget (OMB), of all Class A (Sensitive) and Class B (Large Burden) Collections of Information; Class C (Routine) Collections of Information when necessary; and, where expedited review by OMB is requested by an Operating Division (OPDIV) of Collections of Information.

b. The approval, for publication in the **Federal Register**, of notices of information collection requests submitted to the OMB for clearance.

c. Oversight and coordination of paperwork burden reduction for the Department of Health and Human Services.

d. All other related paperwork reduction staff work, such as Departmental policy development and the responsibility for coordinating and developing the Information Collection Budget.

These authorities may be further redelegated to an Office Director who reports directly to the Deputy Assistant Secretary.

2. Redelegating the following authorities to the Operating Divisions (OPDIVs) (or its equivalent) for all matters related to:

a. The preparation and processing of clearances for collections of information, as well as assuring compliance with related policies, standards, procedures and instructions emanating from the OMB, and the Offices of the Secretary, Assistant Secretary for Management and Budget, and the Deputy Assistant Secretary for Information Resources Management.

b. The review and approval of Class C (Routine) Collections of Information from the public prior to the submission of these requests to OMB, except where expedited review by OMB is requested.

c. The approval, for publication in the **Federal Register**, of notices of OPDIV information collection requests submitted to OMB for clearance.

d. The management of the OPDIV's burden reduction program within the ceiling issued by the Department.

e. All other related paperwork reduction staff work, such as direct communication with OMB on routine reports clearance issues.

To Whom Delegated	Area of Authority
Deputy Assistant Secretary for Management and Acquisition	Office of the Secretary headquarters and regional offices, including Office for Civil Rights Regional and Field Offices and the U.S. Office of Consumer Affairs.
Assistant Secretary for Health.	Public Health Service headquarters, regional and field offices.
Assistant Secretary for Human Development Services	Office of Human Development Services headquarters, regional, and field offices.
Commissioner, Social Security Administration.	Social Security Administration headquarters, regional and field offices.
Administrator, Health Care Financing Administration	Health Care Financing Administration headquarters, regional, and field offices.
Administrator, Family Support Administration.	Family Support Administration headquarters and regional offices.
Director, Office of Child Support Enforcement.	Office of Child Support Enforcement headquarters, regional and field offices.

These authorities may be redelegated (1) to officials who are outside the program operation chain but are not below the grade (or equivalent) of deputy assistant secretary, or (2) with the prior approval of the Assistant Secretary for Management and Budget to other employees.

This redelegation memorandum supersedes all previously redelegated authorities to the addressees on this subject. They include, but may not be limited to the following memoranda: 1) the December 24, 1984 delegation to addressees, subject "Redelegation of Clearance Functions under P.L. 96-511": 2) the April 10, 1987, memorandum on same subject to same addressees; 3) Information and Resources Management, subject "Delegation of Authority to Approve for Publication in the **Federal Register** Notices of Information Collections submitted to the Office of Management and Budget for Clearances."

This redelegation is effective on January 18, 1989. Further, any redelegation that was previously made and that is otherwise allowed by this redelegation shall remain in effect until new redelegations under this authority are made.

Date: January 5, 1989.

S. Anthony McCann,

Assistant Secretary for Management and Budget.

[FR Doc. 89-860 Filed 1-12-89; 8:45 am]

BILLING CODE 4150-05-M

Social Security Administration

Finding Regarding Foreign Social Insurance or Pension System—Jordan

AGENCY: Social Security Administration, HHS.

ACTION: Notice of Finding Regarding Foreign Social Insurance or Pension System—Jordan.

Finding: Section 202(t)(1) of the Social Security Act (42 U.S.C. 402(t)(1)) prohibits payment of monthly benefits to any individual who is not a United States citizen or national for any month after he or she has been outside the United States for 6 consecutive months. This prohibition does not apply to such an individual where one of the exceptions described in section 202(t)(2) through 202(t)(5) of the Social Security Act (42 U.S.C. 402(t)(2) through 402(t)(5)) affects his or her case.

Section 202(t)(2) of the Social Security Act provides that, subject to certain residency requirements of section 202(t)(11), the prohibition against payment shall not apply to any individual who is a citizen of a country which the Secretary of Health and Human Services finds has in effect a social insurance or pension system which is of general application in such country and which:

(a) Pays periodic benefits, or their actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) Permits individuals who are United States citizens but not citizens of that country and who qualify for such benefits to receive those benefits, or the actuarial equivalent thereof, while outside the foreign country regardless of the duration of the absence.

The Secretary of Health and Human Services has delegated the authority to make such a finding to the Commissioner of Social Security. The Commissioner has redelegated that authority to the Director of the Office of International Policy. Under that authority the Director of the Office of International Policy has approved a finding that Jordan, beginning May 1980, has a social insurance system of general application which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) Permits United States citizens who are not citizens of Jordan to receive such benefits, or the actuarial equivalent, at the full rate without qualification or restriction while outside Jordan.

Accordingly, it is hereby determined and found that Jordan has in effect, beginning May 1980, a social insurance system which meets the requirements of section 202(t)(2) of the Social Security Act (42 U.S.C. 402(t)(2)).

This revises our previous finding, published at 23 FR 5674 on July 26, 1958, that Jordan does not have in effect a social insurance or pension system which meets the requirements of section 202(t)(2) of the Social Security Act.

FOR FURTHER INFORMATION CONTACT: J. Joseph Rausch, Room 1104, West High Rise Building, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965-3567.

(Catalog of Federal Domestic Assistance Programs Nos. 13.802 Social Security—Disability Insurance; 13.803 Social Security—Retirement Insurance; 13.805 Social Security Survivors Insurance.)

Dated: January 3, 1989.

Elizabeth K. Singleton,

Director, Office of International Policy.

[FR Doc. 89-855 Filed 1-12-89; 8:45 am]

BILLING CODE 4190-11-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[AA-220-09-4322-02]

Grazing Administration-Exclusive of Alaska; Grazing Fee for the 1989 Grazing Year

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of establishment of grazing fee for the 1989 grazing year.

SUMMARY: The Secretary of the Interior hereby announces that the fee for livestock grazing for the 1989 grazing year is $1.86 per animal unit month on public lands administered by the Bureau of Land Management.

EFFECTIVE DATE: March 1, 1989 through February 28, 1990.

ADDRESS: Any inquiries should be sent to: Director (220), Bureau of Land Management, Room 5626, Main Interior Bldg., 1800 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Billy R. Templeton, (202) 653-9193.

SUPPLEMENTARY INFORMATION: Grazing fees for the use of public rangelands are established and collected under the authority of section 3 of the Taylor Grazing Act of 1934, as amended (43 U.S.C. 315), and Executive Order 12548 of February 14, 1986. The grazing fees

are computed by the formula established in 43 CFR 4130.7-1.

January 9, 1989.

James E. Cason,

Acting Assistant Secretary of the Interior.

[FR Doc. 89-829 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-84-M

Bureau of Reclamation

[INT-FES-89-02]

Change of Water Use in Willard Reservoir, Weber Basin Project, Utah

AGENCY: Bureau of Reclamation (USBR), Interior.

ACTION: Notice of availability of abbreviated final environmental statement (FES): INT-FES-89-02.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969, as amended, the Bureau of Reclamation (Reclamation) has prepared an abbreviated Final Environmental Statement (FES) on the change of water use in the Willard (A.V. Watkins) Reservoir, a feature of the Weber Basin Project, Utah. Reclamation's recommendation is to approve the Weber Water Conservancy District's municipal and industrial (M&I) plan and authorize the marketing of up to 33,000 acre-feet of water from Willard Reservoir for either irrigation or M&I use.

ADDRESSES: Single copies of the FES can be obtained by contracting: Regional Director, Bureau of Reclamation, P.O. Box 11568, Salt Lake City, Utah 84147; telephone (801) 524-5580.

Copies of the FES are available for public inspection at the following locations:

Bureau of Reclamation, Environment and Planning Branch, U.S. Department of Interior, Room 7455, 18th & C Streets NW., Washington, DC 20240; Telephone: (202) 343-4662.

Bureau of Reclamation, Denver Office Library, Denver Federal Center, 6th and Kipling, Building 67, Room 167, Denver, CO 80225; Telephone: (303) 236-6963.

Libraries:

Brigham City Library, Brigham City, UT.
Davis County Library, Farmington, UT.
Davis County North Bench Library, Clearfield, UT.
Harold B. Lee Library, Brigham Young University, Provo, UT.
Kaysville City Library, Kaysville, UT.
Marriott Library, University of Utah, Salt Lake City, UT.
Merrill Library and Learning Resources, Utah State University, Logan, UT.
Morgan County Library, Kaysville, UT.
Ogden City Library, Ogden, UT.
Provo Public Library, Provo, UT.
Salt Lake City Public Library, Salt Lake City, UT.
South Davis County Library, Bountiful, UT.
Stewart Library, Weber State Library, Ogden, UT.
Weber County Library, Ogden, UT.
Weber County Library, Southwest Branch, Roy, UT.

FOR FURTHER INFORMATION CONTACT: Mr. Harold Sersland (Regional Environmental Officer, Upper Colorado Region, Salt Lake City, UT), (801) 524-5580; or

Dr. Wayne O. Deason, (Manager, Environmental Services, Bureau of Reclamation, Denver, CO), (303) 236-9336.

SUPPLEMENTARY INFORMATION: The abbreviated FES does not repeat information contained in the draft environmental statement (INT-DES-87-28), filed on September 14, 1987. Jointly, the two documents contain a full description of the environmental impacts. The FES summarizes the environmental impacts of five alternatives for using currently unsold water in Willard Reservoir.

The reservoir, which has a 215,000 acre-foot capacity, was originally intended to provide irrigation service to agricultural lands on the eastern shore of the Great Salt Lake. Since completion of the reservoir in 1964, demand for irrigation water has not developed as anticipated, leaving about 33,000 acre-feet of available water unsold. This unused water, combined with a series of unusually wet years, contributed to an unanticipated, full reservoir condition which sustained a reservoir fishery. The full reservoir also encouraged a much higher amount of recreation use than would have developed if project water use had occured as planned.

The Weber Basin Water Conservancy District (District), the administering agency, has proposed selling the water for M&I use. Although the State Division of Wildlife Resources and the U.S. Fish and Wildlife Service recognize that they did not originally recommend fish and recreation use of the reservoir, these agencies now recommend that consideration be given to holding the water in the reservoir for fish and recreation purposes.

The five alternatives evaluated in the DES remain unchanged in the FES. The irrigation plan, which would have the project proceed as originally designed and authorized, constitutes the "no Federal action" alternative. Under this alternative, the 33,000 acre-feet of water would remain available for irrigation use.

The current sales plan would limit project water sales to the present amount. The 33,000 acre-feet of unsold water would have to be purchased by a public entity, which would require holding the water in the reservoir for fish, wildlife, and recreation purposes. Because of the large amount of precipitation and the high streamflow that have occurred in recent years, some of the water sold has not been used, resulting in a fairly stable water level in the reservoir. Under average or dry conditions, all of the sold water would be used and cause the reservoir level to drop. The impact of using all sold water, with the 33,000 acre-feet held for fish and recreation, is described in the DES.

The M&I plan proposed by the District is Reclamation's preferred alternative. The use of the unsold irrigation water would be converted to M&I purposes. The water might require additional treatment or more probably would be exchanged for higher quality water.

The fish and recreation plan would limit the sale of water to what is currently being sold. In addition, the water elevation in the reservoir would be maintained at recommended seasonal levels for fisheries and recreation. A public entity would have to not only purchase the 33,000 acre-feet of unsold water but would also have to acquire some water already sold to irrigators to hold reservoir levels needed for fish and recreation.

The combination plan is a combination of the M&I and fish and recreation alternatives. The 33,000 acre-feet of unsold irrigation water would be converted to M&I use and would also provide the seasonal water elevations recommended for fisheries and recreation. This alternative would also require buying back some additional water already sold.

If the change in water use is approved, additional water sales within the scope of this statement would be approved without additional NEPA compliance. However, additional compliance would be carred out on individual sales when environmental review identifies significant impacts not evaluated in the FES.

Dated: December 30, 1988.

Joe D. Hall,

Deputy Commissioner.

[FR Doc. 89-866 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-09-M

Bureau of Land Management

[CA-020-09-4050-90]

California; Susanville District Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior, Susanville District Advisory Council, Susanville, California.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given, in accordance with Pub. L. 94-579 (FLPMA), that a District Advisory Council meeting has been scheduled for Tuesday, February 14, 1989. The meeting will begin at 10:00 a.m. at the Susanville District Office of the Bureau of Land Management, 705 Hall Street, Susanville, California 96130 and end at 4:30 p.m. The agenda will include discussion on the Malacha Hydro-Electric Project. The meeting is open to the public and interested persons may make oral statements to the Council or file a written statement for the Council's consideration.

Anyone wishing to make an oral statement must notify the District Manager, Bureau of Land Management, 705 Hall Street, Susanville, California 96130, by February 7, 1989. Depending on the number of persons wishing to make oral statements, a per person time limit may be established.

Summary minutes of the Council meeting will be maintained in the District Office, and will be available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

FOR FURTHER INFORMATION CONTACT: John Bosworth, Public Affairs Officer, at 916-257-5381.

C. Rex Cleary,

District Manager.

[FR Doc. 89-882 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-40-M

[ID-020-09-4212-13, I-22486]

Amendment of the Malad Hills Management Framework Plan (MFP)/ Notice of Realty Action: Exchange of Public Land in Oneida County, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Amendment of the Malad Hills Management Framework Plan (MFP)/ Notice of Realty Action, exchange of public land in Oneida County, Idaho.

Notice: Notice is hereby given that the BLM has amended the Malad Hills MFP to allow for transfer of certain public lands in exchange for privately owned lands in Oneida County, Idaho.

SUMMARY: The following described lands have been examined and through the public supported land use planning process have been determined to be suitable for transfer by land exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716).

Public lands to be transferred are described as:

T.15 S., R. 30 E., Boise Meridian

Sec. 4: Lots 13, 14, 15, 18, 19, and 20 (230.36 acres).

Non-Federal lands to be acquired are as described as:

T. 14 S., R. 30 E., Boise Meridian

Sec. 16: N½ (320 acres).

The purpose of this exchange is to acquire non-Federal lands which have high public values for grazing, wildlife, recreation, and public access. Acquisition of those lands will block up public lands in the area and will facilitate more efficient management of public lands.

The values of the lands to be exchanged are approximately equal; full equalization of values will be achieved by payment to the United States by Mr. Kenneth Campbell of funds in an amount not to exceed 25 percent (25%) of the total value of the lands to be transferred out of Federal ownership.

Lands to be transferred from the United States will be subject to the following reservations, terms, and conditions: reservation of ditches and canals, oil and gas to the United States, and road right-of-way to Oneida County.

Continued use of the land by valid right-of-way holders is proper subject to the terms and conditions of the grant. Administrative responsibility previously held by the United States will be assumed by the patentee.

SUPPLEMENTARY INFORMATION: Detailed information concerning the conditions of the land exchange can be obtained by contacting Wes Duggan, Deep Creek Realty Specialist, at (208) 766-4766.

Planning Protest

Any party that participated in the plan amendment and is adversely affected by the amendment may protest this action only as it affects issues submitted for the record during the planning process. The protest shall be in writing and filed with the Director (760), Bureau of Land Management, 1800 "C" Street, NW., Washington, DC 20240, within 30 days of this notice.

Land Exchange Comments

For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments regarding the land exchange to the District Manager, Bureau of Land Management, Route 3 Box 1, Burley, Idaho, 83318. Objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any planning protest or objections, regarding the land exchange, this realty action will become final determination of the Department of the Interior and the planning amendment will be in effect.

Dated: January 6, 1989.

Gerald L. Quinn,

District Manager.

[FR Doc. 89-881 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-GG-M

[CO-942-09-4520-12]

Colorado: Filing of Plats of Survey

January 5, 1989.

The plats of survey of the following described land, will be officially filed in the Colorado State Office, Bureau of Land Management, Lakewood, Colorado, effective 10:00 a.m., January 5, 1989.

The supplemental plat creating new lots 13, 14, 15, and 16 in the northeast quarter of section 1, T. 7 S., R. 78 W., Sixth Principal Meridian, Colorado was accepted November 23, 1988.

The plat (in eight sheets) representing the dependent resurvey of the south boundary, portions of the east and west boundaries, the subdivisional lines, and portions of certain mineral surveys, and the subdivision of certain sections and the metes-and-bounds surveys of certain tracts, T. 43 N., R. 10 W., New Mexico Principal Meridian, Colorado, Group No. 616 was accepted December 6, 1988.

The plat (in two sheets) representing the dependent resurvey of a portion of the subdivisional lines and certain mineral surveys and the survey of the subdivision of section 4, T. 42 N., R. 10 W., New Mexico Principal Meridian, Colorado, Group No. 616 was accepted December 6, 1988.

The plat representing the dependent resurvey of portions of the subdivisional lines and the J.R. Hewitt Claim, and the subdivision of certain sections, T. 35 N., R. 9 W., New Mexico Principal Meridian, Colorado, Group No. 795 was accepted December 7, 1988.

The plat representing the dependent resurvey of portions of the west boundary and the subdivisional lines and the subdivision of sections 5 an 6, T. 45 N., R. 13 W., New Mexico Principal Meridian, Colorado, Group No. 850 was accepted September 27, 1988.

The plat representing the dependent resurvey of the south boundary, T. 46 N., R. 13 W., a portion of the north boundary, T. 45 N., R. 13 W. and the survey of the Sectional Guide Meridian and the subdivisional line, T. 45½ N., R. 13 W., New Mexico Principal Meridian, Colorado, Group No. 850 was accepted September 27, 1988.

The plat representing the dependent resurvey of the east boundary, T. 46 N., R. 15 W. and portions of the north boundary and subdivisional lines and the survey of the subdivision of certain sections, T. 46 N., R. 13 W., New Mexico Principal Meridian, Colorado Group No. 850 was accepted September 27, 1988.

These surveys were executed to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Colorado State Office, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado, 80215.

Jack A. Eaves,

Chief, Cadastral Surveyor for Colorado.

[FR Doc. 89-879 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-JB-M

[NV-940-09-4214-10; N-50250]

Proposed Withdrawal and Opportunity for Public Meeting; Nevada

January 5, 1989.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Energy, Nevada Operations Office, has filed an application to withdraw approximately 4,255.50 acres of public land. The purpose of the proposed withdrawal is to provide the U.S. Department of Energy with authority to use the land for site characterization studies, to prevent interference with site characterization activities, and to maintain the physical integrity of the subsurface environment from unplanned or unknown intrusions in order to ensure that scientific studies for site characterization are not invalidated. This notice closes the lands for up to 2 years from surface entry, mining and mineral leasing.

DATE: Comments and requests for meetings should be received on or before April 13, 1989.

ADDRESS: Comments and meeting requests should be sent to the Nevada State Director, BLM, P.O. Box 12000, Reno, NV 89520.

FOR FURTHER INFORMATION CONTACT: Mary Clark, BLM Nevada State Office, (702) 784-5413.

SUPPLEMENTARY INFORMATION: On December 28, 1988, the U.S. Department of Energy filed an application to withdraw the following described public lands from settlement, sale, location or entry under the public land laws, including the mining and mineral leasing laws, subject to valid existing rights:

Mount Diablo Meridian, Nevada

T. 13 S., R. 49 E., (Pro. Dia. No. 44)
secs. 7, 8 and 9;
secs. 10 and 15, except for those lands withdrawn by PLO 2568;
secs. 16 and 17;
sec. 20, NE¼;
sec. 21, N½, N½S½;
sec. 22, N½, N½S½, except for those lands withdrawn by PLO 2568.

The areas described aggregate approximately 4,255.50 acres in Nye County.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the undersigned officer within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the lands will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. Any temporary discretionary land uses to be permitted by BLM during this segregative period will be determined on a case by case basis after consultation with the Department of Energy, Nevada Operations Office.

The temporary segregation of the lands in connection with this withdrawal application shall not affect the administrative jurisdiction over the lands, and the segregation provided for in this notice does not have the effect of authorizing any use of the lands by the Department of Energy.

Edward F. Spang,

State Director, Nevada.

[FR Doc. 89-885 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-HC-M

Fish and Wildlife Service

Receipt of Applications for Permits

The following applicants have applied for permits to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

Applicant: Larry E. Johnson, Phoenix, AZ—PRT-734059

The applicant requests a permit to purchase one female chimpanzee (*Pan troglodytes*) of unknown origin from Monkey Jungle, Miami, Florida, and export the chimpanzee to the Guadalajara Zoo, Mexico, for zoological display and breeding purposes.

Applicant: Hawthorn Corporation, Grayslake, IL—PRT-734010

The applicant requests a permit to export and reimport one male Asian elephant (*Elephas maximus*) for circus performances at which the applicant intends to educate the public with regard to this species' ecological role and conservation needs. The elephant is to be given to the applicant free of charge by Mr. Tarzan Zerbini of Tarzan Zerbini Circus, Webb City, Missouri.

Applicant: Martha Lynn Crump, Gainesville, FL—PRT-733942

The applicant requests a permit to import up to 10 preserved eggs and 150 preserved tadpoles of the Monteverde toad (*Bufo periglenes*) from Costa Rica for scientific research. Applicant intends to conduct a histological examination of the morphology of mouthparts and intestines of tadpoles raised under different conditions of food availability.

Applicant: Grandeur Productions, Inc., Jonesville, NC—PRT-734151

The applicant requests a permit to export and reimport one captive born female leopard (*Panthera pardus*) for public display designed to educate the public with regard to this species' ecological role and conservation needs.

Applicant: James C. Gillingham, Mt. Pleasant, MI—PRT-734192

The applicant requests a permit to import neck and dorsal integumentary tissue samples from three male and three female tuatara (*Sphenodon punctatus*) from the University of

Wellington, Wellington, New Zealand, for histological studies.

Documents and other information submitted with these applications are available to the public during normal business hours (7:45 am to 4:15 pm) Room 403, 1375 K. Street NW., Washington, DC 20005, or by writing to the Director, U.S. Office of Management Authority, P.O. Box 27329, Washington, DC 20038-7329.

Interested persons may comment on any of these applications within 30 days of the date of this publication by submitting written views, arguments, or data to the Director at the above address. Please refer to the appropriate PRT number when submitting comments.

Dated: January 6, 1989.

R.K. Robinson,

Chief, Branch of Permits, U.S. Office of Management Authority.

[FR Doc. 89-903 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-AN-M

Receipt of Applications for Permits

The following applicants have applied for permits to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

Applicant: San Antonio Zoological Gardens & Aquarium, San Antonio, TX—PRT-733832

The applicant requests a permit to import one captive-born male black-footed cat (*Felis nigripes*) from the Rotterdam Zoo, Netherlands, for the purpose of enhancement of propagation.

Applicant: San Antonio Zoological Gardens & Aquarium, San Antonio, TX—PRT-733830

The applicant requests a permit to import one captive-born female black-footed cat (*Felis nigripes*) from the Zoologischer Garten Berlin, Federal Republic of Germany for the purpose of enhancement of propagation.

Applicant: Dr. Robert L. Shipp, Mobile, AL—PRT-732871

The applicant requests a permit to take (move, bury and relocate), in cooperation with the Sea Turtle Stranding and Salvage Network in the State of Alabama, green sea turtles (*Chelonia mydas*), hawksbill sea turtles (*Eretmochelys imbricata*), Kemps (=Atlantic) Ridley sea turtles (*Lepidochelys kempii*), leatherback sea turtles (*Dermochelys coriacea*) loggerhead sea turtles (*Carretta caretta*), and Olive (=Pacific) Ridley sea turtles (*Lepidochelys olivacea*), for the purpose of survival of the species.

Applicant: Idaho Dept. of Fish & Game, Boise, ID—PRT-733906

The applicant requests a permit to import up to 40 peregrine falcons (*Falco peregrinus anatum*) from John LeJeune, Falcon Farms, Ltd., Agassiz, British Columbia, Canada, and/or Dr. Lynn Oliphant, Saskatoon, Saskatchewan, Canada, for release in Idaho. The birds are to be imported over a five-year period and will all be captive-hatched birds.

Documents and other information submitted with these applications are available to the public during normal business hours (7:45 am to 4:15 pm) Room 403, 1375 K Street NW., Washington, DC 20005, or by writing to the Director, U.S. Office of Management Authority, P.O. Box 27329, Washington, DC 20038-7329.

Interested persons may comment on any of these applications within 30 days of the date of this publication by submitting written views, arguments, or data to the Director at the above address. Please refer to the appropriate applicant and PRT number when submitting comments.

Date: January 4, 1989.

R.K. Robinson,

Chief, Branch of Permits, U.S. Office of Management Authority.

[FR Doc. 89-904 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-AN-M

INTERSTATE COMMERCE COMMISSION

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

1. *Parent Corporation and Address of Principal Office.* Rocco Enterprises, Inc., One Rocco Plaza, Harrisonburg, Virginia.

2. *Wholly-Owned Subsidiaries Which Will Participate in the Operations and Their States of Incorporation.*

(i) Rocco, Inc.; Virginia.

(ii) Rocco Building Supplies, Inc.; Virginia.

(iii) Rocco Investments, Inc.; Delaware.

(iv) Rocco Farms, Inc.; Virginia.

(v) Rocco Farm Foods, Inc.; Virginia.

(vi) Rocco Feeds, Inc.; Virginia.

(vii) Rocco Food Products, Inc.; Virginia.

(viii) Rocco FSC, Inc.; Guam.

(ix) Rocco Further Processing, Inc.; Virginia.

(x) Rocco Construction, Inc.; Virginia

(xi) Rocco Realty, Inc.; Virginia.

(xii) Rocco Specialty Foods, Inc.; Virginia.

(xiii) Rocco Turkeys, Inc.; Virginia.

(xiv) Rocco Turkeys of North Carolina, Inc.; Virginia.

Noreta R. McGee,

Secretary.

[FR Doc. 89-858 Filed 1-12-89; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub-No. 286X)]

CSX Transportation, Inc.; Abandonment Exemption; Webster County, WV

Applicant has filed a notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon its 7.66-mile line of railroad between milepost 3.03 at Donaldson and milepost 10.69 near Johnson Run, in Webster County, WV.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by the user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on February 12, 1989 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[1]

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 4 I.C.C. 2d 400 (1988). Any entity seeking a stay involving environmental concerns is

Continued

formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking statements under 49 CFR 1152.29 must be filed by January 23, 1989.[3] Petitions for reconsideration and requests for public use conditions under 49 CFR 1152.28 must be filed by February 2, 1989 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Charles M. Rosenberger, CSX Transportation, Inc., 500 Water Street, Jacksonville, FL 32202.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). See will issue the EA by January 18, 1989. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275-7316. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: January 6, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

FR Doc. 89-775 Filed 1-12-89; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to the Clean Air Act; American National Can Co., Inc.

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on January 5, 1989, a proposed Consent Decree in *United States* v. *American National Can Company, Inc.*, Civil Action No. 87-1800, was lodged with the United States District Court for the Middle District of Pennsylvania. The Consent Decree requires defendant to pay a civil penalty of $130,000 and to install pollution control equipment to bring the end-sealing operation at its Lemoyne Pennsylvania facility into compliance with the emission limitations for volatile organic compounds imposed by the Clean Air Act, 42 U.S.C. 7407, *et seq.*, and the Pennsylvania State Implementation Plan approved under that Act.

The Department of Justice will receive for a period of thirty (30) days from the date of publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530, and should refer to *United States* v. *American National Can Company, Inc.*, DOJ Ref. 90-5-2-1-1178.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Suite 309, Federal Building, Washington and Linden Streets, Scranton, Pennsylvania 18501 and at the Region III Office of the Environmental Protection Agency, 841 Chestnut Street, Philadelphia, Pennsylvania, 19107. Copies of the Consent Decree may be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the U.S. 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. In requesting a copy, please enclose a check in the amount of $2.00 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-888 Filed 1-12-89; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

National Cooperative Research Notification; Composite Materials Characterization, Inc.

Notice is hereby given that, on December 19, 1988, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* (the "Act"), Composite Materials Characterization, Inc. ("CMC") filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing a change in the membership of CMC. The additional written notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, CMC advised that The Dow Chemical Company has become a member of CMC.

CMC, with the addition of the Dow Chemical Company, consists of the following firms: The Dow Chemical Company; General Electric Company; Grumman Aerospace Corporation; Lockheed Corporation; LTV Aerospace and Defense Company; Rohr Industries, Incorporated; and United Technologies Corporation, Sikorsky Aircraft Division. The purpose of CMC is to conduct research and development in the area of composite materials testing, grading and characterization.

On December 18, 1987, CMC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 15, 1988, 53 FR 1074.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 89-890 Filed 1-12-89; 8:45 am]

BILLING CODE 4410-01-M

National Cooperative Research Notification; Semiconductor Research Corp.

Notice is given that, on December 13, 1988, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Semiconductor Research Corporation ("SRC") filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing certain changes in the membership of SRC. The SRC filed its notification of these membership changes for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

The changes consist of the addition of the following companies to the SRC:

Loral Systems Group, Micron Technology, Inc., NCR Corporation.

the deletion of the following companies from SRC:

GCA Corporation, Goodyear Aerospace Corporation.

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encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[2] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C. 2d 164 (1987), and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440-48446).

[3] The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.

the addition of the following companies to the Semiconductor Equipment and Materials Institute, Inc. ("SEMI") Chapter of the SRC:

American Technical Ceramics,
SOHIO Engineered Materials Co.

and the deletion of the following companies from the SEMI Chapter:

Dyanpert/Amedyne
Eagle-Picher Ind., Inc.
FEP Analytic (division of Verity Instruments, Inc.)
Gryphon Products
Iron Beam Technologies, Inc.
Machine Technology, Inc.
MG Industries/Scientific Gases
Micromanipulator Company, Inc.
Oneac Corporation
PT Analytic, Incorporation
Silsco, Inc.
UTI Instruments Company
XMR Inc.

Furthermore, notice is given of the merger of RCA Corporation into the General Electric Company.

On January 7, 1985, SRC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice ("the Department") published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 30, 1985, 50 FR 4281. SRC filed additional notifications on June 6, 1985, November 4, 1985, February 19, 1986, and September 11, 1987, notice of which the Department published on June 28, 1985 (50 FR 26850), December 24, 1985 (50 FR 52568), March 18, 1986 (51 FR 9287), and October 9, 1987 (52 FR 37849), respectively. SCR also filed additional notifications on December 19, 1986 and January 30, 1987; the Department published notice of both on February 13, 1987, 52 FR 4671.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 89-889 Filed 1-12-89; 8:45 am]

BILLING CODE 4410-01-M

Federal Bureau of Prisons

Intent to Prepare Draft Environmental Impact Statement (DEIS) for the Construction of a Federal Correctional Facility Cumberland, Allegany County, MD

AGENCY: Federal Bureau of Prisons, Justice.

ACTION: Notice of intent to prepare a draft environmental impact statement (DEIS).

SUMMARY: .

1. Proposed Action: The U.S. Department of Justice, Federal Bureau of Prisons has determined that a new Federal correctional institution with an adjacent satellite prison camp is needed in its system. A 175 acre tract of land at the Allegany County Industrial Park near the community of Mexico farms will be evaluated. The proposal calls for the construction of a 600 to 700 bed facility to house medium security inmates and a 150 to 200 bed camp to house minimum security inmates.

Approximately 80 of the 175 acres would be used for road access, inmate housing, administration and program spaces and service and support facilities. In addition, exercise areas would be included in the needed acreage.

2. In the process of evaluating the tract of land, several aspects will receive a detailed examination including: Utilities, traffic patterns, noise levels, visual intrusion, threatened and endangered species, cultural resources, and socio-economic impacts.

3. Alternatives: In developing the DEIS, the options of no action and alternative sites for the proposed facility will be fully and thoroughly examined.

4. Scoping Process: During the preparation of the DEIS there will be numerous opportunities for public involvement in order to determine the issues to be examined. A scoping meeting will be held at a location convenient to the citizens of Cumberland. The meeting will be well publicized and will be held at a time which will make it possible for the public and interested agencies or organizations to attend. In addition, a number of informal meetings have already been held and will be continued by representatives of the Bureau of Prisons with interested comunity leaders and officials.

5. DEIS Preparation: Public notice will be given concerning the availability of the DEIS for public review and comment.

6. Address: Questions concerning the proposed action and the DEIS can be answered by: Lloyd McMillan, Site Acquisition Specialist, U.S. Bureau of Prisons, 320 First Street, NW, Washington, DC 20534, Telephone: (202) 724-6817.

William J. Patrick,

Chief, Facilities Development & Operations, Federal Bureau of Prisons, Department of Justice.

[FR Doc. 89-578 Filed 1-12-89; 8:45 am]

BILLING CODE 4410-05-M

DEPARTMENT OF LABOR

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 Administration, 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

Georgia:
GA89-9 (Jan. 6, 1989) ..... p. 228.
New York:
NY89-12 (Jan. 6, 1989) ..... p. 790.
NY89-13 (Jan. 6, 1989) ..... p. 800.
NY89-18 (Jan. 6, 1989) ..... p. 828.

Volume II

Indiana:
IN89-4 (Jan. 6, 1989) ..... p. 290.
IN89-5 (Jan. 6, 1989) ..... p. 304.
Texas:
TX89-3 (Jan. 6, 1989) ..... p. 986.

Volume III

California:
CA89-4 (Jan. 6, 1989) ..... p. 90.
Nevada:
NV89-1 (Jan. 6, 1989) ..... p. 245.
Utah:
UT89-1 (Jan. 6, 1989) ..... pp. 243-250d.

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 6 day of January 1989.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 89-594, Filed 1-12-89; 8:45 am]

BILLING CODE 4510-27-M

Occupational Safety and Health Administration

Alaska State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called the Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve corrections to standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On August 10, 1973, notice was published in the **Federal Register** (38 FR 21628) of the approval of the Alaska plan and the adoption of Subpart R to Part 1952 containing the decision.

The Alaska plan provides for the adoption of State standards which are at least as effective as comparable Federal standards promulgated under section 6 of the Act. Section 1953.20 provides that where any alteration in the Federal program could have an adverse impact on the at least as effective status of the State program, a program change supplement to a State plan shall be required.

In response to Federal standards changes, the State has submitted by letters dated April 15, 1987 and January 12, 1988 from Jim Sampson, Commissioner, to James W. Lake, Regional Administrator, and incorporated as part of the plan, a State standard and amendment comparable to 29 CFR 1910.120, Hazardous Waste Operations and Emergency Response; Interim Final Rule, as published in the **Federal Register** (51 FR 45663) on December 19, 1986; and Corrections, as published in the **Federal Register** (52 FR 16241) on May 4, 1987.

The State's Hazardous Waste Operations and Emergency Response Code, which is contained in Subchapter 10, was adopted on May 19, 1987, and became effective June 19, 1987. The amendment, which corrects errors in the original code, was adopted on October 26, 1987, and became effective December 13, 1987. Notices of the State rulemaking were published in statewide media on March 11 and 18, 1987 for the standard and on August 22 and 28, 1987 for the amendment. The public comment periods were open for 34 days and 30 days, respectively. There were no comments received.

2. Decision

Having reviewed the State submission in comparison with the Federal standard, it has been determined that the State standard and amendment are identical to the Federal standard. OSHA therefore approves the standard and amendment.

3. Location of supplement for inspection and copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of Regional Administrator, Occupational Safety and Health Administration, Room 6003, Federal Office Building, 909 First

Avenue, Seattle, Washington 98174; State of Alaska, Department of Labor, Office of the Commissioner, Juneau, Alaska 99802; and the Office of State Programs, Occupational Safety and Health Administration, Room N-3476, 200 Constitution Avenue NW., Washington, DC 20210.

4. Public participation

Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Alaska State plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

1. The standards are identical to the Federal standards which were promulgated in accordance with Federal law including meeting requirements for public participation.

2. The standards were adopted in accordance with the procedural requirements of State law and further public participation would be unnecessary.

This decision is effective January 13, 1989.

(Section 18, Pub. L. 91-596, 84 Stat. (29 U.S.C. 677)).

Signed at Seattle, Washington this 8th day of February 1988.

Ronald T. Tsunehara,

Acting Regional Administrator.

[FR Doc. 89-809 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

Connecticut State Standards; Approval

1. Background.

Part 1953 of Title 29, Code of Federal Regulation, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called the Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary), (29 CFR 1953.4), will review and approve standards promulgated pursuant to a State Plan, which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On November 3, 1978, notice was published in the **Federal Register** (43 FR 51390) of the approval of the Connecticut Public Sector State Plan and the adoption of Subpart E to Part 1956 containing the decision.

The Connecticut Public Sector only State Plan provides for the adoption of Federal standards as State standards after:

a. Publishing an intent to amend the State Plan by adopting the standard(s) in the Connecticut Law Journal.

b. Approval by the Commissioner of Labor and the Attorney General of the State of Connecticut.

c. Approval by the Legislative Regulation Review Committee, State of Connecticut.

d. Filing in the Office of the Secretary of State, State of Connecticut.

e. Publishing a notice that the State plan is amended by adopting the standard(s) in the Connecticut Law Journal.

The Connecticut Public Sector State Plan provides for the adoption of State standards which are at least as effective as comparable Federal standards promulgated under section 6 of the Act. By letters dated September 16, 1986 and December 29, 1986 from P. Joseph Peraro, Commissioner, Connecticut Department of Labor to OSHA's Acting Regional Administrator, and July 27, 1988, from Commissioner Betty L. Tianti, Connecticut Department of Labor, to John B. Miles, Jr., Regional Administrator, and incorporated as part of the plan, the State submitted updated State standards identical to 29 CFR Parts 1910; 1915; 1917; 1918; 1926; and 1928 and subsequent amendments thereto, as described below:

1. Amendment to 29 CFR 1910.243, Power Lawnmowers, as contained in 50 FR 4648 (February 1, 1985).

2. Deletion to 29 CFR 1910.1029, Coke Oven Emission Standard; Conforming Deletions; as contained in 50 FR 37352 (September 13, 1985).

3. Amendment to 29 CFR 1910.1047, Occupational Exposure to Ethylene Oxide; Labeling Requirements, as contained in 50 FR 41491 (October 11, 1985).

4. Amendment to 29 CFR 1910.19, Special Provision for Air Contaminants, as contained in 50 FR 51173 (December 13, 1985).

5. Amendment to 29 CFR 1910.1000, Air Contaminants, as contained in 50 FR 51173 (December 13, 1985).

6. Revision to 29 CFR 1910.1043, Occupational Exposure to Cotton Dust; Final Rule, as contained in 50 FR 51120 (December 13, 1985).

7. Revision to 29 CFR 1910.19, Special Provisions for Air Contaminants, as contained in 51 FR 22733 (June 20, 1986).

8. Revision to 29 CFR 1926.1001, Asbestos, Tremolite, Anthophyllite and Actinolite, as contained in 51 FR 22733 (June 20, 1986).

9. Revision to 29 CFR 1926.55, Gas, Vapors, Fumes, Dusts and Mists, as contained in 51 FR 22756 (June 20, 1986).

10. Addition to 29 CFR 1926.58, Asbestos, Tremolite, Anthophyllite and Actinolite, as contained in 51 FR 22756 (June 20, 1986).

11. Addition to 29 CFR 1910.120, Hazardous Waste Operations and Emergency Response, as contained in 51 FR 45654 (December 19, 1986).

12. Amendment to 29 CFR 1910.120, Hazardous Waste Operations and Emergency Reponse, as contained in 52 FR 16242 (May 4, 1987).

13. Amendment to 29 CFR 1910.1001, Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite; Corrections and Information Collection Requirements Approval, as contained in 52 FR 17752 (May 12, 1987).

14. Amendment to 29 CFR 1926.58, Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite; Corrections and Information Collection Requirements Approval, as contained in 52 FR 17756 (May 12, 1987).

15. Addition to 29 CFR 1910.1200, Hazard Communication; Final Rule, as contained in 52 FR 31852 (August 24, 1987).

16. Addition to 29 CFR 1915.99, Hazard Communication, as contained in 52 FR 31877 (August 24, 1987).

17. Addition to 29 CFR 1917.28, Hazard Communication, as contained in 52 FR 31877 (August 24, 1987).

18. Addition to 29 CFR 1918.90, Hazard Communication, as contained in 52 FR 31877 (August 24, 1987).

19. Addition to 29 CFR 1926.59, Hazard Communication, as contained in 52 FR 31877 (August 24, 1987).

20. Addition to 29 CFR 1928.21, Hazard Communication, as contained in 52 FR 31886 (August 24, 1987).

21. Amendment to 29 CFR 1910.19, Special Provisions for Air Contaminants, as contained in 52 FR 34562 (September 11, 1987).

22. Amendment to 29 CFR 1910.1000, Air Contaminants, as contained in 52 FR 34562 (September 11, 1987).

23. Addition to 29 CFR 1910.1028, Benzene, as contained in 52 FR 34562 (September 11, 1987).

24. Addition to 29 CFR 1910.16, Longshoring and Marine Terminals, as contained in 52 FR 36026 (September 25, 1987).

25. Addition to 29 CFR 1910.177, Serving Multi-piece and Single-piece Rim Wheels, as contained in 52 FR 36026 (September 25, 1987).

26. Addition to 29 CFR 1917.1, Scope and Applicability, as contained in 52 FR 36026 (September 25, 1987).

27. Revision to 29 CFR 1917.44, General Rules Applicable to Vehicles, as contained in 52 FR 36026 (September 25, 1987).

28. Revision to 29 CFR 1910.268, Telecommunications, as contained in 52 FR 36387 (September 28, 1987).

29. Revision to 29 CFR 1926.550, Cranes and Derricks, as contained in 52 FR 36382 (September 28, 1987).

30. Revision to 29 CFR 1926.552, Materials Hoists, Personnel Hoists and Elevators, as contained in 52 FR 36382 (September 28, 1987).

31. Revision to 29 CFR 1926.903, Underground Transportation of Explosives, as contained in 52 FR 36382 (September 28, 1987).

2. Decision

The above State standards have been reviewed and compared with the relevant Federal standards. It has been determined that the State standards are identical to the Federal standards, and are accordingly approved.

3. Location of supplement for inspection and copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, 133 Portland Street, Boston, Massachusetts 02114; Office of the Commissioner, State of Connecticut, Department of Labor, 200 Folly Brook Boulevard, Wethersfield, Connecticut 06109; and the Office of State Programs, 200 Constitution Avenue NW., Room N3700, Washington, DC 20210.

4. Public participation

Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplements to the Connecticut Public Sector Plan as proposed changes and making the Regional Administrator's approval effective upon publication for the following reason:

1. The standards were adopted in accordance with the procedural requirements of State law which included public comment, and further public participation would be repetitious.

This decision is effective January 13, 1989.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667)).

Signed at Boston, Massachusetts, this 19th day of October, 1988.

John B. Miles, Jr.,

Regional Administrator.

[FR Doc. 89-810 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

New Mexico State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act), by which the Regional Administrator for Occupational Safety and Health (hereinafter called Regional Administrator), under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4), will review and approve standards promulgated pursuant to a State Plan, which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On December 10, 1975, notice was published in the **Federal Register** (40 FR 57455) of the approval of the New Mexico State Plan and the adoption of Subpart DD to Part 1952 containing the decision.

The New Mexico State Plan provides for the adoption of Federal standards as State standards after:

1. Notice of public hearing published in a newspaper of general circulation in the State at least sixty (60) days prior to the date of such hearing.

2. Public hearing conducted by the Environmental Improvement Board.

3. Filing of adopted regulations, amendments, or revocations under the State Rules Act.

The New Mexico State Plan provides for the adoption of State standards which are at least as effective as comparable Federal standards promulgated under section 6 of the Act.

By letter dated September 12, 1988, from Sam A. Rogers, Bureau Chief, to Gilbert J. Saulter, Regional Administrator, and incorporated as part of the Plan, the State submitted State standards identical to 29 CFR 1910.272, Grain Handling Facilities; 29 CFR 1910.1048, Formaldehyde; 29 CFR 1910.1048, Amendment to Formaldehyde; 29 CFR 1910.211, Definitions; and 29 CFR 1910.217, Mechanical Power Presses.

These standards, contained in New Mexico Occupational Health and Safety Regulation 200, were promulgated on July 7, 1988, in accordance with applicable State law.

The subject standards became effective September 17, 1988, pursuant to New Mexico State Law, Section 50-9-1 through 50-9-25.

2. Decision

The above State standards have been reviewed and compared with the relevant Federal standards. It has been determined that the State standards are identical to the Federal standards, and are accordingly approved.

3. Location of supplement for inspection and copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, U.S. Department of Labor-OSHA, 525 Griffin Street, Room 602, Dallas, Texas 75202; Director, Environmental Improvement Division, 1190 St. Francis Drive, Room 2200-North, Sante Fe, New Mexico 87503; and the Office of State Programs, 200 Constitution Avenue NW., Washington, DC 20210.

4. Public participation

Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplements to the New Mexico State Plan as proposed changes and making the Regional Administrator's approval effective upon publication for the following reason:

1. The standards were adopted in accordance with the procedural requirements of State law which included public comment, and further public participation would be repetitious.

The decision is effective January 13, 1989.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667)).

Signed at Dallas, Texas, this 7th day of October, 1988.

Gilbert J. Saulter,

Regional Administrator.

[FR Doc. 89-811 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

Nevada State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for

Occupational Safety and Health (hereinafter called Regional Administrator), under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(e) of the Act and 29 CFR Part 1902. On January 4, 1974, notice was published in the **Federal Register** (39 FR 1008) of the approval of the Nevada plan and the adoption of Subpart W to Part 1952 of Title 29 containing the decision. The Nevada plan provides for the adoption of Federal standards as State standards by reference.

By letters and memos dated September 14, and 21, and October 10 and 13, 1988, from Nancy C. Barnhart to Frank Strasheim and incorporated as part of the plan, the State submitted State standard revisions identical to 29 CFR 1910.217, Mechanical Power Presses (March 14, 1988, 53 FR 8322); 29 CFR 1910.28, 1910.35, 1910.103, 1910.106, 1910.107, 1910.108, 1910.109, 1910.110, 1910.111, 1910.155, 1910.178, 1910.180, 1910.181, 1910.251, 1910.265, 1910.266, and 1910.399, Safety Testing or Certification of Certain Workplace Equipment and Materials (April 12, 1988, 53 FR 12102); 29 CFR 1910.1047, Occupational Exposure to Ethylene Oxide (April 6, 1988, 53 FR 11414); 29 CFR 1926, Subpart Q, Concrete and Masonry Construction Safety Standards (June 16, 1988, 53 FR 22612) and 29 CFR 1926.550, Crane or Derrick Suspended Personnel Platforms (August 2, 1988, 53 FR 29116). These standards are contained in the Division of Occupational Safety and Health Standards for General Industry and Construction Standards. The subject standards, 29 CFR 1910.217, Mechanical Power Presses; 29 CFR 1910, Safety Testing or Certification of Certain Workplace Equipment and Materials; 29 CFR 1910.1047, Occupational Exposure to Benzene; 29 CFR 1926, Subpart Q, Concrete and Masonry Construction and 29 CFR 1926.550 Crane or Derrick Suspended Personnel Platforms were adopted be reference on April 14, 1988, June 13, 1988, August 25, 1988, June 16, 1988 and August 2, 1988 respectively, pursuant to Nevada State law, section 618.295.

2. Decision

Having reviewed the State submission in comparison with the Federal standards, it has been determined that the standards are identical to the Federal standards and accordingly are approved.

3. Location of Supplement for Inspection and Copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Occupational Safety and Health Administration, 71 Stevenson Street, Room 415, San Francisco, CA 94105; and Director, Division of Occupational Safety and Health, 1370 South Curry Street, Carson City, Nevada 89710; and Directorate of Federal/State Operations, Room N3700, 200 Constitution Avenue NW., Washington, DC 20210.

4. Public Participation

Under 29 CFR 1953.2(c) the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Nevada State plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

1. The standards are identical to the Federal Standards which were promulgated in accordance with Federal law including meeting requirements for public participation.

2. The standards were adopted in accordance with procedural requirements of State law and further participation would be unnecessary.

This decision is effective January 13, 1989.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at San Francisco, California this 31st day of October, 1988.

Frank Strasheim,

Regional Administrator.

[FR Doc. 89-812 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

Oregon State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On December 28, 1972, notice was published in the **Federal Register** (37 FR 28628) of the approval of the Oregon plan and the adoption of Subpart D to Part 1952 containing the decision.

The Oregon plan provides for the adoption of State standards which are at least as effective plan provides for the adoption of State standards which are at least as effective as comparable Federal standards promulgated under section 6 of the Act. Section 1953.20 provides that where any alteration in the Federal program could have an adverse impact on the at least as effective as status of the State program, a program change supplement to a State plan shall be required.

On its own initiative, the State of Oregon has submitted by letter dated August 3, 1988 from John A. Pompei, Administrator, to James W. Lake, Regional Administrator, and incorporated as part of the plan, a repeal of State Initiated Rule OAR 437-63-090(3), Overhead Conveyor Requirement, which was formerly contained in the State's standard OAR 437-63, Handling Materials and Material Handling Equipment, and which received Federal Register approval at 39 FR 38037 on October 25, 1974. The Rule was repealed after the Notice of Proposed Amendment of Rules dated May 16, 1988 was mailed to those on the Department of Insurance and Finance mailing list established pursuant to OAR 436-01-000 and to those on the Department's distribution mailing list as their interest appeared. One comment was received and the matter of concern was clarified by a letter of response. No requests for public hearings were received. The repealer was adopted and effective on July 22, 1988.

2. Decision

The above State Rule has been reviewed and OSHA has determined that no comparable Federal standard exists. OSHA therefore approves this standard repeal.

3. Location of supplement for inspection and copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Occupational Safety and Health Administration, Room 6003, Federal Office Building, 909 First Avenue, Seattle, Washington 98174;

Accident Prevention Division, Department of Insurance and Finance, 21 Labor and Industries Building, Salem, Oregon 97310; and the Office of State Programs, Occupational Safety and Health Administration, Room N3476, 200 Constitution Avenue Northwest, Washington, DC 20210.

4. Public Participation

Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Oregon State Plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reason:

1. The State's Rule was repealed in accordance with procedural requirements which included public comments and further public participation would be repetitious.

This decision is effective January 13, 1989.

(Sec. 18, Pub. L. 91-596, 84 STAT. 6108 (29 U.S.C. 667).

Signed at Seattle, Washington this 19th day of October, 1988.

Ryan E. Kuehmichel,

Acting Regional Administrator

[FR Doc. 89-813 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

Oregon State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On December 28, 1972, notice was published in the **Federal Register** (37 FR 28628) of the approval of the Oregon plan and the adoption of Subpart D to Part 1952 containing the decision.

The Oregon plan provides for the adoption of State standards which are at least as effective as comparable Federal standards promulgated under section 6 of the Act. Section 1953.20 provides that where any alteration in the Federal program could have an adverse impact on the at least as effective as status of the State program, a program change supplement to a State plan shall be required. The Oregon plan also provides for the adoption of Federal standards as State standards by reference.

The State submitted by letter dated August 2, 1988, from John A. Pompei, Director, to James W. Lake, Regional Administrator, and Incorporated as part of the plan, the State's incorporation by reference of 29 CFR 1910.272, Grain Handling Facilities, as published in the **Federal Register** (53 FR 49624) on December 31, 1987 and a subsequent amendment as published in the **Federal Register** (53 FR 17696) on May 18, 1988. The standard was adopted by reference and became effective on July 7, 1988, pursuant to ORS 654.025(2), ORS 656.726(3), and ORS 183.335, as ordered and transmitted under the Oregon APD Administrative Order 10-1988. On June 8, 1988, the State mailed the proposed Amendment of Rules to those on the Department of Insurance and Finance mailing list established pursuant to OAR 436-01-000 and to those on the Department's distribution list as their interest appeared. No written comments or requests for a public hearing were received.

2. Decision

Having reviewed the State submission in comparison with the Federal standard, it has been determined that the State standard is identical to the comparable Federal standard. OSHA therefore approves this standard; however, the right to reconsider this approval is reserved should substantial objections be submitted to the Assistant Secretary.

3. Location of Supplement for Inspection and Copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Occupational Safety and Health Administration, Room 6003, Federal Office Building, 909 First Avenue, Seattle, Washington 98174; Accident Prevention Division, Department of Insurance and Finance, Labor and Industries Building, Salem, Oregon 97310; and Office of State Programs, Occupational Safety and Health Administration, Room N-3476, 200 Constitution Avenue NW., Washington DC 20210.

4. Public Participation

Under 29 CFR 193.2(c) the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Oregon State Plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

1. The standard is identical to the Federal standard which was promulgated in accordance with Federal law including meeting requirements for public participation.

2. The standard was adopted in accordance with the procedual requirements of State law and further participation would be unnecessary.

This decision is effective January 13, 1989.

(Section 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667)).

Signed at Seattle, Washington this 20th day of October, 1988.

Ryan E. Kuehmichel,

Acting Regional Administrator.

[FR Doc. 89-814 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

Oregon State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On December 28, 1972, notice was published in the **Federal Register** (37 FR 28628) of the approval of the Oregon plan and the adoption of Subpart D to Part 1952 containing the decision. The Oregon plan provides for the adoption of Federal standards as State standards by reference.

In response to Federal standards changes, the State has submitted by letter dated September 14, 1988, from John A. Pompei, Administrator, to James W. Lake, Regional Administrator, and

incorporated as part of the plan, a State standard comparable to 29 CFR 1910.1048, Formaldehyde, as published in the **Federal Register** (52 FR 46291) dated December 4, 1987 and (53 FR 6628) dated March 2, 1988.

The State's rules pertaining to Formaldehyde, contained in OAR 437-02-360(27), were adopted by reference and became effective on September 12, 1988, pursuant to ORS 654.025(2), ORS 656.726(3), and ORS 183.335, as ordered and transmitted under Oregon APD Administrative Order 14-1988. On August 16, 1988, the State mailed the proposed amendment of Rules to those on the Department of Insurance and Finance mailing list, established pursuant to OAR 436-01-000 and to those on the Department's distribution list as their interest appeared. No written comments or requests for a public hearing were received.

2. Decision

Having reviewed the State submission in comparison with the Federal standard, it has been determined that the State standard is identical to the Federal standard.

3. Location of Supplement for Inspection and Copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Occupational Safety and Health Administration, Room 6003 Federal Office Building, 909 First Avenue, Seattle, Washington 98174; Department of Insurance and Finance, Labor and Industries Building, Salem, Oregon 97310; and the Office of State Programs, Occupational Safety and Health Administration, Room N-3476, 200 Constitution Avenue NW., Washington, DC 20210.

4. Public Participation

Under 29 CFR 1953.2(c) the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Oregon State Plan as a proposed change and making the Regional Administrator's approval effective upon publication of the following reasons:

1. The standard is identical to the Federal standard which was promulgated in accordance with Federal law including meeting requirements for public participation.

2. The standard was adopted in accordance with the procedural requirements of State law and further participation would be unnecessary.

This decision is effective January 13, 1989.

(Section 18, Pub. L. 91-596, 84 Stat. [29 U.S.C. 667]).

Signed at Seattle, Washington this 24th day of October, 1988.

James W. Lake,

Regional Administrator.

[FR Doc. 89-815 Filed 1-12-89; 8:45 am]

BILLING CODE 4510-26-M

NATIONAL COMMUNICATIONS SYSTEM

Federal Telecommunication Standards

AGENCY: National Communications System, Office of Technology and Standards.

ACTION: Notice for comment on proposed standard.

SUMMARY: The purpose of this notice is to solicit the views of Federal agencies, industry, the public, and State and local governments on proposed Federal Telecommunications Standard 1045; "Telecommunications: HF Radio Automatic Link Establishment.".

DATE: Comments are due within 90 days of the date of this notice.

ADDRESS: Send comments to the National Communications System, Office of Technology and Standards, Washington, DC 20305-2010.

FOR FURTHER INFORMATION CONTACT: Institute for Telecommunication Sciences, National Telecommunications & Information Administration, Mr. Robert Adair, telephone (303) 497-3723, or Mr. Dave Peach, telephone (303) 497-5309.

SUPPLEMENTARY INFORMATION: 1. The General Services Administration (GSA) is responsible under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, for the Federal Standardization Program. On August 14, 1972, the Administrator of General Services designated the National Communications System (NCS) as the responsible agent for the development of Federal telecommunication standards for NCS interoperability and the computer communication interface.

2. Prior to the adoption of proposed Federal standards, it is important that proper consideration be given to the needs and views of Federal agencies, industry, the public, and State and local governments.

3. Requests for copies of the December 6, 1988 draft of FED-STD 1045 should be directed to the National Communications System, Office of Technology and Standards, Washington, DC 20305-2010.

Dennis Bodson,

Assistant Manager, NCS Office of Technology & Standards.

[FR Doc. 89-672 Filed 1-12-89; 8:45 am]

BILLING CODE 3610-05-M

NATIONAL ECONOMIC COMMISSION

Meetings

AGENCY: National Economic Commission.

ACTION: Notice of Commission meetings.

SUMMARY: The National Economic Commission meetings scheduled for January 17, 18, and 19 have been cancelled. Additional public meetings are scheduled for February 7, 8, 14, 15, and 16. The commission meetings scheduled to be held on January 31, February 1 and 2, which were originally closed, are now open to the public. The commission was established by section 2101 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, enacted December 22, 1987.

Date, Time and Place: January 31, 11:00 a.m.—5:30 pm; February 1, 9:00 a.m.—5:30 p.m.; February 2, 9:00 a.m.—4:30 pm; February 7, 11:00 a.m.—5:30 p.m.; February 8, 9:00 a.m.—5:30 pm; February 14, 9:00 a.m.—6:00 p.m.; February 15, 9:00 a.m.—5:30 pm; February 16, 9:00 a.m.—12:00 noon. All meetings will be held in Room 562, Dirksen Senate Office Building, Washington, DC.

Agenda: The agenda for these meetings will be announced as soon as practicable before the meetings.

Open Meeting: All meetings of the commission will be open to the public.

For Additional Information: Contact Jim Hildreth at 703/425-8986, National Economic Commission, 734 Jackson Place, NW., Washington, DC 20503.

Supplementary Information: See **Federal Register**, volume 53, No. 80, Tuesday, April 26, 1988, page 14871.

Drew Lewis,

Co-Chairman.

Robert S. Strauss,

Co-Chairman.

[FR Doc. 89-1059 Filed 1-12-89; 8:50 am]

BILLING CODE 6820-45-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-26431; File No. SR-CSE-88-4]

Self-Regulatory Organizations; Cincinnati Stock Exchange, Inc.; Order Approving Adoption of CSE Rule 11.9(t), Relating to the Limitation of Liability for Member Use of Exchange Facilities

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder,[2] the Cincinnati Stock Exchange, Inc. ("CSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission") on August 16, 1988 a proposed rule change to adopt new CSE Rule 11.9(t). As proposed, CSE Rule 11.9(t) would limit the liability of the Exchange and its facilities manager for claims by CSE members and member employees arising out of their use of the Exchange's National Securities Trading System and Automated Extension Processing System.[3]

Notice of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26276, November 14, 1988) and by publication in the **Federal Register** (53 FR 46958, November 21, 1988). The Commission received no comments on the proposed rule change.

Existing CSE Rule 14.5 limits the Exchange's liability to its members for losses resulting from their use of the Intermarket Trading System. Although the CSE states that Exchange policy currently limits the Exchange's liability to members for losses arising out of their use of CSE's data processing systems, there exists no specific Exchange Rule to this effect. Proposed CSE Rule 11.9(t) would formally reaffirm that the Exchange is not liable to its members or member organizations, as well as their successors, representatives or associated persons, for system-related claims arising from the use of Exchange facilities, including (without limitation) the National Securities Trading System ("NSTS") and the Automated Extension Processing System ("AEPS"). The Exchange cites as the statutory basis for proposed CSE Rule 11.9(t) those provisions of section 6(b)(5) and 11A of the Securities Exchange Act of 1934 that encourage the use of new data processing and communication techniques to facilitate economically efficient executions of securities transactions.[4]

The proposed rule change is similar to an existing rule at other exchanges.[5] Further, the adoption of CSE Rule 11.9(t) does not diminish in any way the responsibilities of the exchanges to regulate the operation and use of such facilities in compliance with the Act, the rules thereunder or applicable rules of the Exchange.

The Commission finds that the proposed rule change is consistent with the Act, and the rules and regulations thereunder applicable to a national securities exchange. More specifically, proposed CSE Rule 11.9(t) is consistent with sections 6(b)(5) and 11A of the Act, which encourage the development and use of new data processing and communication techniques to facilitate economically efficient executions of securities transactions. The Commission believes that facilities such as the CSE's NSTS and the AEPS Systems are useful in furthering the establishment of an efficient national market system. To this end, it is consistent with the purposes of the Act for a self-regulatory organization to limit its liability with respect to the use of such facilities by its members. Additionally, the Commission finds that the proposed rule change will not alter the duties and responsibilities inherent in the Exchange's role as a self-regulatory organization registered with the Commission as national securities exchange. Finally, the proposed adoption of CSE Rule 11.9(t) has no impact on the potential liability of the Exchange for the claims of non-members arising from the use of Exchange facilities.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the above mentioned rule change is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Dated: January 9, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-869 Filed 1-12-89; 8:45 am]

BILLING CODE 8010-01-M

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] On November 3, 1988, the Commission received a letter from the CSE, which deleted proposed CSE Rule 11.9(t)'s extension of the liability limitation to CSE customers. *See* letter from David Colker, General Counsel, CSE to George Scargle, Staff Attorney, SEC, Division of Market Regulation, dated October 31, 1988.

[4] 15 U.S.C. 78f(b)(5), 78k-1.

[5] *See, e.g.*, Chicago Board Options Exchange Rule 6.7 and Securities Exchange Act Release No. 14982 (July 20, 1978), 15 SEC Docket 318 (August 1, 1978). *See also* American Stock Exchange Article IV, Section 1(e); and Philadelphia Stock Exchange Article XII, Section 12-11.

[6] *See* 17 CFR 200.30-3(a)(44).

[Release No. 34-26430; File No. SR-MSE-88-07]

Self-Regulatory Organizations; Order Granting Temporary Approval of Proposed Rule Change by Midwest Stock Exchange, Inc., Relating to the Automated Execution of "Stopped, Out-of-Range" Orders on a "Next Sale, But No Better Than The Last Sale" Basis

I. Introduction

Pursuant to section 19(b)(1) [1] of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder,[2] the Midwest Stock Exchange, Inc. ("MSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission") on September 16, 1988 a proposed rule change that would provide for the automatic execution of "stopped, out-of-range" orders on a "next sale, but no better than the last sale" basis. The proposal would be implemented on a sixty (60) day pilot basis, and would initially provide for the automatic execution of orders of 399 shares or less.

Notice of the proposed pilot program was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26196, October 18, 1988) and by publication in the **Federal Register** (53 FR 43062, October 25, 1988). The Commission received no comments on the proposed rule change.

II. Description of the Proposal

The MSE is proposing a pilot program that would change the method in which "stopped, out-of-range" orders are executed on the Exchange Floor. The proposed rule change would provide automated execution of such orders on a "next sale, but no better than the last sale" basis. Presently these orders are processed on a manual basis. This change would represent a new application of the Midwest Automated Execution System ("MAX").

Currently, when an Exchange co-specialist receives a buy or sell order that if executed would create a new high or low price for the day, the order is said to be "out-of-range," and the order is "stopped." The order is then placed in the co-specialist's open order file to be manually executed when conditions permit. The orders are then executed on a "next sale, but no better than the last sale" basis.

The Exchange has provided the following example of the manner in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 C.F.R. 240.19b-4.

which "stopped, out-of-range" orders would be executed by MAX under the proposed rule change.

Where the market is ⅜ bid—⅝ offered, and the last sale was ½ occurring on an uptick, and where the high of the day is ½, a market order to buy is stopped.

—Where the next sale is ⅜, the order is filled at ½ (*i.e.*, no better than the last sale).

—Where the next sale is ½, the order is filled at ½.

—Where the next sale is ⅝, the order is filled at ⅝ (*i.e.*, next sale, but no better than the last sale).

Initially, only orders of 399 shares or less would be subject to automatic execution under the proposed pilot program, although a maximum execution of 1099 shares would remain available for orders over MAX that are not "stopped, out-of-range".

The Exchange cites two reasons supportive of its claim that the pilot program would facilitate the efficient handling of "stopped, out-of-range" orders. First, the Exchange contends that automatic execution of such orders would assure customers of execution as soon as conditions warrant. Second, the Exchange contends that automatic execution of such orders would relieve co-specialists from the burden of constantly monitoring and executing these orders manually. The Exchange is proposing to operate the pilot program on a sixty (60) day trial basis.

III. Discussion and Conclusion

Small order routing and execution systems are designed to receive smaller sized orders electronically from broker-dealers and route them to the appropriate stock exchange floor for automatic execution or manual handling by the specialist. The MSE's MAX System provides an automated small order routing and execution mechanism for retail orders for certain eligible securities, and automatically routes market and limit orders of up to 1,099 shares from member firms to specialist posts, guaranteeing execution of orders of up to 1,099 shares at the best bid or offer displayed on the Intermarket Trading System ("ITS").

MSE Rule 34, Art. XX governs the operations of MSE's Guaranteed Execution System.[3] Because MSE Rule 34, Art. XX guarantees executions on the basis of the best ITS bid or offer, an order may be executed out of the primary market price range for the day. However, for MSE dual trading system issues, MSE Rule 34, Art. XX requires that a "stop" must be granted if requested by an MSE member firm if the execution would occur outside of the primary market range for the day.[4] Thus, MSE Rule 34, Art. XX generally operates to protect customers from adverse price moves on the primary market for MSE dual trading system issues, such that executions received on the MSE would be no worse than if executed on the primary market.

As noted above, the Exchange contends that automatic execution of "stopped, out-of-range" orders would assure customers of execution as soon as conditions warrant. The continued coverage of the protection afforded customers under MSE Rule 34, Art. XX and the best execution duty that generally governs customer order executions both support the Exchange's contention that automatic execution of "stopped, out-of-range" orders would assure customers of timely execution of their orders.

The Commission believes that the proposed rule change is consistent with the Act, and the rules and regulations thereunder applicable to a national securities exchange, and, more specifically, section 6(b)(5) of the Act. For the limited purpose of adopting a 60 day pilot program for the automatic execution of "stopped, out-of-range" orders of 399 shares or less on a "next sale, but no better than the last sale" basis, the Commission believes approval of the pilot program is appropriate. We note that "out of range" customer orders subject to automatic execution under the pilot will still be afforded the same price protections that they currently have under MSE rule while potentially receiving the benefit of more timely executions. Accordingly, the proposed rule change should facilitate the efficient handling of "stopped, out-of-range" orders while maintaining adequate customer protections.[5]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the above mentioned rule change is hereby approved on a temporary basis until March 9, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

January 9, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-870 Filed 1-12-89; 8:45 am]

BILLING CODE 8010-01-M

[3] Rules of the Midwest Stock Exchange, Inc., Art. XX, Rule 34, Midwest Stock Exchange Guide (CCH) ¶ 1714 at 2098 (1987).

[4] A "stop" order to buy (sell) becomes a market order when a transaction in the security occurs at or above (below) the stopped price after the order is represented in the trading crowd. *See, e.g.*, 2 New York Stock Exchange Guide (CCH) Rule 2, ¶ 2014 at 2530 (1987).

[5] If the MSE decides to apply for permanent approval of the pilot, the Commission would be interested in receiving information on the operation of the pilot and any problems encountered in addition to specific data on the number of orders automatically executed under the pilot.

[6] *See* 17 CFR 200.30-3(a)(44).

[Release No. 34-26433; File No. SR-NASD-88-36]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Eligibility Criteria for NASDAQ National Market System Securities

The National Association of Securities Dealers, Inc. ("NASD") submitted on August 5, 1988, and amended on September 8, 1988,[1] a proposed rule change pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act") [2] and Rule 19b-4 [3] thereunder.

The proposed rule change amends Parts I and III of Schedule D to the NASD's By-Laws relating to qualification standards for NASDAQ National Market System ("NASDAQ/NMS") issuers. The amendments derive primarily from discussions among representatives of the NASD, certain of the registered securities exchanges, and the North American Securities Administrators Association ("NASAA"). These discussions concerned the development of a set of minimum quantitative and qualitative listing criteria that would provide a basis for a uniform exemption from state securities registration requirements for all securities traded in markets with such listing criteria. The minimum listing criteria and terms of the uniform marketplace exemption are set forth in a memorandum of understanding ("MOU") executed on March 16, 1988, by the presidents of NASAA and the NASD. The MOU was approved by the NASD Board of Governors on May 9, 1988, and by the NASAA membership on October 10, 1988. In addition, the Commission has endorsed the MOU.[4]

[1] The amendment, which is available in the Commission's Public Reference Room, corrected a technical error in the original filing.

[2] 15 U.S.C. 78s(b)(1) (1982).

[3] 17 CFR 240.19b-4 (1988).

[4] *See* Securities Act Release No. 6810 (December 16, 1988).

The proposed rule change reflects the terms of the MOU and will enable the NASD to implement it.

The quantitative designation and maintenance criteria in the proposed rule change (Sections 2 and 4 of Part III of Schedule D) amend the existing NASDAQ/NMS criteria to make them substantially equivalent to the criteria imposed by the American Stock Exchange ("Amex") prior to February 1987. The NASD states in its proposed rule change that it believes that such levels are consistent with designating securities in which there is a national level of interest among investors and that would therefore most greatly benefit from exemption from state registration af securities provision while providing sufficient safeguards to innvestors to warrant such an exemption.

The proposed rule change also amends section 5(b) of Part III to modify the requirement imposed upon issuers with respect to interim reports by removing the requirement that such reports be distributed to shareholders and substituting the requirement that such reports be made available to shareholders. With respect to this provision, the NASD notes in its proposed rule change that many issuers routinely distribute interim reports to shareholders but believes that in some instances a mandatory distribution of such reports may be unduly burdensome and costly to issuers. The NASD also notes that neither the New York Stock Exchange ("NYSE") nor the Amex requires mandatory distribution of interim reports to shareholders.

The proposed rule change also adds a new provision to Part IIII [section 5(i)] that imposes upon NASDAQ/NMS issuers the requirement to obtain shareholder approval of certain significant corporate transactions.[5] In its proposed rule change, the NASD states that the purpose of this provision is to provide shareholders of NASDAQ/NMS issuers a greater level of participation in corporate affairs by enhancing the qualitative requirements for NASDAQ/NMS designation. The NASD believes that implementation of the shareholder approval requirement is another important step in the continuing development of the National Market System sagment of NASDAQ and that such a requirement provides further shareholder protection commensurate with the stature of the issuers comprising that market.

The proposed rule change also amends Part I of Schedule D by adding a definition of the term "net tangible assets."

Notice of the 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. 25993, August 12, 1988) and by publication in the **Federal Register** (53 FR 31790, August 19, 1988).

The Commission received only one comment letter on the proposal.[6] Moreover, the commentator, Sullivan & Cromwell ("S&C"), addressed only the shareholder approval provisions (Section 5(i) of Part III of Schedule D). Specifically, S&C argued that the shareholder approval requirements were inappropriate because such matters traditionaly have been, and should continue to be, reserved to the states, and, if adopted, may hinder the development of NASDAQ/NMS by eliminating a significant difference between NASDAQ/NMS securities and NYSE and Amex securities, thus possibly causing some issues to be listed on the exchanges that might otherwise become NASDAQ/NMS securies.[7] In response, the NASD argued that its proposed section 5(i) is substantially similar to the current NYSE shareholder approval rule and requested that the Commission approve the NASD's proposed rule change as currently filed.[8]

The Commission has reviewed carefully the points raised in the comment letter and finds that the proposed rule change is consistent with the Act. First, as noted by the NASD, the proposed shareholder approval standards traditionally have been required by the stock exchanges, and the proposed standards are substantially similar to current NYSE standards. Second, the Commission need not and does not find that the proposed standards are compelled by the Act, but we are satisfied that the NASD has acted within its discretion in reaching an acceptable balance in finding that any burdens that may be imposed upon NASDAQ/NMS issuers by the proposed rule change are outweighed by the benefits to be gained from ensuring shareholder participation in major acquisition transactions and transactions that raise particular concerns over conflicts of interest. Moreover, the Commission believes that approval of the rule change is appropriate to facilitate the implementation of the NASD/NASAA MOU and the resultant exemption of NASDAQ/NMS securities from state registration requirements.

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.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change be, and hereby is, approved.

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[5] Section 5(i)(1) provides that each NASDAQ/NMS issuer shall require shareholder approval of the issuance of securities in connection with: (a) options plans or other special remuneration plans for directors, officers or key employees; (b) actions resulting in a change in control of the issuer; (c) the acquisition, direct or indirect, of a business, a company, tangible or intangible assets or property or securities representing any such interests (i) from a director, officer or substantial security holder of the company (including its subsidiaries and affiliates) or from any company or party in which one of such persons has a direct or indirect interest, or (ii) where the present or potential issuance of common stock or securities convertible into common stock could result in an increase in outstanding common shares of 25% or more. Section 5(i)(2) provides that, where shareholder approval is required, the minimum vote that will constitute shareholder approval shall be a majority of votes cast, provided that the total vote cast represents over 50% in interest of all securities entitled to vote on the proposal.

[6] Letter from Sullivan & Cromwell to Jonathan G. Katz, Secretary, SEC, dated September 9, 1988.

[7] As a separate matter, S&C also argued that, if approved, the proposal should incorporate a variety of changes generally along the lines of changes recently proposed by the NYSE. *See* File No. SR-NYSE-88-19, Securities Exchange Act Release No. 25944, 53 FR 28930, August 1, 1988. Specifically, S&C suggests the following changes to the shareholder approval subsection: (1) Delete the term "key employees" in connection with options plans or other special remuneration because of the uncertainty of determining who is covered by the term; (2) create explicit exceptions from the shareholder approval requirement for issuances of warrants or rights generally to shareholders of the issuers, broadly-based option plans that include employees other than just offices and directors, and issuances to persons not previously employed by an issuer that are an inducement for such persons to enter into an employment contract with the issuer; (3) eliminate the provision for shareholder approval of actions resulting in a change in control of the issuer, because the proposal already contains a requirement for shareholder approval whenever a present or potential issuance could result in an increase in outstanding shares of common stock of 25% or more; (4) create an exception from the shareholder approval requirement for issuances in conjunction with de minimis acquisitions from a director, officer or substantial security holder or from any company or party in which one of these persons has a substantial direct or indirect interest; and (5) include a definition of the term "outstanding" shares.

[8] Letter from T. Grant Callery, Associate General Counsel, NASD, to Katherine A. England, Branch Chief, Division of Market Regulation, SEC, dated September 20, 1988. With respect to S&C's proposed changes (*see* note 7, *supra*), the NASD represented that if the Commission approves the NYSE's proposed rule change, the NASD will present the changes to its board within 90 days so that the NASD Board of Governors may determine whether to conform the NASD shareholder approval rule to the NYSE rule.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: January 9, 1989.

Jonathan G. Katz,

Secretary.

FR Doc. 89-872 Filed 1-12-89; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-16744; (812-7165)]

Legg Mason Cash Reserve Trust et al.; Notice of Application

January 9, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: Legg Mason Cash Reserve Trust, Legg Mason Income Trust, Inc., Legg Mason Special Investment Trust, Inc., Legg Mason Tax-Exempt Trust, Inc., Legg Mason Total Return Trust, Inc. and Legg Mason Value Trust, Inc., and any investment companies to be established in the future for which Legg Mason Fund Adviser, Inc. or Western Asset Management Company serves as manager or investment adviser.

Relevant 1940 Act Sections: Applicants seek an order granting exemption from the provisions of section 23(a)(1) of the 1940 Act to permit them to file with the SEC financial statements signed or certified by an independent public accountant selected at a board of directors or trustees meeting held within 90 days before or after the beginning of their fiscal years.

Filing Date: The application was filed on November 1, 1988.

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 3, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants 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 attorneys, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549; Applicants: c/o Marie K. Karpinski, Legg Mason Wood Walker, Incorporated, 111 South Calvert Street, Baltimore, Maryland 21202.

FOR FURTHER INFORMATION CONTACT: Thomas Mira, Staff Attorney (202) 272-3047, or Brion Thompson, Branch Chief (202) 272-3016 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The 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).

Applicants' Representations

1. Each of the Applicants is an open-end investment company under the 1940 Act organized as a Maryland corporation or as a Massachusetts business trust. Legg Mason Fund Adviser, Inc. serves as manager and/or investment adviser to all of the Applicants. Western Asset Management Company serves as investment adviser to Legg Mason Income Trust, Inc. and Legg Mason Cash Reserve Trust.

2. State law does not require Applicants to hold annual shareholders' meetings. Regularly scheduled Board meetings are currently held on the same dates for all of the Applicants in January, February, May, July and October of each year. It is the usual practice to consider an issue affecting more than one of the Applicants at the same meeting.

3. Each of the Applicants' Boards, other than Legg Mason Cash Reserve Turst, consists of six persons, four of whom are not "interested persons" as defined in the 1940 Act. There is substantial identity among the members of all such Boards. The Board of Legg Mason Cash Reserve Trust is comprised of four trustees, three of whom are not "interested persons", and all four of whom serve on the Boards of the other Funds.

4. The Applicants' respective fiscal year commencement dates are staggered as follows: January 1 (Legg Mason Income Trust, Inc. and Legg Mason Tax-Exempt Trust, Inc.); April 1 (Legg Mason Special Investment Trust, Inc., Legg Mason Total Return Trust, Inc. and Legg Mason Value Trust, Inc.); and September 1 (Legg Mason Cash Reserve Trust). The staggered fiscal year ends allow more efficient use of management and accounting personnel.

5. The selection of accountants for the Applicants is based on the recommendation of the Audit Committee of each Board. Each Applicant's Audit Committee is comprised of the "disinterested" members of the Board. The duties of the Audit Committee of each Applicant include meeting with the accountants as necessary to review the audit, financial statements, accountants' comments regarding the Applicant's policies, procedures and controls and the accountants' proposed opinion; reviewing audit and non-audit services provided by the accountants and the fees charged for such services; and evaluating the independence of the Applicant's independent public accountants and recommending whether to retain such accountants for the next fiscal year. The Audit Committees meet at least once a year, immediately preceding the Board meeting at which selection is to be considered, to review the performance of the independent accountants and to decide on its recommendation to the Board for the coming year.

Applicants' Legal Conclusions

1. The application of section 32(a)(1) in light of the present fiscal years and meeting dates of the Applicants would require two or three additional Board meetings for the sole purpose of selecting independent public accountants for the Applicants or a change in the present meeting schedule, because the regularly scheduled meetings do not fall within 30 days of the various Applicants' fiscal year commencement dates. Applicants submit that the present meeting schedule is advantageous to them because it allows the accountants to complete a substantial portion of the prior year's audit and present the results to the Audit Committee of each Applicant before the Committee selects accountants for the coming year. If meeting dates are changed or new funds with different fiscal years are added to the complex in the future, the requirement of section 32(a)(1) could become more onerous.

2. Applicants submit that it is desirable to consider the selection of their independent public accountant at the same time as one or more of the other Applicants during a regularly scheduled Board meeting. Expanding the 60-day window (30 days before or after the beginning of each fiscal year) to 180 days (90 days before or after the beginning of each fiscal year) would permit the Applicants to select accountants twice during the year at a regularly scheduled Board meeting. The purpose of the 60-day window is obscure since if a fund holds an annual meeting of shareholders the 1940 Act allows the directors to select the accountants at any time prior thereto. Applicants submit that it is preferable to avoid the extra expense and inconvenience of holding additional Board meetings solely for the purpose of selecting independent public

accountants, as would be required if the 60-day window were not expanded. Accordingly, Applicants conclude that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-871 Filed 1-12-89; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[Application No. 02/02-5519]

Filing of an Application for a License to Operate as a Small Business Investment Company; Zenia Capital Corp.

Notice is hereby given of the filing of an application with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1988)) by Zenia Capital Corporation, 39-01 Main Street, Suite 210, Flushing, New York 11354, for a license to operate as a small business investment company (SBIC) under the Small Business Investment Act of 1958, as amended, (15 U.S.C. *et. seq.*), and the Rules and Regulations promulgated thereunder.

The proposed officers, directors and shareholders are:

Name	Title	Percentage of Ownership
Zenia C. Yuan, 39-01 Main St., Flushing, NY 11354.	President/ Director Treasurer.	50
Sam C. Yuan, 39-01 Main St., Flushing, NY 11354.	Secretary/ Director.	50
Orest M. Glut, 39-01 Main St., Flushing, NY 11354	Financial Manager.	
Miin-Fei Hwang, 39-01 Main St., Flushing, NY 11354.	Director	

As a section 301(d) Licensee it will provide assistance solely to small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by person whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the new company under thier management, including profitability and financial soundness in accordance with the Act and Regulations.

Notice is hereby given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 "L" Street, NW., Washington, DC 20416.

A copy of this Notice will be published in the newspaper of general circulation in Flushing, New York.

(Catalog of Federal Domestic Assistance Programs No. 59.011, Small Business Investment Companies).

Date: January 9, 1989.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 89-825 Filed 1-12-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended

January 6, 1989

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket No.: 46051

Date Filed: January 4, 1989.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 1, 1989.

Description: Application of United Air Lines, Inc. pursuant to section 401 of the Act and Subpart Q of the Regulations applies for an amendment of its certificate of public convenience and necessity for Route 130 in order to authorize United to operate (1) nonstop service between Chicago, Illinois, and points in Japan, and (2) between Chicago, Illinois, and points in Asia on Route 130 via Japan.

Docket No.: 46052

Date Filed: January 4, 1989.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: February 1, 1989.

Description: Application of Trans European Airways, S.A. pursuant to section 402 of the Act an Subpart Q of the Regulations requests authority, pursuant to the U.S.-Belgium bilateral, Annex II (Which specifically authorizes charter transportation), to operate (i) unrestricted Third and Fourth Freedom flights, (ii) Fifth Freedom flights as provided for in the U.S. Belgium bilaterial.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 89-876 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-62-M

Coast Guard

[CGD 88-115]

Rules of the Road Advisory Council; Working Group Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of Working Group Meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2) notice is hereby given of a three member Working Group meeting of the Rules of the Road Advisory Council (RORAC). The meeting will be held on Thursday and Friday, February 9-10, 1989, at the World Trade Center, 29th Floor, Board of Director's Room, 2 Canal Street, New Orleans, Louisiana, and is scheduled to begin at 9:00 a.m. and end at 3:30 p.m. each day. The agenda for the meeting includes the following items concerning the Navigation Rules, International—Inland (COMDTINST M16672.2A):

1. Vertical Sector Lighting Requirements for Unmanned Barges operating on International (COLREG) waters.
2. Inland rule 38 exemption on sidelight placement.
3. International/Inland rule 23 to allow vessels of less than 50 meters in length to exhibit the forward masthead light as far forward as is practicable as opposed to forward of amidships.
4. Discussion of brightness of masthead light on tow vessels operating on Western Rivers.

The Working Group is interested in hearing the advice from individual attendees and interested parties.

Persons interested in addressing the Working Group on these issues should contact the Executive Director.

Attendance is open to the public. Public comments and/or oral statements are invited at the meeting. Any members of the public may present a written statement to the Working Group at any time.

Additional information may be obtained from Commander Tom Meyers, Executive Director, Rules of the Road Advisory Council, U.S. Coast Guard (G-NSR-3), 2100 Second St. SW., Washington, DC 20593-0001, Telephone (202) 267-0357.

Dated: January 10, 1989.

A. B. Smith,

Captain, U.S. Coast Guard Acting Chief, Office of Navigation Safety and Waterway Services

[FR Doc. 89-874 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-14-M

Federal Aviation Administration

Proposed Advisory Circular 21-QCC; Quality Control For Composite Materials and Structures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice announces the availability of proposed Advisory Circular (AC) 21-QCC, Quality Control For Composite Materials and Structures for review and comments. The proposed AC 21-QCC provides information and guidance concerning an acceptable means, but not the only means, of demonstrating compliance with the requirements of the Federal Aviation Regulations (FAR) Part 21, Certification Procedures for Products and Parts.

DATE: Comments submitted must identify the proposed AC 21-QCC file number, P8-220-0005, and be received by February 13, 1989.

ADDRESSES: Copies of the proposed AC 21-QCC can be obtained from and comments may be returned to the following: Federal Aviation Administration, Production Certification Branch, AIR-220, Aircraft Manufacturing Division, Aircraft Certification Service, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Frank Paskiewicz, Production Certification Branch, AIR-220, Aircraft Manufacturing Division, Room 333, Aircraft Certification Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591 (202) 267-8361.

SUPPLEMENTARY INFORMATION:

Background

The proposed AC 21-QCC provides information and guidance to FAA production approval applicants or holders concerning acceptable quality control systems and related procedures used in the manufacture of composite materials and structures for aircraft and related products.

Comments Invited

Interested persons are invited to comment on the proposed AC 21-QCC listed in this notice by submitting such written data, views, or arguments as they desire to the aforementioned specified address. All communications received on or before the closing date for comments specified above will be considered by the Director, Aircraft Certification Service, before issuing the final AC.

Comments received on the proposed AC 21-QCC may be examined, before and after the comment closing date in Room 333, FAA Headquarters Building (FOB-10A), 800 Independence Avenue, SW., Washington, DC 20591, between 8:30 a.m and 4:30 p.m.

Issued in Washington, DC on December 23, 1988.

Alphonse G. Santarelli,

Acting Manager, Aircraft Manufacturing Division.

[FR Doc. 89-806 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-13-M

[Summary Notice No. PE-89-1]

Petition for Exemption; Summary of Petitions Received and Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before February 2, 1989.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on January 9, 1989.

Denise Donohue Hall,

Manager, Program Management Staff, Office of the Chief Counsel.

Petitions for Exemption

Docket No.: 25652.

Petitioner: Cochise Community College.

Sections of the FAR Affected: 14 CFR 141, Appendix H, paragaphs (3)(c) (1) and (3).

Description of Relief Sought: To allow the enrollment of students in the ground portion of the petitioner's FAA-approved Flight Instructor Certification Course prior to the students' completion of the flight portion of the FAA-approved Commercial Pilot Certification Course.

Docket No.: 25664.

Petitioner: Gulfstream Pacific Airways, Inc.

Regulations Affected: 14 CFR 43.3(a) and (g).

Description of Relief Sought: To allow petitioner's pilots to remove and install passenger seats when necessary to accommodate a flight.

Docket No.: 25737.

Petitioner: CCAIR, Inc., dba CCAIR Cargo.

Sections of the FAR Affected: 14 CFR 21.197(c).

Description of Relief Sought: To allow petitioner to operate certain aircraft maintained in accordance with the requirements of § 135.411(a) under

special flight permit with continuing authorization.

Docket No.: 25742.
Petitioner: Skydive Deland, Inc.
Sections of the FAR Affected: 14 CFR 105.43 and 91.15(a)(2).
Description of Relief Sought: To allow foreign skydivers to participate in events held by petitioner at Deland Municipal Airport (Taylor Field), Deland, Florida. The foreign skydivers would be required to show proof of membership in their National Aero Club, along with proof that their equipment has been approved or accepted in the participant's country.

Docket No.: 25746.
Petitioner: Seagull Air Service, Inc.
Sections of the FAR Affected: 14 CFR 43.3(a) and (g).
Description of Relief Sought: To allow pilots employed by petitioner to perform the preventive maintenance functions of removing and/or replacing the passenger seats and seat belts of aircraft used in part 135 operations.

Docket No.: 20583.
Petitioner: Tenneco, Inc.
Sections of the FAR Affected: 14 CFR 61.58(c)(1).
Description of Relief Sought/ Disposition: To extend Exemption No. 3106, as amended, that allows petitioner's pilots in command (PIC) to complete the entire 24-month PIC in FAA-approved visual or Phase II simulators provided that the pilot taking the flight check has completed three takeoffs and three landings within the proceding days in the specific type aircraft in which the pilot is to serve as pilot in command.
Grant. December 30, 1988. Exemption No. 3106D.

Docket No.: 25307.
Petitioner: Precision Airlines.
Sections of the FAR Affected: 14 CFR 135.429(a) and 135.435.
Description of Relief Sought: To amend Exemption No. 4867 that allows petitioner to use on its aircraft certain parts, repaired, overhauled, or otherwise maintained by foreign original equipment manufacturers. The amendment would add six German-built Dornier aircraft, Model Number DO228-202, to the exemption.

Grant. December 30, 1988. Exemption No. 4867A.

Docket No.: 25351.
Petitioner: USAir, Inc.
Sections of the FAR Affected: 14 CFR 121.371(a) and 121.378.
Description of Relief Sought/ Disposition: To allow petitioner to use foreign vendors to perform inspection, repair, and overhaul work on airframe, engines, components, and equipment on petitioner's fleet of British Aerospace BAC 1-11, Boeing 737-300 and 737-200, and McDonnel-Douglas DC-9-30 aircraft, where such foreign vendors are the original equipment manufacturers of such equipment.

Partial Grant. December 29, 1988. Exemption No. 5005.

[FR Doc. 89-805 Filed 1-12-89; 8:45 am]
BILLING CODE 4910-13-M

Radio Technical Commission for Aeronautics (RTCA); Special Committee 135—Environmental Conditions and Test Procedures for Airborne Equipment; Meeting

Pursuant to Section 10(A)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given for the thirteenth meeting of RTCA Special Committee 135 on Environmental Conditions and Test Procedures for Airborne Equipment to be held February 1-3, 1989, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005, commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Introductory remarks; (2) approval of the minutes of the previous meeting, RTCA Paper No. 436-88/ SC135-262; (3) review draft of proposed revision to DO-160B; (4) review status of the RF susceptibility problem and proposed changes to section 20.0, Radio Frequency Susceptibility; (5) review proposed changes to section 23.0, Lightning Direct Effects; (6) update change coordinator list; (7) other business; and (8) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, D.C. 20005; (202) 682-0266. Any Member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 4, 1989.

Geoffrey R. McIntyre,
Acting Designated Officer.

[FR Doc. 89-807 Filed 1-12-89; 8:45 am]
BILLING CODE 4910-13-M

Radio Technical Commission for Aeronautics (RTCA); Special Committee 163—Unintentional or Simultaneous Transmissions That Adversely Affect Two-Way Radio Communication; Procedures for Airborne Equipment; Meeting

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given for the eighth meeting of RTCA Special Committee 163 on Unintentional or Simultaneous Transmissions that Adversely Affect Two-Way Radio Communication to be held February 6-8, 1989, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005, commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Introductory remarks; (2) approval of the minutes of the previous meeting, RTCA Paper No. 438-88/ SC163-67; (3) review task assignments; (4) review fifth draft of the MOPS, RTCA Paper No. 440-88/SC163-66; (5) assignment of tasks; (6) other business; and (7) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, D.C. 20005; (202) 682-0266. Any Member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 4, 1989.

Geoffrey R. McIntyre,
Acting Designated Officer.

[FR DOC. 89-808 Filed 1-12-89; 8:45 am]
BILLING CODE 4910-13-M

Federal Highway Administration

Environmental Impact Statement; Mecklenburg County, NC

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in Mecklenburg County, North Carolina.

FOR FURTHER INFORMATION CONTACT: Max Tate, District Engineer, Federal Highway Administration, 4505 Falls of Neuse Road, P.O. Box 26806, Raleigh, North Carolina 27611, Telephone (919) 790-2852.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the North Carolina Department of Transportation (NCDOT), will prepare an invironmental impact statement (EIS) on a proposed relocation of US 521 extending approximately 3.4 miles from the South Carolina state line to north of the proposed Charlotte Southern Outer Loop including an interchange with the Outer Loop in Mecklenburg County.

Improvements to the corridor are considered necessary to provide for existing and projected traffic demand. Alternatives under consideration include (1) the "no-build", (2) improving the existing facilities and (3) a multilane highway on new location.

Letters describing the proposed action and soliciting comments are being sent to appropriate Federal, State and Local agencies. A public meeting and meeting with local officials will be held in the study area. A public hearing will also be held. Information on the time and place of the public hearing will be provided in the local news media. The draft EIS will be available for public and agency review and comment at the time of the hearing. No formal scoping meeting is planned at this time.

To ensure that the full range of issues related to the proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action should be directed to the FHWA at the address provided above.

(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 6, 1989.

Max Tate,

District Engineer, Raleigh, North Carolina.

[FR Doc. 89-883 Filed 1-12-89; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Supplement to Department Circular—Public Debt Series—No. 33-88]

Treasury Notes, Series AJ-1990

Washington, December 29, 1988.

The Secretary announced on December 28, 1988, that the interest rate on the notes designated Series AJ-1990, described in Department Circular—Public Debt Series—No. 33-88 dated December 22, 1988, will be 9⅛ percent. Interest on the notes will be payable at the rate of 9⅛ percent per annum.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 89-820 Filed 1-12-89; 8:45 am]

BILLING CODE 4810-40-M

[Supplement to Department Circular—Public Debt Series—No. 34-88]

Treasury Notes, Series Q-1992

Washington, December 30, 1988.

The Secretary announced on December 29, 1988, that the interest rate on the notes designated Series Q-1992, described in Department Circular—Public Debt Series—No. 34-88 dated December 22, 1988, will be 9⅛ percent. Interest on the notes will be payable at the rate of 9⅛ percent per annum.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 89-821 Filed 1-12-89; 8:45 am]

BILLING CODE 4810-40-M

Customs Service

[T.D. 89-8]

Automated Manifest System (AMS) Information Dissemination Product; Public Access

AGENCY: U.S. Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This document revises the final notice document published at T.D. 88-38 in the **Federal Register** on July 1, 1988 (53 FR 25041) concerning the information dissemination product called the Automated Manifest System, to reflect the preparation for sale to the public of a daily magnetic tape containing all releasable data from vessel manifests which are transmitted electronically to Customs through the AMS. The existing notice "contemplated" the preparation of a weekly tape.

EFFECTIVE: December 16, 1988.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Russell A. Berger, Regulations and Disclosure Law Branch, (202) 566-8237. Operational Aspects: Eula D. Walden, Office of Automated Commercial System Operations, (202) 566-6012.

SUPPLEMENTARY INFORMATION:.

Background

By a final notice document published as T.D. 88-38 in the **Federal Register** on July 1, 1988 (53 FR 25041), pursuant to OMB Circular A-130, dated December 12, 1985 (50 FR 527391), the public was informed of a new information dissemination product developed by Customs called the Automated Manifest System (AMS) which allows carriers, port authorities (PAs), and service centers to electronically transmit data to Customs from inward vessedl manifests thereby facilitating and expediting the release of cargo from Customs custody.

The public was also informed that Customs would make available for public sale a magnetic tape containin- data from all the manifests being transmitted electronically to Customs through AMS, assuring proper confidentiality where requested. It was at the time "contemplated that the tape [would] be available on a weekly basis."

In this latter regard, it is now contemplated, and determined, that the magnetic tape will instead be made available on a daily basis. Persons interested in receiving this tape or in obtaining further information about it may contact the Office of Automated Commercial System Operations at (202) 566-6012.

Drafting Information

The principal author of this document was Russell A. Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

Dated: January 4, 1989.

William von Raab,

Commissioner of Customs.

[FR Doc. 89-847 Filed 1-12-89; 8:45 am]

BILLING CODE 9111-26-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 9
Friday, January 13, 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).

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m., Wednesday, January 18, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Publication for comment of proposed revisions to the methodology for computing the Private Sector Adjustment Factor (PSAF).

2. Any items carried forward from a previously announced meeting.

Note.—This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Date: January 11, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-925 Filed 1-11-89; 11:05 am]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: Approximately 10:30 a.m., Wednesday, January 18, 1989, following a recess at the conclusion of the open meeting.

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. Appointment of new members to the Consumer Advisory Council.

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 11, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-926 Filed 1-11-89; 8:45 am]

BILLING CODE 6210-0-M

NATIONAL MEDIATION BOARD

TIME AND DATE: 2:00 p.m., Wednesday, February 8, 1989.

PLACE: Board Hearing Room 8th Floor, 1425 K. Street NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Ratification of the Board actions taken by notation voting during the month of January, 1989.

2. Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

SUPPLEMENTARY INFORMATION: Copies of the monthly report of the Board's notation voting actions will be available from the Executive Director's office following the meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Charles R. Barnes, Executive Director, Tel: (202) 523-5920.

DATE OF NOTICE: January 10, 1989.

Charles R. Barnes,

Executive Director, National Mediation Board.

[FR Doc. 89-939 Filed 1-11-89; 12:04 pm]

BILLING CODE 7550-01-M

Corrections

Federal Register
Vol. 54, No. 9
Friday, January 13, 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.

DEPARTMENT OF AGRICULTURE

Cooperative State Research Service

Special Research Grants Program for Fiscal Year 1989; Solicitation of Applications

Correction

In notice document 88-28888 beginning on page 50500 in the issue of Thursday, December 15, 1988, make the following correction:

1. On page 50501, in the first column, the sequence of the last two headings should be reversed.

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 81126-8226]

Coastal Migration Pelagic Resources of the Gulf of Mexico and South Atlantic

Correction

In rule document 88-30260 appearing on page 153 in the issue of Wednesday, January 4, 1989, make the following correction:

In the third column, in the first complete paragraph, in the last line, "(2°20.4′ N. latitude)" should read "(25°20.4′ N. latitude)".

BILLING CODE 1505-01-D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 64

[Gen. Docket 87-505; FCC 88-341]

National Security Emergency Preparedness Telecommunications Service Priority System

Correction

In rule document 88-27108 beginning on page 47535 in the issue of Wednesday, November 23, 1988, make the following corrections:

1. On page 47536, in the second column, at the beginning of the first indented line, insert "3.".

Appendix A to Part 64—[Corrected]

2. On the same page, in the same column, in Appendix A to Part 64, in paragraph 1c, in the 10th line, "condition" should read "conditions".

3. On page 47537, in Appendix A to Part 64, in the second column, in paragraph u, in the second line, "associate" should read "association".

4. On page 47539, in Appendix A to Part 64, in the second column, in paragraph 6f(6), in the second line, "and" should read "an".

5. On page 47540, in Appendix A to Part 64, in paragraph 9c, in the second column, in the 10th line, after "of" insert "a".

6. On page 47541, in Appendix A to Part 64, in the third column, in paragraph 12c(4)(b), in the third line, "and" should read "or".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO-930-09-4214-10; COC 49195]

Proposed Withdrawal; Scheduled Public Meeting; Colorado

Correction

In notice document 88-29415 beginning on page 51597 in the issue of December 22, 1988, make the following corrections:

1. On page 51597, in the third column, under "T. 6S., R. 78 W.,", in the third line, after "E½W½NW¼" insert a comma.

2. On the same page, in the same column, under "T. 7 S., R. 78 W. (Protraction Diagram No. 9, Accepted April 26, 1965),", in the fifth line, after "Sec. 6, All" insert a comma.

3. On page 51598, in the 1st column, under "T. 6 S., R. 79 W.,", in the 1st line, after "Sec. 25, SW¼SW¼NE¼" remove the comma; and in the 11th line, "Sec. 34, E¼," should read "Sec. 34, E½,".

BILLING CODE 1505-01-D

federal register

Friday
January 13, 1989

Part II

Department of the Interior

Minerals Management Service

30 CFR Part 202, 203, 206, 210, and 212
43 CFR Part 3480
Revision of Coal Product Valuation Regulations and Related Topics; Final Rule

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 202, 203, 206, 210, and 212

43 CFR Part 3480

Revision of Coal Product Valuation Regulations and Related Topics

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: This rulemaking provides for the amendment and clarification of regulations governing the valuation of coal for royalty purposes. The amended and clarified regulations govern the methods by which value is determined when computing coal royalties under Federal coal leases and Indian (Tribal and allotted) coal leases (except leases on the Osage Indian Reservation, Osage County, Oklahoma). The revised regulations will result in consistent and uniform guidance to industry relative to the valuation of coal for royalty computation purposes.

EFFECTIVE DATE: March 1, 1989.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch, (303) 231-3432, (FTS) 326-3432.

SUPPLEMENTARY INFORMATION: The principal authors of this rule are Earl Cox, Herbert B. Wincentsen, Rodney Noah, and Michael Throckmorton of the Royalty Valuation and Standards Division of the Minerals Management Service (MMS), Lakewood, Colorado; Donald T. Sant, Deputy Associate Director for Valuation and Audit, MMS; and Peter J. Schaumberg of the Office of the Solicitor, Washington, DC.

I. Introduction

A notice of proposed rulemaking for coal product valuation regulations was published in the **Federal Register** on January 15, 1987 (52 FR 1840), with a 90-day comment period. The public comment period was reopened on July 9, 1987. Additional comments were accepted through July 23, 1987 (52 FR 25887). A total of 136 comments were received from industry representatives, elected members of Congress, State governments, local governments, Indian Tribes, Indian organizations, and other persons.

During the initial comment period, a public hearing on the proposed rulemaking was held on March 3, 1987, in Denver, Colorado. The Royalty Management Advisory Committee (RMAC) also held a meeting on April 1, 1987, in Denver, Colorado, on the proposed coal valuation rulemaking. Industry, State, and Indian representatives also met with MMS and Department of the Interior (Department) officials during the comment period to discuss issues pertaining to the proposed rulemaking. Minutes from these meetings were included in the record and were incorporated as comments on the proposed rulemaking along with the transcripts from the public hearing and RMAC meeting, and written comments received by MMS.

On August 12, 1987, MMS published a notice in the **Federal Register** (52 FR 29868) reopening the public comment period for 69 days primarily to obtain public comments on a proposal submitted jointly on behalf of the coal and electric utility industries. This proposal included a comprehensive, section-by-section set of revisions to the January 1987 proposed rulemaking. The MMS received 48 comments on the industry proposal which are discussed in more detail below.

The MMS also recently completed two rulemakings to adopt new product valuation regulations for oil (53 FR 1184, January 15, 1988) and gas (53 FR 1230, January 15, 1988). The rulemaking process for oil and gas included draft rules, proposed rules, and two further notices of proposed rulemaking with draft final rules appended. (Citations are included in the preamble to the final rules.)

On June 7, 8, and 9, 1988, MMS held open meetings with representatives of the Western States, Indian Tribes, and the coal and electric utility industries to discuss a draft of this proposed rule. Several suggested changes and additions offered at those meetings were incorporated in a Further Notice of Proposed Rulemaking for coal product valuation regulations published in the **Federal Register** on July 15, 1988 (53 FR 26942) with a 60-day comment period. A total of 51 commenters comprised of representatives of State and local governments, other Federal agencies, the coal and electric utility industries, Indian Tribes, Indian Tribal organizations, individuals, and other organizations responded.

A public hearing on the proposed rulemaking was held during the 60-day comment period following the July 15, 1988, notice. Minutes of that September 7, 1988, meeting are included as comments on the proposed rulemaking.

Except for the addition of the severance tax exclusion from coal value at § 206.257(b)(5), the regulatory provisions in this notice have not changed significantly from the July 15, 1988 proposal. Therefore, we are not repeating the preamble discussion in this notice. Interested parties should refer to the July 15, 1988, notice (53 FR 26942).

II. Purpose and Background

These rules supersede all currently effective coal royalty valuation directives, such as those contained in numerous Secretarial, MMS, and U.S. Geological Survey Conservation Division (now Bureau of Land Management Onshore Operations) decisions and orders. These rules apply to production on or after the effective date of the final rule for all leases.

Structurally, these rules add sections to 30 CFR Parts 202, 203, and 206, revise §§ 206.10 and 210.10, revise subpart titles in Part 212, and remove paragraphs from 30 CFR 203.250 and 43 CFR 3485.2. Paragraph (b) of § 203.250 is redesignated to Part 202 at § 202.250.

For the convenience of coal lessees, payors, and the public, the following chart summarizes the regulation changes:

Regulation changes (all from 30 CFR, except as noted)	Descriptions
I. Redesignations	
1. Paragraph (b) of § 203 250 is designated to Part 202 as § 202.250	This administrative action more appropriately locates within 30 CFR the information contained in this paragraph.
2. Paragraph (a) of § 203.250 is redesignated as § 203.250	This administrative action removes the paragraph designation.
3. Paragraph (j) of 43 CFR 3485.2 is redesignated to 43 CFR 3485.2(d)	This action resulted from the deletion of paragraphs (d) through (g) of 43 CFR 3485.2(d).
II. Deletions	
1. Paragraph (c), (d), (e), (f), (g), (h), (i), (j), and (k) of § 203.250 are removed	This action eliminates the existing coal product valuation regulations. .
2. Paragraphs (d), (e), (f), (g), (h), (i), and (k) of 43 CFR 3485.2 are removed	This action eliminates the existing coal product valuation regulations found at section 3485 of 43 CFR. These regulations are redundant with those at § 203.200 of 30 CFR Part 203, and would conflict with the new regulations intended to replace those in § 203.200.
III. Additions	
1. New section numbers 250 through 265 are added to Subpart F of Part 206	The addition of these sections provides new coal valuation regulations to replace those currently found at 30 CFR 203.200 and 43 CFR 3485.2.
2. The following new subparts are added to Part 212:. Subpart H—Geothermal Resources—[Reserved]. Subpart I—"OCS Sulfur [Reserved].".	This administrative action creates new subparts for future rulemaking requirements.
IV. Amendments	
1. Section 206.10 is amended to reference 30 CFR 210.10 for information collection requirements contained in 30 CFR Part 206	This administrative action places the information collection requirements in 30 CFR 210.10.

Regulation changes (all from 30 CFR, except as noted)	Descriptions
2. Section 210.10 is amended to include all information collection requirements, except for the Production Accounting and Auditing System (PAAS) and Royalty-In-Kind (RIK)	This administrative action places most information collection requirements in 30 CFR 210.10.
3. The titles of Subparts C, D, F, and G under Part 212 are revised to read: Subpart C—Federal and Indian Oil—[Reserved]. Subpart D—Federal and Indian Gas—[Reserved]. Subpart F—Coal—[Reserved]. Subpart G—Other Solid Minerals—[Reserved].	This administrative action creates new subparts for future rulemaking requirements.
4. Paragraph (b) of § 212.200 under Part 212 is amended	This technical amendment deletes the obsolete reference to the "District Mining Supervisor" and replaces the word "Associate Director for Royalty Management" with the word "MMS" for consistency with other parts.

These rules largely continue past practice for coal valuation. Two exceptions to this generalization are notable. Under these rules, lessees may deduct from gross proceeds their costs of Federal Black Lung excise taxes, abandoned mine lands fees, and severance taxes. However, these deductions are only available to Federal lessees, and are not available to lessees of Indian tribal or allotted lands. Secondly, Indian cents-per-ton royalty provisions are included in these rules. Royalty provisions also appear in Title 25 of the Code of Federal Regulations at 25 CFR 211.15(c), 212.18(c), 213.23(c), and 214.10(b).

These rules expressly recognize, however, that where the provisions of any Indian lease, or any statute or treaty affecting Indian leases, are inconsistent with the regulations, then the lease, statute, or treaty shall govern to the extent of the inconsistency. This same principle applies to Federal leases.

The Mineral Leasing Act (MLA), as amended specifically by the Federal Coal Leasing Amendments Act of 1976 (FCLAA) requires that:

> A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations

The MLA and leases issued under the MLA do not specifically define "value," "gross value," "gross proceeds," or "value of production," or how to arrive at those values.

Valuation has long been described as the process of determining the worth of, or setting a price upon, anything. In the U.S. economic system, value has often been closely associated with market value. This means that the value of any good or service in terms of economics is defined by its ability to command other goods or services in exchange. The most common medium of exchange is money. Therefore, many economists signify the value of a good or service by the amount of money which it will command, in other words its value in terms of the commonly accepted medium of exchange.

The concept of establishing values based on the transactions of the marketplace and the benefits of market competition are well known. The Supreme Court summarized the positive effects of competition when it said: "Basic to faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the nations's resources and thus direct the course its economic development will take." *Times-Picayune Co.* v. *United States,* 345 U.S. 594 (1953).

The regulatory approach to royalty valuation of the these final rules recognizes the existence of a market economy and subscribes to the premise that the private sector is presumed to be the most appropriate economic agent vis-a-vis Government planning and direction. Hence, in deference to the market concept, MMS accepts the principle that the most effective and efficient value-setting mechanism is the value set by competition in the free market.

Value in these regulations generally is determined by prices set by individuals of opposing economic interests transacting business between themselves. Prices received for the sale of products from Federal and Indian leases pursuant to arm's-length contracts are often accepted as value for royalty purposes. However, even for some arm's-length contracts, contract prices may not be used for value purposes if the lease terms provide for other measures of value (such as Indian leases) or when there is a reason to suspect the bona fide nature of a particular transaction. Even the alternative valuation methods, however, are determiend by reference to prices received by individuals buying or selling like-quality products in the same general area and having opposing economic interests. Also, in no instance can the basis of value be less than the amount received by a lessee in a particular transaction.

III. Response to General Comments Received on Proposed Coal Product Valuation Regulations and Related Topics

The notice of proposed coal valuation regulations was published in the **Federal Register** on January 15, 1987 (52 FR 1840). The public comment period was reopened from July 9, 1987, through July 23, 1987. On August 12, 1987 (52 FR 29868), MMS reopened the public comment period for 60 additional days to receive public response on a comprehensive alternative valuation proposal, which was submitted jointly by representatives of the coal and electric utility industries. On November 17, 1987 (52 FR 43919), MMS gave notice that it intended to issue a further notice of proposed rulemaking. In that notice, MMS explained that it had received many comments throughout the comment periods. The MMS also stated that some comments had been received after the close of the 60-day period following the August 12, 1987, notice. The MMS concluded by stating that all comments received since the January 15, 1987, proposed rulemaking and until the deadline of the planned further notice of proposed rulemaking would be accepted. On July 15, 1988, MMS published the further notice of proposed rulemaking (53 FR 26942). All comments postmarked by September 13, 1988, which was the closing date of the comment period, were accepted and included in the rulemaking record.

The MMS received many diverse comments on the principles underlying the proposed valuation methodology. Some comments were directed to proposing alternative valuation methodologies. These comments did not address specific sections of the proposed regulations. The general comments were categorized into 7 issues plus a section on other miscellaneous comments, which are addressed first. Following that discussion, MMS will discuss comments received pursuant to specific sections.

General Issue 1: The Ad Valorem Royalty Rate

Comment: One issue that permeated many of the comments, but which is unrelated to coal valuation, concerns the royalty rate. Several commenters from industry and States concluded that the 12½ percent royalty rate was too high thus placing an unfair financial burden on lessees, which in turn places them at an economic disadvantage. One State commented that royalty rates, in concert with valuation of deep-mined coal, place underground mines at a disadvantage,

and the 8-percent royalty rate "should be lowered accordingly to a maximum rate of 5 percent, but more equitably, a lower rate should be adopted by legislative action."

MMS Response: The royalty rate is not a valuation issue. The 12½-percent royalty rate imposed on surface coal operations is required by statute. The Mineral Leasing Act (MLA), as amended by the Federal Coal Leasing Amendments Act of 1976 (FCLAA), requires the Secretary of the Interior to determine a royalty "of not less than 12½-per centum * * * except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." The Bureau of Land Management (BLM) regulations at 43 CFR 3473.3-2 require a royalty rate of 8 percent for coal from underground mines, with the provision to determine a lesser rate if conditions warrant, but in no case less than 5 percent. It is now well settled that BLM has the authority to readjust Federal coal leases and that FCLAA and its implementing regulations apply to pre-FCLAA leases.

Coastal States Energy Co. v. *Hodel*, 816 F.2d 502 (10th Cir. 1987); *FMC Wyoming Corp.* v. *Hodel*, 815 F.2d 496 *(10th Cir. 1987)*; Ark Land Co., 97 IBLA 241, 244 (1987); *Coastal States Energy Co.*, 94 IBLA 352 (1986); *Gulf Oil Corp.*, 91 IBLA 93, 96 (1986); *Ark Land Co.*, 90 IBLA 43, 45 (1985). The MLA at 30 U.S.C. 209 provides statutory authority to reduce royalty rates for those lessees that cannot successfully operate their leases under the prevailing terms and conditions. The MMS notes that BLM has been attentive to industry's concerns regarding royalty rates. The BLM issued a procedural document concerning guidelines for royalty rate reduction on June 26, 1987 (52 FR 24347, June 30, 1987). By **Federal Register** notice dated August 5, 1988 (53 FR 29586), BLM gave notice of its intent to expand royalty rate reduction guidelines to accommodate and facilitate expedited administrative handling of certain reduction applications. By **Federal Register** notice dated July 29, 1988 (53 FR 28822), BLM announced a proposed rulemaking to amend royalty rates for underground mining operations.

General Issue 2: Valuation of Coal Under Some Form of a Cents-per-Million British Thermal Units (Btu) Valuation Procedure

Comment: During the initial comment period following the January 15, 1987, proposed rules, MMS received several comments from industry that advocated a royalty valuation procedure based exclusively on the coal's heat content. That value would be expressed in cents-per-million Btu. Additional comments were received after the July 15, 1988, notice, which further clarified how the procedure was envisioned to function. Other comments were received expressing either support or opposition to this alternative valuation procedure.

Simply stated, the cents-per-million Btu valuation that industry proposed would operate as follows: (1) An initial average value of all Federal surface-mined coal would be established by dividing the monies received for Federal surface-mined coal—less transportation and washing expenses, Federal fees and taxes, State and local taxes, and royalties—by the total number of million Btu's sold. No price adjustment would be made for the sulfur, ash, or moisture content of the coal. (2) This average value would be tied to a current economic index and would fluctuate annually with the rise and fall of that index. (3) Thereafter, a Federal lessee would pay a set royalty, adjusted to compensate for the index fluctuation, based only on the number of Btu's contained in the coal sold or consumed. (4) Metallurgical coal, which is not sold on a heat content basis, would be exempted from the cents-per-million Btu method. (5) No recommendation has been made as to how coal sold under a non-arm's-length contract, or coal consumed by the Federal lessee, would be valued to establish the initial cents-per-million Btu figure. Further, no recommendation has been made for valuing underground-mined coal.

One State commenter agreed with and three other industry commenters supported the cents-per-million Btu valuation procedure. These commenters generally rationalized that the procedure was preferable to MMS's "gross proceeds approach" because it is easy to administer and is more equitable because it separates value from the cost of mining.

MMS Response: The MMS has thoroughly examined this proposed procedure and has concluded the proposal may not represent the market value. The following table illustrates the result of adopting a standardized coal value of $1.00 per million Btus, which would be applicable to all leases.

Field/Area	Btu/lb	Standardized value/short ton at $1/MMBtu	Average market value/short ton (1985)
Fort Union (ND)	6,500	$13.00	$9.30
Powder River (WY)	8,400	16.80	8.67
Uinta (CO, UT)	11,000	22.00	27.69

As shown in this brief example, this procedure derives values that to not accurately represent the coal market. From this example, it appears that the procedure is biased against low Btu coal.

Apart from the inherent flaws embedded in the pricing mechanism, it fails to recognize that coal has never been, or likely ever will be, valued solely for its heat content. Moisture, ash, and sulfur often represent critical quality factors that must be taken into account by electric utilities prior to the purchase and consumption of coal. For example, the January 1987 issue of *Energy* (Volume XI), published by Sun-Progress Inc., states, "Scrubbers placed in the stacks at generating plants are needed to remove the pollutants from the emissions and, depending on the quality of sulphur and ash, can account for up to a third of a generating plant's expenses."

The MMS also concluded that the development and selection of a single dollar amount per million Btu would not be easy and could gravitate into a highly complex, labor intensive exercise. For instance, detailed procedures would have to be developed to explain how the base value is to be derived. To be equitably, other indexes would have to be developed to compensate for variables such as moisture content, ash, sulfur, and so forth.

General Issue 3: Grandfathering of Certain Agreements and Arrangements Under the Final Rules

Comment: Some industry comments received after the initial January 15, 1987, proposed rulemaking stated that all existing coal sale contracts or supply agreements should be "grandfathered" under any new royalty scheme. Under this approach, any such coal sales contracts would be subject to the royalty requirements in effect at the time the coal supply contract was executed. One of these comments cited the Interior Board of Land Appeals (IBLA) support for this position by quoting *Kanawha & Hocking Coal & Coke Co.*, 93 IBLA 179, at 183 as follows: "The method of calculating the value of coal for royalty purposes shall be that method set forth in the regulation on the effective date of readjustment, and any subsequent regulatory change will not alter that method." Similarly, two industry commenters requested that only leases readjusted after these rules become effective should be subject to these regulatory requirements. Other respondents raised this issue again in comments submitted specific to § 206.250(b).

In the preable to MMS's July 15, 1988, notice, MMS explained that it was its intent that absent specific lease terms that set forth valuation criteria, the proposed rules, when final, would govern the valuation of coal from Federal and Indian leases. However, MMS noted that there are some lessees with contracts that pre-date the Federal Coal Leasing Amendments Act (FCLAA) of 1976 and that do not have reimbursement provisions common to contracts after FLCAA's enactment. The MMS requested comments on whether there is a way to grandfather these contracts that would be consistent with the requirements of FCLAA and the MLA.

With regard to the comments that MMS should not make the new regulations applicable to existing pre-FCLAA contracts because the new rules would require royalty to be paid on payments which the commenters said are not royalty bearing under existing rules, MMS requested further comments, specifically identifying the type of payments that are involved.

The MMS received comments that included examples of situations that the commenters believed should not be subject to royalty under the final rules. These examples are:

1. Transfer of water rights. One comment stated that the mine transferred water rights as part of the consideration included in the negotiated coal sales contract. The commenter asserted that the water rights represented 8.3 percent of the coal's sale price and should be royalty exempt.

2. Services provided by the purchaser that are typically the responsibility of the lessee. Several lessees explained that because of the proximity of the mine to the power plant and because of long-standing operating relationships between the mine and power plant, the utility was crushing the coal on behalf of the lessee. In other instances the commenter explained there exists shared ownership of coal mine equipment such as draglines or coal mine facilities such as loadout facilities and primary crushers. The commenters insisted that these services, which represent noncash elements of value and would be subject to royalty under these final rules, should be royalty exempt since these agreements precede the effective date of these rules.

3. Lump sum prepayments. One commenter explained that a lump sum prepayment had been received to cover mine start-up capitalization costs. This commenter stated that since the payment was made prior to these rules, it should not be subject to royalty. This comment further explained that the lump sum payment "had nothing whatsoever to do with royalty avoidance," and that the payment does not affect the sales price.

On a more general note, one State commenter offered the suggestion to pay under the final regulations only if those royalties would be less than that payable under the prior regulations. This commenter stated that this procedure should be used in those situations where the lessee's sales contract has not pass-through provisions.

MMS Response: The State commenter's proposal is administratively infeasible and would constitute an extreme audit burden. Moreover, the lessee's royalty reporting burden would effectively be doubled, because each reporting month the lessee would be required to perform an accounting under two sets of regulations to determine its royalty payment.

The MMS's position with regard to any form of consideration paid under a coal supply contract, for the sale of produced coal, is that such consideration is part of the value of coal and is therefore subject to royalty. In this regard, the final rules represent a continuation of existing policy, except for the exclusion from royalty value for costs of Federal Black Lung excise taxes, abandoned mine lands fees, and severance taxes, as provided for at § 206.257(b)(5). The MMS has an established record under prior royalty valuation rules of aggressively pursuing royalty collections in those situations where the lessee has been receiving noncash benefits from its customer under coal sales agreements. Likewise, MMS has operated under a long-standing policy of accepting nothing less than the gross value received by the lessee for the sale of coal. With regard to the comment which referred to the lump-sum payment received to cover mine start-up capitalization costs, if the commenter's representation that the payment did not affect the contract sales price for each ton of coal were in fact true, then the payment may not be royalty bearing. However, it is MMS's experience that in most situations these kinds of costs are recovered through the contract sales price and therefore are in fact consideration for coal production. In such a situation, MMS would require royalty to be paid on some or all that lump sum. The reason for MMS's position is that a royalty is due on the value of production in marketable condition. The lessee is obligated to incur all costs to bring the coal production to that point, inlcuding all of the mine development costs, production costs, and costs of making the production marketable. If the buyer receives coal and in exchange transfers consideration to the lessee to reimburse it for any of the above-described costs, then that payment is part of the value of the production. Hence, it is subject to royalty.

A corollary issue is whether all or only a portion of such a one-time payment is royalty bearing. First, no royalty would be payable unless and until there is coal production. Once there is production, the lump-sum payment must be equitably pro-rated. If the contract includes a repayment clause or other applicable provision, that would be used. This would require an examination of the contract terms on a case-by-case basis.

However, if the contract does not contain a repayment clause or other applicable provision, MMS will develop a schedule to amortize the payment over the full tonnage deliverable over the life of the contract. If the contract terminates prematurely, royalty may not be due on the full lump-sum payment. By way of illustration, assume a $12 million lump-sum payment for start-up capitalization costs. Assume further that the contract is for 12 years and the anticipated take, based on full utilization of the customer's installed capacity, is 1 million tons/year. One possible equitable allocation method could be to allocate $1 of the lump-sum payment to each ton of production. If the contract were to terminate after 8 years, royalty may be due on only two-thirds of the lump-sum payment.

Therefore, MMS generally considers payments under a contract to be payment for coal production and royalty bearing. However, the lessee has the opportunity to rebut that presumption and demonstrate that the payment was not for coal production. *See* discussion below regarding § 206.257(b)(6).

With regard to the language quoted above from the IBLA in *Kanawha & Hocking Coal & Coke Co.*, the discussion was with respect to a particular lease provision. Therefore, the IBLA's statement is not relevant to the vast majority of coal leases which do not have the same provision.

General Comment 4: Valuation of Coal Under the Joint Proposal by Coal and Electric Utility Industries

Comment: The industry comments were submitted as a joint proposal by six groups representing the coal producers and electric utilities. This proposal included a comprehensive, section-by-section set of revisions to the January proposed rulemaking, including a justification for the suggested modifications. The most significant

revision in the joint industry proposal is to set aside the valuation standards contained in MMS's January 15, 1987, proposed rulemaking and substitute, instead, the concepts of "gross royalty value" and "net royalty value." Industry stated the basis for the their proposal is the Internal Revenue Code's (IRC) concept of "gross income from property" as used for depletion allowance calculations (IRC 613). This "gross royalty value" would be increased by amounts for non-Federal royalties and reduced by processing allowances and amounts based on Federal Black Lung excise taxes, Abandoned Mine Land fees, and State and local taxes (such as severance taxes). The resulting figure would be the "net royalty value" and upon which royalties would be paid. The "gross royalty value" would exclude outbound (long-distance) transportation costs incurred with f.o.b. destination sales. "Gross royalty value" would also exclude take-or-pay payments for royalty assessment.

The Department received a considerable number of comments on the joint industry proposal. A letter from the Governor of Montana, representing personal views and those of the Governors of Colorado, New Mexico, and Wyoming, generally opposed the joint industry proposal and supported continued reliance on the proposed valuation procedures. Several Governors subsequently wrote individual letters to express personal opinions where their views differed from that of the consensus view. The Governor of Wyoming and the Governor of Colorado indicated they could support exclusion of royalty reimbursements from gross proceeds to address the "royalty on royalty" issue. The Governor of Utah suggested that a depletable income method may be incorporated into the hierarchy of MMS's gross proceeds valuation framework. However, he stated that the depletable income method "should not reduce the fair market value or the royalty amount derived from the coal."

The Governor of North Dakota urged the Department to continue the ongoing review of product valuation and expressed specific concerns regarding the production of lignite in the State.

Numerous comments were submitted by electric utility firms and from Governors of States that consume substantial quantities of western coal production. These commenters urged adoption of the joint industry proposal, stating that the joint industry proposal would reduce fuel costs, which in turn would reduce consumer electricity costs. Some commenters supported the valuation proposal by rationalizing that a reduced valuation basis would compensate for the increased ad valorem royalty rates now required under the MLA.

The Assistant Attorney General for Natural Resources, The Navajo Nation, offered comments to the Subcommittee on Mineral Resources Development and Production during the Oversight Hearing on Proposed Coal Product Valuation Rules on November 16, 1987. The Assistant Attorney General opposed the joint industry proposal, stating: "Industry's deletion of the concept of 'gross proceeds' for royalty payment purposes is inconsistent with the concept underlying the present valuation regulations—that royalties from ad valorem leases be based on a percentage of gross proceeds. We urge MMS to retain the 'gross proceeds' methodology for valuation."

MMS Response: The Department expended considerable effort in reviewing the joint industry proposal. Representatives from MMS and from the Department met separately with representatives of the Internal Revenue Service (IRS) to discuss the operation of the "gross income from property" rules and the computation of the percentage depletion allowance. Also, analysts in the MMS reviewed the potential advantages and disadvantages of revenue problems that could arise if the joint industry proposal were adopted as the basis of coal royalty valuation. The MMS analysts solicited input from States and coordinated with principal industry representatives to arrive at a mutually agreed upon range of royalty revenue amounts that would, in the collective judgment of the States, MMS, and industry, most likely occur if the joint industry proposal were accepted.

Following this extensive review, MMS decided not to adopt the joint industry proposal. The following reasoning is provided to explain MMS's decision.

1. The Joint Industry Proposal is not Readily Adaptable to Lease Accounting

The MMS is required to collect and account for royalties on a lease basis. Royalty rates may vary from lease to lease; prices will vary from contract to contract; and contracts may dedicate specific reserves. The IRS determination is made on a taxpayer basis, which would be an aggregate, at least, of all leases and contracts for a single mine, and could conceivably encompass more than one mining operation. Thus, the industry proposal seems to be inconsistent with the basis on which MMS must collect and account for royalties. Making the proposal consistent with MMS needs would require that MMS develop an allocation procedure to convert depletable income to a lease basis. Such a procedure would likely be expensive and require the use of simplifying assumptions to the extent of being unacceptable.

2. The Joint Industry Proposal Creates New Auditing Problems

The Joint Industry Proposal would be a new and complex approach to coal royalty valuation determinations. It is significantly different from the existing valuation methodology used for coal and other minerals. As a result, MMS (as well as State and Indian) auditors would be required to relearn an entirely new system. This necessarily would delay many audits.

General Comment 5: The Advice of the Royalty Management Advisory Committee Was Ignored

Comment: Some commenters stated that in the January 1987 proposed rulemaking, MMS neither acknowledged nor adopted the Royalty Management Advisory Committee's (RMAC's) recommendations concerning coal product valuation. These commenters also stated that MMS did not provide its reasoning for not accepting RMAC's recommendations. Several commenters reiterated this position following the July 15, 1987, notice.

MMS Response: These comments are not supported by the record. The January 15, 1987, (52 FR 1840) **Federal Register** notice states that "MMS also has considered the written and oral comments from the public on the draft rules and the resolution presented to the Secretary by RMAC." The MMS also noted with appreciation the dedicated efforts of all participants who worked on the problems of coal valuation. The MMS considered the section-by-section analysis that preceded the proposed rules adequate explanation and notice to the public, including RMAC, of the substantive reasoning and motivation that guided the formulation of the proposed rules.

General Comment 6: Royalty On Take-Or-Pay and Other Similar Type Payments

Comment: The MMS received many comments concerning the inclusion of take-or-pay payments in the proposed gross proceeds definition. Four commenters, two Indian and two States, expressed support for the inclusion of take-or-pay payments as part of gross proceeds. One commenter reasoned that the inclusion was proper "since the other contractual terms may be affected by inclusion of such language in the

selling agreement." Another commenter stated that gross proceeds "does not simply mean the amount received by the lessee. Rather, it must have an expansive definition to include any consideration * * * including any minimum payments, stand-by fees, or take-or-pay payments." Other commenters recommended that the gross proceeds definition stand as proposed with respect to including take-or-pay payments, but offered no additional reasoning or support.

Industry commenters generally opposed the collection of royalty on take-or-pay payments. Several commenters specifically stated that royalty is due only on production; others specifically stated that MMS lacks statutory support to collect royalty on take-or-pay payments; and some commenters stated that royalty should be collected on take-or-pay payments only under certain circumstances. With respect to the issue that royalty is only due on production, one commenter explained that "if no coal is produced, there is no diminution in the value of the coal reserve and therefore no royalty should be payable." Several other commenters took the same position. Another commenter stated that the "assessment of royalties on take-or-pay payments is inconsistent with the traditional framework for royalty payments. * * * The royalty becomes due only when coal is mined." Many commenters argued that the take-or-pay payments serve as a mechanism to cover the producer's investment risk and as such do not constitute a prepayment for Federal coal. Several commenters continued by stating that the Government has no right to share in the rewards resulting from risk of the capital investment. Several commenters declared that the proposed regulations were internally inconsistent, with certain parts requiring royalties to be paid on take-or-pay payments not related to coal production, while other parts such as §§ 206.259, 206.255, and 206.257 [now designated §§ 206.257, 206.253, and 206.255, respectively] require royalty to be paid on coal produced and sold or otherwise finally disposed of. One commenter also suggested that MMS adopt a wait-and-see position and let the courts decide the legality of collecting royalty on take-or-pay issues.

With regard to the comments citing MMS's lack of statutory support to collect royalties on take-or-pay payments, one commenter noted that "The plain language of FCLAA (30 U.S.C. 207) ties royalty assessment to the value of recovered coal." Other commenters echoed this view. Another commenter stated that the MLA does not allow royalty collection "on coal not mined, produced and sold." Another commenter stated that "The statutory authority to include in production royalties payments made on 'take-or-pay' provisions as if they were 'advance royalties' is certainly subject to question." The commenter further noted that payment of advance royalties is controlled by 30 U.S.C. 207(b). The commenter concluded: "Since advance royalties can only be accepted in lieu of continued operation—one percent of commercial quantities of recoverable coal reserves * * * if an operator is producing the required one percent, section 6 [of FCLAA] would prohibit the lessee from reducing his production royalty payment by the amount of his 'take-or-pay' payment, since these payments are not, by statute, considered 'advance royalties.' "

As noted earlier, several commenters agreed that under certain conditions royalty should be collected on take-or-pay payments. One industry commenter stated: "Some payments received under 'take-or-pay' clauses may well constitute payments for the disposition of coal produced by the lessee, and in such cases we agree that they should be subject to royalty."

Other industry commenters objected to collecting royalty on any other contractually required compensatory payments, other than take-or-pay, which are not based on coal production. The commenters referred to such payments as assignment payments, prepaid reserve payments, damages awarded by courts, buy-outs, bonuses, and capacity charges.

In the July 15, 1988, notice (53 FR 26951), MMS requested further comments as to whether the following payments identified by industry should be subject to royalty:

1. Damages recovered under a court judgment for the purchaser's breach of the sales contract;

2. Payments made under a force majeure clause;

3. "Settlement" payments made to terminate a sales contract before the contractually-specified termination date; this includes situations where there may or may not be a follow-on contract;

4. Payments for assignment of an interest in the lease;

5. Payments not designated as part of the purchase price but made on a periodic or regularly scheduled basis under the contract;

6. Payments not designated as part of the purchase price, which may or may not vary with the amount of coal delivered, and paid on a one-time or not regularly scheduled basis under the contract in a specific sum or calculated under a prescribed formula;

7. Payments or reimbursements for services or processing costs customarily the responsibility of the lessee, including that required to put the product in marketable condition.

Many industry and several State comments agreed that absent any physical removal of the resource from the leased property, no royalty should be due on any type of payment received by the lessee. Five comments advocated the assessment of royalty on take-or-pay or similar type payments. Some commenters suggested that take-or-pay type payments should be royalty bearing but that royalty collection should be deferred until the time of production. One State commenter also suggested that interest should accrue on take-or-pay payments beginning at the time those payments are received by the lessee and until royalty is paid. One State commenter maintained that take-or-pay and similar type payments should remain in gross proceeds but its specific application causing an assessment of royalty would be contingent upon a finding that such payments are consideration for the sale of coal.

While industry commenters contended that most take-or-pay payments are to reimburse the lessee for the risk involved in the lessee's investment of capital into his mining operation, a Tribal representative stated that the lessor is also at risk. The lessor has committed his reserves to the mining operation and thus has a sizable risk and commitment to the operation. Therefore, for sharing in the risk inherent in the mining operation, the lessor should also share in all proceeds received by the lessee, including all take-or-pay payments.

Many comments cited the August 17, 1988, Fifth Circuit Court of Appeals decision in *Diamond Shamrock Exploration Co. et al v. Hodel*, 853 F.2d 1159 15th Cir. 1988), where the Court ruled in the context of natural gas royalties that royalty payments are not due on receipt of take-or-pay payments, but are only due when the purchaser takes so-called "make-up" gas (gas taken in excess of minimum quantities in later periods against the purchase price of which previous take-or-pay payments are credited).

MMS Response: The Department has not further appealed the Fifth Circuit's decision in *Diamond Shamrock*, and will apply the rationale of that decision for purposes of coal royalty valuation.

Therefore, MMS's final coal regulations have been revised from previous proposed rules by revising the definition of "gross proceeds" in 30 CFR 206.251 to exclude the phrase "* * * payments or credits for advanced prepaid reserve payments subject to recoupment through reduced prices in later sales; payments or credits for advanced exploration or development costs that are subject to recoupment through reduced prices in later sales; take-or-pay payments; and reimbursements, including but not limited to * * *." Of course, as discussed further below, if any of such payments at some point is used as a payment for produced coal, then they would still be subject to royalty as gross proceeds for produced coal.

For consistency within the body of the rules, 30 CFR 206.257(g) has been amended in part by deletion of the sentence, "If take-or-pay payments are a part of gross proceeds, no additional royalty shall be due if future make-up deliveries are taken, unless the purchaser is required to pay any additional amount because only a partial payment was previously made or as a result of price increases during the make-up period."

The MMS will not extend the Fifth Circuit's ruling beyond its holding to exclude from value and gross proceeds any payment received by the lessee not specfically denominated as purchase price, a position which the Fifth Circuit decision neither implies nor supports. Instead, the regulations at 30 CFR 206.257(b)(6) will provide lessees the opportunity to rebut the presumption that payments received by the lessee are not part of the total consideration paid for coal and, hence, are not royalty bearing. Since the question at issue is not whether a payment was made but, instead, whether that payment is part of the consideration paid for coal, MMS would expect any rebuttal to address the commercial relationship between the buyer and the seller (lessee). Specifically, MMS would require substantial explanation of why the value paid by a purchaser, under a coal sales contract, is not equitable to the value received by the lessee for the sale of coal.

In all instances, the substance of the transaction or contract clause, and not its form, will control.

General Comment 7: Marketable Condition Requirement

Following the January 15, 1987, proposed rulemaking, MMS received numerous comments regarding the definition of marketable condition. Some commenters stated that the definition was so vague and subjective as to be meaningless. Some commenters advanced alternative approaches to the term marketable condition. Many industry commenters concurred with the alternative valuation proposal submitted jointly by the coal and electric utility industries. Under that proposal, royalty would be computed at the earlier point of either when coal has been extracted, crushed, and sized or when the coal is loaded for delivery. In actual application, royalty would typically be assessed after coal had been processed through the crushing and sizing circuit, since the alternative to sell run-of-mine uncrushed coal does not constitute common industry practice.

Several commenters expressed concern that MMS's valuation approach would assess royalty on beneficiated products such as coal that has been subjected to "deep thermal drying," or "coal pelletization."

In order to address these concerns, MMS added § 206.265 to the July 15, 1988, notice and specifically requested in the preamble that commenters respond as to whether the definition of marketable condition requires further development. Commenters were asked to propose specific changes to the proposed regulatory language.

No commenter responded directly to MMS's request for specific alternative language designed to clarify the definition of marketable condition. Several commenters stated that freeze-proofing and dust suppression were not elements of marketable condition but instead provided a service for the purchaser. One commenter stated that the sale of run-of-mine coal constituted coal in marketable condition because the purchaser accepts the coal in that condition. In this situation, it is the buyer (utility) that owns and operates the crushing facilities.

One Indian commenter stated that it is the buyer's specifications that establish marketable condition and, therefore, the value of all beneficiation should be included in the royalty value.

MMS Response: The requirement that the lessee place the lease product in marketable condition at no expense to the lessor is a vital royalty concept. It defines the minimum level of effort and expenditure the lessee must undertake to place leasehold production in merchantable condition without any contribution or sharing of expenses by the lessor. Any further processing activity beyond that necessary for placing the lease product in marketable condition would be a derivative of the lessee's contractual sales obligation. From a royalty perspective, the additional processing would ostensibly qualify for a deduction from royalties accruing from the sale of leasehold production that has undergone processing beyond that necessary to prepare the mineral as a marketable product.

Marketable condition is the form and condition of leasehold production resulting from the application of normal mining processes. The established market demands and expects that lease production be in such a condition that it can be accommodated by existing buyer facilities used for receipt, handling, and consumption of leasehold production. With respect to coal, processes commonly applied by mine operators (or lessees) to prepare coal for the market include all operations which extract, sever, or otherwise separate coal from its in-place position in the geologic strata; crushing (to limit upward size), sizing, storing, blending, and loading for shipment (including oiling); and all transportation requirements in and about the mine beginning at the point of extraction and including movement to all plants and facilities in which normal mining processes are applied.

Processes which are not identified with common mine operations or practices include both surface and in-situ coal gasification or liquefaction operations, any other operations involving the chemical alteration of coal, and operations involving the physical processing of coal to a condition of quality beyond that normally attributed or associated with coal marketed from the same area.

However, the conditioning of coal for the market does not consist of a uniform set of processes. Rather, the marketable condition requirement is as flexible as the requirements of different market segments. For example, some types of coal sold to certain market segments are not normally screened. Instead, the run-of-mine coal is passed through a crusher to reduce the large pieces. The result of this size reduction is prepared coal that can be accommodated by both seller (lessee) and buyer's coal handling facilities. In other situations where coal fines present problems, the marketable condition requirement for coal will include screening, to eliminate the specified coal fines fraction.

Therefore, the test of marketable condition relies on: (1) The market segment that coal is sold into; (2) the customary requirements of preparation or conditioning normally expected by that market segment; and (3) the typical level of preparation or conditioning by coal producers in that area.

Therefore, under no circumstances will MMS accept the gross proceeds established under any sale of coal that

does not meet the market's minimum requirement for marketable condition. Specifically, the sale of run-of-mine coal for steam coal utilization by an electric utility does not constitute coal in marketable condition. In this situation, MMS will add to the gross proceeds the cost of those normal mining processes which are ordinarily the responsibility of the lessee. This provision is explicitly set forth at § 206.257(h).

Other Miscellaneous General Comments

Comment: Several commenters expressed concern that deletion of redundant royalty provisions from 43 CFR 3485.2 would create confusion because of cross-references found in other sections of 43 CFR Part 3480.

MMS Response: The MMS agrees that some potential confusion could result if certain sections of 43 CFR Part 3480 continue to refer to portions of 43 CFR 3485.2 which would be deleted under a final rulemaking. The BLM will, as part of its normal ongoing housekeeping duties, ensure that 43 CFR Part 3480 is appropriately modified to eliminate cross-references to nonexistent sections.

Comment: The MMS received ten comments from industry and one comment from a State requesting that the proposed rules be withdrawn and that new rules be written. Eight other industry commenters stated MMS's proposed rules were too complicated and urged MMS to adopt simple rules. As one commenter explained, "there's no reason for excessively complex administrative procedures to determine what should be paid." In that same vein, three other industry commenters stated that the general intent of MMS's rules was not clear and that MMS should take additional measures to explain what the regulations would accomplish.

MMS Response: The MMS believes there is great public interest to be served by issuing updated, consolidated, and clarified regulations. With reference to the comment that the rules propose excessively complex procedures, MMS knows of no other procedure to communicate the necessary cost accounting and computation procedures imbedded in coal washing and transportation allowances other than the furnishing of detailed instructions and explanations. The MMS concludes that absent the detail furnished in these proposed rules, lessees would be placed at increased risk of applying improper coal valuation methods and of deducting erroneous coal washing and transportation allowances.

Comment: Twelve industry commenters, two State commenters, and one Indian commenter stated that the proposed rules constitute a major rulemaking as described under Executive Order 12291. The contention is that the proposed rules represent a significant change from the existing regulatory standard, thus, as one commenter described, mandating "a full and complete regulatory impact analysis." One comment from a State provided an opposite view stating, "I do not see these proposed regulations for valuation of coal as a profound change in the regulations already in effect or in the practice which is being used by the MMS * * *."

MMS Response: The Department has determined that these rules do not constitute a major rulemaking under Executive Order 12291. This determination obviates the need for a full and complete regulatory impact analysis.

Comment: Several commenters stated that MMS has not described the monetary impact associated with the proposed rules.

MMS Response: During the period from August 1987 to January 1988, the Department conducted an extensive review of monetary impacts associated with this rulemaking. The Department did not work in isolation but rather consulted extensively with several western coal States and with several industry representatives.

The Department recognizes that the exclusion of Federal and State production taxes will result in less royalty collections than if royalty were payable on the tax payments. It should be recognized, however, that future royalty collections are expected to continue to increase in both nominal and real dollars. Moreover, several factors act to reduce the negative impact on royalty, so that the ultimate reduction in the increase in future royalty collections is less than might first appear. Finally, the offsetting benefits attendant to excluding production taxes from the royalty base are sufficiently compelling that the Department believes the public interest is ultimately served by the exclusion.

The production tax exclusion applies only to ad valorem coal production, and has no impact on the cents per ton royalties paid prior to lease readjustment. Federal coal royalty collections increased from $6.4 million in 1976 to $101.1 million in 1986, a 1,480 percent increase because of increases in price and production (including the development of the Powder River Basin), and lease readjustments. Federal coal royalty collection increased by another 40 percent between 1986 and 1987, with little change in production (less than 2.5 percent). This large revenue increase was due to readjusting leases from the former cents per ton basis to the new ad valorem basis. Readjustments coupled with continued price decreases may increase 1987 revenues by more than 50 percent, reaching 220 percent of the 1986 collections level in 1990 when the readjustment process is expected to be largely complete. Rather than reducing royalties below current collection levels, the effect of the exclusion is to make the increase less dramatic—likely, 2,850 percent of the 1976 level rather than 3,350 percent, or 187 percent of the 1986 level rather than 220 percent.

The actual difference in Federal and State revenue collections, however, will be less than the potential difference in royalty collections. Royalties paid reduce taxable income for Federal and State income tax purposes. To the extent a coal lease is more profitable than it would otherwise be at higher royalties, a significant portion of that profit is absorbed by higher Federal and State income taxes. Moreover, it is expected that this increased profitability will also be reflected in higher bonus bids for coal leases. Finally, as discussed below, the exclusion is expected to make Federal coal more competitive in the market, resulting in some increase in production. This increased production will act to broaden the Federal and State royalty and tax base, resulting in higher revenue collections.

To the extent increases in royalties are "pass through" items in existing long-term coal supply contracts, the decreased collections will be reflected, on a dollar-for-dollar basis, in reduced electric utility generating costs and customer bills. To this extent, the ultimate beneficiary of the tax exclusion will be the consumer.

The Department believes that any remaining impact on royalty collections is more than offset by other local, regional, and national benefits. To the extent demand responds to price, the exclusion is expected to result in some increase in Federal coal production, as well as a reduction in the royalty related development delay. Similarly, the exclusion also results in a tendency to expand the geographic market for Federal coal, which may further increase production. Some of this increased Federal coal production may well come at the expense of increased oil consumption, thus fostering objectives of energy supply diversification and reduced dependence on foreign oil, with the attendant balance of payments benefits.

Additional local and regional employment and income benefits would

be realized to the extent that lower royalty payments contribute to making unprofitable operations marginally profitable. This would result in maintaining mines that otherwise might shut down. Since coal mining is part of the regional economic base in areas where it occurs, employment and income changes in coal mining affect jobs and incomes elsewhere throughout the region. For example, several studies have shown that for every 10 jobs in coal mining, between 6 and 10 additional jobs are created elsewhere in the region. Similarly, a recent study at the University of New Mexico shows that an increase in regional income of $2.46 would be expected for every dollar increase in net income from coal mining.

The MMS also conducted a similar analysis for Indian lands. However, this study is no longer relevant since under the final rules Indian leases will not be subject to the AML fee, Black Lung excise tax, or severance tax exclusions.

Comment: One Indian commenter asserted, "The Assumption that the Lessee will Advance the Interest of the Royalty Owner is Not Grounded in Fact." The comment supported this position by stating that the underlying assumptions such as an open marketplace for coal, the existence of arm's-length sales contracts, and that the lessee always acts to maximize its revenues, are "simply not true."

MMS Response: The MMS disagrees with the assertions of this comment.

There is an operative open marketplace for coal in the United States. The existence of arm's-length coal sales contracts between coal producers and electric utilities, steel mills, export coal buyers, and other coal users is a commonplace occurrence. Business literature is replete with explanations of goals and objectives of American business. Typically a firm will endeavor to maximize the value of a business by obtaining as great a price for its product as the marketplace will permit.

Comment: Many industry commenters stated that MMS had written the proposed coal product valuation regulations based on oil and gas industry principles. As stated in one comment, "By attempting to overlay existing oil and gas valuation concepts on the federal coal royalty program, MMS has arbitrarily ignored the physical properties of coal, realities of coal production, and basic business principles." Many commenters followed these objections by asking that MMS withdraw the proposed regulations and rewrite regulations more specific to coal.

MMS Response: The MMS considers the coal product value rulemaking as adhering to fundamental mining, preparation, and marketing precepts common to the entire extractive minerals industry.

Comment: Numerous industry commenters claimed MMS's proposed regulations were destroying the longstanding past practice of royalty valuation which is supported by administrative and judicial decisions. Some commenters stated that MMS's regulations represented an attempt to broaden, not clarify regulations pertaining to royalty valuation. One respondent offered, "[T]he Minerals Management Service has demonstrated an attitude which borders on the rapacious. The proposed rules are nothing more than a naked attempt to maximize revenues from federal and Indian coal leaseholds." One commenter concluded that MMS's use of longstanding policy to support these regulations was untenable, because there is no longstanding policy for coal product valuation.

MMS Response: The final rules are a rational policy choice within the bounds of the Secretary's discretion. Since Congress did not specify how the royalty value should be determined, the Secretary has discretion to adopt a reasonable set of standards for royalty valuation. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question * * * is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A.* v. *Natural Resources Defense Council,* 467 U.S. 837, 843 (1964). A reviewing court will need not conclude that the agency's interpretation of the statute was the only permissible one, only that it was reasonable, and not arbitrary, capricious, or contrary to law.

In the case of *Motor Vehicle Manufacturers Association of the United States* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983), the court stated that "[r]egulatory agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." The agency is obliged to articulate a reasonable basis for its current position. The MMS has done so in this rulemaking.

Comment: Two State and one Indian commenter stated that the manner in which the proposed regulations are constructed essentially eliminates the protection of the existing regulations, and the self-implementing aspects of the proposed regulations invite industry abuse. These commenters further charge that MMS was abrogating its monitoring, review and audit responsibilities with respect to coal product valuation. On the other hand, one industry comment stated an objection to the "subjective determination elements [which] indicate a significant distrust by the government of the coal industry's past practices of valuation and accounting for royalty purposes."

MMS Response: The MMS believes that no derogatory connotation of industry accounting or valuation practices should be attributed to these rules. These rules should also not be viewed as delegating valuation responsibilities and duties to industry. The report entitled "Fiscal Accountability of the Nation's Energy Resources" written by the Linowes Commission and published in January 1982 (p. xvi) stated that "The Federal government should perform an oversight role. It must not waste its limited resources on tasks that are industry's responsibility. In managing royalty collection, it should not remain mired in bookkeeping details that rightly belong to the lessee. Instead, it should develop systematic, independent cross checks of royalties paid and reports submitted by companies, and it should impose meaningful penalties for false statements or gross errors." The MMS considers these rules to carry out that recommendation.

Comment: After industry commenters stated that MMS lacked statutory authority to maximize the rate of return for "the public's resources" and that the regulations are "greedy," two State commenters took the opposite position, "demand[ing] that the Department establish royalty policies which do not undermine state and federal revenues, particularly at a time when revenues are already curtailed."

MMS Response: The MMS's acceptance of values established under arm's-length contracts cannot be characterized as "greedy." The arm's-length valuation standard is the most commonly utilized and the most accurate representation of any good's true worth and does not constitute an unusual valuation theory design to maximize the rate of return for the public's and Indian's resources at the expense of the coal industry. The use of arm's-length contract values maximizes the return to the public or the Indians to the extent that the lessee is also striving to sell coal at the highest profit it can attain. In this respect, MMS is sharing in the proceeds of contracts that are the results of the free will of coal lessees and their coal purchasers. Hence, the maximization of return to the lessor is

normally an unintended yet unavoidable result.

Comment: Many industry commenters stated that the proposed regulations do not promote development of Federal coal resources. An area of concern to these commenters is that these regulations discourage conservation of Federal coal. Two industry commenters stated that the proposed regulations would influence the economic behavior of the coal industry. One commenter offered its rationale for this position by stating, "The economic forces of the marketplace would move mine plans away from high royalty/high cost coal to lower royalty/lower cost coal or would hasten the closure or cessation of the mining of such federal coal reserves." One commenter also stated, "that MMS or BLM, is party to the ups and downs of the coal business and as such should work with the industry to improve market share as well as profitability." One comment stated that MMS failed to take into consideration the Mining and Minerals Policy Act of 1970, which states in part, "The Congress declares that it is the continuing policy of the Federal Government * * * to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining * * *." One State commenter and one Indian commenter suggested MMS should ignore any potential economic impacts that may result from the final coal valuation regulations. Opposing this viewpoint, one industry commenter concluded that MMS should consider the plight of the electric utility rate payer, who ultimately bears the full burden of any royalty increase.

MMS Response. The MMS disagrees with the statement that these regulations do not promote development of coal resources. The MMS considers these regulations to promote development to the extent that they would better communicate MMS's coal valuation policy to lessees. In this respect, the informed judgment of lessees, who are also prudent businessmen, is enhanced thus providing increased certainty regarding the economic consequences of Federal or Indian coal lease production. The MMS has no mandate to promulgate coal valuation rules which are expressly designed to preserve or improve the Federal or Indian lessor's overall nationwide market share of coal production.

Comment. Two industry commenters concluded that MMS is attempting to accomplish through administrative rulemaking what Congress should be doing through legislation. One industry commenter further explained that MMS's proposed valuation regulations "fly in the face of the clear congressional resolve and would properly be viewed as an 'end run' around Congress."

MMS Response. The MMS is not usurping the power of Congress. To the contrary, Congress' absence of specification on the issue of value reveals Congress' clear invitation to the Department of the Interior to measure the application of value by the needs of later days. The MMS, like all administrative agencies, is empowered to administer Federal statutes and prescribe necessary rules to place into effect the will of Congress. Title 30 U.S.C. 189 authorizes the Secretary of the Interior to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter * * *."

Comment. Two industry commenters stated that the proposed royalty valuation instructions are unclear when there is mixed mineral ownership at a single mine. One commenter requested that MMS provide guidance for the calculation of royalties "when an operator is producing coal from both Federal and non-Federal [lands] * * *." This commenter also stated that this issue becomes even more critical with respect to payments for insurance compensation, coal recovered from waste piles or slurry ponds, take-or-pay payments, and purchaser reimbursements for certain cost items. Another industry commenter claimed that it is "entirely possible that the definition of gross proceeds will be significantly different on Federal and non-Federal leases."

MMS Response. The MMS agrees that royalty terms in leases between private land owners and coal operators, or between States and coal operators, may differ significantly from Federal lease royalty terms. However, the applicability of these proposed rules is limited to Federal and Indian Tribal and allotted coal leases. See § 206.250. Similarly, valuation procedures or instructions contained in private or State leases do not pertain to Federal or Indian leases. It is the lessee's obligation to ensure that in situations of mixed mineral ownership, coal production is properly allocated between Federal, Indian and non-Federal and non-Indian leases.

IV. Section-by-Section Analysis and Response to Comments

Comments were not received on every section of the proposed regulations. Therefore, if any of those sections were not changed significantly from the proposal, there generally is no further discussion in this preamble. The preambles to the proposed regulation published on January 15, 1987 (52 FR 1840), and on July 15, 1988 (53 FR 26942) may be consulted for a full description of the purposes of those sections. For other sections, this preamble will address primarily the extent to which the final rule was changed from the proposal. Again, a complete discussion of the applicable sections may be found in the preamble to the proposed regulation.

Section 202.250 Overriding royalty interest.

Comment. Two comments, one from industry and one from a Federal agency, were received concerning overriding royalties. One commenter stated, "[A]lthough regulations limiting overriding royalties are in existence, the wholesale treatment of 43 CFR Part 3400 to override royalties cannot be done without violating express contractual rights of the owners of the overriding royalty interests." The other commenter asked, "[W]hat are the procedures for handling a case where the company grants an overriding royalty to another individual or company?"

MMS Response. Regulations pertaining to overriding royalty interests are presently found at both 30 CFR 203.200(b) and 43 CFR 3485.2(b). This rulemaking eliminates the redundant regulatory provisions from 30 CFR 203.200(b) (redesignated as 30 CFR 202.250) and clarifies that BLM is the proper agency to approve overriding royalty interests. See 43 CFR 3473.3–2 (1987). The specific provisions of 43 CFR 3485.2(b) are unaffected by these rules. Questions regarding procedures for obtaining approval of overriding royalty interests or similar types of production payments should be directed to BLM.

Section 206.250 Purpose and scope.

Comment. Following the January 15, 1987, proposed rulemaking, MMS received 18 comments from nine industry respondents and two Indian respondents on proposed § 206.250. One industry commenter recommended no change to the language of this proposed section. Four industry commenters agreed with paragraph (a). However, these same commenters also stated MMS had lost sight of the goals of valuing production stated in paragraph (a) later in its regulations by requiring royalty to be paid on take-or-pay payments. Two Indian commenters disagreed with the thrust of paragraph (a) stating that coal production from Indian tribal and allotted leases should

not be valued under the same criteria as Federal coal production. One Indian commenter stated that MMS had neglected to set forth in the proposed regulations MMS's trust responsibilities to the Indians. One industry commenter requested that the MMS "explain in the preamble to the final rules that coal must be allocated to each particular lease in the course of product valuation and royalty assessment."

MMS Response. In response to the concerns expressed by the Indians, MMS modified § 206.250 by adding paragraph (d) to this section to explicitly acknowledge the United States' trust responsibilities to the Indians. That modification was published in the July 15, 1988, notice.

In response to this modification MMS received several comments from Indians expressing approval.

The MMS believes the new valuation regulations, with the changes discussed in more detail below, are one way of meeting with the Secretary's obligations to Indian lessors.

With respect to industry comments regarding royalty on production, MMS has revised its position with respect to take-or-pay payments. See discussion above.

Comment: The MMS received two comments, one industry and one Indian, on proposed § 206.250(c). One commenter agreed with the proposed rule, finding that all royalty payments should be subject to audit and adjustment. The Indian commenter stated that "MMS' past audit record does not reassure the tribes that all royalties due will be collected."

MMS Response: The issuance of more detailed and clarified valuation regulations, as intended by these rules, will further enhance the productivity of MMS auditors.

Section 206.251 Definitions

The MMS received several comments on the proposed definitions in § 206.251. Not all of the definitions received significant additional comments. Also, comments on definitions already were addressed in the July 15 notice. Following are most of the original comments and MMS's responses.

"Ad valorem lease" *Comment:* Some industry respondents recommended deletion of the words "amount or" from the proposed definition of "ad valorem lease." One commenter explained: "Amount of production is only relevant in a take-in-kind royalty provisions [sic]. There is no authorization for such a provision in the MLA [Mineral Leasing Act of 1920, as amended]."

MMS Response: The phrase "based upon a percentage of the amount or value of the production" is appropriate because Indian leases may include a royalty-in-kind proviso. Because these rules pertain to both Federal and Indian coal production, it is proper to include regulatory language that provides for this possibility.

"Allowance" *Comment:* The phrase "Coal washing allowance" appears in these proposed rules as an integral part of the definition of "Allowance." Many industry respondents recommended expanding the scope of the definition and changing the term "coal washing allowance" to "coal processing allowance." One commenter stated that this change was necessary to be consistent with the proposed revisions to § 206.260 [redesignated in the July 15, 1988, notice as §§ 206.258 and 206.259]. Many other commenters supported the proposed expansion for various similar reasons including the suggestions that "an allowance should be extended to all processing costs incurred downstream from the point of royalty determination" and to "other methods of beneficiation which may increase the value of coal * * *." Examples provided as other forms of processing included pelletizing, treatment with chemicals or oil, drying, crushing, and sizing.

MMS Response: The MMS acknowledges the existence of developing coal quality enhancement techniques other than the commercially available coal washing process. However, rather than transplant coal washing allowance procedures to other coal beneficiation technologies, MMS believes it is preferable to provide a rule that recognizes coal beneficiation processes other than coal washing for royalty valuation purposes. Section 206.265 was added to the July 15, 1988, notice to address these comments. The discussion of § 206.265 appears later in this preamble.

Comment: One Indian commenter recommended deleting "all references to washing allowances," and maintained that the basic premise of the regulations is that the lessee "is obligated to place the mineral in its first marketable condition." In support of this position, this commenter stated: "The incorporation of a practice which is primarily a conservation measure does not belong in regulations to value the product for royalty purposes." This commenter concluded that such decisions as approving washing allowances should be the responsibility of "the agency leasing the minerals."

MMS Response: Coal washing is not necessarily practiced as an exclusive conservation measure. It is feasible for coal operators to wash coal to upgrade a first marketable product. Because the net effect of coal washing is to increase heat content and to provide a cleaner burning product by removal of ash and sulfur, an operator may desire to wash coal to extend its market reach or expand its potential customer base. The MMS considers any attempt to differentiate between washing as a conservation measure (to develop a first marketable product) and washing as a marketing tactic to be a needless expenditure of MMS's limited manpower resources. Allowances have been provided to coal lessees that wash Federal coal since the inception of ad valorem royalty rates. Indian coal washing has never occurred. However, allowances for washing Indian coal would equally apply. These rules increase the level of detail necessary to obtain coal washing allowances but otherwise would continue existing policy.

Comment: Some industry respondents recommended deleting the "reasonableness" standard. The proposed definition provided for a coal washing allowance based on the "reasonable, actual costs." One commenter explained that "there is no indication of what would be considered reasonable or unreasonable. We believe that the concept of 'reasonableness' is inherent in all of the lessee's obligations under these regulations."

MMS Response: The MMS nomally considers any cost incurred for coal washing or transportation that is out of proportion to standard industry practices to be unreasonable. However, this statement may be tempered by the specific situation that created the unusual (and possibly unreasonable) costs. In any event, because the commenter acknowledges that the concept of reasonableness is present in all lessee's obligations, it seems no greater an imposition to explicitly state the term in the regulation.

Comment: A few industry respondents recommended substituting the word "value" for the word "cost," because, as stated by one commenter, "it is the *value* of the coal processing activity that should be allowed by MMS—not just its cost."

MMS Response: The MMS believes these commenters have misconstrued the thrust of the regulations. The royalty owner and the lessee share in the value-enhancing of coal washing or coal transportation. As a matter of policy MMS has determined that it is appropriate to continue participation in the costs of washing or transporting the production from either Federal or Indian coal leases. Participating in washing or transportation costs in the form of

allowances results in a net reduction of the royalty payment, which is in itself a cost to the lessor. Therefore, the value of coal washing or transportation to the royalty owner is the increased value of the product sold, less the incurred costs to wash and/or transport coal.

The phrase "Transportation allowance" also appears in these rules as an integral part of the definition of "Allowance." Several industry respondents provided comments on this proposed definition. Many of the same comments were received as discussed above with respect to the phrase "coal washing allowance." These will not be addressed again.

Comment: One industry commenter recommended "that the final regulations should be amended to provide an allowance for all transportation costs." No elaboration or explanation was provided.

One industry commenter recommended that the rules should provide that "a lessee may claim a transportation allowance * * * if a lessee is compelled for geographical, topographical, or other reasons to transport coal from a lease to mine facilities off the lease where it is sold." This comment also suggested granting a transportation allowance under any circumstances where coal is transported more than one mile from the Federal lease. One State commenter suggested that all transportation operations, on or off the lease, even if it is in-mine haulage, should be granted transportation allowances if the transportation occurs after the coal is in marketable condition. Another State commenter concluded that MMS should ensure that transportation allowances are not granted for in-mine haulage.

One industry commenter recommended that the transportation regulations should take into account the situation where in-mine transportation occurs, but the coal being transported is from another adjacent, but distinct, mine. This commenter concluded that transportation in this situation should be eligible for an allowance. Two other commenters, one State and one Indian, similarly recommended inserting the word "necessary," such that the affected portion of the regulation would read "means an allowance for the reasonable, actual, necessary costs incurred by the lessee * * *."

A few industry commenters recommended that the term "remote" is ambiguous and requires clarification. Two of these commenters also claimed the term "mine" required clarification. No suggestions as to additional clarifying language were offered.

MMS Response: The MMS recognizes that transportation costs resulting from the movement of coal throughout the mine complex can be a significant cost. Transportation costs are, in fact, a large factor in determining whether a coal deposit can be mined.

The lessor has historically not participated in the cost of mining, including the costs of normal mine processing operations and any necessary movement of mined material about the mine area. The lessor has historically shared in the cost of outbound (long-distance) transportation where sales occur at the destination rather than the mine. This existing policy is proposed to be continued with further clarification to distinguish those situations where the lessor should participate in the cost of transportation.

The following questions are posed to implement a clarified policy regarding transportation allowances.

1. Does coal transportation occur in what could reasonably be considered the vicinity of the mine, lease, etc., which is defined by some administrative boundary or definition?

An affirmative response to this question would constitute de facto mine haulage and would not qualify for a transportation allowance. Coal movement outside the lease boundary from where it was extracted but inside a larger encompassing mine boundary is not unusual. Any coal movement about the mine premise and between mine processing facilities is at the direction of the mine manager, who ultimately exercises control over the flow of coal from the point of extraction through all processing circuits and loadout facilities.

2. Is the coal transportation considered a normal mining operation?

Coal movement from the pits (in the case of a surface mine) or the portals (in the case of an underground mine) to crushing facilities, preparation plants, surge bins, stockpiles, silos or other storage, loading, or sales facilities of the mine is common trade practice and considered part of the mining operation.

The Minerals Management Service recognizes that it is not only a necessary industry practice to move coal to and from the various processing facilities but to also arrange for coal to enter the stream of commerce and for possession to transfer to the buyer. Transportation recognized as necessary to the operation of the mine would not qualify for transportation allowances.

3. Does the transportation of coal occur prior to the first point where production can reasonably be marketed?

The mine operator is responsible for arranging for the sale and transfer of coal to buyers in the marketplace. The first point where coal may be marketed is the point where title, possession, and liability of loss can transfer from the mine operator to buyers. This point is normally the mine loadout facility.

4. Are there any extraordinary or exceptional circumstances involving coal transportation that should be considered as relevant factors or that could render other transportation allowance eligibility criteria invalid?

Under normal mining conditions, all transportation occurring prior to an f.o.b. (free-on-board) mine sales point would be born exclusively by the lessee. However, under unusual arrangements or circumstances that create transportation costs that are uncommon or which are beyond the established norm for that area, a transportation allowance could be granted.

The MMS has no intent to provide transportation allowances for routine in-mine transportation costs, which every mining operation encounters to some degree. In-mine transportation is an integral part of the total mining process, the cost of which the Federal or Indian owner has historically not shared. Additional discussion of transportation allowances appears later in this preamble. The MMS notes, however, that under the definition of "mine," no allowance would be approved for coal transported between mine facilities, including, for instance, transportation between the pit (or portals, in the case of an underground mine) and the crusher, or for transfer from the crusher to other mine surface facilities, including the storage and loadout facility.

The requirement of a lessee to perform this normal in-mine haulage at no cost to the lessor is sometimes lost because the nature of mineral occurrence does not always lend itself to convenient clustering of mine facilities. Other competing factors such as access to electrical power, water, and long-distance transportation corridors, e.g., railroads, highways, or political or topographical constraints often require compromised mine design.

The MMS has surveyed the various types of minerals produced from mines on Federal and Indian leases and have found that all lessees engage in some degree of mine haulage and normal processing to produce a marketable product at no expense to the lessor. The MMS routinely considers these activities as occurring "at the mine," even though the mine's facilities are not necessarily near the point of extraction.

"Area" *Comment:* Two industry respondents stated that the definition was neither relevant nor precise.

MMS Response: The MMS finds the term "area" to be relevant because of its use in §§ 206.257(c)(2) (i) and (ii), which sets forth the first two valuation criteria for non-arm's-length sales. Under the approach, lessees will use values established under comparable arm's-length coal sales contracts for coal with similar economic and quality characteristics found in the same geographic region. Therefore, for example, a lessee in North Dakota seeking to establish a value for its non-arm's-length coal sales could not resort to coal sales contracts in Colorado as a means of establishing a royalty value.

"Arm's-length contract" The definition of "arm's-length contract generated numerous comments following the January 15, 1987, original proposed rulemaking. The definition in that earlier proposal would have found a controlling interest regardless of how small the ownership between the two persons was. The July 15, 1988, notice amended the earlier proposed definition.

"Arm's-length contract" is defined as a contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that contract. Affiliation essentially would be a control test; ownership in excess of 50 percent constitutes control; ownership of 10 through 50 percent creates a presumption of control; and ownership of less than 10 percent creates a presumption of noncontrol which MMS can rebut. Contracts between relatives would not be arm's-length contracts. To be considered arm's-length for any production month, a contract must meet the requirements of the definition for that month as well as when the contract was executed. Thus, if two contracting parties were not affiliated when the contract was executed, but are affiliated now, the contract would be non-arm's-length.

Alternatively, if two parties were affiliated and executed a non-arm's-length contract, but subsequently divested ownership in one-another, that contract would continue to be regarded as non-arm's-length until such time that the contract terminates or is replaced by a contract negotiated at arm's-length.

Comment: One State commenter proposed an alternative definition that would not include the issue of control. This commenter also stated that regardless of which definition is adopted, "MMS should retain the ability to review contracts [for their arm's-length status] as they relate to current sales."

A few industry commenters stated that MMS's "Arm's-length contract" definition was too reliant on form rather than substance. These commenters asserted that where a contract was agreed upon when the parties were nonaffiliated and that contract has continued unamended even though the parties have since become affiliated, the contract should be viewed as "arm's-length."

MMS Response: The July 15, 1988, proposed definition is retained unchanged in the final rules. The arm's-length test must be met each production month. Contracts entered into by independent parties lose their arm's-length status when the contracting parties become affiliated. Clearly, any contract signed by former unaffiliated parties would only continue to operate under the permission of the controlling entity, if the entity's best interest is served. The MMS does not consider such a contract to be arm's-length.

"Audit" *Comment:* Several industry respondents and one Indian respondent submitted numerous comments regarding the January 15, 1987, proposed definition of this term. Three industry commenters requested clarification regarding who conducts audits of royalty payments and on what date an audit would be deemed final. Two industry commenters stated a need to clarify this definition's relation to the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA). One Indian commenter stated that the phrase "production verification" should also be defined. One commenter stated that MMS should be required to disseminate audit findings to Indian tribes and allottees "as their needs arise."

MMS Response: The MMS is the prime auditing authority of coal royalty payments from either Federal or Indian coal lessees. States and Indians may also audit coal royalty payments under the provisions of individually executed cooperative agreements. The results of an audit are normally considered final when the lessee accepts the audit findings or its appeal rights are exhausted. The Federal Government is not prevented from reopening an audit if there is evidence of substantial omission or fraud. The definition in the July 15, 1988, notice modified the January 15, 1987, proposed definition by deleting all language following the first sentence of the definition. The deleted material was only intended to be explanatory. These final rules contain the July 15, 1988, proposed definition unchanged from that proposal.

"Coal washing" *Comment:* Several respondents provided comments concerning this definition. Several industry commenters recommended revising this definition from "Coal washing" to "Coal processing." Support for this modification provided in these comments followed the same rationale as stated earlier: Other methods of beneficiation besides coal washing may increase the value of coal. One commenter further explained, "The definition of coal washing should be rewritten to clarify that these processes are included and provide incentives to develop new technologies for increased or different federal coal use." One Indian commenter recommended deleting the definition entirely but offered no reasoning.

MMS Response: The MMS responded to these issues earlier at the discussion of the term "Allowance."

Comment: The MMS received many comments from industry respondents stating that all preparation costs should be excluded from the royalty value.

MMS Response: The details of these comments and MMS's response to them were published in the July 15, 1988 (53 FR 26942), notice. The reader should refer to the referenced issue of the **Federal Register.**

The final rules maintain the longstanding requirement for the lessee to place the mined product in marketable condition at no expense to the lessor. An extensive discussion of the "marketable condition" requirement is contained earlier in this preamble.

"Contract" *Comment:* Several industry respondents provided comments recommending deletion of the phrase "that with due consideration creates an obligation" from the proposed definition. Two commenters stated the phrase was "unnecessary and confusing."

MMS Response: The MMS considers the elements of consideration and obligation to be fundamental elements of coal sales contracts. These rules retain the language of the January 15, 1987, proposed rulemaking.

"Gross proceeds" *Comment:* Following the original January 15, 1987, proposed rulemaking, MMS received many comments on the definition of "Gross proceeds." Many comments were concerned with the proposal to exclude the AML fee and Black Lung excise tax from the value of coal. An extensive description of those comments appeared in the preamble to the July 15, 1988 (53 FR 26942), notice. Readers should refer to the referenced issue of the **Federal Register** to review those comments and MMS's response.

Comments received since the July 15, 1988, notice regarding the inclusion or exclusion of the AML fee, Black Lung excise tax, and other taxes or fees are

addressed in the discussion of § 206.257(b).

MMS Response: There is no doubt, for example, that when the purchaser pays $10/ton for coal, that is the lessee's gross proceeds. Whether all of that $10 is royalty-bearing is a separate issue and is addressed below in § 206.257(b).

Comment: Many commenters including States, Indians, and industry, commented that they favored recognizing all forms of consideration received by the lessee for purposes of valuing Federal and Indian coal. Several industry respondents opposed the concept of including noncash forms of consideration such as providing crushing or loading services to the lessee. One commenter maintained: "There may be occasions when there truly is significant consideration given to the seller which is not included in the actual sales price of the coal. When that is the case, then there is justification to collect royalty on such consideration." This commenter concluded, however, that the proposed rules do not define what is significant.

MMS Response: The MMS partially responded to this issue as it was raised in the discussion of "grandfathering." The MMS's policy is restated again to be very clear on this issue. The MMS has always required royalty to be paid on all components of produced coal value, including those components of a coal sales agreement that are not in the form of cash and are not imbedded in the price. As stated in the January 15, 1987, proposed rulemaking, "The definition of gross proceeds is intended to be expansive to ensure that it includes all the benefits flowing from the purchaser to, or on behalf of, the seller for the disposition of the coal * * *."

The rationale for this policy is that a mine operator can benefit equally from transactions involving noncash as well as cash benefits. In other words, cost avoidance can contribute as much to overall firm profitability as incoming revenues can. However, the royalty owner likewise is entitled to receive a share of the noncash value components received by the lessee. Any other proposition is unacceptable because the outcome would clearly represent royalty assessed on an amount that represents less than the full value of coal.

Comment: Many industry commenters stated that the use of "gross proceeds valuation" does not have a basis in law. One commenter supported this position by stating that, "The words 'gross proceeds' do not appear in the Mineral Leasing Act of 1920. Section 7 of the Act, as amended in 1976, established a royalty based on coal's value." This reasoning was expressed as support in other comments.

MMS Response: Section 7 of the MLA, as amended by FCLAA, requires royalty to be paid on "the value of coal as defined by regulations." The regulations in effect since 1976 have required royalty to be based on "gross value." Although the "gross proceeds" term herein is new, it is not forwarding a new concept. The selection of the term "gross proceeds" is to assure regulatory consistency within MMS and is an exercise of discretion provided by statute.

Comment: Some industry commenters stated that MMS should not use the gross proceeds established under contracts signed in the 1970's. One respondent commented that "These negotiated coal prices are over-inflated and not indicative of fair market value. They were contracted during the 'oil crisis' and the moratoriums on federal coal leasing." The commenter advocates that MMS "should develop a method that takes into account the average coal price at each mine and does not consider those 1970's contracts as indicative of fair market value." Another industry commenter offered an alternative proposal where royalty would be based on the average price of a geographic area if "the current 'arm's-length' price exceeds the average price for coal sold in the same geographic area by 20 percent or more * * *."

MMS Response: For arm's-length contracts, MMS does not believe that there is any justification for receiving a royalty based on less than a contract sales price regardless of when the contract was signed. The lessee receives the benefit of a higher price and the royalty owner is entitled to share in that benefit. Non-arm's-length situations are addressed later in this preamble. Interestingly, a similar issue was raised several decades ago. The conclusion was as follows: "Prices specified in contracts made years ago, but still effective, are just as significant a part of present markets for natural gas as those made yesterday, or those which may be made tomorrow." (Federal Power Commission, Natural Gas Investigation 222 [Docket No. G-580, 1948]).

Many comments were received on the take-or-pay issue prior to the July 15, 1988 (53 FR 26942), notice. Those comments were summarized in this referenced notice and will not be repeated here.

Numerous comments on the take-or-pay issue were received since the July 15, 1988, notice. The MMS responded to the issue of take-or-pay payments and similar type payments earlier in this preamble. The MMS's response also explains changes to the "gross proceeds" definition that have been made to conform to the Fifth Circuit Court of Appeals decision regarding take-or-pay.

The remaining definition of gross proceeds remains unchanged from the July 15, 1988, notice.

The definition of "gross proceeds" includes the total monies and other consideration "accruing" to the lessee. Because the definition of arm's-length contract does not include any provisions which address the concept that such contracts must reflect the entirety of the agreement between the parties, MMS concluded that the definition of gross proceeds should be sufficiently broad to encompass all consideration to which the lessee is entitled. The term "accruing" is intended to accomplish this purpose.

"Lease" *Comment:* Seven industry and one Indian respondent submitted comments regarding this proposed definition. One commenter stated that the definition was too broad, and six other commenters advocated redefining the term to exclude arrangements that are not leases, such as profit-sharing arrangements or joint ventures. Three other commenters suggested that MMS should adopt BLM's definition of lease as found at 43 CFR 3400.0-5(r), stating that there was no need for two bureaus of the same Department to have different definitions of the same term.

MMS Response: The definition of "Lease" is largely a restatement of the definition of that term as defined by various statutes.

"Lessee" *Comment:* Ten industry commenters stated that the definition was too broad and "subject to misconception," and that MMS should redefine this term to eliminate persons who pay royalties but have no interest in the lease. As explained by one commenter, "It [the definition] could, for instance, include as a 'lessee' a coal buyer who in the coal sales contract agrees to reimburse the coal miner for royalties payable."

MMS Response: The term "lessee" as defined in these rules does not extend to an unaffiliated coal buyer, which under a coal sales contract agrees to reimburse the lessee for royalty expenses. The lessee cannot contract away an obligation created by the taking of a lease. Further, failure of a coal buyer to render payment to the lessee does not relieve the lessee of its obligation to submit royalty payments for coal sold from a Federal or Indian coal lease. The definition does, however, include a coal buyer who agrees to report and pay the royalty to the MMS.

"Like-quality coal" *Comment:* One industry respondent questioned the meaning of the word "similar." Specifically, the comment asked how much variation in the chemical and physical characteristics would be allowed within the term "similar."

MMS Response: In general, MMS would consider two coals to be similar if they fall within the same coal classification, as set forth by The American Society for Testing Materials (ASTM) Standard D-388. However, MMS cautions that these general tolerances for the similarity test are not conclusive. Btu, ash, sulfur, and moisture content, and in specific situations other tests such as washability, drop shatter test, test for water soluble alkali or other tests may be necessary to conclude similarity.

"Net-back method" *Comment:* Numerous industry respondents submitted comments on the proposed definition that was contained in the January 15, 1987, proposed rulemaking. Two commenters advocated taking into consideration only the actual cost of transportation, thus eliminating costs such as coal handling, washing, etc., from the net-back calculations. One commenter suggested changing the definition to mean a procedure for valuing produced coal at the mine-mouth when a sale has taken place downstream from the lease or mine. Similarly, other commenters who advocated the "depletion income" valuation method offered an alternative proposal by defining the term to mean "a procedure for valuing coal downstream from the lease or mine working back from the point of gross royalty valuation to arrive at net royalty value at the first point of marketable condition." Any transportation, washing, or handling services would not be included in the "net royalty value." One commenter stated that the definition should be deleted as it is unnecessary under its proposed alternative "fair market value approach." One commenter stated that the "point of measurement for royalty purposes" is not specified in the definition and questioned how that point would be determined. One commenter recommended modifying the definition "to recognize that it is a procedure for determining the value of coal at the point of extraction." This commenter advocated also including "all portions of the value added to the coal as a result of post-extractive processes."

MMS Response: The definition in the July 15, 1988, notice which has been carried forward unchanged in these final rules, substantially revised the earlier proposal. The MMS will not permit any expense incurred prior to the point where the mineral is placed in marketable condition to be included in a net-back valuation method. To permit otherwise would contradict long-standing Department of the Interior policy and would deny equal royalty treatment to other lessees, which cannot avail themselves of a net-back valuation procedure. Therefore, the definition contained in this rulemaking has been streamlined but the concept is unchanged. The MMS will use a net-back valuation method only when other methods of determining value, such as those specified in the rules, are inapplicable. In doing a net-back, MMS will start at the first point at which a market value for the product can be determined, and will deduct costs of transportation, washing, handling, etc. to reach a value for royalty purposes.

"Net output" *Comment:* Two industry respondents requested that the term be redefined to mean "the quantity of coal delivered to the purchaser." The commenter supported this change to "make the definition more accurate and readable."

MMS Response: The MMS believes the term "produced" provides more flexibility and accuracy by including such situations as retention of washed coal by the on-site washer for purposes of drying coal or space heating.

"Person" *Comment:* Three industry respondents requested that the definition be revised. Two advocated changing the definition to read " 'Person' means any individual or legal entity." One commenter justified the proposed change by stating that "This revision is intended to make the definition legally sound, less confusing and less subject to being misconstrued."

MMS Response: The MMS's definition of "person" is consistent with sound legal principles and other statutes.

"Selling arrangement" *Comment:* Several industry respondents commented that this definition's meaning and purpose in the regulations are unclear and should be deleted.

MMS Response: The term "selling arrangement" is used in § 206.262 "Transportation allowances-general." The purpose of the term, as it is used in the rule, is to prohibit the transfer of transportation costs incurred under one particular sale to other sales not involving transported coal. It also clarifies that although present royalty reporting requirements for Form MMS-4014 allow aggregated reporting of sales, for purposes of allowances these deductions will be by individual contractual sales arrangement. These final rules adopt the July 15, 1988, notice definition.

"Severance tax"—Because these final rules adopt Recommendation VII-5 of the Commission on Fair Market Value Policy for Federal Coal Leasing that "the base for calculating Federal royalty payments should be the f.o.b. price minus all State and local severance and similar taxes," a definition of "Severance tax" has been added to this section. The intent of this definition is that only State and local production-related taxes may be excluded from the Federal coal lessee's gross proceeds and that other taxes and royalties may not be excluded.

"Spot market price"—The July 15, 1988, notice included a definition of "spot market price." Although no comments were received on this definition, MMS wishes to make clear its intent through the following explanation. The definition provides: "The price received under any sales transaction when planned or actual deliveries span a short period of time, usually not exceeding one year." The term "planned" is used because duly executed spot sales contracts providing for near term future sales would be evidence of market value at that time.

This definition is adopted unchanged in the final rules.

Section 206.262 Information collection

Comment: One industry and one Indian respondent commented on MMS's proposed information collection requirements. The industry commenter stated, "Collection of washing and transportation allowance data is unnecessary with a market value test" valuation, as opposed to a gross proceeds requirement. (The detailed discussion of alternative valuation proposals is contained at § 206.257(b).) The Indian commenter requested that MMS "clarify that this information will be available to Indian tribes on request for use in tribal management programs."

MMS Response: The MMS will respond to the alternative valuation procedures in the responses to comments at § 206.257(b). With respect to the sharing of mineral lease data with Indians, it is MMS policy to provide the Indian lessor any information relevant to its specific Indian leases, provided the Indian lessor agrees to safeguard certain proprietary financial and trade information.

Section 206.253 Coal subject to royalties—General provisions

Comment: The MMS received many comments from numerous industry

respondents and one Indian respondent concerning proposed § 206.253. One industry commenter recommended that no changes be made to this section. Numerous industry respondents submitted many comments objecting to the provisions of paragrpah (a). Five commenters stated that only coal produced under a resource recovery and protection plan should be subject to royalty. One commenter explained that "BLM approves of the lessee's Resource Recovery and Protection Plan and thereby approves of the quality and quantity of that coal which must be recovered * * *." The commenter "urged that the rules provide that so long as the Resource Recovery and Protection Plan is being achieved, no royalties be charged for coal which is not mined pursuant to that plan." Four other commenters stated paragraph (a) was a duplication of BLM's existing authority for Maximum Economic Recovery (MER). One commenter noted, "The BLM's Maximum Economic Recovery regulations already serve to define how the reserve will be produced." One commenter objected to paragraph (a), stating that the requirement to pay royalties "on coal avoidably lost does not take into consideration the real world of mine operation and business." Indian commenters stated royalty should be due on all coal, including that coal unavoidably lost. Five other commenters stated that paragraph (a) was inadequate in other respects. One Indian commenter stated that this paragraph failed to deal with theft. Two other commenters stated it did not adequately define "avoidably lost." One commenter stated this paragraph would impose a royalty on coal too thin to mine or too poor a quality to use at a utility plant. One industry commenter stated that paragraph (a) refers to coal "which is 'unavoidably lost as determined by BLM pursuant to 43 CFR Group 3400' " but noted that "the Group 3400 regulations do not address the concept of 'unavoidably lost.' "

MMS Response: The BLM determines the quantity of coal subject to royalty under its production verification responsibilities. Section 206.253(a) does not duplicate or usurp BLM's responsibilities pursuant to 43 CFR Group 3400. MMS points out, however, that coal avoidably lost is subject to BLM's scrutinty under 43 CFR Group 3400 performance standards. Coal which cannot be produced for various reasons, and is not mined, in compliance with the BLM-approved Resource Recovery and Protection Plan would not be subject to royalty. However, the Federal or Indian lessor does not bear the economic burden of absorbing losses due to the actions of an imprudent operator. In regards to theft, BLM may consider stolen coal avoidably lost and thus subject to royalty.

One industry commenter stated that although MMS uses the word "produced" in paragraph (a), the word is not defined in the proposed regulations. This commenter also offered a definition: "[C]oal is produced for royalty purposes when it is severed and placed in commercially salable condition, and then either sold, consumed, or otherwise disposed of." This commenter further noted that the use of the term "produced" in paragraph (a) was inconsistent with the gross proceeds approach of the regulations.

MMS Response: The MMS accepts the common usage and meaning of the word "produced," and believes no definiton in the regulations is necessary. The MMS discussed this issue in greater depth in the general comments regarding take-or-pay and similar type payments. The MMS agrees with the commenter that coal "produced" is relevant to coal that may be used by the lessee on-lease or off-lease, but not sold.

The intent of paragraph (a) is to make clear that royalty is due when coal is used, sold, or otherwise produced and disposed of by the lessee on or off the lease. These final rules include, unchanged, the regulation as it was proposed in the July 15, 1988, notice.

Comment: One industry comment stated that coal, free-of-charge, is provided to the Indian lessor. This commenter noted that royalty should not be charged on that coal.

MMS Response: The MMS understands that coal provided free-of-charge to the Indian lessor is explicitly provided for by lease terms. These rules explicitly provide for lease terms to govern where specifically inconsistent with these rules. See § 206.250(b).

Comment: Several industry respondents provided comments discussing paragraph (b). Two commenters requested that MMS clarify the language of paragraph (b) to state that insurance payments received by the lessee for losses other than coal would not be royalty bearing. One commenter suggested adding the phrase "for the coal lost" to the end of paragraph (b) as it was proposed.

MMS Response: The regulations published in the January 15, 1987 (52 FR 1840), proposed rulemaking were changed in the July 15, 1988 (53 FR 26942), notice to clarify MMS's intent on this issue. Royalty will be due only on insurance monies received by the lessee for the loss of coal. Royalty will not be due on insurance monies received for replacement of equipment or real estate. The July 15, 1988, notice language has been adopted in the final rules.

Comment: One industry commenter questioned if it were necessary "to determine if the insurance contract is arm's-length and go through the procedures of 30 CFR 206.257?"

MMS Response: The MMS believes that the issue of arm's-length versus non-arm's-length insurance payments is not relevant in this situation. In the instance of coal avoidably lost, MMS would determine the value of the coal pursuant to § 206.257.

Comment: Two industry commenters stated that no royalty was due on insurance proceeds. One commenter explained, "An insurance payment is a contractual agreement between the lessee and a third party by which the lessee has shifted the risk of losses to the third party through the payment of certain insurance premiums." A few industry commenters stated that the lessor should carry its own insurance or share in the lessee's insurance premiums if the lessor wished to indemnify itself from losses.

MMS Response: Royalty is due on insurance proceeds because the insurance payment compensates the lessee for the loss of Federal or Indian coal. If not for the production and loss of the Federal or Indian coal, the lessee would not receive the insurance payment. Once severed from the lease, protecting coal is the responsibility of the lessee until risk of loss has been transferred to the purchaser. Where the protection extends to insurance coverage, that coverage also reduces the lessor's risk on the royalty portion, which represents an undivided interest on all production from Federal and Indian leases.

Comment: Section 206.253(c), which requires royalty to be paid on coal recovered from waste piles or slurry ponds, received several comments from respondents. One commenter agreed with this paragraph. Two commenters stated that the record keeping requirements relating to the allocation of coal "may be difficult since the 'event' at issue may have occurred 10–12 years in the past."

MMS Response: The record keeping requirements are not new. Correct allocation of Federal and non-Federal production (or Indian/non-Indian) is a consistent obligation of lessees. See, for example, 30 CFR 211.63(k) of the July 30, 1982, Minerals Management Service final rulemaking for Coal Exploration and Mining Operations (47 FR 33192). If

adequate records have been discarded over time, production estimates approved by BLM would be sufficient for royalty determination purposes.

Comment: One industry commenter posed the question of how to account for coal in waste pits, which was derived "from multiple Federal leases and both Federal and non-Federal lands?" This commenter further maintained that the requirements of paragraph (c) are both "unreasonable and unenforceable."

MMS Response: Specific cases involving allocation issues will be dealt with on a case-by-case basis. If complete production records were kept by the lessee, correct allocation of coal in waste pits will not be difficult.

Comment: One industry commenter recommended that "there has been no prior obligation to keep such records [as required by paragraph (c)]."

MMS Response: The commenter is incorrect. Production records have always been required to be kept in order to verify coal production removed from a lease. See 30 CFR 211.63(k) (July 30, 1982) (47 FR 33192), Minerals Management Service final rulemaking for Coal Exploration and Mining Operations. Prior to that rulemaking, see 30 CFR 211.66(a) (May 17, 1976) (41 FR 20271), final rulemaking.

Comment: One industry commenter stated that paragraph (c) [§ 206.255(c)] in the January 15, 1978, proposed rulemaking] should be revised to reflect that royalties are due when coal is sold or used, "not at the time of recovery."

MMS Response: This comment is reasonable and the regulations were changed in July 15, 1988, notice to require royalty payments when the coal recovered from waste or slurry ponds is used, sold, or otherwise disposed. This language has been carried through to the final rules.

Comment: One industry commenter stated, "MMS should address the possible situation where waste piles and slurry ponds may contain coal produced using both underground and surface methods."

MMS Response: The MMS will investigate such a situation when or if it occurs; however, MMS is convinced that if proper records were retained by the lessee, correct allocation and royalty calculation is feasible.

Section 206.254 Quality and quantity measurement standards for reporting and paying royalties

Comment: Numerous industry respondents submitted comments relating to § 206.254. One commenter recommended no changes to this section. Nine respondents objected to the quality reporting standards set forth in paragraph (a). Two commenters believed the requirements of paragraph (a) are burdensome and recommended deletion. One commenter continued by asserting that "MMS is requesting a great amount of unnecessary information." Three other commenters similarly stated that there was "no legitimate governmental interest in receiving this information, particularly if the coal is being sold pursuant to a bona fide arm's-length coal supply agreement. Federal coal royalties are calculated on quantity and price."

MMS Response: Such information is necessary so that MMS may perform its oversight functions. The MMS believes that such information should be readily available for purposes of properly analyzing values used for coal sold under non-arm's-length conditions. The valuation of coal sold under non-arm's-length conditions normally requires a comparison to like-quality coal sold in the same area under arm's-length conditions. The requirement to provide such information to MMS is specified at 30 CFR Part 216. The reporting regulations of § 206.254(a) for coal are more specific, but do not impose additional requirements.

Comment: Several commenters requested that MMS clarify paragraph (a) to require that quality information be submitted once a month for a representative shipment providing no extraordinary bonuses or penalties were incurred by the lessee during the month.

MMS Response: Section 206.257 requires lessees to perform coal quality analysis at intervals set forth in their contracts, but in no case less than quarterly. However, the reporting of those analyses to MMS should be consistent with the standards contained in 30 CFR Part 216. The MMS contemplates that the weighted average of all shipments during a reporting period will be reported because coal lessees do not report the details of individual shipments unless only one shipment was made during the reporting period.

Comment: One commenter requested that the provisions of paragraph (a) be revised to address "the circumstance where the sales contract does not provide the intervals at which quality determinations will be made."

MMS Response: The MMS concurred with the comment and accordingly incorporated clarifying language in the July 15, 1988, notice. For the general case in which a sales contract does not provide the intervals at which quality determinations will be made, quality tests will be performed not less than quarterly.

Comment: One commenter recommended amending paragraph (a) such that the quarterly coal quality tests would only be required "if coal on which royalty is due was mined during that period."

MMS Response: Quality tests would be performed at intervals specified in the coal contract but not less than quarterly. The reporting of those quality parameters should be consistent with the reporting requirements of 30 CFR Part 216.

MMS received a few comments concerning paragraph (b). The commenters recommend amending paragraph (b) to exclude "extraneous ash and moisture [from the weight] (i.e., that not found to be inherent in the coal itself) before calculating royalties." The commenter cited *A.J. Taft Coal Co.* v. *U.S.*, 605 F. Supp. 366 (D. Ala. 1984), aff'd 760 F. 2d 279 (11th Cir. 1985) in support of this proposal. Another commenter stated that the weight of water added for dust suppression should be deducted.

MMS Response: Under the valuation rules, coal royalties are based on gross proceeds. Thus, to the extent that ash and moisture penalties effect gross proceeds, the Federal or Indian lessor also shares in the reduced revenues received for the sale of coal containing excessive impurities. Additional discounts for coal weight contributed by impurities are inconsistent with general principles of ad valorem royalty accounting, which principally rely on revenue receipts for the sale of production rather than on the weight of production.

The MMS similarly rejects the latter comment concerning a deduction for water added for dust suppression. Ad valorem royalties are based on value of coal sold in marketable condition. The commenter noted that an average of 2 gallons of water is added to each ton of coal sold. The additional 16 pounds of added water per ton of coal represents a weight increase of about 0.8 percent, an amount which is below the acceptable percentage of error of tolerance present in many certified rail or truck scales. The MMS also suggests that the costs of the additional recordkeeping requirements that would be necessary to support actual water weight applied to coal would easily exceed royalty savings.

Section 206.255 Point of royalty determination

Section 205.257 of the January 15, 1987, proposed rulemaking was redesignated § 206.255 in the July 15, 1988, notice. The language was also

slightly amended. The term "used" was added to the paragraphs (b) and (c) to make it clear that use of coal by the lessee triggers the royalty payment obligation. Section 206.255 of the July 15, 1988, notice is adopted into these final rules without change.

Comment: The MMS received many comments from industry respondents and one Federal agency concerning § 206.255 (formerly § 206.257) published in the January 15, 1987, proposed rulemaking. Nine industry respondents submitted numerous comments related to paragraph (a). One commenter stated that this paragraph was vague; another comment stated that it was confusing. One commenter specifically recommended deleting the phrase "marketable condition," and explained that the phrase was unnecessary where a specified point of royalty determination is designated. Ten comments offered alternative points of royalty measurement other than that "prescribed by BLM." Three commenters suggested that the point of royalty measurement should be after the coal is crushed and screened. One commenter believed this was a reasonable point since these operations were undertaken by all lessees. One commenter stated that the point of royalty measurement should occur "at the point at which the coal is severed from the mineral estate." One commenter suggested substituting the term "mine" in place of "point of royalty measurement prescribed by BLM." One commenter advocated that the point of royalty determination should be the first of either "the point when coal is produced and first placed in a marketable condition or loaded for delivery." One commenter stated that the point of royalty measurement should be where "ownership is transferred at the point of sale." Two commenters stated that the point of royalty determination should be the point of sale, normally f.o.b. the mine. Another commenter also stated that there was no provision for the lessee to have input into this determination.

MMS Response: The "marketable condition" standard is present for consistency with § 206.257(h). The MMS will not accept, for royalty purposes, the gross proceeds accruing to the lessee for the arm's-length sale of coal which is not in marketable condition, as defined at § 206.251. The point of royalty determination is a joint BLM and MMS function. Often the point of sale specified in a sales contract is the same as the point of royalty determination, which is typically at or near the mine. The MMS expects that extensive consultation would occur between all concerned parties, including the lessee, prior to establishing a point of royalty determination. However, the final decision of a point of royalty determination is not delegable to the lessee. Where unusual selling arrangements exist, BLM and MMS may, at their discretion, assign any point of royalty determination, including a point different from the point of sale contained in the sales contract.

Comment: Six comments from four industry respondents and one Federal agency were received on paragraph (b). The Federal agency suggested that MMS should promulgate a definition for "large coal stockpile." Two commenters requested MMS to clarify what constitutes excessive stockpiles or inventory. Two of these commenters asked that MMS be flexible "in these [excessive stockpiles or inventory] determinations since a 100,000-ton stockpile may be 'excessive' at one operation but may be quite normal at another." One commenter recommended substituting the word "when" for the word "after," stating that the current word is confusing. Two commenters agreed with MMS's paragraph (b). One commenter stated, "Many of the recently readjusted Federal leases specify that royalties will continue to be paid at the time coal is produced. It is suggested that the provisions of this section need to be further strengthened to clarify that this section will prevail over the terms of the lease * * *."

MMS Response: The MMS will be flexible in determining what constitutes an "excessive stockpile." These determinations will be made on a case-by-case basis by BLM. The MMS did not, however, strengthen paragraph (b) to prevail over lease terms. As contractual agreements, leases and their provisions prevail over regulations where leases and regulations are inconsistent.

Comment: Seven comments from six industry respondents were received on paragraph (c). One commenter recommended deleting this paragraph entirely, "since all Federal coal leases contain provisions for royalty rates and frequency of payments." Six other commenters objected to the language "or otherwise disposed of." In lieu of this language, two commenters suggested substituting the word "consumed"; one commenter suggested substituting the word "removed"; and one commenter suggested substituting "or used by the lessee on lease or off lease."

MMS Response: The purpose of paragraph (c) is to refer to 30 CFR 206.256(d), which deals with practical situations for paying royalty when coal is sold, used, or otherwise finally disposed of. The MMS considers the phrase "or otherwise disposed of" necessary to anticipate other dispositions of coal in addition to sale. The MMS does not intend this provision to mean that royalty normally is due when coal is removed from a lease and transferred to a nearby stockpile prior to sale. The word "sold" was added to the provision to be consistent with other parts of these regulations which discuss disposition of Indian and Federal coal.

Section 206.256 Valuation standards for cents-per-ton leases

Comment: Several industry and one Indian respondent submitted nine comments regarding § 206.258 of the January 15, 1987, notice, now redesignated § 206.256. The MMS received no comments on paragraph (a).

Three industry respondents submitted three comments concerning paragraph (b). One commenter recommended that "the word 'volume' be replaced with the word 'quantity' to be consistent with proposed 30 CFR 206.254(b)." The other commenters were concerned with the requirement that royalty would be due on coal avoidably lost. Two commenters questioned the conditions under which royalty would be due on coal left in-place (unmined) and one stated that paragraph (b) was essentially a "duplicate regulation by the Department of Interior [sic] in that BLM already has existing authority to assure maximum economic recovery * * *."

MMS Response: Paragraph (b) was changed in the July 15, 1988, notice by replacing the word "volume" with the word "quantity." "Quantity" is consistent with usage at 30 CFR 206.254(b), because coal is not measured for royalty purposes by "volume." Also, see MMS's response regarding coal avoidably lost at § 206.253.

Comment: Three comments from industry respondents were received on paragraph (c). Two commenters recommended deleting this paragraph completely. The other commenter maintained that both washing and transportation allowances should be available for cents-per-ton leases. The commenter stated that denying allowances for only cents-per-ton leases "create[s] a double standard."

MMS Response: The denial of allowances for cents-per-ton coal lease does not create a double standard of royalty valuation. Cents-per-ton royalty payments are not increased because of the value added benefits of washed coal. The historic practice of collecting

cents-per-ton royalty on the quantity of cleaned coal rather than the quantity of uncleaned coal actually mined is continued. See initial policy at 30 CFR 211.64, May 17, 1976, 41 FR 20271.

Comment: Three industry and one Indian respondent submitted five comments pertaining to paragraph (d). One Indian comment commended MMS for its position "that it will be the policy * * * to convert cents-per-ton leases to ad valorem leases on readjustment dates unless, of course, a cents-per-ton lease would yield greater royalties to an Indian tribe." All other comments were put forth by industry. Two of these commenters recommended deletion of this paragraph. One commenter reasoned "that this entire area [of lease readjustments] is in such a state of turmoil that MMS should probably refrain from addressing this issue at this time." Another commenter stated, "The royalty to be paid for coal depends on the actual date of coal severance (date of being mined) * * *." One commenter noted that the 30-day requirement of paragraph (d) could be in conflict with certain lease terms and MMS should ensure that the "proposition ('lease terms govern') should be constant throughout the rules." One commenter "suggested that the lessee should at least be given some 'force majeure' relief on the 30-day requirement if he is unable to rotate his stockpile due to forces beyond the lessee's control."

MMS Response: There is no confusion in the area of lease readjustment. The policy of the Department of the Interior is to readjust all Federal coal leases to be consistent with the requirements of 30 U.S.C. 207, as implemented by appropriate regulations of 43 CFR Subpart 3451. This policy has been upheld by the courts (citations provided earlier). The purpose of this regulation is to provide the lessee formal written policy regarding the imposition of new ad valorem royalty rates on previously mined coal inventories, which were in existence on the effective date of the lease readjustment.

The language of § 206.256 as published in the July 15, 1988, notice was carried forward into this final rulemaking.

Section 206.257 Valuation standards for ad valorem leases

The final rulemaking adopts the basic valuation approach as it was proposed in the July 15, 1988, notice. However, several changes have been made to conform with the amended definition of gross proceeds and to adopt the Commission on Fair Market Value Policy for Federal Coal Leasing recommendation that State and local severance taxes be excluded from gross proceeds. Other minor changes, which are described below, were made for clarity.

Following the original January 15, 1987, proposed rulemaking, MMS received several editorial-type comments concerning paragraph (a) which were suggested for clarification. Some comments repeated earlier statements that a processing allowance should be used in place of a washing allowance. The MMS clarified paragraph (a) in the July 15, 1988, notice by revising the language and adding the deductibility of an allowance for beneficiation pursuant to § 206.265. No additional comments were received specific to this paragraph. Therefore, this paragraph has no changes from the July 15, 1988, notice.

Paragraph (b)(1) contains no changes from the July 15, 1988, notice. This paragraph essentially continues the existing policy of determining per centum coal royalties on the basis of sales prices obtained pursuant to arm's-length contracts. Acceptance of the sanctity of such contracts remains a fundamental valuation concept. It represents very important ideas about the nature of business in the free marketplace. That is, that businesses have the right, within the bounds of what is legal, to fix a relationship by a binding written agreement. The freedom to write contracts and to abide by their terms represents a fundamental trait of this Nation's economic system. These rules and specfically this paragraph adhere to this feature of the U.S. economic system, because this paragraph states that the lessor agrees to limit its share of royalties to a specified fraction of receipts received by the lessee. In other words, MMS accepts as a proper valuation for the payment of royalties the value negotiated at arm's-length with a purchaser in light of the marketing conditions that existed at the time the contract was entered.

The MMS received several comments suggesting alternative methodologies for valuation. Earlier in this preamble MMS responded to a proposal to value on the basis of heat content. Other commenters suggested establishing "fair market value" through techniques other than by contract sale prices. The MMS rejects all of these alternatives. The MMS maintains that there is nothing wrong with the workings of the competitive marketplace. Accordingly, the marketplace will continue to be the primary determinant of value of coal for royalty purposes.

Comment: Paragraph (b)(2) conditions MMS acceptance of gross proceeds under contracts on whether each contract reflects the total consideration actually transferred from buyer to seller. A number of industry comments objected to this provision and stated that MMS should restrict the value basis to the contract sales price.

MMS Response: MMS recognizes that there must be exceptions to the general rule that the lessee's arm's-length contract price should be accepted without question as the value for royalty purposes.

For example, if a lessee sells coal to the neighboring nonaffiliated utility at reduced prices and in return the utility sells electricity to the lessee at a reduced rate, then the coal sale agreement would not be reflective of the full value of coal.

In the event that MMS becomes aware of consideration that exists outside the four corners of the contract, MMS could accept the lessee's gross proceeds as value, adjusted to reflect the additional consideration when that additional consideration can be converted to a dollar value. However, in some circumstances the additional consideration may not be easily calculable. Thus, even if the parties are not affiliated and the contract is "arm's-length," MMS may require under paragraph (b)(2) that the coal production be valued in accordance with paragraph (c), the standards used to value coal disposed of under non-arm's-length contracts. Under these standards, the lessee's gross proceeds still may determine value, but the lessee will be required to demonstrate comparability to other arm's-length contracts. Thus, despite several industry comments suggesting that this section be deleted, it is retained in the final rules.

Paragraph (b)(2) is not meant to apply to situations where there is intentional misconduct by the lessee. Such circumstances are covered by paragraph (b)(3). Rather, it could be used in situations where a lessee did not consider a particular benefit provided by its purchaser to be a payment for coal, but MMS on review considers it to be part of the consideration for coal production under the contract.

Comment: Many comments were received concerning paragraph (b)(3) following the July 15, 1988, notice. Many industry comments asserted that MMS was attempting to expand its rule beyond the traditional bounds of a lessor, as intended by Congress. One comment stated "MMS is bringing the negligence concept from tort law to a contractual relationship." Many comments stated that this regulation would effectively grant MMS license to second guess the lessee's legal and

business judgment. Other comments stated that paragraph (b)(3) created undue uncertainties in the royalty valuation process and would result in an expansion of litigation.

MMS Response: Even if the contract is between unaffiliated persons and thus "arm's-length," pursuant to § 206.251, if MMS determines that the gross proceeds do not reflect the reasonable value of the production because of misconduct by the contracting parties or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and lessor, then MMS may require that the coal be valued pursuant to the first applicable criterion of paragraph (c)(2).

Thus, MMS first must determine that a price is unreasonable; for example, by looking at comparable contracts and sales. Then MMS must determine that the unreasonably low price was the result of misconduct or a breach by the lessee of its duty to market the production for the mutual benefit of itself and the lessor.

A breach of the lessee's duty to market production for the mutual benefit of the lessee includes, but is not limited to, collusion between the producer/seller and buyer, pricing practices found by a court or regulatory authority to be incorrect or fraudulently manipulated, or negligence in negotiating contracts.

When MMS makes the determination under paragraph (b)(3), the effect is that the arm's-length contract price will not be accepted automatically. Instead, value will be independently determined using the benchmarks in paragraph (c).

Comment: Paragraph (b)(5) excludes the cost of the Black Lung excise tax, the AML fee, and severance tax from gross proceeds to arrive at the value for Federal royalty purposes. These specific exclusions do not apply to Indian leases. In the preamble to the July 15, 1988, notice, MMS provided an extensive accounting of comments that had been received prior to that date. In the July 15, 1988, preamble, MMS requested additional comments on whether the Black Lung excise tax and AML fee should be excluded from the value basis. The MMS requested further comment on whether the concept of excluding certain costs should be extended to include exemption for the costs of State severance taxes and "royalty on royalty." "Royalty on royalty" or "royalty on itself" is a phrase used by commenters to describe the royalty effects of a lessee raising the sales price to recapture the cost of the royalty itself.

The overwhelming majority of industry commenters advocated excluding all Federal and State imposed taxes, fees, and royalties. Most of these commenters stated that the taxes and fees did not add to the value of the coal and therefore should not be subject to royalty. One western coal producing State commenter agreed with the industry consensus. Four western coal producing States recommended rejecting the policy of excluding the Black Lung excise tax and the AML fee from the royalty value. Four western coal producing States also recommended rejecting the policy of excluding State severance taxes from the value basis. Three western coal producing States recommended rejecting the policy of excluding the cost of royalty ("royalty on royalty") from the value basis. One commenter stated: "MMS' algebraic manipulations in the preamble notwithstanding, this proposal boils down to nothing more and nothing less than reducing the 12.5% royalty rate to 11.39%." One western coal producing State chose not to comment on any of these possible exclusions but instead requested an alternative valuation system for low Btu content coal. Several coal consuming States advocated adoption of the alternative valuation proposal that was submitted jointly by representatives of the coal and electric utility industries. That proposal would exclude all production taxes, fees, and royalties.

Several industry commenters stated that the proposed exclusions should extend to Indian coal also. The Indian commenters, on the other hand, expressed agreement with the proposed regulatory provision to exempt Indian coal from any of the exclusions for taxes, fees, and royalties. One Federal agency stated that excluding the Black Lung excise tax and the AML fee from Indian lands "could precipitate an adverse situation, wherein producers would preferentially develop non-Indian lands. This does not seem consistent with the trust responsibility of the Federal Government with regard to Indian mineral resources."

The MMS received numerous comments on the deletion of reimbursements for Black Lung Excise Taxes and Abandoned Mine Land Reclamation Fees (AML) from royalty value. Thirty-nine respondents, consisting of industry representatives, one local government association, and one State, specifically supported MMS's proposed deletion of reimbursements for Black Lung Excise Taxes and Abandoned Mine Land Reclamation Fees from royalty value. One industry respondent explained: "The exclusion of Abandoned Mine Land Reclamation (AML) fees and Black Lung (BL) taxes is appropriate as they add no enhancement to the real value of the coal." Another industry commenter noted support for "Secretary Hodel's proposal to exclude those reimbursables [Federal Black Lung Taxes and Abandoned Mine Land Fees] from gross proceeds on the grounds that it is inequitable to require lessees to pay royalties on levies imposed by Federal, State, or local governments solely to mine coal." Many other respondents repeated this rationale. One industry respondent offered a somewhat different reasoning by stating that it was appropriate for MMS to take action to "enhance the competitiveness of Federal and Tribal coal, and hence the viability of the domestic coal industry."

Eighteen respondents, consisting of 14 State organizations and 4 Indian groups, opposed the exclusion of any reimbursed taxes or fees from gross proceeds. Most respondents maintained that MMS's explanation of why Black Lung Excise Taxes and AML fees are excluded from gross proceeds was not sufficient or acceptable. One Indian respondent specifically commented that MMS's justification for exclusion was not true with respect to Indians who do not set the rate of either the Black Lung Excise Tax or the AML fee. The respondent further noted that AML fees have not been made available to Indian lands. A State respondent commented: "These fees are essentially a pass-through, the lessee does receive the benefit of the purchaser reimbursing him * * *." These costs would otherwise be borne by the lessee. Another State respondent claimed: "The MMS proposal would have the effect of reducing royalties on coal without going through the findings required under the Minerals Leasing Act, 30 U.S.C. 209." One other State respondent concurred with this statement. Several other State respondents objected to the exclusion of Black Lung Excise Taxes and AML fees on the grounds that it sets a precedent and "opens the door for the exclusion of other items * * *."

The MMS also received comments stating that the value of coal should be reduced by amounts for State and local severance taxes. Most comments maintained that the resulting lower royalty costs would promote development and lower costs to consumers. Other comments stated that severance taxes should be excluded from the value basis because the lessee merely collects these taxes on behalf of the taxing authority. Hence, the lessee obtains no benefit or value from the collection of such pass-through taxes. As one comment explained, "None of these cost [tax] components are part of the 'value' of the raw product, coal, to

the lessee. The lessee receives nothing in return for these payments; i.e., they are true liabilities and to charge a royalty on them is unconscionable." Several commenters pointed out the MMS's proposed rules are not in accord with the February 1984 recommendation of the President's Commission on fair market value policy for Federal Coal Leasing (Linowes Commission). One commenter restated the conclusions of Linowes Commission by stating "[T]he Federal royalty should be based on the value of the coal being produced, not on State and local taxes as well. Federal royalty policies should not create an incentive for higher State and local severance taxes, or similar production based taxes, by increasing the effective total return to a given percentage tax. State and local governments should bear the direct responsibility for the full financial impact of their severance taxes. Accordingly, the Commission recommended that 'the base for calculating Federal royalty payments should be the F.O.B. price minus all State and local severance and similar taxes'."

A definition of severance tax has been added in § 206.251. *See* discussion above.

During the September 7, 1988, public hearing, a difference of opinion surfaced concerning whether exclusions for taxes, fees, or royalties, represents an established industry standard outside of Federal coal leasing. One industry commenter stated unequivocally that all private coal leases in the west contained valuation terms that were net (noninclusive) of taxes, fees, and royalties. The other industry commenter refuted the previous commenter's position by stating that it was not that conclusive. The commenter stated that lease terms often varied by region and often the bargaining strengths of the parties dictated the ultimate lease valuation provisions. This commenter then concluded that his company's leases and other large landholder's leases contained lease terms requiring royalty to be assessed at the gross (no exclusion) level.

MMS Response: The MMS has adopted the provision that amounts for AML fees and Black Lung taxes are excluded from royalty value. The MMS agrees that these fees do not add to the value of the coal. On review, MMS declined to extend the exclusions from royalty value to include "royalty on royalty." The term "royalty on royalty" is somewhat a misnomer. Although various mathematical calculations were submitted to show the effects of purchaser royalty reimbursement on royalty payments, no argument could change the nature of what a mineral royalty is: A share of minerals produced. At a rate of 12.5 percent, one ton out of eight belongs to the lessor, no more and no less. To attribute some intangible addition to the lessor's share destroys the concept of royalty itself. Therefore, the proposal to exclude "royalty on royalty" was not adopted in the final rule.

Paragraph (b)(5) also has been modified to allow for the exclusion of State and local severance taxes from gross proceeds. Additional language was added to clarify that these exclusions refer only to the cost of the tax or fee itself. No additional deduction is allowed because the lessee has incurred interest charges or other monetary penalties arising from the nonpayment or underpayment of the Black Lung excise tax, AML fee, or severance tax.

The Department believes that there are several reasons to exclude severance taxes from the Federal royalty value for coal. First, coal has its own valuation history. Second, but related, are the characteristics of the coal marketplace.

The comment submitted jointly by the National Coal Association, American Mining Congress, Edison Electric Institute and the Western Coal Traffic League, and the comment submitted on behalf of Kanawha and Hocking Coal & Coke Company and Valley Camp of Utah, Inc., focused on the historical valuation of coal. First, as noted earlier, prior to the Federal Coal Leasing Amendments Act of 1976 (FCLAA) revision to the Mineral Leasing Act (MLA), virtually all Federal coal leases had cents-per-ton royalty clauses. Therefore, severance taxes as part of royalty value was not an issue. The first administrative decision dealing with the coal severance tax issue is *Knife River Coal Co.*, 29 IBLA [Interior Board of Land Appeals] 26 (1977), a decision involving one of the few pre-FCLAA leases with an ad valorem royalty clause. The Board concluded that it should follow the decisions involving gas and include severance tax reimbursements as part of the value. However, in deciding that case, IBLA did not address two important concepts. First, the MLA as amended by FCLAA was different for coal than for gas in terms of defining the royalty obligation. For gas, royalty is due on the "value of the production," 30 U.S.C. 226, whereas for coal, royalty is due on "the value of coal as defined by regulation * * *." Second, IBLA did not consider that when the Department adopted regulations to implement the new statutory scheme as for gas. The current coal regulations in 30 CFR 203.200(f) use the term "gross value" whereas the oil and gas rules in 30 CFR Part 206 always used the term gross proceeds. Also, the department did adopt specific rules providing that tax reimbursements are included in gross proceeds. *See* Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases (NTL-5), 42 FR 22610 (May 4, 1977)]. Such a specific requirement was not promulgated for coal.

More important than the historical application of regulatory provisions by the Department, however, is the perception today by both coal producers and coal purchasers of the market for coal. As MMS has consistently emphasized in its product value rulemaking, the best determinant of value is the market. In the coal context, some of the comments maintain that severance taxes are not part of the market value of the coal. For example, in its comments, the Western Fuels Association reiterated testimony that it had previously provided to the Congress:

> The value of a product does not increase because a tax or fee is added to it, only its cost increases. As a matter of fact, the inclusion of these items could well cause the product's value to decline.

The Western Fuels Association, as well as many other commenters, also cited the Linowes Commission, *Report of the Commission: Fair Market Value Policy for Federal Coal Leasing.* Recommendation VIII-5 of that report states: "The base for calculating Federal royalty payments should be the F.O.B. price minus all State and local severance taxes and similar taxes." Thus, this independent commission did not consider taxes to be part of value.

A comment which focused directly on the question of how the market perceives severance taxes was submitted by Utah Power & Light Co. It's comment states:

> The MMS has stated that the cornerstone of the regulations is the interaction of buyers and sellers who are knowledgeable, willing and not obligated to buy or sell. This market concept does not properly consider federal and state taxes and/or fees which are not set in the market place, but arbitrarily set by federal and state agencies for purposes of raising revenues. The states and Federal Government as lessor can manipulate its' [sic] royalty revenue by increasing or decreasing taxes and fees, proving they do not contribute to the value of coal. This not only puts a burden of uncertainty on producers and consumers of federal coal but provides the lessor a mechanism to impact the "⅛ share" of production he is to receive.

Additionally, the inclusion of these fees, which are not market driven, unnecessarily inflate the cost of federal coal in the long-run, potentially making it an undersirable fuel choice.

Utah Power & Light's comments were addressing only AML fees, Black Lung taxes, State severance taxes and Federal royalty—not State or Federal income taxes and similar taxes.

The characteristics of the market for coal also was the subject of considerable comment by the Edison Electric Institute (EEI). It is EEI's conclusion that "Coal is not a commodity like oil. The market for Western coal is user specific and is custom-produced according to quantity and quality." The EEI also noted: "In fact, seldom is the same price paid for Western coal from the same mine where the mine sells coal to several buyers."

It is indeed true that oil and gas and coal are very different commodities. In addition to their obvious physical differences and the differences in production methods, Federal western coal is used in large part only for electric generation, whereas this is only one of many uses for oil and gas. Related to their varied uses is the fact that oil and gas prices are dictated in large part by international market forces. Coal, on the other hand, is affected more by specific markets because it is not a fungible. For example, many large western mines are developed to supply coal to a particular powerplant which is designed specifically to burn that coal. If that purchaser is lost, the coal may not be readily saleable.

The differences in the coal market from that for oil and gas have resulted in different contracting practices, with the value of the coal being established first, and then severance taxes and other reimbursables being treated separately. Again, what purchasers are willing to pay for domestic oil and gas tends to be dictated more by international market forces than by local market needs.

It is the Department's conclusion from the large number of comments it received that consideration of the interaction of the market place supports excluding severance taxes from the value of the coal for royalty purposes. As noted above, coal buyers, and sellers commented that taxes are not part of the coal's value. Many of the comments point that even the states which impose a severance tax recognize that there is a determinable value for the coal before the tax is assessed because the assessment is based on the value of the coal net of any amount representing the tax. Thus, for coal, the Department has concluded that severance taxes increase the cost of the resource but not its value. Consequently, the Department is excluding severance taxes from the value of coal for Federal royalty purposes.

Comment: Paragraph (b) (6) of the proposed rule provided that the royalty value would not include payments received by a lessee pursuant to its contract if the lessee demonstrates to MMS's satisfaction, that such payments were not part of the total consideration paid for the purchase of coal.

Most comments received by MMS were addressed earlier in the general comment response to MMS's position with respect to take-or-pay and similar type payments. However, one comment raissed particular issues that require separate responses here. The commenter stated that the proposed regulation, as worded, appears to defeat judicial review because the demonstration (that a payment is not royalty bearing) is "to MMS's satisfaction," instead of an objective finding of fact. The commenter concluded that "Royalty determinations are subject to judicial review under the Administrative Procedure Act as actions that have not been committed to agency discretion by law, and MMS cannot adopt an unreviewable standard in the face of this congressional mandate for review."

MMS Response: There is no attempt to circumvent the requirements of The Administrative Procedure Act. The MMS decisions generally are subject to the administrative appeal process. Adverse decisions may ultimately be taken to the Federal court system for relief.

The MMS has adopted this paragraph (b)(b) as proposed. Under this section, there is a presumption that payments received by the lessee from its purchaser are payments for coal production. The lessee can rebut that presumption, but the burden is on the lessee to come forward with the justification for its position that the payment was not for coal production. The MMS always has had a consistent policy that royalty is due on no less than the lessee's gross proceeds, which includes all payments for production. Heretofore, that policy resulted in royalty demands on virtually all payments from the purchaser to the seller. However, payments must indeed be payments for coal production before any royalty is owed. Therefore, lessees will have the opportunity to come forward with arguments as to why a particular payment under a coal sales contract is not part of the value of the coal production.

Because there are so many different types of coal sales contract clauses, MMS cannot include in this rulemaking comprehensive criteria which could be considered in deciding whether a lessee has met its burden to demonstrate a particular payment is not royalty bearing. However, MMS will certainly consider such factors as the terms of the sales contract, the lessee's rationale for its claim that the payment is not part of the value of production, how the purchaser characterizes the transaction (particularly if it is a public utility subject to state public utilities commission regulation), and any other relevant matters. Other factors could include the following:

1. The unit sale or contract price, including prices that explicitly vary with the level of production, are considered royalty bearing.

2. Payments not designated as part of the purchase price, but made on a periodic or regularly scheduled basis, generally are royalty bearing.

3. "Settlement" payments made to terminate a sales contract before the contractually-specified termination date will usually not be considered payment for produced coal. If there is a follow-on contract, MMS will review the circumstances to determine if some or all of the payment is royalty bearing.

4. Payments or reimbursements for services or processing costs customarily the responsibility of the lessee, including that required to put the product in marketable condition, will usually be considered payment for produced coal.

5. Damages recovered under a court judgment, or included in a liquidated damages clause, that are for the purchaser's breach of a sales contract are usually not considered payment for produced coal, if they correspond to or are a reasonable estimate of the producer's lost profit.

The provisions of paragraph (b)(6) will not be applicable to any types of payments which other sections of the rules expressly include as part of the royalty value, such as payments for the costs of placing production in marketable condition.

As MMS gains experience in dealing with these issues, MMS expects to develop criteria which may be included in the regulations at a later date.

Paragraph (c), which contains MMS's valuation criteria when coal is disposed of under non-arm's length conditions, generally is unchanged from the July 15, 1988, notice. The MMS did make one change to clarify the application of the first benchmark in paragraph (c)(2). The proposed rule provided that MMS would accept the lessee's gross proceeds under its non-arm's-length contract if those proceeds were "equivalent" to those

under "comparable" arm's-length contracts. While the proposal included criteria for comparability, no criteria existed for equivalency; therefore, MMS has modified the final rule to provide that the lessee's non-arm's-length gross proceeds will be acceptable if it is within the "range" of gross proceeds paid under comparable arm's-length contracts in the field or area.

Comment: The MMS received numerous comments following the January 15, 1987, proposed rulemaking concerning non-arm's-length valuation. Eight industry, three Indian, and three State respondents submitted 27 comments regarding the non-arm's-length valuation criteria of the regulations. One industry commenter stated MMS should always be notified which valuation criteria is being used. One industry commenter questioned what is a "reasonable value[?]" One industry commenter stated that the value of non-arm's-length sales should always be established using that lessee's arm's-length contracts. The respondent supported its position by stating, "The lessee's arm's-length contracts are the best evidence of the value" had the lessee "sold the coal under an arm's-length contract." One industry commenter suggested using the average price of the lessee's arm's-length contracts. One industry respondent stated that paragraph (c) could be deleted if "the criteria for determining gross royalty [were adopted] as prescribed in 26 CFR 1.6134(b)(2), based on a representative market or field price."

Fourteen comments recommended either revising the application order or revising the language of the valuation criteria. Two State commenters recommended exchanging the sequence of paragraphs (c)(2)(i) and (c)(2)(ii). Two Indian commenters recommended ignoring arm's-length contracts of the lessee and seeking "[t]he highest gross proceeds" in "the same coal field" or alternatively "from other coal fields" as being the first two preferred valuation criteria. One State commenter suggested revising paragraph (c)(2)(ii) because it would be too difficult to implement, and the contracts of other lessees would not be available. Another industry commenter stated that the term "area" as used in paragraph (c)(2)(ii) should be defined. Two industry and one State respondent specifically addressed paragraph (c)(2)(iii), which would use prices reported to a public utility commission as the value for royalty purposes. One State commenter suggested this method was the most accurate because "it is highly unlikely that they [utilities] will understate their coal or fuel costs." One industry commenter stated that the value should be the production costs reported to the public utility commission less taxes and fees but plus a profit. One industry commenter disagreed with the use of paragraph (c)(2)(iii) because the regulation is unclear as to "who is reporting the price of the coal," and the price could include transportation and handling expenses, thus unnecessarily increasing the royalty value of the coal.

MMS Response: The intent of sequenced valuation criteria is to avoid any opportunity to selectively choose a valuation method which minimizes the lessee's royalty obligation, as opposed to correctly establishing royalty value under these rules. Conversely, these rules also offer the lessee the assurance that MMS would not arbitrarily rebut the benchmark that assigns the highest gross proceeds in the area to the lessee unless mandated by the regulatory criteria.

The July 15, 1988, notice contained minor modifications to the non-arm's-length valuation criteria listed in paragraph (c) of the January 15, 1987, proposed rulemaking. Most notable was that criteria (i) and (ii) were combined into a single valuation criterion. The effect from this modification is to increase the number of arm's-length contracts available for review, thus increasing the opportunity for a value via comparable arm's-length contracts. Also, as discussed above, MMS has replaced the term "equivalent" with provisions that clarify MMS's intent that the non-arm's-length price would be acceptable if it is within the range of comparable arm's-length contracts in the field or area. The MMS also removed the term "reasonable" from the phrase "reasonable value," which was stated in the first two sentences of paragraph (c)(2). Any value correctly established under paragraph (b) or (c) is the value for royalty purposes.

With respect to the comment requesting adoption of 26 CFR 1.613-4(b)(2), MMS cannot identify any benefits in administration or simplification in valuation that would occur. The Internal Revenue Service (IRS) rejects the taxpayer's use of representative market or field prices determined by exceptional, insignificant, unusual, tie-in, or accommodation sales. The IRS also disregards any representative market or field price established in transactions between members of a controlled group unless the IRS has determined the price to be a competitive sale price. See 26 CFR 1.613-4(c)(3). The IRS requires any taxpayer that computes its depletable income using representative market or field prices to attach to its tax return a summary statement indicating the price or prices used and the sources of the information as to such price or prices. Also, IRS requires the relevant supporting data to be assembled, segregated, and made readily available at the taxpayer's principal place of business (26 CFR 1.614-4(c)(5)). The MMS considers the IRS provisions more burdensome than the provisions in these rules.

Comment: One State respondent objected to using spot market prices to value coal under paragraph (c)(2)(v), explaining that "our experience with published or publically [sic] available spot market prices for fuels leaves much to be desired." Three commenters disagreed with the mandatory prioritization of the non-arm's-length valuation criteria. One State commented that such a prioritized approach could "be more appropriately referred to as a straight jacket system." Another State commented that "prioritizing the benchmarks constitutes a significant change in long-standing * * * procedures" and would "limit the Secretary's discretionary ability * * *." One Indian commenter maintained that the lessee should not select the appropriate valuation criterion, but instead MMS should apply the correct valuation method.

One Indian commenter stated the non-arm's-length valuation criteria are too subjective and costly to administer. One Indian commenter stated that if the approach of paragraph (c) were to be used (to determine value in accordance with this paragraph), then "[t]he Secretary should determine whether each contract is arm's-length or non-arm's-length * * *."

One industry commenter stated that the net-back approach of paragraph (c)(2)(vi) was ill-defined.

MMS Response: The MMS will review the procedures adopted by lessees to establish non-arm's-length royalty values on a selective basis. The MMS intends to ensure compliance with these rules through vigorous monitoring, review, and audit activity. The MMS will verify that lessees chose the correct valuation method and will be available to assist lessees in calculating net-back royalty values. The MMS agrees that the prioritized valuation criteria procedure is a departure from past practice. The benchmark system has been adopted in order to provide certainty in valuing coal for royalty purposes. The MMS wishes to point out that MMS discretion is not attenuated in making a decision

on whether or not a contract is arm's-length. If a lessee incorrectly maintains that a contract is arm's-length and pays royalty accordingly, the MMS may find otherwise and require royalties be paid according to non-arm's-length criteria.

Comment: In the July 15, 1988 notice, the coal industry had commented that in today's weak coal market MMS should not receive a royalty computed on a cost-based contract that exists between affiliates. These comments were based on the premise that in today's environment mining costs often exceed the price for which coal can be sold in the marketplace. Therefore, MMS specifically requested comments on whether the final rules should include a provision whereby royalty value for non-arm's-length sales in mine mouth or captive mine situations should be based principally on current market determinants such as spot prices.

Several comments were received responding to this specific request. The majority of commenters supported the non-arm's-length valuation procedure as proposed by MMS; i.e., the first applicable benchmark but in no case less than gross proceeds. One commenter stated, "The prices in such [non-arm's-length] contracts nonetheless represent the value of coal to the purchaser, at least to the extent that such contract prices are accepted and passed on to consumers by the appropriate electric utility regulatory body, and they are gross proceeds to the producer. It would be grossly unfair to allow producers to pay a royalty only on the current spot market price of coal when they receive, and electricity consumers pay, far more for the coal."

Another commenter noted that accurate spot market prices are generally unavailable, and, although they are an indication of current market prices, they have no application when compared to long-term captive mine agreements. Only one commenter agreed that the value of coal should be based solely on market value determinants such as spot market prices. In a somewhat different approach, another commenter stated that value for captive mines could be determined by biennial regional rulemaking. In this approach MMS would in some way average current spot and term bids with the average contract price paid during the previous year. In regard to Indian coal, one comment stated, "We recommend that for Indian coal leases, MMS take the higher of the results between the current market determinants and the value as determined by benchmarks. Such dual accounting for Indian leases is consistent with the Secretary's trust responsibility." One other comment was received in regard to the the non-arm's-length benchmarks at § 206.257(c)(2). This comment expressed concern that in a rising market, using a comparative arm's-length value would remove some of the benefits of a long-term arrangement with their subsidiary. This same commenter also cautioned that prices reported to public utility commissions or prices reported to the Energy Information Administration may contain plant handling or transportation costs that should not be subject to royalty.

Another commenter applauded MMS's use of the net-back method as the benchmark of last resort.

MMS Reponse. The MMS has decided not to disturb the arm's-length valuation criteria as listed in the July 15, 1988, notice. Therefore, the first criteria to be applied are market-based value determinants. The lessee would be required to compare its non-arm's-length contract with its comparable arm's-length contracts and to other comparable arm's-length contracts of coal producers in the same area. Using the comparability criteria in paragraph (c)(2) will ensure that long-term contracts are compared only to other long-term contracts and not to spot contracts. Likewise, in valuing a lessee's spot sales contract, only other spot sales contracts will be used.

Failing to establish a value using the arm's-length comparability test, the lessee would then establish the coal's value using the prices approved by a State public utility commission or, following that, prices reported to the Energy Information Administration of the Department of Energy. Setting the coal's value for royalty purposes based on prices approved by public utility commissions is consistent with MMS's gross proceeds concept, because the amount that a utility can pay for its own captive coal production is regulated and approved by the public utility commission. Therefore, in this situation, MMS is limiting its royalty value to that value received by the lessee.

As restated in 1984 by the Supreme Court of the State of New Mexico in a case involving the reasonableness of coal costs:

> The normal burden to be met in making a *prima facie* case regarding costs incurred in transactions with non-affiliates is a demonstration that the costs were, in fact, incurred. However, the normal burden regarding costs incurred in transactions with affiliates is heavier, requiring a showing of the reasonableness of the costs. *Boise Water Corp.* v. *Idaho Public Utilities Commission*, 97 Idaho 832, 555 P.2d 163 (1976).

If the public utility commission is unconvinced of the justness or reasonableness of a utility's costs, including fuel (coal) costs, it can deny incorporation of those costs into the electric rates.

The MMS ranked the use of spot market prices low for minimal application because of dissimilarities between long-term contracts and spot market sales in market purpose and motivation and because of disparities in long-term versus spot sales market share.

Literature published on the domestic coal market states that the domestic coal market is subdivided into two categories: The commercial coal market and the captive coal market.

The commercial coal market is comprised of coal producers that do not use their product and coal consumers that do not produce it. Within this subdivision two types of transactions dominate, which are the long-term contract and spot sales. The purposes of long-term coal contracts have been stated to be:

—Assured quantity (buyer expectation)
—Assured quality (buyer expectation)
—Predictable price (buyer expectation)
—Assured demand (seller expectation)
—Minimized investment risk (seller expectation)
—Guaranteed cashflow (seller expectation)

Only some of the previously listed advantages of security and stability, for the buyer or the seller, are present in the spot market. Because both the supply and demand for spot market coal tends to be short term, the pricing of spot market coal is substantially more volatile than that of long-term contracts.

The volatility of the spot market, for both the coal consumer and coal producer, coupled with the huge investments required to open a western surface mine, relegates the spot sales to a small fraction of the total market. The Department of Energy, Energy Information Administration, publication titled *Coal Data: A Reference* (released March 6, 1987), shows the following historical average relationship between market share of long-term contracts and spot sales.

Year	Long-term contract (million short tons)	Spot sales million short tons	Spot sales tonnage as a percent of total tonnage [1]
1981	500.9	75.5	13.10
1982	540.6	57.0	9.54
1983	523.6	69.2	11.67
1984	584.8	99.3	14.52

Year	Long-term contract (million short tons)	Spot sales million short tons	Spot sales tonnage as a percent of total tonnage [1]
1985	592.4	74.3	11.14

[1] Total tonnage equals long-term contract tonnage plus spot sales tonnage.

The Wyoming Geological Survey publication titled *Wyoming Geo-notes No. 14* (published April 1987) stated that in 1985 spot sales accounted for about 4 percent of total Wyoming coal sales. In 1986 spot sales accounted for about 5 percent of total Wyoming coal sales.

The second major subdivision of the domestic coal market is the captive coal market, wherein the consumers produce their own coal to satisfy their needs. In contrast to the commercial market, captive coal producers do not normally sell captive coal production on the spot market. Instead, captive coal's principal use is to serve internal consumption requirements.

Comment: Prior to publication of the July 15, 1988, notice, several comments were made on § 206.259(d), now designated § 206.257(d). Three industry and two Indian respondents submitted four comments concerning paragraph (d). Three industry commenters suggested amending this paragraph to provide for lessee appeals of MMS valuation determinations. Both comments proposed adding a new section of regulation, with one commenter stating "to provide for an adjudicatory hearing on MMS determinations under 5 U.S.C. 544 [sic]." One Indian commenter recommended "in the case of Indian lands, all non-arm's-length computations of value for royalty purposes * * * should be preapproved [by MMS]." Another Indian commenter agreed, and also stated paragraph (d) "should require MMS to notify the tribe or allottee involved of any change in value determinations."

MMS Response: The right of a lessee to appeal MMS decisions is provided at 30 CFR Part 290. Further right of appeal is provided at 43 CFR Part 4, "Department Hearings and Appeals Procedures." The MMS considers that the current appeal procedures provide appropriate avenues of recourse to the lessee. With regard to the comment of Tribal or allottee notification of value determinations, the MMS finds it reasonable that Tribes or allottees should be provided an explanation when MMS product value determinations affect royalties.

For the July 15, 1988, notice, paragraph (d) was modified from the first proposal. Paragraph (d)(1) provides that value determinations under paragraph (c) do not require MMS's prior approval. However, the lessee would be required to retain all data that would be subject to review and audit. The MMS could direct a lessee to use a different value for calculating royalty if it determines that the lessee's reported value is inconsistent with the requirements of the regulations.

Paragraph (d)(2) requires a lessee to make sales and sales quantity data available to authorized MMS, State, and Indian representatives, to the Inspector General of the Department of the Interior, and to other authorized persons.

Paragraph (d)(3) continues to provide a notification requirement if a lessee determined value using the second through fifth benchmarks.

Paragraphs (d)(1), (d)(2), and (d)(3) are adopted unchanged in this final rulemaking.

Comment: Paragraph (e) was added in the July 15, 1988, notice to clarify that if a lessee improperly determines value, the lessee would be liable for both the additional royalties and interest. A few commenters noted that interest is not actually a penalty, and that penalties should be charged in addition to interest. Comments were also received on the issue of interest after the January 15, 1987, proposed rulemaking. Several commenters stated MMS should pay interest to lessees for royalty overpayments. One commenter explained, "For the sake of consistency and fundamental fairness, the interest payment should either apply in both cases or in neither." One commenter took a different approach, arguing that if "the United States cannot provide or pay interest on judgments without the express consent or approval of the Congress, it does not seem to preclude the government's recognition of such over-payment, along with the interest accrued, through means of an escrow account system with payment of the interest going to the prevailing party." this same commenter provided an alternative recommendation "to allow credits on royalties due in the future, including the interest earned on the original over-payment of royalty." One commenter recommended revising current paragraph (e) to "provide for some allowance for error for which no interest will be assessed on the underpayment, similar to the Internal Revenue Service's allowance for the payment of estimated tax which will be due."

MMS Response: MMS believes that the interest payment required for improperly reporting value, while not a penalty, is a sufficient deterrent to intentional underreporting. In addition, under the provisions of 18 U.S.C. 1001, it is a crime punishable by up to 5 years imprisonment or a fine of $10,000, or both, for anyone knowingly and willfully to submit or cause to be submitted to any Agency of the United States any false or fraudulent statement(s) to any matters within the Agency's jurisdiction.

On the issue of MMS paying interest to lessees for royalty overpayments, Congress has not provided MMS with this option, and MMS cannot authorize which interest payments, without Congress' approval. The MMS also does not have authority to establish escrow accounts.

Comment: Twenty industry and one Indian respondent commented on § 206.257(g), which primarily would require that the value for royalty purposes can be no less than the gross proceeds accruing to the lessee less applicable exclusions. Paragraph (g) was initially proposed as § 206.259(f). Comments pertaining to the "which could accrue" issue have been addressed by MMS at § 206.257(b). Other comments were received concerning take-or-pay payments. The *MMS* addressed the issue of royalty on take-or-pay payments in the discussion of general comments. Readers are requested to refer to those sections for MMS's discussion concerning these topics. One industry comment was received which specifically objected to a royalty value floor of no less than gross proceeds. One Indian comment was received concerning the paragraph (g) provisions of take-or-pay payments as related to make-up deliveries. The Indian respondent requested that paragraph (g) be clarified such that "a lessee should not be allowed to deduct from royalty payments any return of take-or-pay payments required by the lessee in the event make up quantities are not available. Royalties on take-or-pay payments should be able to be offset only with make-up deliveries, not royalty adjustments."

MMS Response: With respect to the comment requesting clarification of the disposition of royalty payments made on take-or-pay payments subsequently returned, MMS would either refund the royalty overpayment or otherwise provide a credit against further royalties from that lease. The MMS considers the lessee's refund of a take-or-pay payment to the purchaser to be tantamount to a retroactive contract price adjustment, thus precipitating necessary adjustments in previously paid royalties.

For this final rulemaking, MMS has amended paragraph (g), deleting

reference to take-or-pay payments. Please refer to the section on general comments for MMS's policy on take-or-pay payments. Regarding the comment that objected to a royalty floor of no less than the lessee's gross proceeds, MMS responded to this issue in its response at paragraph (c).

Comment: After the January 15, 1987, proposed rulemaking, twelve industry respondents submitted 18 comments concerning § 206.257(h), which was intially designated as § 206.259(g). Two commenters stated that there was no need for MMS to charge royalties on additional imputed values because the contract price normally reflects the fair value for both the coal sold and the services provided in connection with the sale of that coal. Four commenters stated that there could be a need for such a provision, with one particular commenter explaining that "otherwise, an opportunity for abuse could occur and royalty payments could in some isolated instances partially be avoided by manipulation of contracts." Four commenters also urged MMS to apply this regulation prospectively to newly executed contracts, not to existing contractual relationships. These commenters continued to explain that the retroactive application of the provision of paragraph (h) would create a major disruption in the industry, because the coal industry is replete with existing contractual realtionships wherein purchasers are providing certain services or facilities which normally would be the responsibility of the lessee. One commenter objected on the basis that "the rules create some sort of an operational warranty on the lessee's activity under the lease. We know of no authorization of such an express warranty." One commenter objected to paragraph (h) because "MMS should not collect a royalty on the increased value of coal resulting from beneficiation." This commenter further questioned "how the owner of a raw product can value it to a lessee on the basis of what it will be worth after the lessee spends the money to upgrade the product." One commenter claimed, "Paragraph (g) [h] imposes a lease term not presently contained in the existing Federal coal leases, namely that the lessee is required to place coal in a marketable condition." Three other commenters took a similar position, stating that the provisions of paragraph (h) have no basis in law. Three commenters requested that MMS retain the current regulations (30 CFR 203.200) and supported their position by stating that paragraph (h) was unnecessary and what constitutes marketable condition was vague.

MMS Response: The MMS has retained paragraph (h) as originally written (originally designated as paragraph (g)) in the proposed regulations published January 15, 1987. The MMS responsibilities regarding paragraph (h) will be upheld in considering both past and future coal sales contracts. The MMS does not now allow Federal or Indian royalties to be avoided through sales contracts which require purchasers to fulfill services that are normally the responsibility of the lessee. Allowing a sale price to be reduced because the purchaser performs certain normal mine preparation services which typically fall to the lessee or mine operator represents an indirect, but nevertheless just as real, deduction from royalties for the cost of placing coal in marketable condition. The MMS and its predecessor agency have always required that lessees place lease production in marketable condition without cost to the Federal or Indian lessor. This practice has not been changed in these final regulations. Additional discussion of this issue is found in MMS's general comments response regarding "marketable condition" and "grandfathering."

Comment: Numerous comments were received after the July 15, 1988, notice regarding § 206.259(e), now redesignated as § 206.257(i). Twenty-three industry, one Indian, and one State respondent submitted 35 comments. Thirteen industry commenters specifically called for the deletion of this paragraph. Nine industry commenters object to "second guessing" by MMS. One commenter particularly noted this paragraph would make MMS a party to sales contracts. Two commenters stated that paragraph (i) was unworkable, with one commenter explaining that unless MMS increases staffing requirements to analyze contracts "that they [MMS] are not in the position to interpret the contract or any subsequent amendments." Five industry commenters believed this paragraph would prevent compromise between the lessee and the buyer and, as one other commenter explained, "would result in a * * * flooding of the courts with unnecessary litigation merely to justify a position." One industry commenter stated that the third sentence, requiring contract amendments to be in writing, was in conflict with the definition of "contract" in these proposed regulations.

One Indian respondent objected to the provision of paragraph (i) allowing contract amendments to be retroactive. The commenter further stated that "the lessee should not be able to compromise the lessor's right to receive royalty payments pursuant to the original contract and not under any amendments that have compromised the price." Two industry commenters objected to the provisions of paragraph (i) because the provision would be unfair to the consumer. As one commenter explained, "[T]he coal producer will always be able to argue that the consumer or purchaser should agree to some higher price since that is what MMS would set in any event since the producer, under federal regulations, has an affirmative obligation to extract the maximum possible price from the coal consumer." Two industry commenters stated that paragraph (i) was unwarranted, with one commenter further explaining that there is no "reason to presume that a producer will not obtain the maximum consideration allowed under its contracts." One State respondent countered this presumption, stating that "failure on somebody's part to enforce the contract is, according to one auditor's experience, not at all hypothetical. They [the auditors] have found instances where a company has simply neglected to invoice for several years for a payment they were definitely entitled to under the contract."

MMS Response: Paragraph (i) was revised in the July 15, 1988, notice to eliminate the "could receive" language but emphasizes that royalty is due on all benefits to which the lessee is legally entitled. The rule also limits any effect on royalty due to retroactive contract revisions to a two-year historical period.

Paragraph (i) imposes a diligence requirement on lessees. This section would require a lessee to pay royalty in accordance with its contract price, but also expressly would recognize that contract prices may be amended retroactively. Retroactive price adjustments would be limited to 2 years. The MMS is aware that often there is a process of negotiation that occurs before the contract is formally amended and that lower payments may be received in the interim. Royalties may be paid on the gross proceeds received by the lessee until all reasonable attempts to force the purchaser to renegotiate the contract or to comply with the existing contract are exhausted, provided the lessee takes proper and timely action to receive prices or benefits to which it is entitled, or to revise the contract retroactively. Thus, the MMS will accept a renegotiated or a revised contract price if the main reason for renegotiating or revising the contract is not solely to reduce royalties. The phrase "applies to

price increases only and" has been deleted from the last paragraph to eliminate excess redundancy. However, if a higher price can be legally enforceable under a contract and the lessee is not diligent in obtaining that price, royalties will be due on that higher price.

Comment: In response to the July 15, 1988, notice, several commenters repeated the allegation that paragraph (i) would allow the MMS to "second guess" industry practices, and suggested that this provision be deleted.

MMS Response: These regulations reflect MMS's willingness generally to accept arm's-length contract prices as value, but there is a concomitant obligation on the part of the lessee to obtain all to which the lessee is entitled under its contract. If it fails to take such reasonable measures, MMS will assess royalty on the prices which reasonably could have been obtained in accordance with the contract.

Comment: Several commenters objected to the requirement that contract revisions or amendments must be in writing and signed by all parties. The commenters stated that this requirement obstructed normal business practices in their day-to-day administration of coal sales contracts and constituted undue interference by the government.

MMS Response: The MMS does not intend to interfere in the day-to-day administration of contracts. The MMS believes that the consideration flowing from buyer to seller is the best measure of the parties' interpretation of their sales agreement. This provision is included in the final rule to ensure that any retroactive price reduction, and thus any claim by the lessee for refunds or credits, is legally enforceable.

Comment: One commenter expressed concern that a two year limitation to retroactively change value could impose an undue burden on the lessee where non-arm's-length value has been determined by prices reported to a public utility commission. The commenter stated that public utility commissions often rule on fuel costs three to five years after they have been included in rates and adjust them retroactively. Another commenter approved of MMS's restriction of limiting retroactive price changes to two years.

MMS Response: Paragraph (i) provides that retroactive adjustments to value will be limited to two years unless MMS approves a longer period. In a situation such as the one described a longer period would be approved.

Paragraph (k) was published in the January 15, 1987, proposed rulemaking, as paragraph (i) and modified slightly in the July 15, 1988, notice to specifically note that the rights to information by Indian lessors are not diminished by this paragraph.

The release of financial and confidential information for Federal solid mineral leases is subject to the Department of the Interior's (Department) regulations for releasing this type of data to the public. See 43 CFR 2.13. It is the policy of the Department to make the records available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. 552. It is the policy of MMS to make available information requested under the FOIA at the earliest possible date, while, at the same time, protecting the rights of individuals involved, and the administrative processes surrounding such rights. It also is the policy of the Department to withhold information falling within one of the FOIA exemptions only if (1) disclosure is prohibited by statute or Executive Order, or (2) sound grounds exist for not releasing such information. Accordingly, MMS considers certain information submitted by a person or entity privileged and financially confidential. We recognize the critical importance of this information to the success and competitive position of a business. Therefore, MMS does not release this information without the permission of the submitter. However, MMS will, to the extent legally permitted, release proprietary data to any State or Indian tribe upon a satisfactory explanation of why this particular data is necessary and following the execution of a binding written agreement to safeguard the proprietary data.

Section 206.259 Determination of Washing Allowances.

In the July 15, 1988 (53 FR 26942), notice, MMS discussed various changes that had occurred from the January 15, 1987, proposed rulemaking. The MMS noted that the allowance limits had been eliminated. The MMS also provided its rationale for that modification. Another change from the January 15, 1987, proposed rulemaking was the substitution of the interest rate associated with Standard and Poor's industrial BBB rate in place of Moody's Aaa corporate bond rate. This interest rate is used to compute the return on investment component in non-arm's-length allowance calculations. An extensive explanation of this change is provided in the preambles to the final oil and gas product valuation rules published on January 15, 1988 (Oil—53 FR 1212–1214; Gas—53 FR 1262–1263, respectively).

Comment: In the July 15, 1988, notice, MMS also requested comments on providing an exception to the cost-based approach for non-arm's-length allowance computation. The MMS explained that in certain circumstances where the gas plant operator provides the same services under arm's-length contracts as it does for itself, the arm's-length contract processing costs can be substituted in place of actual costs. The MMS requested whether a similar provision should be included for coal washing.

MMS Response: The MMS received no comments on this proposal; therefore, the final rule contains no such provision.

Comment: Many comments received by MMS pursuant to the January 15, 1987, proposed rulemaking were not addressed at the time of the July 15, 1988, notice. To the extent these comments continue to be relevant to the July 15, 1988, publication, they are addressed below.

Two industry commenters specifically recommended that the allowance should be based on the added value, not the cost incurred. One commenter explained, "The lessee's royalty obligations end once the coal is first placed in a marketable condition, and that is the point at which royalty value should be determined."

MMS Response: The MMS believes that determining the value added would be subjective, difficult to implement, and would require additional rulemaking. The reasonable, actual cost of coal washing is the preferred method to arrive at an appropriate allowance.

Comment: Two industry commenters specifically endorsed MMS's proposal to continue coal washing allowances. Eighteen other industry commenters recommended that MMS extend the allowance to include all forms of beneficiation (processing). According to one commenter, coal processing would encompass coal washing, "pelletizing; beneficiation; treatment with substances including chemicals or oil; drying; and subsequent handling which occurs after coal is first placed in a marketable condition." Three Indian and one industry respondent opposed granting any washing allowances, with one Indian commenter going further to recommend that "no allowances be given for any type of coal beneficiation." This commenter reasoned, "To provide for allowances for all types of coal beneficiation will create a bureaucratic nightmare * * *." One industry commenter recommended deleting all allowances as "unnecessary under * * *

market value standards." This commenter explained that market value would be determined "by current sales of comparable unwashed coal." One Indian commenter opposed an allowance because "a practice which is primarily a conservation measure does not belong in regulations to value the product for royalty purposes."

MMS Response: The regulations continue the historic practice of allowing deductions for the cost of coal washing from the sale proceeds of cleaned coal. See 30 CFR 211.63, May 17, 1976, 41 FR 20271, for original policy. The MMS believes that improving the quality of domestic energy resources is in the national interest. The allowance procedure will not be difficult to implement and should be less difficult to administer than the procedure that was in effect under the prior rules. Treating coal with oil or chemicals in order to suppress dust and/or improve handling is considered to be the responsibility of the lessee to place coal in a marketable condition. Any payment for such activities therefore is a component of gross proceeds, if this treatment is required by the purchaser.

Comment: One industry commenter proposed an alternative method for calculating allowances using the previously discussed Internal Revenue Code (IRC) "depletion income" method of valuing coal. A "processing allowance" would be subtracted from the "depletion income" before the royalty rate is applied to the resulting "net royalty value." The allowance would be calculated by multiplying the "depletion income" by a fraction, "the numerator of which is the cost of all post marketable condition processes and handling [after crushing and sizing] and the denominator of which is the total costs of all pre and post marketable condition processes and handling." This commenter justified this method as being more advantageous than the "complex and inadequate concept proposed by MMS" because it is (1) simple to calculate "based on available information and easily audited"; (2) used by other State and Federal "agencies with satisfactory results"; (3) eliminates "potential for excessive deductions"; and (4) results in a "fair" allowance.

MMS Response: The MMS has carefully reviewed the underlying principles and history of the proportionate profits method and has concluded that it has no application for determining washing allowances for royalty purposes.

The proportionate profits formula is a specific procedure under IRS regulations to determine the "gross income from mining" for depletion allowance income tax purposes when representative field or market prices are unavailable or inapplicable.

The outcome of the proportionate profits formula is elimination from the depletion allowance of all nonmining costs. Its purpose is to establish a representative market or field price for integrated miner/manufacturers only when representative prices cannot be obtained in the area. Its intent is to place integrated miner/manufacturers on the same depletion allowance basis as ordinary nonintegrated miners, thus providing no unfair tax advantage to the integrated firms.

The proportionate profits method is premised on the theory that each dollar of total costs, including nonmining applications, earns the same percentage of profits as mining processes. Assuming this principle to be uniformly true, and it is not (for example, see *Hugoton Production Company* v. *The United States*, 349 F. 2d 418 (cl. ct. 1965)), it is improper to extrapolate this principle to situations which involve deductions for the ordinary mining processes. The workings of the marketplace suggest that if a mine product has not been prepared to meet the minimum acceptable conditions that are customary for the market, then that mined product may not be saleable and, hence, would have no value in the normal sense of the term. For these reasons MMS does not accept the proportionate profits formula to determine any allowance for royalty purposes.

Comment: Two Indian commenters stated that the regulations were unclear with respect to when allowances would be approved. One commenter also stated, "The preamble to the rules also states that coal washing allowances will be allowed when they enhance the value of the coal. But the regs * * * do not require any showing that there is an enhancement * * *."

MMS Response: Allowance forms showing recorded costs are to be submitted to MMS. Regulations on the timing of form submittal are provided at § 206.259 (c) and (e). With respect to the latter comments, MMS believes that a prudent lessee would to take up the task and incur the expense of washing coal unless the process ultimately increases the value or marketability of the coal.

Comment: One Indian comment stated "inclusion of ad valorem property taxes in allowable operating costs should not include taxes imposed by the Navajo Nation."

MMS Response: To the extent that property taxes are levied directly upon washing equipment or to the extent that it can be demonstrated that property taxes are allocable to washing equipment, MMS believes that such taxes should be included in the cost basis for allowance calculation. Such taxes represent costs just as real to the lessee as labor, materials, utilities, fuel, or other direct costs.

Comment: One Indian comment recommended that the language of the regulations be clarified such "that no profit can be included in the cost of washing * * *." One State commenter stated "if washing allowances are provided for, we see no reason to factor a profit component into the lessee's cost. A profit is not guaranteed to a lessee mining federal coal * * *."

MMS Response: The return on investment component of non-arm's-length allowances is not a profit component. Rather, this component is intended to represent a fair rate of return to capital. The MMS has solicited and received significant comments on what would constitute a fair return under these circumstances. The MMS believes based on these comments that the Standard and Poors BBB bond rate represents a rational choice among alternatives.

Regarding § 206.258(b)(2), MMS has removed the word "initial" before the phrase "depreciable investment in the wash plant * * *." This term caused confusion. It was not MMS's intent to exclude costs incurred after the original construction of the wash plant. Rather, total investment was the intent.

Comment: Two comments discussed paragraph (b)(2)(iv)(A), which prohibits altering the depreciation schedule initially established by the original owner of a coal wash plant. One Indian commenter agreed with this stipulation. An industry commenter disagreed stating, "A buyer will almost inevitably assign a new and different value to acquired assets. Such value will often exceed the previous owner [sic] book value, and establishes the new basis upon which future depreciation is calculated * * *."

MMS Response: In MMS's judgment, the simple change of capital asset ownership does not create a situation requiring asset depreciation to be repeated. However, any additional retooling, refurbishing, retrofitting, or other capital improvements would necessarily be added to the capital investment base and depreciated accordingly.

Comment: Following the July 15, 1988, notice, several additional comments were received concerning washing allowances. In general, Indian comments opposed allowances for

washing. State commenters expressed support for washing allowances. Industry generally favored washing allowances and in particular expressed support for the elimination of any limit to the allowance cost. However, one industry commenter opposed the granting of washing allowances. Two comments were received that expressed concern over the use of Standard and Poor's BBB industrial bond rate for non-arm's-length allowance determinations. One commenter stated that the "[j]ustification for the use of the rate in 52 FR 1212–1214 concerns the risk associated with mineral-related projects. However, washing and transportation, even transportation using new technologies, are ancillary services. The risk is in the mining of coal."

MMS Response: As stated earlier, MMS has examined the use of the Standards and Poor's BBB industrial bond rate carefully and has concluded that the use of such rate would be appropriate for use as an allowed rate of return for washing and transportation of coal.

Section 206.260 Allocation of washed coal

Comment: Following the January 15, 1987, proposed rulemaking, five industry respondents submitted five comments concerning § 206.261, now designated § 206.260. Two commenters agreed with the procedures to allocate washed coal back to the leases from which it was produced. Four respondents recommended substituting the term "processed" for "washed" in order to be consistent with their other proposals to expand washing allowances to include other forms of beneficiation.

MMS Response: The MMS did not amend § 206.261 when redesignating to § 206.260 in the July 15, 1988, notice and has not changed § 206.260 for this final rulemaking. For the MMS response to the washing/processing issue, please refer to the MMS responses to comments at § 206.265.

Sectin 206.262 Determination of transportation allowances.

In the July 15, 1988 (53 FR 26942), notice, MMS discussed various changes that were made to the January 15, 1987, proposed rulemaking. The MMS noted that the allowance limits had been eliminated. The MMS also provided its rationale for that modification. Another change from the January 15, 1987, proposed rulemaking was the substitution of the interest rate associated with Standard and Poor's industrial BBB rate in place of Moody's Aaa corporate bond rate. This interest rate is used to compute the return on investment component in non-arm's-length allowance calculations. An extensive explanation of this change is provided in the preamble to the final oil and gas product valuation rules published on January 15, 1988 (53 FR 1212–1214 and 53 FR 1262–1263, respectively). In order to be consistent with coal washing regulations at § 206.259(d)(1), identical language has been added to § 206.262(d)(1), and the reference to penalties has been deleted.

Comment: In the July 15, 1988, notice, MMS also requested comments on providing an exception to the cost-based approach for non-arm's length allowance computation, whereby the lessee could apply to MMS for an exception from the requirement that it compute actual costs if the lessee has a transportation rate approved by a regulatory authority and the rate is not excessive as compared to other arm's-length contracts. If there are no other arm's-length contracts to use for comparison, other criteria apply.

MMS Response: The MMS received no comments on this proposal; therefore, the final rule contains no such provision.

Comment: Many comments received by MMS pursuant to the Janaury 15, 1987, proposed rulemaking were not addressed at the time of the July 15, 1988, notice. To the extent these comments continue to be relevant to the July 15, 1988, publication, they are addressed below.

Comment: The MMS received 24 comments from seven industry, five Indian, and two State respondents concerning proposed § 206.261(a)(i). Six industry commenters stated that the term "remote" was ambiguous and should be clarified. One of these commenters specifically stated, "The criteria demands [sic] clear definition." One industry and one Indian commenter requested MMS define the meaning of "transportation."

Four comments were received on paragraph (a) addressing the requirement that the point of sale or washing facility be "remote" from the lease or mine. One industry commenter stated, "It makes no sense to forbid a transportation allowance for sales to the 'mine-mouth' customers * * *." In the same vein, another industry commenter stated, "MMS should consider instances where long distances exist between the point of severance and the washing facility or point of sale which may be located on the same lease or mine area." Two other commenters specifically opposed this notion. One Indian commenter requested that the regulation be clarified to "indicate that no transportation allowance will be allowed except from the lease boundary." Another Indian commenter suggested that an allowance would be appropriate from the lease boundary to the point of sale.

Three comments were received on paragraph (a) concerning what would be considered as transportation to a point of sale or washing facility remote from the lease or mine. Two industry commenters suggested that any transportation to a point of sale or washing facility greater than one mile from the mine or lease boundary should be eligible for a transportation allowance. One of these commenters explained that this standard "provides much greater certainty than under the ambiguous remote standard * * *." One industry commenter stated that all transportation should be eligible for allowance after the coal is "severed from the ground and either is removed from the lease itself or * * * reaches the surface of the ground" in the case of underground mining.

MMS Response: The MMS responded to similar comments earlier in this preamble in the discussion of § 206.251 Definitions, "Allowance."

Comment: Six commenters addressed other aspects of paragraph (a). One industry commenter stated that the word "reasonable" should be deleted as it gives too much discretion to MMS. Two Indian and three State commenters expressed concern that protections to the lessor that exist in the current regulations were being abandoned. Two State comments requested that language be added which would ensure "the value will never be less than what value would have accrued, had the sale been FOB the mine." The other three commenters requested that the word "necessary" be added to this paragraph in order to provide protection against any potential lessee abuse.

MMS Response: The MMS reiterates its belief that lessees are also prudent businessmen and as such are unlikely to undertake operations that are unnecessary or unreasonable. Since most royalty rates are set at or below 12½ percent, is difficult to contrive a situation where any lessee interested in maximizing its allowance would benefit from unnecessary or unreasonable expenditures. For each unnecessary dollar spent the lessee could only recoupe, at most, the amount equal to the lease royalty, which is 12.5 cents or less.

Comment: The MMS received several additional comments following the July 15, 1988, notice. Two comments stated that in no case should a transportation allowance be allowed to reduce the

value to zero. One comment offered an alternative proposal: "Under no circumstances shall the washing allowance and transportation allowance reduce the value to less than the value of like quality and quantity coal being sold from the area under an arm's-length agreement." Another comment stated there should be some absolute limit to the allowance deduction.

MMS Response: The MMS does not believe any threshold or limit to allowances is necessary. The rules provide that the allowances cannot reduce the value for royalty purposes to zero. Limiting transportation allowances to amounts such that the royalty value of destination sales would not fall below the royalty value of f.o.b. mine sales does represent one test available to MMS in reviewing allowances, but it does not constitute the conclusive action that would be taken by MMS. In keeping with the general free-market themes that underpin this rulemaking, MMS believes that the lessee normally is striving to attain the greatest return. When the lessee must incur additional costs to transport coal to remote sales destinations, the presumption is that those additional costs were necessary because the market for f.o.b. mine sales was saturated. The MMS has no intention of second guessing prudent business judgments made by lessees in response to their market assessments.

Comment: One comment advised MMS to exercise caution when reviewing transportation allowances as some lessees may attempt to manipulate the point of sale to benefit from a transportation allowance.

MMS Response: The MMS will diligently review transportation allowances, applying the criteria stated above in MMS's discussion of "Allowance" at § 206.251 Definitions.

Other changes made to the transportation allowance section are the same as those discussed above for washing allowances.

Section 206.263 Contract submission

After the January 15, 1987, proposed rulemaking, the MMS received many comments opposing the requirement to submit contracts to MMS upon request. The MMS responded to those comments and others in the July 15, 1988, notice. In response to the July 15, 1988, notice, several commenters again objected to the contract submittal requirement.

MMS Response: The MMS intends to review contracts during on-site audits. However, the MMS must retain the right to obtain sales contracts or other agreements from Federal or Indian lessees. The MMS will take all necessary precautions to safeguard contracts from unauthorized disclosure. The section has not changed from the July 15, 1988, notice.

Section 206.264 In-situ and surface gasification and liquefaction operations

Comment: The MMS received several comments from industry respondents on this section. Two industry commenters stated that this section provided excessive authority to MMS to determine value. As one commenter explained, "The result [of MMS authority] will be a dampening effect on the development of new technologies."

Three industry commenters recommended that MMS's valuation authority be restricted to in-situ processes only and that post mining processes such as liquefaction and thermal drying be excluded from royalty valuation by applying the provisions of § 206.257 to the value of feedstock coal when it first becomes marketable. One of these commenters explained, "The lessor should share in the benefit of such processes only to the extent of royalty at the prescribed rate on the value of feedstock coal * * *." One commenter recommended that if MMS authority was not restricted by the changes suggested "[i]t would be more appropriate to delete this section, place it in a reserved category and reconsider it in the future."

One industry respondent recommended no changes to proposed § 206.264.

MMS Response: The MMS does not envision that the development of new coal technologies will be dampened by § 206.264, which merely states that MMS will determine the royalty value of production developed by in situ or surface gasification or liquefaction technology. Historically, Federal treatment of developing technologies with reference to federal resources has ben accommodating. As noted previously in the preamble § 206.265 has been added since the January 15, 1987, proposed rulemaking, in response to the comments received.

Section 206.265 Value enhancement of marketable coal

In order to address concerns that MMS would assess royalties on the value added by new beneficiation technologies, such as "deep thermal drying," or "coal pelletization," § 206.265 was added to the July 15, 1988, notice. This section would also apply to surface gasification or liquefaction, if coal is placed in marketable condition prior to processing to a different physical or chemical form.

Comment: Several comments were received that commended the addition of this section. Only one Indian commented that these beneficiation processes were for the purpose of placing lease products in marketable condition and that royalty should be asessed on the total value of products sold. Two comments were received that stated when a net-back valuation was necessary, two times the Standard and Poor's BBB industrial bond rate was appropriate for high risk ventures. Two commenters expressed concern that two times the BBB industrial bond rate may be excessive and requested that the rate be reviewed before publication of final rules.

MMS Response: The MMS has retained the rate of return component in paragraph (b) at two times the Standard and Poor's industrial BBB rate. The MMS does not consider this rate as excessive. It is a well-established economic principle that the incremental cost of funds are a function of both the general economy and the results of operation of the individual company. The results of operation consider prior investments. In this case, we are dealing with new and evolving technologies without much prior experience. Given this reality, it is not appropriate to apply the industry standard for rate of return when the project is known to be complex and a high risk venture. For extremely risky operations such as the Great Plains Coal Gasification Project in North Dakota, the General Accounting Office (GAO) estimated an internal rate of return over the life of the gasification project to be between 14 percent and 19 percent (GAO/RCED-85-92, May 28, 1985). This project also had Government price guarantees. For other more risky projects, higher rates recognize the risk associated with the project and exceed the industry and standard for cost of capital. The MMS therefore concludes that, in net-back valuations, proper rate of return for beneficiation projects should be 2 times the industrial BBB rate.

V. Procedural Matters

Executive Order 12291

The Department of the Interior (DOI) has determined that this document is not a major rule and does not require a regulatory analysis under Executive Order 12291. This rulemaking consolidates Federal and Indian coal royalty valuation regulations; clarifies DOI coal royalty valuation and coal transportation and coal washing allowance policy; and provides for consistent royalty valuation policy among all leasable minerals.

Regulatory Flexibility Act

Because this rule primarily consolidates and streamlines existing regulations into a single part for consistent application, there are no significant additional requirements or burdens placed upon small business entities as a result of implication of this rule. Therefore, the DOI has determined that this rulemaking will not have a significant economic effect on a substantial number of small entities and does not require a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Paperwork Reduction Act of 1980

The information collection requirements contained in §§ 206.254, 206.257, 206.259, 206.262, and 206.263 of this rule have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq. and assigned clearance number 1010–0040, –0063, –0064, and –0074.

Public reporting burden for this collection of information is estimated to vary from one-half hour to 3 hours per response with an average of 1.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Due to the complexity of the information requested, applications for allowances using Forms MMS–4292 and MMS–4293 in non-arm's-length or no-contract situations may require up to an estimated 40 hours per response. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Mail Stop 632, Minerals Management Service, 12203 Sunrise Valley Drive, Reston, VA 22091; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is not required.

List of Subjects

30 CFR Part 202

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 203

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 206

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 210

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 212

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

43 CFR Part 3480

Government contracts, Intergovernmental relations, Land Management Bureau, Mineral royalties, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements.

Date: January 9, 1989.

James E. Cason,

Assistant Secretary—Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR Parts 202, 203, 206, 210, and 212 and 43 CFR Part 3480 are amended as follows:

Title 30—Mineral Resources

PART 202—ROYALTIES

1. The authority citation for Part 202 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

§ 202.250 [Amended]

2. Paragraph (b) of § 203.250 under Subpart F of Part 203 is redesignated as a new § 202.250 under Subpart F of Part 202.

3. 30 CFR 202 is amended by revising newly redesignated § 202.250 to read as follows:

§ 202.250 Overriding royalty interest.

The regulations governing overriding royalty interests, production payments, or similar interests created under Federal coal leases are in 43 CFR Group 3400.

PART 203—RELIEF OR REDUCTION IN ROYALTY RATE

1. The authority citation for Part 203 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

§ 203.250 [Amended]

2. Paragraphs (c), (d), (e), (f), (g), (h), (i),(j), and (k) of § 203.250 under Subpart F are removed.

3. Paragraph (b) of § 203.250 is redesignated as a new § 202.250 under Subpart F of Part 202.

4. Paragraph (a) under § 203.250 is redesignated as a new § 203.250 under Subpart F and retitled "Advance royalty." The new section reads as follows:

§ 203.250 Advance royalty.

Provisions for the payment of advance royalty in lieu of continued operation are contained at 43 CFR 3483.4.

5. A new § 203.251 is added in Subpart F to read as follows:

§ 203.251 Reduction in royalty rate or rental.

An application for reduction in coal royalty rate or rental shall be filed and processed in accordance with 43 CFR Group 3400.

PART 206—PRODUCT VALUATION

1. The authority citation for Part 206 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. 30 CFR Part 206 is amended by revising § 206.10 of Subpart A to read as follows:

Subpart A—General Provisions

§ 206.10 Information collection.

The information collection requirements contained in 30 CFR Part 206 have been approved by the Office of

Management and Budget (OMB) under 44 U.S.C. 3501 et seq. The forms, filing date, and approved OMB clearance numbers are identified in 30 CFR 210.10 and 30 CFR 216.10.

3. Subpart F is revised to read as follows:

Subpart F—Coal

Sec.
206.250 Purpose and scope.
206.251 Definitions.
206.252 Information to collection.
206.253 Coal subject to royalties—general provisions.
206.254 Quality and quantity measurement standards for reporting and paying royalties.
206.255 Point of royalty determination.
206.256 Valuation standards for cents-per-ton leases.
206.257 Valuation standards for ad valorem leases.
206.258 Washing allowances—general.
206.259 Determination of washing allowances.
206.260 Allocation of washed coal.
206.261 Transportation allowances—general.
206.262 Determination of transportation allowances.
206.263 Contract submission.
206.264 In situ and surface gasification and liquefaction operations.
206.265 Value enhancement of marketable coal.

Subpart F—Coal

§ 206.250 Purpose and scope.

(a) This subpart prescribes the procedures to establish the value, for royalty purposes, of all coal from Federal and Indian Tribal and allotted leases (except leases on the Osage Indian Reservation).

(b) If the specific provisions of any statute, treaty, or settlement agreement between the United States (or Indian lessor) and a lessee resulting from administrative or judicial litigation, or any coal lease subject to the requirements of this subpart, are inconsistent with any regulation in this subpart, then the statute, treaty, lease provision, or settlement shall govern to the extent of that inconsistency.

(c) All royalty payments made to the Mineral Management Service (MMS) are subject to later audit and adjustment.

(d) The regulations in this subpart are intended to ensure that the trust responsibilities of the United States with respect to the administration of Indian coal leases are discharged in accordance with the requirements of the governing mineral leasing laws, treaties, and lease terms.

§ 206.251 Definitions.

"Ad valorem lease" means a lease where the royalty due to the lessor is based upon a percentage of the amount or value of the coal.

"Allowance" means an approved, or an MMS-initially accepted deduction in determining value for royalty purposes. "Coal washing allowance" means an allowance for the reasonable, actual costs incurred by the lessee for coal washing, or an approved or MMS-initially accepted deduction for the costs of washing coal, determined pursuant to this subpart. "Transportation allowance" means an allowance for the reasonable, actual costs incurred by the lessee for moving coal to a point of sale or point of delivery remote from both the lease and mine or wash plant, or an approved MMS-initially accepted deduction for costs of such transportation, determined pursuant to this subpart.

"Area" means a geographic region in which coal has similar quality and economic characteristics. Area boundaries are not officially designated and the areas are not necessarily named.

"Arm's-length contract" means a contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that contract. For purposes of this subpart, two persons are affiliated if one person controls, is controlled by, or is under common control with another person. For purposes of this subpart, based on the instruments of ownership of the voting securities of an entity, or based on other forms of ownership:

(a) Ownership in excess of 50 percent constitutes control;

(b) Ownership of 10 through 50 percent creates a presumption of control; and

(c) Ownership of less than 10 percent creates a presumption of noncontrol which MMS may rebut if it demonstrates actual or legal control, including the existence of interlocking directorates.

Notwithstanding any other provisions of this subpart, contracts between relatives, either by blood or by marriage, are not arm's-length contracts. The MMS may require the lessee to certify ownership control. To be considered arm's-length for any production month, a contract must meet the requirements of this definition for that production month as well as when the contract was executed.

"Audit" means a review, conducted in accordance with generally accepted accounting and auditing standards, of royalty payment compliance activities of lessees or other interest holders who pay royalties, rents, or bonuses on Federal or Indian leases.

"BIA" means the Bureau of Indian Affairs of the Department of the Interior.

"BLM" means the Bureau of Land Management of the Department of the Interior.

"Coal" means coal of all ranks from lignite through anthracite.

"Coal washing" means any treatment to remove impurities from coal. Coal washing may include, but is not limited to, operations such as flotation, air, water, or heavy media separation; drying; and related handling (or combination thereof).

"Contract" means any oral or written agreement, including amendments or revisions thereto, between two or more persons and enforceable by law that with due consideration creates an obligation.

"Gross proceeds" (for royalty payment purposes) means the total monies and other consideration accruing to a coal lessee for the production and disposition of the coal produced. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as crushing, sizing, screening, storing, mixing, loading, treatment with substances including chemicals or oils, and other preparation of the coal to the extent that the lessee is obligated to perform them at no cost to the Federal Government or Indian lessor. Gross proceeds, as applied to coal, also includes but is not limited to reimbursements for royalties, taxes or fees, and other reimbursements. Tax reimbursements are part of the gross proceeds accruing to a lessee even though the Federal or Indian royalty interest may be exempt from taxation. Monies and other consideration, including the forms of consideration identified in this paragraph, to which a lessee is constractually or legally entitled but which it does not seek to collect through reasonable efforts are also part of gross proceeds.

"Indian allottee" means any Indian for whom land or an interest in land is held in trust by the United States or who holds title subject to Federal restriction against alienation.

"Indian Tribe" means any Indian Tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians for which any land or interest in land is held in trust by the United States or which is subject to Federal restriction against alienation.

"Lease" means any contract, profit-share arrangement, joint venture, or other agreement issued or approved by the United States for a Federal or Indian coal resource under a mineral leasing

law that authorizes exploration for, development or extraction of, or removal of coal—or the land covered by that authorization, whichever is required by the context.

"Lessee" means any person to whom the United States, an Indian Tribe, or an Indian allottee issues a lease, and any person who has been assigned an obligation to make royalty or other payments required by the lease. This includes any person who has an interest in a lease as well as an operator or payor who has no interest in the lease but who has assumed the royalty payment responsibility.

"Like-quality coal" means coal has similar chemical and physical characteristics.

"Marketable condition" means coal that is sufficiently free from impurities and otherwise in a condition that it will be accepted by a purchaser under a sales contract typical for that area.

"Mine" means an underground or surface excavation or series of excavations and the surface or underground support facilities that contribute directly or indirectly to mining, production, preparation, and handling of lease products.

"Net-back method" means a method for calculating market value of coal at the lease or mine. Under this method, costs of transportation, washing, handling, etc., are deducted from the ultimate proceeds received for the coal at the first point at which reasonable values for the coal may be determined by a sale pursuant to an arm's-length contract or by comparison to other sales of coal, to ascertain value at the mine.

"Net output" means the quantity of washed coal that a washing plant produces.

"Person" means by individual, firm, corporation, association, partnership, consortium, or joint venture.

"Selling arrangement" means the individual contractual arrangements under which sales or dispositions of coal are made to a purchaser.

"Severance tax" means any tax paid to any government agency based upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the value of coal, or any license fee, unless such license fee is based on either the volume or the value of production. Mineral royalties are not tases.

"Spot market price" means the price received under any sales transaction when planned or actual deliveries span a short period of time, usually not exceeding one year.

§ 206.252 Information collection.

The information collection requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The forms, filing date, and approved OMB clearance numbers are identified in 30 CFR 210.10 and 30 CFR 216.10.

§ 206.253 Coal subject to royalties—general provisions.

(a) All coal (except coal unavoidably lost as determined by BLM pursuant to 43 CFR Group 3400) from a Federal or Indian lease subject to this part is subject to royalty. This includes coal used, sold, or otherwise disposed of by the lessee on or off the lease.

(b) If a lessee receives compensation for unavoidably lost coal through insurance coverage or other arrangements, royalties at the rate specified in the lease are to be paid on the amount of compensation received for the coal. No royalty is due on insurance compensation received by the lessee for other losses.

(c) In the event waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time the recovered coal is used, sold, or otherwise finally disposed of. The royalty rate shall be that rate applicable to the production method used to initially mine coal in the waste pile or slurry pond; i.e., underground mining method or surface mining method. Coal in waste pits or slurry ponds initially mined from Federal or Indian leases shall be allocated to such leases regardless of whether it is stored on Federal or Indian lands. The lessee shall maintain accurate records to determine to which individual Federal or Indian lease coal in the waste pit or slurry pond should be allocated. However, nothing in this section requires payment of a royalty on coal for which a royalty has already been paid.

§ 206.254 Quality and quantity measurement standards for reporting and paying royalties.

(a) For leases subject to § 206.257 of this subpart, the quality of coal on which royalty is due shall be reported on the basis of percent sulfur, percent ash, and number of British thermal units (Btu) per pound of coal. Coal quality determinations shall be made at intervals prescribed in the lessee's sales contract. If there is no contract, or if the contract does not specify the intervals of coal quality determination, the lessee shall propose a quality test schedule to MMS. In no case, however, shall quality tests be performed less than quarterly using standard industry-recognized testing methods. Coal quality information shall be reported on the appropriate forms required under 30 CFR Part 216.

(b) For all leases subject to this subpart, the quantity of coal on which royalty is due shall be measured in short tons (of 2,000 pounds each) by methods prescribed by the BLM. Coal quantity information shall be reported on appropriate forms required under 30 CFR Part 216 and on the Report of Sales and Royalty Remittance, Form MMS-4014, as required under 30 CFR Part 210.

§206.255 Point of royalty determination.

(a) For all leases subject to this subpart, royalty shall be computed on the basis of the quantity and quality of Federal or Indian coal in marketable condition measured at the point of royalty measurement as determined jointly by BLM and MMS.

(b) Coal produced and added to stockpiles or inventory does not require payment of royalty until such coal is later used, sold, or otherwise finally disposed of. The MMS may ask BLM or BIA to increase the lease bond to protect the lessor's interest when BLM determines that stockpiles or inventory become excessive so as to increase the risk of degradation of the resource.

(c) The lessee shall pay royalty at a rate specified in the lease at the time the coal is used, sold, or otherwise finally disposed of, unless otherwise provided for at § 206.256(d) of this subpart.

§ 206.256 Valuation standards for cents-per-ton leases.

(a) This section is applicable to coal leases on Federal, Indian Tribal, and allotted Indian lands (except leases on the Osage Indian Reservation) which provide for the determination of royalty on a cents-per-ton (or other quantity) basis.

(b) The royalty for coal from leases subject to this section shall be based on the dollar rate per ton prescribed in the lease. That dollar rate shall be applicable to the actual quantity of coal used, sold, or otherwise finally disposed of, including coal which is avoidably lost as determine by BLM pursuant to 43 CFR Part 3400.

(c) For leases subject to this section, there shall be no allowances for transportation, removal of impurities, coal washing, or any other processing or preparation of the coal.

(d) When a coal lease is readjusted pursuant to 43 CFR Part 3400 and the royalty valuation method changes from

a cents-per-ton basis to an ad valorem basis, coal which is produced prior to the effective date of readjustment and sold or used within 30 days of the effective date of readjustment shall be valued pursuant to this section. All coal that is not used, sold, or otherwise finally disposed of within 30 days after the effective date of readjustment shall be valued pursuant to the provisions of § 206.257 of this subpart, and royalties shall be paid at the royalty rate specified in the readjusted lease.

§ 206.257 Valuation standards for ad valorem leases.

(a) This section is applicable to coal leases on Federal, Indian Tribal, and allotted Indian lands (except leases on the Osage Indian Reservation) which provide for the determination of royalty as a percentage of the amount of value of coal (ad valorem). The value for royalty purposes of coal from such leases shall be the value of coal determined pursuant to this section, less applicable coal washing allowances and transportation allowances determine pursuant to §§ 206.258 through 206.262 of this subpart, or any allowance authorized by § 206.265 of this subpart. The royalty due shall be equal to the value for royalty purposes multiplied by the royalt rate in the lease.

(b)(1) The value of coal that is sold pursuant to an arm's-length contract shall be the gross proceeds accuring to the lessee, except as provided in paragraphs (b)(2), (b)(3), (b)(5), and (b)(6) of this section. The lessee shall have the burden of demonstrating that its contract is arm's-length. The value which the lessee reports, for royalty purposes, is subject to monitoring, review, and audit.

(2) In conducting reviews and audits, MMS will examine whether the contract reflects the total consideration actually transferred either directly or indirectly from the buyer to the seller for the coal produced. If the contract does not reflect the total consideration, then the MMS may require that the coal sold pursuant to that contract be valued in accordance with paragraph (c) of this section. Value may not be based on less than the gross proceeds accruing to the lessee for the coal production, including the additional consideration.

(3) If the MMS determines that the gross proceeds accruing to the lessee pursuant to an arm's-length contract do not reflect the reasonable value of the production because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then MMS shall require that the coal production be valued pursuant to paragraph (c)(2) (ii), (iii), (iv), or (v) of this section, and in accordance with the notification requirements of paragraph (d)(3) of this section. When MMS determines that the value may be unreasonable, MMS will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's reported coal value.

(4) The MMS may require a lessee to certify that its arm's-length contract provisions include all of the consideration to be paid by the buyer, either directly or indirectly, for the coal production.

(5) Notwithstanding any other regulations in this subpart, except for Indian leases, the value of coal for royalty purposes shall not include amounts of Federal Black Lung excise taxes authorized by the Black Lung Benefits Revenue Act of 1977 (26 U.S.C. 4121), abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(a)), and severance taxes. These exclusions include only the costs of the Federal Black Lung excise tax, abandoned mine land fee, and severance tax themselves and do not include late payment charges and/or other monetary penalties which may be levied on coal producers for nonpayment or underpayment of either the Federal Black Lung excise tax, the abandoned mine land fee, or the severance tax.

(6) The value of production for royalty purposes shall not include payments received by the lessee pursuant to a contract which the lessee demonstrates, to MMS's satisfaction, were not part of the total consideration paid for the purchase of coal production.

(c)(1) The value of coal from leases subject to this section and which is not sold pursuant to an arm's-length contract shall be determined in accordance with this section.

(2) If the value of the coal cannot be determined pursuant to paragraph (b) of this section, then the value shall be determined through application of other valuation criteria. The criteria shall be considered in the following order, and the value shall be based upon the first applicable criterion:

(i) The gross proceeds accruing to the lessee pursuant to a sale under its non-arm's-length contract (or other disposition of produced coal by other than an arm's-length contract), provided that those gross proceeds are within the range of the gross proceeds derived from, or paid under, comparable arm's-length contracts between buyers and sellers neither of whom is affiliated with the lessee for sales, purchases, or other dispositions of like-quality coal produced in the area. In evaluating the comparability of arm's-length contracts for the purposes of these regulations, the following factors shall be considered: Price, time of execution, duration, market or markets served, terms, quality of coal, quantity, and such other factors as may be appropriate to reflect the value of the coal;

(ii) Prices reported for that coal to a public utility commission;

(iii) Prices reported for that coal to the Energy Information Administration of the Department of Energy;

(iv) Other relevant matters including, but not limited to, published or publicly available spot market prices, or information submitted by the lessee concerning circumstances unique to a particular lease operation or the saleability of certain types of coal;

(v) If a reasonable value cannot be determined using paragraphs (c)(2) (i), (ii), (iii), or (iv) of this section, then a net-back method or any other reasonable method shall be used to determine value.

(3) When the value of coal is determined pursuant to paragraph (c)(2) of this section, that value determination shall be consistent with the provisions contained in paragraphs (b)(5) and (b)(6) of this section, as appropriate.

(d)(1) Where the value is determined pursuant to paragraph (c) of this section, that value does not require MMS's prior approval. However, the lessee shall retain all data relevant to the determination of royalty value. Such data shall be subject to review and audit, and MMS will direct a lessee to use a different value if it determines that the reported value is inconsistent with the requirements of these regulations.

(2) Any Federal or Indian lessee will make available upon request to the authorized MMS, State, or Indian representatives, or to the Inspector General of the Department of the Interior or other persons authorized to receive such information, arm's-length sales and sales quantity data for like-quality coal sold, purchased, or otherwise obtained by the lessee from the area.

(3) A lessee shall notify MMS if it has determined value pursuant to paragraphs (c)(2) (ii), (iii), (iv), or (v) of this section. The notification shall be by letter to the Associate Director for Royalty Management of his/her designee. The letter shall identify the valuation method to be used and contain a brief description of the procedure to be followed. The notification required by this section is a

one-time notification due no later than the month the lessee first reports royalties on the Form MMS-4014 using a valuation method authorized by paragraphs (c)(2) (ii), (iii), (iv), or (v) of this section, and each time there is a change in a method under paragraphs (c)(2) (iv) or (v) of this section.

(e) If MMS determines that a lessee has not properly determined value, the lessee shall be liable for the difference, if any, between royalty payments made based upon the value it has used and the royalty payments that are due based upon the value established by MMS. The lessee shall also be liable for interest computed pursuant to 30 CFR 218.202. If the lessee is entitled to a credit, MMS will provide instructions for the taking of that credit.

(f) The lessee may request a value determination from MMS. In that event, the lessee shall propose to MMS a value determination method, and may use that method in determining value for royalty purposes until MMS issues its decision. The lessee shall submit all available data relevant to its proposal. The MMS shall expeditiously determine the value based upon the lessee's proposal and any additional information MMS deems necessary. That determination shall remain effective for the period stated therein. After MMS issues its determination, the lessee shall make the adjustments in accordance with paragraph (e) of this section.

(g) Notwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing to the lessee for the deposition of produced coal less applicable exclusions of paragraphs (b)(5) and (b)(6) of this section and less applicable allowances determined pursuant to §§ 206.258 through 206.262, and § 206.265 of this subpart.

(h) The lessee is required to place coal in marketable condition at no cost to the Federal Government or Indian lessor. Where the value established pursuant to this section is determined by a lessee's gross proceeds, that value shall be increased to the extent that the gross proceeds has been reduced because the purchaser, or any other person, is providing certain services, the cost of which ordinarily is the responsibility of the lessee to place the coal in marketable condition.

(i) Value shall be based on the highest price a prudent lessee can receive through legally enforceable claims under its contract. Absent contract revision or amendment, if the lessee fails to take proper or timely action to receive prices or benefits to which it is entitled, it must pay royalty at a value based upon that obtainable price or benefit. Contract revisions or amendments shall be in writing and signed by all parties to an arm's-length contract, and may be retroactively applied to value for royalty purposes for a period not to exceed two years, unless MMS approves a longer period. If the lessee makes timely application for a price increase allowed under its contract but the purchaser refuses, and the tessee takes reasonable measures, which are documented, to force purchaser compliance, the lessee will owe no additional royalties unless or until monies or consideration resulting from the price increase are received. This paragraph shall not be construed to permit a lessee to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of coal.

(j) Notwithstanding any provision in these regulations to the contrary, no review, reconciliation, monitoring, or other like process that results in a redetermination by the MMS of value under this section shall be considered final or binding as against the Federal Government, its beneficiaries, the Indian Tribes, or allottees until the audit period is formally closed.

(k) Certain information submitted to MMS to support valuation proposals, including transportation, coal washing, or other allowances pursuant to § 206.265 of this subpart, is exempted from disclosure by the Freedom of Information Act, 5 U.S.C. 522. Any data specified by the Act to be privileged, confidential, or otherwise exempt shall be maintained in a confidential manner in accordance with applicable law and regulations. All requests for information about determinations made under this Part are to be submitted in accordance with the Freedom of Information Act regulation of the Department of the Interior, 43 CFR Part 2. Nothing in this section is intended to limit or diminish in any manner whatsoever the right of an Indian lessor to obtain any and all information as such lessor may be lawfully entitled from MMS or such lessor's lessee directly under the terms of the lease or applicable law.

§ 206.258 Washing allowances—general.

(a) For ad valorem leases subject to § 206.257 of this subpart, MMS shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to wash coal, unless the value determined pursuant to § 206.257 of this subpart was based upon like-quality unwashed coal. Under no circumstances shall the washing allowance and the transportation allowance authorized by § 206.262 of this subpart reduce the value for royalty purposes to zero.

(b) If MMS determines that a lessee has improperly determined a washing allowance authorized by this section, then the lessee shall be liable for any additional royalties, plus interest determined in accordance with 30 CFR 218.202, or shall be entitled to a credit without interest.

(c) Lessees shall not disproportionately allocate washing costs to Federal or Indian leases.

(d) No cost normally associated with mining operations and which are necessary for placing coal in marketable condition shall be allowed as a cost of washing.

(e) Coal washing costs shall only be recognized as allowances when the washed coal is sold and royalties are reported and paid.

§ 206.259 Determination of washing allowances.

(a) *Arm's-length contracts.* (1) For washing costs incurred by a lessee pursuant to an arm's-length contract, the washing allowance shall be the reasonable actual costs incurred by the lessee for washing the coal under that contract, subject to monitoring, review, audit, and possible future adjustment. The MMS's prior approval is not required before a lessee may deduct costs incurred under an arm's-length contract. However, before any deduction may be taken, the lessee must submit a completed page one of Form MMS-4292, Coal Washing Allowance Report, in accordance with paragraph (c)(1) of this section. A washing allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form MMS-4292 is filed with MMS, unless MMS approves a longer period upon a showing of good cause by the lessee.

(2) In conducting reviews and audits, MMS will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from the lessee to the washer for the washing. If the contract reflects more than the total consideration paid, then the MMS may require that the washing allowance be determined in accordance with paragraph (b) of this section.

(3) If the MMS determines that the consideration paid pursuant to an arm's-length washing contract does not reflect the reasonable value of the washing because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty

to the lessor to market the production for the mutual benefit of the lessee and the lessor, then MMS shall require that the washing allowance be determined in accordance with paragraph (b) of this section. When MMS determines that the value of the washing may be unreasonable, MMS will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's washing costs.

(4) Where the lessee's payments for washing under an arm's-length contract are not based on a dollar-per-unit basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent. Washing allowances shall be expressed as a cost per ton of coal washed.

(b) *Non-arm's-length or no contract.* (1) If a lessee has a non-arm's-length contract or has no contract, including those situations where the lessee performs washing for itself, the washing allowance will be based upon the lessee's reasonable actual costs. All washing allowances deductd under a non-arm's-length or no contract situation are subject to monitoring, review, audit, and possible future adjustment. Prior MMS approval of washing allowances is not required for non-arm's-length or no contract situations. However, before any estimated or actual deduction may be taken, the lessee must submit a completed Form MMS–4292 in accordance with paragraph (c)(2) of this section. A washing allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form MMS–4292 is filed with MMS, unless MMS approves a longer period upon a showing of good cause by the lessee. The MMS will monitor the allowance deduction to ensure that deductions are reasonable and allowable. When necessary or appropriate, MMS may direct a lessee to modify its estimated or actual washing allowance.

(2) The washing allowance for non-arm's-length or no contract situations shall be based upon the lessee's actual costs for washing during the reported period, including operating and maintenance expenses, overhead, and either depreciation and a return on undepreciated capital investment in accordance with paragraph (b)(2)(iv)(A) of this section, or a cost equal to the depreciable investment in the wash plant multiplied by the rate of return in accordance with paragraph (b)(2)(iv)(B) of this section. Allowable capital costs are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the wash plant.

(i) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes, rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(ii) Allowable maintenance expenses include: Maintenance of the wash plant; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(iii) Overhead attributable and allocable to the operation and maintenance of the wash plant is an allowable expense. State and Federal income taxes and severance taxes, including royalities, are not allowable expenses.

(iv) A lessee may use either paragraph (b)(2)(iv)(A) or (B) of this section. After a lessee has elected to use either method for a wash plant, the lessee may not later elect to change to the other alternative without approval of the MMS.

(A) To compute depreciation, the lessee may elect to use either a straight-line depreciation method based on the life of equipment or on the life of the reserves which the wash plant services, whichever is appropriate, or a unit of production method. After an election is made, the lessee may not change methods without MMS approval. A change in ownership of a wash plant shall not alter the depreciation schedule established by the original operator/lessee for purposes of the allowance calculation. With or without a change in ownership, a wash plant shall be depreciated only once. Equipment shall not be depreciated below a reasonable salvage value.

(B) The MMS shall allow as a cost an amount equal to the allowable capital investment in the wash plant multiplied by the rate of return determined pursuant to paragraph (b)(2)(v) of this section. No allowance shall be provided for depreciation. This alternative shall apply only to plants first placed in service or acquired after March 1, 1989.

(v) The rate of return shall be the industrial rate associated with Standard and Poor's BBB rating. The rate of return shall be the monthly average rate as published in *Standard and Poor's Bond Guide* for the first month of the reporting period for which the allowance is applicable and shall be effective during the reporting period. The rate shall be redetermined at the beginning of each subsequent washing allowance reporting period (which is determined pursuant to paragraph (c)(2) of this section).

(3) The washing allowance for coal shall be determined based on the lessee's reasonable and actual cost of washing the coal. The lessee may not take an allowance for the costs of washing lease production that is not royalty bearing.

(c) *Reporting requirements.*—(1) Arm's-length contracts. (i) With the exception of those washing allowances specified in paragraphs (c)(1)(v) and (vi) of this section, the lessee shall submit page one of the initial Form MMS–4292 prior to, or at the same time, as the washing allowance determined pursuant to an arm's-length contract is reported on Form MMS–4014, Report of Sales and Royalty Remittance. A Form MMS–4292 received by the end of the month that the Form MMS–4014 is due shall be considered to be received timely.

(ii) The initial Form MMS–4292 shall be effective for a reporting period beginning the month that the lessee is first authorized to deduct a washing allowance and shall continue until the end of the calendar year, or until the applicable contract or rate terminates or is modified or amended, whichever is earlier.

(iii) After the initial reporting period and for succeeding reporting periods, lessees must submit page one of Form MMS–4292 within 3 months after the end of the calendar year, or after the applicable contract or rate terminates or is modified or amended, whichever is earlier, unless MMS approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period).

(iv) The MMS may require that a lessee submit arm's-length washing contracts and related documents. Documents shall be submitted within a reasonable time, as determined by MMS.

(v) Washing allowances which are based on arm's-length contracts and which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by MMS in writing shall qualify as being in effect at the time these regulations become effective.

(vi) The MMS may establish, in appropriate circumstances, reporting requirements that are different from the requirements of this section.

(2) Non-arm's-length or no contract. (i) With the exception of those washing allowances specified in paragraphs

(c)(2)(v) and (vii) of this section, the lessee shall submit an initial Form MMS–4292 prior to, or at the same time as, the washing allowance determined pursuant to a non-arm's-length contract or no contract situation is reported on Form MMS–4014, Report of Sales and Royalty Remittance. A Form MMS–4292 received by the end of the month that the Form MMS–4014 is due shall be considered to be timely received. The initial reporting may be based on estimated costs.

(ii) The initial Form MMS–4292 shall be effective for a reporting period beginning the month that the lessee first is authorized to deduct a washing allowance and shall continue until the end of the calendar year, or until the washing under the non-arm's-length contract or the no contract situation terminates, whichever is earlier.

(iii) For calendar-year reporting periods succeeding the initial reporting period, the lessee shall submit a completed Form MMS–4292 containing the actual costs for the previous reporting period. If coal washing is continuing, the lessee shall include on Form MMS–4292 its estimated costs for the next calendar year. The estimated coal washing allowance shall be based on the actual costs for the previous period plus or minus any adjustments which are based on the lessee's knowledge of decreases or increases which will affect the allowance. Form MMS–4292 must be received by MMS within 3 months after the end of the previous reporting period, unless MMS approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period).

(iv) For new wash plants, the lessee's initial Form MMS–4292 shall include estimates of the allowable coal washing costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the plant, or if such data are not available, the lessee shall use estimates based upon industry data for similar coal wash plants.

(v) Washing allowances based on non-arm's-length or no-contract situations which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by MMS in writing shall qualify as being in effect at the time these regulations become effective.

(vi) Upon request by MMS, the lessee shall submit all data used by the lessee to prepare its Forms MMS–4292. The data shall be provided within a reasonable period of time, as determined by MMS.

(vii) The MMS may establish, in appropriate circumstances, reporting requirements which are different from the requirements of this section.

(3) The MMS may establish coal washing allowance reporting dates for individual leases different from those specified in this subpart in order to provide more effective administration. Lessees will be notified of any change in their reporting period.

(4) Washing allowances must be reported as a separate line on the Form MMS–4014, unless MMS approves a different reporting procedure.

(d) *Interest assessments for incorrect or late reports and failure to report.* (1) If a lessee deducts a washing allowance on its Form MMS–4014 without complying with the requirements of this section, the lessee shall be liable for interest on the amount of such deduction until the requirements of this section are complied with. The lessee also shall repay the amount of any allowance which is disallowed by this section.

(2) If a lessee erroneously reports a washing allowance which results in an underpayment of royalties, interest shall be paid on the amount of that underpayment.

(3) Interest required to be paid by this section shall be determined in accordance with 30 CFR 218.202.

(e) *Adjustments.* (1) If the actual coal washing allowance is less than the amount the lessee has taken on Form MMS–4014 for each month during the allowance form reporting period, the lessee shall be required to pay additional royalties due plus interest computed pursuant to 30 CFR 218.202, retroactive to the first month the lessee is authorized to deduct a washing allowance. If the actual washing allowance is greater than the amount the lessee has estimated and taken during the reporting period, the lessee shall be entitled to acredit without interest.

(2) The lessee must submit a corrected Form MMS–4014 to reflect actual costs, together with any payment, in accordance with instructions provided by MMS.

(f) *Other washing cost determinations.* The provisions of this section shall apply to determine washing costs when establishing value using a net-back valuation procedure or any other procedure that requires deduction of washing costs.

§ 206.260 Allocation of washed coal.

(a) When coal is subjected to washing, the washed coal must be allocated to the leases from which it was extracted.

(b) When the net output of coal from a washing plant is derived from coal obtained from only one lease, the quantity of washed coal allocable to the lease will be based on the net output of the washing plant.

(c) When the net output of coal from a washing plant is derived from coal obtained from more than one lease, unless determined otherwise by BLM, the quantity of net output of washed coal allocable to each lease will be based on the ratio of measured quantities of coal delivered to the washing plant and washed from each lease compared to the total measured quantities of coal delivered to the washing plant and washed.

§ 206.261 Transportation allowances—general.

(a) For ad valorem leases subject to § 206.257 of this subpart, where the value for royalty purposes has been determined at a point remote from the lease or mine, MMS shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to:

(1) Transport the coal from a Federal or Indian lease to a sales point which is remote from both the lease and mine; or

(2) Transport the coal from a Federal or Indian lease to a wash plant when that plant is remote from both the lease and mine and, if applicable, from the wash plant to a remote sales point. In-mine transportation costs shall not be included in the transportation allowance.

(b) Under no circumstances shall the washing allowance and the transportation allowance authorized by § 206.257 of this subpart reduce the value of coal under any selling arrangement to zero.

(c)(1) When coal transported from a mine to a wash plant is eligible for a transportation allowance in accordance with this section, the lessee is not required to allocate transportation costs between the quantity of clean coal output and the rejected waste material. The transportation allowance shall be authorized for the total production which is transported. Transportation allowances shall be expressed as a cost per ton of cleaned coal transported.

(2) For coal that is not washed at a wash plant, the transportation allowance shall be authorized for the total production which is transported. Transportation allowances shall be expressed as a cost per ton of coal transported.

(3) Transportation costs shall only be recognized as allowances when the transported coal is sold and royalties are reported and paid.

(d) If, after a review and/or audit, MMS determines that a lessee has improperly determined a transportation allowance authorized by this section, then the lessee shall pay any additional royalties, plus interest, determined in accordance with 30 CFR 218.202, or shall be entitled to a credit, without interest.

(e) Lessees shall not disproportionately allocate transportation costs to Federal or Indian leases.

§ 206.262 Determination of transportation allowances.

(a) *Arm's-length contracts.* (1) For transportation costs incurred by a lessee pursuant to an arm's-length contract, the transportation allowance shall be the reasonable, actual costs incurred by the lessee for transporting the coal under that contract, subject to monitoring, review, audit, and possible future adjustment. The MMS's prior approval is not required before a lessee may deduct costs incurred under an arm's-length contract. However, before any deduction may be taken, the lessee must submit a completed page one of Form MMS–4293, Coal Transportation Allowance Report, in accordance with paragraph (c)(1) of this section. A transportation allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form MMS–24293 is filed with MMS, unless MMS approves a longer period upon a showing of good cause by the lessee.

(2) In conducting reviews and audits, MMS will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from the lessee to the transporter for the transportation. If the contract reflects more than the total consideration paid, then the MMS may require that the transportation allowance be determined in accordance with paragraph (b) of this section.

(3) If the MMS determines that the consideration paid pursuant to an arm's-length transportation contract does not reflect the reasonable value of the transportation because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then MMS shall require that the transportation allowance be determined in accordance with paragraph (b) of this section. When MMS determines that the value of the transportation may be unreasonable, MMS will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's transportation costs.

(4) Where the lessee's payments for transportation under an arm's-length contract are not based on a dollar-per-unit basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent for the purposes of this section.

(b) *Non-arm's-length or no contract.* (1) If a lessee has a non-arm's-length contract or has no contract, including those situations where the lessee performs transportation services for itself, the transportation allowance will be based upon the lessee's reasonable actual costs. All transportation allowances deducted under a non-arm's-length or no-contract situation are subject to monitoring, review, audit, and possible future adjustment. Prior MMS approval of transportation allowances is not required for non-arm's-length or no-contract situations. However, before any estimated or actual deduction may be taken, the lessee must submit a completed Form MMS–4293 in accordance with paragraph (c)(2) of this section. A transportation allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form MMS–4293 is filed with MMS, unless MMS approves a longer period upon a showing of good cause by the lessee. The MMS will monitor the allowance deductions to ensure that deductions are reasonable and allowable. When necessary or appropriate, MMS may direct a lessee to modify its estimated or actual transportation allowance deduction.

(2) The transportation allowance for non-arm's-length or no-contract situations shall be based upon the lessee's actual costs for transportation during the reporting period, including operating and maintenance expenses, overhead, and either depreciation and a return on undepreciated capital investment in accordance with paragraph (b)(2)(iv)(A) of this section, or a cost equal to the depreciable investment in the transportation system multiplied by the rate of return in accordance with paragraph (b)(2)(iv)(B) of this section. Allowable capital costs are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the transportation system.

(i) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes; rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(ii) Allowable maintenance expenses include: Maintenance of the transportation system; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(iii) Overhead attributable and allocable to the operation and maintenance of the transportation system is an allowable expense. State and Federal income taxes and severance taxes and other fees, including royalties, are not allowable expenses.

(iv) A lessee may use either paragraph (b)(2)(iv)(A) or paragraph (b)(2)(iv)(B) of this section. After a lessee has elected to use either method for a transportation system, the lessee may not later elect to change to the other alternative without approval of the MMS.

(A) To compute depreciation, the lessee may elect to use either a straight-line depreciation method based on the life of equipment or on the life of the reserves which the transportation system services, whichever is appropriate, or a unit of production method. After an election is made, the lessee may not change methods without MMS approval. A change in ownership of a transportation system shall not alter the depreciation schedule established by the original transporter/lessee for purposes of the allowance calculation. With or without a change in ownership, a transportation system shall be depreciated only once. Equipment shall not be depreciated below a reasonable salvage value.

(B) The MMS shall allow as a cost an amount equal to the allowable capital investment in the transportation system multiplied by the rate of return determined pursuant to paragraph (b)(2)(B)(v) of this section. No allowance shall be provided for depreciation. This alternative shall apply only to transportation facilities first placed in service or acquired after March 1, 1989.

(v) The rate of return shall be the industrial rate associated with Standard and Poor's BBB rating. The rate of return shall be the monthly average as published in *Standard and Poor's Bond Guide* for the first month of the reporting period of which the allowance is applicable and shall be effective during the reporting period. The rate shall be redetermined at the beginning of each subsequent transportation allowance reporting period (which is determined pursuant to paragraph (c)(2) of this section).

(3) A lessee may apply to the MMS for exception from the requirement that it compute actual costs in accordance with paragraphs (b)(1) and (b)(2) of this section. The MMS will grant the exception only if the lessee has a rate for the transportation approved by a Federal agency (for both Federal and Indian leases) or by a State regulatory agency (for Federal leases). The MMS shall deny the exception request if it determines that the rate is excessive as compared to arm's-length transportation charges by systems, owned by the lessee or others, providing similar transportation services in that area. If there are no arm's-length transportation charges, MMS shall deny the exception request if: (i) No Federal or State regulatory agency costs analysis exists and the Federal or State regulatory agency, as applicable, has declined to investigate pursuant to MMS timely objections upon filing; and (ii) The rate significantly exceeds the lessee's actual costs for transportation as detemined under this section.

(c) *Reporting requirements*—(1) Arm's-length contracts. (i) With the exception of those transportation allowances specified in paragraphs (c)(1) (v) and (vi) of this section, the lessee shall submit page one of the initial Form MMS–4293 prior to, or at the same time as, the transportation allowance determined pursuant to an arm's-length contract is reported on Form MMS–4014, Reports of Sales and Royalty Remittance.

(ii) The initial Form MMS–4293 shall be effective for a reporting period beginning the month that the lessee is first authorized to deduct a transportation allowance and shall continue until the end of the calendar year, or until the applicable contract or rate terminates or is modified or amended, whichever is earlier.

(iii) After the initial reporting period and for succeeding reporting periods, lessees must submit page one of Form MMS–4293 within 3 months after the end of the calendar year, or after the applicable contract or rate terminates or is modified or amended, whichever is earlier, unless MMS approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period). Lessees may request special reporting procedures in unique allowance reporting situations, such as those related to spot sales.

(iv) The MMS may require that a lessee submit arm's-length transportation contracts, production agreements, operating agreements, and related documents. Documents shall be submitted within a reasonable time, as determined by MMS.

(v) Transportation allowances that are based on arm's-length contracts and which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by MMS in writing shall qualify as being in effect at the time these regulations become effective.

(vi) The MMS may establish, in appropriate circumstances, reporting requirements that are different from the requirements of this section.

(2) Non-arm's-length or no contract. (i) With the exception of those transportation allowances specified in paragraphs (c)(2) (v) and (vii) of this section, the lessee shall submit an initial Form MMS–4293 prior to, or at the same time as, the transportation allowance determined pursuant to a non-arm's-length contract or no-contract situation is reported on Form MMS–4014, Report of Sales and Royalty Remittance. The initial report may be based on estimated costs.

(ii) The initial Form MMS–4293 shall be effective for a reporting period beginning the month that the lessee first is authorized to deduct a transportation allowance and shall continue until the end of the calendar year, or until the transportation under the non-arm's-length contract or the no-contract situation terminates, whichever is earlier.

(iii) For calendar-year reporting periods succeeding the initial reporting period, the lessee shall submit a completed Form MMS–4293 containing the actual costs for the previous reporting period. If the transportation is continuing, the lessee shall include on Form MMS–4293 its estimated costs for the next calendar year. The estimated transportation allowance shall be based on the actual costs for the previous reporting period plus or minus any adjustments that are based on the lessee's knowledge of decreases or increases that will affect the allowance. Form MMS–4293 must be received by MMS within 3 months after the end of the previous reporting period, unless MMS approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period).

(iv) For new transportation facilities or arrangements, the lessee's initial Form MMS–4293 shall include estimates of the allowable transportation costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the transportation system, or, if such data are not available, the lessee shall use estimates based upon industry data for similar transportation systems.

(v) Non-arm's-length contract or no-contract-based transportation allowances that are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For purposes of this section, only those allowances that have been approved by MMS in writing shall qualify as being in effect at the time these regulations become effective.

(vi) Upon request by MMS, the lessee shall submit all data used to prepare its Form MMS–4293. The data shall be provided within a reasonable period of time, as determined by MMS.

(vii) The MMS may establish, in appropriate circumstances, reporting requirements that are different from the requirements of this section.

(viii) If the lessee is authorized to use its Federal- or State-agency-approved rate as its transportation cost in accordance with paragraph (b)(3) of this section, it shall follow the reporting requirements of paragraph (c)(1) of this section.

(3) The MMS may establish reporting dates for individual lessees different than those specified in this paragraph in order to provide more effective administration. Lessees will be notified as to any change in their reporting period.

(4) Transportation allowances must be reported as a separate line item on Form MMS–4014, unless MMS approves a different reporting procedure.

(d) *Interest assessments for incorrect or late reports and failure to report.* (1) If a lessee deducts a transporation allowance on its Form MMS–4014 without complying with the requirements of this section, the lessee shall be liable for interest on the amount of such deduction until the requirements of this section are complied with. The lessee also shall repay the amount of any allowance which is disallowed by this section.

(2) If a lessee erroneously reports a transportation allowance which results in an underpayment of royalties, interest shall be paid on the amount of that underpayment.

(3) Interest required to be paid by this section shall be determined in accordance with 30 CFR 218.202.

(e) *Adjustments.* (1) If the actual transportation allowance is less than the amount the lessee has taken on Form MMS–4014 for each month during the allowance form reporting period, the lessee shall be required to pay

additional royalties due plus interest, computed pursuant to 30 CFR 218.202, retroactive to the first month the lessee is authorized to deduct a transportation allowance. If the actual transportation allowance is greater than the amount the lessee has estimated and taken during the reporting period, the lessee shall be to a credit without interest.

(2) The lessee must submit a corrected Form MMS-4014 to reflect actual costs, together with any payment, in accordance with instructions provided by MMS.

(f) *Other transportation cost determinations.* The provisions of this section shall apply to determine transportation costs when establishing value using a net-back valuation procedure or any other procedure that requires deduction of transportation costs.

§ 206.263 Contract submission.

(a) The lessee and other payors shall submit to MMS, upon request, contracts for the sale of coal from ad valorem leases subject to this subpart. The MMS must receive the contracts within a reasonable period of time, as specified by MMS. Lessees shall include as part of the submittal requirements any contracts, agreements, contract amendments, or other documents that affect the gross proceeds received for the sale of coal, as well as any other information regarding any consideration received for the sale or disposition of coal that is not included in such contracts. At the time of its contract submittals, MMS may require the lessee to certify in writing that it has provided all documents and information that reflect the total consideration provided by purchasers of coal from ad valorem leases subject to this subpart. Information requested under this section may include contracts for both ad valorem and cents-per-ton leases and shall be available in the lessee's offices during normal business hours or provided to MMS at such time and in such manner as may be requested by authorized Department of the Interior personnel. Any oral sales arrangement negotiated by the lessee must be placed in a written form and be retained by the lessee. Nothing in this section shall be construed to limit the authority of MMS to obtain or have access to information pursuant to 30 CFR Part 212.

(b) Lessees and other payors shall designate, for each contract submitted pursuant to this section, whether the contract in arm's-length or non-arm's-length.

(c) A lessee's or other payor's determination that its contract is arm's-length is subject to future audit to verify that the contract meets the criteria of the arm's-length contract definition in § 206.251 of this subpart.

(d) Information required to be submitted under this section that constitutes trade secrets and commercial and financial information that is identified as privileged or confidential shall not be available for public inspection or made public or disclosed without the consent of the lessee or other payor, except as otherwise provided by law or regulation.

§ 206.264 In-situ and surface gasification and liquefaction operations.

In an ad valorem Federal coal lease is developed by in-situ or surface gasification or liquefaction technology, the lessee shall propose the value of coal for royalty purposes to MMS. The MMS will review the lessee's proposal and issue a value determination. The lessee may use its proposed value until MMS issues a value determination.

§ 206.265 Value enhancement of marketable coal.

If, prior to use, sale, or other disposition, the lessee enhances the value of coal after the coal has been placed in marketable condition in accordance with § 206.257(h) of this subpart, the lessee shall notify MMS that such processing is occurring or will occur. The value of that production shall be determined as follows:

(a) A value established for the feedstock coal in marketable condition by application of the provisions of § 206.257(c)(2)(i-iv) of this subpart; or,

(b) In the event that a value cannot be established in accordance with subsection (a), then the value of production will be determined in accordance with § 206.257(c)(2)(v) of this subpart and the value shall be the lessee's gross proceeds accruing from the disposition of the enhanced product, reduced by MMS-approved processing costs and procedures including a rate of return on investment equal to two times the Standard and Poor's BBB bond rate applicable under § 206.259(b)(2)(v) of this subpart.

PART 210—FORMS AND REPORTS

1. The authority citation for Part 210 is revised to read as follows:

Authority: 25 U.S.C. 396 *et seq.;* 25 U.S.C. 396a *et seq.;* 25 U.S.C. 2101 *et seq.;* 30 U.S.C. 181 *et seq.;* 30 U.S.C. 351 *et seq.;* 30 U.S.C. 2101 *et seq.;* 30 U.S.C. 1701 *et seq.;* 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.;* 43 U.S.C. 1331 *et seq.;* 43 U.S.C. 1801 *et seq.*

2. 30 CFR Part 210 is amended by revising § 210.10 of Subpart A to read as follows:

Subpart A—General Provisions

§ 210.10 Information collection.

This section identifies MMS Royalty Management Program information collection requirements, except for reports required for the MMS Production Accounting and Auditing System (PAAS), which are identified in 30 CFR 216.10, and reports required for the Government's Royalty-In-Kind (RIK) Program, which are identified in 30 CFR 208.3. The information collection requirements identified in this section have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The forms and approved OMB clearance numbers are as follows:

Form No., name and filing date	OMB No.
MMS-2014—Report of Sales and Royalty Remittance—Oil and Gas—Due by the end of first month following production month for royalty payment and for rentals no later than anniversary date of the lease	1010-0022
MMS-4014—Report of Sales and Royalty Remittance—Solid Minerals—Due by end of month following sales or production month (unless lease terms specify a different frequency for royalty payments) and for rentals no later than the date specified in the lease terms	1010-0064
MMS-4025—Oil and Gas Payor Information Form—Due 30 days after issuance of a new lease or a change to an existing lease	1010-0033
MMS-4030—Solid Minerals Payor Information Form—Due 30 days after issuance of a new lease or change to an existing account established by an earlier form	1010-0064
MMS-4109—Gas Processing Allowance Summary Report—Initial report due within 3 months following the last day of the month for which an allowance is first claimed unless a longer period is approved by MMS	1010-0075
MMS-4110—Oil Transportation Allowance Report—Initial report due within 3 months following the last day of the month for which an allowance is first claimed, unless a longer period is approved by MMS	1010-0061
MMS-4280—Application for Reward for Original Information—Due when a reward is claimed for information provided which may lead to the recovery of royalty or other payments owed to the United States	1010-0076
MMS-4292—Coal Washing Allowance Report/Application—Due prior to, or at the same time that the allowance is first reported on Form MMS-4014, and annually thereafter if the allowance does not change	1010-0074
MMS-4293—Coal Transportation Allowance Report/Application—Due prior to, or at the same time that the allowance is first reported on Form MMS-4014 and annually thereafter if the allowance does not change	1010-0074

Form No., name and filing date	OMB No.
MMS-4295—Gas Transportation Allowance Report—Initial report due within 3 months following the last day of month for which an allowance is first claimed unless a longer period is approved by MMS....	1010-0075

The information is being collected by the Department of the Interior to meet its congressionally mandated accounting and audit responsibilities relating to Federal and Indian mineral royalty management. The information collected will be used to determine (a) whether royalty payments represent the proper values; (b) the transportation and processing allowances that may be deducted from royalty payments due on Federal and Indian lands, and (c) the eligibility of informants to receive rewards. The reports are mandatory and are required to receive a benefit. Information reporting forms are available from MMS. Requests should be addressed to: Minerals Management Service, Royalty Management Program, P.O. Box 17110, Denver, Colorado 80217.

PART 212—RECORDS AND FILES MAINTENANCE

1. The authority citation for Part 212 is revised to read as follows:

Authority: 25 U.S.C. 396 *et seq.*; 25 U.S.C. 396a *et seq.*; 25 U.S.C. 2101 *et seq.*; 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351 *et seq.*; 30 U.S.C. 1001 *et seq.*; 30 U.S.C. 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*; 43 U.S.C. 1331 *et seq.*; and 43 U.S.C. 1801 *et seq.*

2. The titles of Subparts C, D, F, and G under Part 212 are revised to read as follows:

Subpart C—Federal and Indian Oil—[Reserved]

Subpart D—Federal and Indian Gas—[Reserved]

Subpart F—Coal—[Reserved]

Subpart G—Other Solid Minerals—[Reserved]

3. The following new subparts are added to Part 212:

Subpart H—Geothermal Resources—[Reserved]

Subpart I—OCS Sulfur—[Reserved]

4. The introductory text of paragraph (b) of § 212.200 is revised to read as follows:

§ 212.200 Maintenance of and access to records.

(a) * * *

(b) The MMS shall have access to all records of the operator/lessee pertaining to compliance to Federal royalties, including, but not limited to: * * * * *

Group 3400—Coal Management

PART 3480—COAL EXPLORATION AND MINING OPERATIONS RULES

1. The authority citation for Part 3480 continues to read as follows:

Authority: The Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181, *et seq.*); the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359); the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201, *et seq.*); the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470, *et seq.*); the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*); the Act of March 3, 1909, as amended (25 U.S.C. 396); the Act of May 11, 1938, as amended (25 U.S.C. 396a-396g); the Act of February 28, 1891, as amended (25 U.S.C. 397); the Act of May 29, 1924 (25 U.S.C. 398); the Act of March 3, 1927 (25 U.S.C. 398a-398e); the Act of June 30, 1919, as amended (25 U.S.C. 399); R.S. 441 (43 U.S.C. 1457); the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471, *et seq.*); the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, *et seq.*); and the Freedom of Information Act (5 U.S.C. 552).

§ 3485.2 [Amended]

2. Section 3485.2 of 43 CFR Part 3480 is amended by removing paragraphs (d), (e), (f), (g), (h), (i), and (k). Paragraph (j) of § 3485.2(j) is redesignated as paragraph (d) of § 3485.2.

[FR Doc. 89-706 Filed 1-12-89; 8:45 am]

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federal register

Friday
January 13, 1989

Part III

Department of Agriculture

Farmers Home Administration

7 CFR Part 1980

Revision of Guaranteed Farmer Program Loan Regulations; Final Rule

DEPARTMENT OF AGRICULTURE

Farmers Home Administration

7 CFR Part 1980

Revision of Guaranteed Farmer Program Loan Regulations

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: The Farmers Home Administration (FmHA) amends its guaranteed loan regulations to implement certain provisions of the Agricultural Credit Act of 1987 (Pub. L. 100-233) and to provide clarification for the processing and servicing of guaranteed Operating (OL), Soil and Water (SW) and Farm Ownership (FO) loans. This action is necessary to carry out the provisions of Pub. L. 100-233 and to encourage greater participation in the guaranteed loan program for farmers. The intended effect is to facilitate the handling of guaranteed loans; to insure prompt payment of losses to lenders for bankruptcy cases; and to reduce the Government's cost for the program.

EFFECTIVE DATE: January 13, 1989.

ADDRESSES: The Interim Regulatory Impact Analysis (IRIA) will be made available for public inspection during regular working hours at the following address: Office of the Chief, Directives Management Branch, USDA, Room 6348, South Agriculture Building, 14th and Independence Avenue SW., Washington, DC 20250. Telephone (202) 475-4019.

FOR FURTHER INFORMATION CONTACT: Ann Dill, Guaranteed Loan Making Branch, Farmers Home Administration, USDA, Room 5440, Washington, DC 20250. Telephone (202) 382-1186.

SUPPLEMENTARY INFORMATION:

Classification

This action has been reviewed under USDA procedures established in Departmental Regulation 1512-1, which implements Executive Order 12291, and has been determined to be major because it will result in an annual effect on the economy of $100 million or more.

Memorandum of Law

I have reviewed the regulations which the Farmers Home Administration (FmHA) is publishing as a final rule to implement, among other items, Titles 5 and 6 of the Agricultural Credit Act of 1987, Pub. L. 100-233, 101 Stat. 1662 et seq. I find that these regulations comply with that statute and that FmHA has the authority to propose such regulations pursuant to section 339 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1989).

Christopher Hicks,
General Counsel.

Summary of IRIA

The USDA has developed an Interim Regulatory Impact Analysis (IRIA) due to the effect the Agricultural Credit Act of 1987 (the Act) will have on the economy. There are a number of requirements in the Act; however, one of the most significant requirements is the loan restructuring with debt write down provision.

The Agricultural Credit Act of 1987 provides for substantial revisions in loan servicing procedures of FmHA. The objective of this impact analysis is to summarize the revised loan restructuring procedures, estimated costs and budget impacts from restructuring with debt write down.

The restructuring provisions of the Act provide for a write down of debt to the recovery value of collateral where the return to the Government under the restructured debt is at least as great as the return from involuntary liquidation.

A summary of the PRIA was published in the **Federal Register** on September 14, 1988, [53 FR 35638]. A summary of the IRIA was published in the **Federal Register** on September 14, 1988 [FR 35638] as a part of another regulation package.

The revision of guaranteed Farmer Program regulations is only one of the several documents published in the **Federal Register** to implement the requirements of the Act and should have a lesser impact on the economy than the loan restructuring with debt write down.

Programs Affected

These changes affect the following FmHA programs as listed in the catalog of Federal Domestic Assistance:
10.404—Emergency Loans
10.406—Farm Operating Loans
10.407—Farm Ownership Loans
10.416—Soil and Water Loans
10.422—Business and Industrial Loans

Intergovernmental Consultation

1. For the reasons set forth in the final rule related to Notice 7 CFR Part 3015, Subpart V (48 FR 29115, June 24, 1983) and FmHA Instruction 1940-J, "Intergovernmental Review of Farmers Home Administration Programs and Activities" (December 23, 1983), Emergency loans, Farm Operating loans, and Farm Ownership loans, with the exception of nonfarm enterprise activity, are excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

2. The Soil and Water Loan Program is subject to the provisions of Executive Order 12372 and FmHA Instruction 1940-J.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR Part 1940, Subpart G, "Environmental Program." It is the determination of FmHA that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Pub. L. 91-190, an Environmental Impact Statement is not required.

Background

FmHA published a proposed rule in the **Federal Register** on May 9, 1988 [53 FR 16416], for comments on its proposed revisions to the guaranteed loan regulations dealing with payment of estimated loss claims while a borrower is engaged in a reorganization bankruptcy at the time the plan is confirmed by the bankruptcy court, and at the completion of the bankruptcy plan. FmHA also published a proposed rule in the **Federal Register** on June 17, 1988, [53 FR 22764] for comments on its proposed revisions implementing various sections of the Agricultural Credit Act of 1987 and clarifying the processing and servicing of guaranteed loans. A interim rule was published in the **Federal Register** on January 3, 1989, [54 FR 11] implementing certain provisions of the May 9, 1988 and June 17, 1988 proposed rules. Any items covered in the interim rule will remain subject to public comment. In order to expedite the implementation of the remaining provisions, the **Federal Registers** of May 9 and June 17, 1988 are combined in the issuance of this document.

Discussion of Comments

This rule combines proposed rules published May 9, 1988, [52 FR 16416] and June 17, 1988, [53 FR 22764].

A total of 8 comments were received on the proposed rule published in the **Federal Register** on May 9, 1988 [53 FR 16416]. Comments were received from bank officials, FmHA employees, and other Federal agencies and an FmHA employee association.

Overall, most of the comments were favorable. Several respondents suggested clarification of several items. All comments have been carefully considered and appropriate changes and clarifications made. One respondent suggested that attorneys' fees be considered as part of the loss. The

Agency does not agree. The guarantee covers loss of principle and interest on a loan. One respondent commented that we should require a lender to submit an estimated loss report rather than have it optional. We disagree, as it is our opinion this should be the lender's choice. One respondent objected to FmHA monitoring the lender's files. We disagree. It is our opinion that monitoring of lender files is necessary to insure proper program administration and is helpful to both FmHA and the lender. One respondent indicated that sometimes there are lengthy delays in the approval of bankruptcy reorganization plans and that partial loss estimates be made in such cases if FmHA and the lender can agree on the estimate. We agree. Some of the comments were general in nature and require no response. Some of the comments are more specifically addressed later in this preamble. The proposed amendments for these revisions are modified and adopted in this final rule.

A total of 24 comments were received on the proposed rule published in the **Federal Register** on June 17, 1988, [53 FR 22764]. Comments were received from commercial lenders, FmHA employees, other Federal Agencies, interest groups, individuals and state government agencies. Following is a brief summary of the comments received and the action the Agency is taking in response to the comments. The proposed amendments for these revisions are modified and adopted in this final rule. Additional minor changes to correct internal inconsistencies and to clarify certain minor items are not discussed below but are also adopted in this final rule.

Subpart A

Section 1980.6 Definitions and abbreviations. A reference was added to the definition of a borrower to refer to § 1980.106(b)(4) of Subpart B of this part. No negative comments were received. The Agency adopts the proposed rule.

Section 1980.12 Case and identification (ID) numbers. One respondent submitted a comment under this section dealing with what happens when a holder does not agree to a servicing option. This is evidently a misprint as § 1980.12 deals only with the assignment of case numbers. It is believed that the respondent was referring to § 1980.124 which deals with consolidations, rescheduling, reamortizing, and deferral. The respondent's question was, if the FmHA purchased the holder's portion of the loan, does the borrower have an insured loan and would the guaranteed borrower then be eligible for the added servicing options that go along with an insured loan. In addition, the respondent felt that holders would not be very willing to purchase the guaranteed portion of a loan if they knew there was a possibility that if a deferral was ever approved, they would not receive any payment on the guarantee during the deferral period.

Section 1980.124(a)(6) of Subpart B of this part states, "Any holder(s) agrees in writing to the rescheduling, reamortization, and deferral. The holder(s) must understand that they will not receive any payments from the lender or from FmHA during the deferral period." This is a general requirement. A holder may not wish to agree to one of the enumerated servicing options, but the holder should understand that it may very well be to its financial advantage to agree than to have its interest prematurely repurchased by the lender or FmHA. Even if the holder wishes to retain the guaranteed portion of a loan when the lender wants to reschedule, reamortize or defer, the holder should be aware that, due to servicing requirements, the lender or FmHA may need to purchase the guaranteed portion of the loan from the holder. For additional guidance regarding the servicing of guaranteed loans, paragraph X of Form FmHA 449-35, "Lender's Agreement," spells out the lender's rights to repurchase the guaranteed portion from the holder. If FmHA purchases the guaranteed portion of a loan from a holder, FmHA merely steps in the shoes of the holder. The borrower is still a borrower of the lender unless the lender assigns its portion of the loan to FmHA, and only then would the borrower be entitled to FmHA's insured servicing options; otherwise the guaranteed borrower will continue to be serviced by the lender. The Agency believes the repurchase of the holder's interest is clarified in the appropriate sections of the regulations. The Agency adopts the proposed rule as is.

Section 1980.13 Eligible lenders. This section sets out the criteria that lenders must meet if they wish to participate in the guaranteed program.

Several comments were received expressing concern that all Agricultural Credit Corporations were not included in the proposed rule, which allows an Agricultural Credit Corporation to become an eligible lender only if it is a subsidiary of a Federal or State chartered bank. Lenders must be subjected to credit examinations. While stand-alone Agricultural Credit Corporations are subject to regular examinations and regulated by the Farm Credit System, they do not receive the oversight of an Agricultural Credit Corporation that is a subsidiary of a bank. It must be noted that an Agricultural Credit Corporation that is not a subsidiary may still become an eligible lender if the State Directors request that an exception be granted as stated in § 1980.85 of this subpart. The Agency adopts the proposed rule.

Another respondent felt that FmHA should expand the definition of being in good standing with its licensing authorities to include such items as strong asset ratios, low problem loan percentages, and a minimum length of time incorporated. The majority of the lenders involved are small agricultural banks whose financial condition is known by the local population. The Agency believes the addition of these requirements would have an adverse effect on lenders who wish to become eligible lenders as it would just be an additional paper burden. The Agency adopts the proposed rule.

One respondent commented that the Agricultural Credit Act of 1987 required the Federal Land Bank and the Federal Intermediate Credit Bank in each district to merge into a single entity (i.e., a Farm Credit Bank) by July 6, 1988. The Act also required that the stockholders of each Production Credit Association (PCA) and Federal Land Bank Association (FLBA) that have substantially the same chartered territory, vote no later than January 6, 1989, on merging their organizations into a single entity. The respondent requested that eligible Farm Credit System lenders be defined as any Farm Credit Bank, Bank for Cooperatives, and any other Farm Credit System institution with direct lending authority. The Agency agrees and has adopted this change to the proposed rule.

Section 1980.20 Loan guarantee limits. This section sets out the criteria for the establishment of the percent of guarantee. The lender and the applicant will propose this percent of guarantee. FmHA can either accept or reject the proposed percent requested. The Agency proposed to allow all Farmer Program guaranteed loans be issued with a 90 percent guarantee.

Several respondents felt that the Agency should continue to be able to determine if the requested percent of guarantee was proper, and felt that this percent be based on risk exposure. The higher the risk, the lower the percent of guarantee that the Agency would be willing to grant. The respondents believe that limiting the percentage to guarantee to 90 percent would limit the flexibility of the program and reduce the availability to loan guarantees to

farmers. The Agency has reconsidered its position and agrees. Negotiation of the guaranteed percentage provides an opportunity for the lender and FmHA to reach a compromise on sharing of risks, which would allow more guarantees to be issued. However, the maximum percentage of guarantee for Farmer Program loans will be 90 percent.

The Agricultural Credit Act of 1987, Section 625, "Sense of Congress Regarding Guaranteed Loan Programs," states that the Agency should issue guarantees for loans to the maximum extent possible to assist eligible borrowers whose loans are restructured by institutions of the Farm Credit System, commercial banks, insurance companies, and other lending institutions.

Since the Agency has a charge to use its guarantee authority to the maximum extent possible, the proposed rule is amended to continue to allow guarantee percentages to be negotiated, and the proposed rule is adopted as changed.

Section 1980.22 Charges and fees by lender. This section provides guidance as to the fees and charges a lender may establish for loans. The Agency amended this section to clarify that if these charges and fees are the same as those charges other applicants pay for similar types of transactions, the lender may charge them to a guaranteed customer. No negative comments were received. The Agency adopts the proposed rule.

Section 1980.40 Environmental requirements. The section sets forth the environmental requirements regarding an environmental impact statement (EIS) which must be met. Previously the need for an EIS was determined by the State Director. The Agency amended this section to provide that this determination be made by the approval official. No negative comments were received. The Agency adopts the proposed rule.

Section 1980.41(a) Equal Credit Opportunity Act. This subsection has been amended to provide a reference to physical/mental handicap (providing the applicant can execute a legal contract) as an additional prohibited grounds for discrimination. No negative comments were received and the Agency adopts the proposed rule.

Section 1980.67 Bankruptcy. This section has been added to provide guidance of payments of estimated losses as the result of bankruptcy. The section which was previously 1980.67 has been redesignated as 1980.68. No negative comments were received and the Agency adopts the proposed rule.

Section 1980.85 Exception authority. This section provides guidance for the making of an exception to any requirement or provision of this subpart which is not inconsistent with any applicable law or opinion of the Comptroller General, provided the Administrator determines that application of the requirement or provision would adversely affect the Government's interest. To provide further clarification, the Agency has amended this to include a specific reference to the authorizing statute.

Subpart B

Section 1980.101 Introduction. This section sets forth the policies for issuing guaranteed Operating (OL) (both loans and lines of credit), Farm Ownership (FO), Soil and Water (SW), Recreation (RL), and Emergency (EM) loans to lenders who are in need of a guarantee to continue with a farm borrower. Two of the loan programs (RL and EM) were deleted in the proposed rule due to suspension of the programs for a number of years. There were no negative comments received concerning the deletion of the RL program; thus, the Agency adopts the proposed rule.

One respondent commented that due to the Administration's push for increasing the guaranteed loan program and the serious national drought situation that exists, the deletion of the guaranteed EM loan program would be a very bad policy. As stated in the proposed rule, this program has been suspended for a number of years. Lenders have shown very little interest in the program due to the complicated process of calculating losses and the additional paper work involved in applying for the subsidized interest rate. This fact, plus recent legislation which places additional emphasis on allowing guaranteed operating loans to be made to help family-size farmers overcome losses incurred during the 1988 drought, leads the Agency to believe that these factors, along with the additional servicing option of debt write down, will allow the lender to continue with those farmers who have been affected by the drought. It will also assure that lenders will not have to learn a new way of submitting guaranteed applications which would be very complicated as to the documentation of losses resulting from the drought. The Agency adopts the proposed rule.

The Agency also proposed to remove the "Debt Adjustment Program–Farmers Home Administration (FmHA) Guarantees of Loans with Accompanying Debt Adjustment by Lender," which was Exhibit B of this subpart. No negative comments were received; thus, the Agency adopts this portion of the proposed rule.

The Agency also proposed to remove § 1980.101(f), which dealt with restricting the issuance of OL and FO guarantees if the loan will be used to increase the production of crops in surplus. No negative comments were received; thus, the Agency adopts the proposed rule.

Section 1980.106 Abbreviations and definitions. This section sets forth the definitions for key phrases throughout this regulation.

One respondent commented that the definition for an applicant should be clarified to insure that the party applying for the guaranteed loan or line of credit is the party that will become the borrower if the loan is made. The present definition in this section for an applicant states, "The party applying for a guaranteed loan or line of credit." The Agency does not believe further clarification is necessary. The Agency adopts the proposed rule as is.

One respondent commented that the definition of a joint operation added additional confusion as it requires that a husband and wife, who typically apply for credit together as co-applicants, be considered a joint operation. This will increase confusion which will result in an increasing number of instances where improper assistance is inadvertently granted and will falsely show that the Agency is making a shift away from individuals to entity borrowers. While the Agency agrees that this requirement might cause some confusion initially, it must be pointed out that a husband or a wife may each file as an individual. Also, the Consolidated Farm and Rural Development Act does not contemplate making or guaranteeing one loan to two individuals and the Equal Opportunity Credit Act prohibits discrimination based on marital status. The Agency is treating a husband and wife just like any other individuals who farm together. Thus, the Agency cannot change this language of the proposed rule.

Another respondent was concerned that the removal of the definition of aquaculture would result in certain aquaculture practices which would no longer be permissible, such as the growing and harvesting of aquatic plants. The Agency agrees and has revised this section to include a definition for aquaculture. The Agency adopts the proposed rule as changed.

One respondent commented that in the definition of family farm, the word "immediate" should be inserted before the word "family" in paragraph (b)(6)(iv)(A) of this section. This change would insure that lenders have a clear understanding of what constitutes the

members of a family farm. The Agency agrees and has amended the proposed rule accordingly.

The same respondent also suggested that the words "full time" be deleted from the family farm definition in paragraph (b)(6)(v), which provides guidance for the amount of outside labor an applicant may use in carrying on the farming operation. Sometimes a lender will submit a request for a guarantee which includes an extraordinary amount of full time hired labor and the argument is that this section will allow excessive full time hired labor. The Agency disagrees because it must still be demonstrated that the full-time hired labor be a "reasonable" amount. The Agency adopts the proposed rule as is.

Several respondents commented that the requirement for a 10 percent reserve in the definition for a positive cash flow was too restrictive. The argument was that in most cases, guaranteed loans are used for borrowers with tight cash flow and limited repayment ability. The respondents did indicate that a reserve was necessary but a 5 percent reserve was more in line with the clientele for which lenders would be requesting guarantees. In many cases, the reason that the lender is requesting a guarantee is not so much because of a tight cash flow, but because the security margins have deteriorated to where the lender is faced with a loan being classified as marginal. Many of these borrowers will have an acceptable cash flow, as the guarantee will provide the lender the relief from the bank examiners to continue with the loan. The Agency adopts the proposed rule as is.

One respondent commented that the cash flow required an average standard of living but there is no description of how to determine what an average standard of living will be. The Agency agrees and has revised the definition of average standard of living to read "provide living expenses which are in accordance with the essential family needs." The Agency adopts the proposed rule as amended.

One respondent commented that § 1980.106(b)(23), which deals with the definition of veterans, should be amended to read, "For a period of at least 180 days, any part of which occurred after January 31, 1955, but on or before May 7, 1975." They stated if this was not amended, it would appear that only those who had entered the reserves during the Vietnam era would be entitled to veteran's preference, but not those who actually served in Vietnam for six or more months. Presently the regulations reads "for a period of not more than 180 days, any part of which occurred after January 31, 1955, but on or before May 7, 1975." Removing the word "not" clarifies that persons who served during this timeframe will be defined as veterans. The Agency adopts the proposed rule as amended.

Section 1980.108 General provisions. This section provides the guidance regarding security for the loans, personal guarantees, persons entitled to veteran's preference, credit elsewhere, etc.

One respondent commented that the requirement that the borrower's and personal guarantor's financial statement not be more than 60 days old at time of certification and loan closing is very restrictive. The respondent suggested a more reasonable time of 90 days. The Agency agrees and adopts the proposed rule as amended.

One respondent commented that the requirement for the lender to certify to FmHA that the lien position required under the terms of the loan has been obtained is too stringent as it is not always possible for the lender to be aware of a claim or lien. They suggested that the language be changed to allow the lender to ascertain that there are no *known claims.* This change should insure that the lender exercised reasonable diligence while taking into account that there might be situations where the lender was not aware of the claim or lien. The majority of lenders today are using in-house attorneys to close loans. The attorney should be responsible for providing the lender with the necessary information as to claims and liens upon the property in question. It is the lender's responsibility to insure that the proper lien position is obtained at loan closing and if there are any questions, they should obtain the assistance of an attorney.

Acceptance of this change would make it difficult to deny a loss claim if at a later date it was determined the lender did not have the proper lien position. The Agency adopts the proposed rule as is.

One respondent commented that in paragraph (c) of this section, which requires each lender to certify that the loan cannot be made without a guarantee, the lender should not be further required to certify that credit is not available elsewhere. They suggested that since the lender cannot reasonably certify that no other lender would or could make the loan that the word "elsewhere" be deleted from the heading. The Agency agrees with this suggestion as the intent of the paragraph was not to have the lender certify that the applicant cannot obtain any credit anywhere but rather that the applicant cannot obtain credit from that particular lender without a guarantee. The Agency adopts the proposed rule as changed.

Several respondents commented that the change which considers different lien positions on the same real estate security as separate and identifiable collateral was a welcome relief. They went on to comment that similar authority for use with chattel secured loans such as Operating loans would be helpful. The Agency believes that allowing different lien positions on real estate to be considered as separate and identifiable collateral provides a means whereby the farmer may take advantage of the equity in the real estate property. The Agency does not believe that allowing different lien positions on chattels would be beneficial to the farmer. Real estate, during normal times is fairly stable in value; chattels tend to lose value over time. By allowing a separate lien position on chattels to be used as collateral when it is not separate and identifiable will cause confusion if a loss claim was filed and other parties have an interest in the chattel property. The Agency adopts the proposed rule as is.

One respondent commented that crop insurance should be required. While the Agency agrees, it cannot require that it be a blanket policy. The Agency has amended this section to encourage the taking of crop insurance if it is available.

One respondent commented that it was not a good idea to adopt the proposed change deleting the requirement that personal guarantees from principal members of cooperatives and corporations be taken. The Agency has reconsidered its proposal and has amended the proposed rule to retain the present requirements regarding the liability of the principal members or stockholders of the corporation or cooperative (in the case of operating loans) or members or stockholders holding a majority interest (in the case of Farm Ownership or Soil and Water loans). The Agency adopts the proposed rule as changed.

In addition to the above changes to the proposed rule the Agency has expanded on the relationship between FmHA insured loans and guaranteed loans. This was added to clarify the relationship between the two.

Section 1980.109 Promissory notes, line of credit agreements, security instruments, and financing statements. Several respondents commented that they felt all members or stockholders of a cooperative or a corporation should be required to sign the note as co-signer(s) and they should be personally liable for the debt. The argument was that there

could be times when certain members or stockholders have extensive assets and, under the proposed rule, would not be required to either sign the note or pledge these assets. Requiring members or stockholders to sign the note and to be personally liable for the debt will insure that they will all have an active interest in the debt and will also better protect the interest of the Government in preventing or minimizing future losses. The Agency has reconsidered its proposal and has amended the proposed rule to retain the present requirements regarding the liability of the principal members or stockholders of the corporation or cooperative (in the case of operating loans) or members or stockholders holding a majority interest (in the case of Farm Ownership or Soil and Water loans).

There were also several respondents who suggested that the proposed rule requirement that demand notes not be allowed would discourage participation in the program by lenders. They indicated that the "payment on demand" clause was a common and accepted practice in the agricultural lending industry. They felt that if a recipient of a guaranteed loan is performing as projected in the approved operating budget and is otherwise fulfilling the loan obligations, the loan recipient would have a valid defense to the lender who would exercise the demand clause. The Agency cannot guarantee a note which is immediately due and payable, and that is what a demand note is. The Agency adopts the proposed rule as is.

Section 1980.113 Receiving and processing applications. This section provides guidelines to the field staff on the difference between a preliminary and a complete application and how each application will be handled when received.

One respondent commented that in paragraph (a)(1) that lenders are not always providing the information requested on the form. It was suggested that this paragraph be clarified to insure a lender would provide any other information requested on the form. The regulations already require a lender to provide the necessary information. If the lender does not, the lender should not be receiving a guarantee. Also, the Agency believes that the regulation as proposed, makes it clear what sources of information should be looked at and has adopted the proposed rule as is.

One respondent commented that in paragraph (c) of this section, an appeal should never be allowed on a preliminary application. A complete application should be required, which would allow for a complete determination to be made before an appeal is even considered. To do otherwise will result in a completed application being submitted, thus having two appeals on the same request. The opportunity for an appeal should be afforded whenever an adverse action is taken. If a lender insists on presenting FmHA with a preliminary application and the information clearly indicates the application would be rejected, then the Agency would have to notify the lender and the loan applicant stating the reason(s) and providing appeal rights. The Agency adopts the proposed rule as is.

One respondent commented that the line of credit agreements between the borrower and the lender should establish the period of time (1, 2, or 3 years) and the ceiling (amount) for lines of credit. The Agency agrees and has adopted the proposed rule as amended.

Several respondents commented on the requirement that an application include a 5-year financial and production history and documentation as to what the sources of prices and yield information were used, and that consideration be given to allowing the use of the County average yields when an applicant's production history has been affected by a disaster(s) declared by the President or designated by the Secretary of Agriculture. The Agency believes that in order to obtain an historical record of a farmer's ability to manage the operation, five years is the minimum historical requirement. Reducing the five-year requirement to three years could adversely affect the historical financial and production picture and present an unrealistic projection of the farmer's actual accomplishments. As to the need for additional lender documentation as to prices and yields, if the lender provides the information already required, the Agency will be able to make a sound decision on the farmer's financial and production abilities. The Agency does not adopt either suggestion for reducing the number of years required for historical data or the need for additional lender documentation as to prices and yields. The suggestion that a farmer be allowed to use county averages for those years when a disaster was responsible for a reduction in yields has been incorporated into the final rule. The Agency adopts this proposed rule as changed.

One respondent suggested that if a lender had established "normal prices" for use in operational forecasts for long-term loans, this would be acceptable to the Agency. It was felt that these prices, based on historical cash prices and adjusted to reflect commodity prices, would minimize the impact on projections of volatility in the commodity markets. If the Agency would allow lenders to utilize these prices, it would result in many different types of price projections being submitted to the Agency for consideration which would result in additional confusion. The Agency adopts this section of the proposed rule as is.

Several respondents commented that paragraph (b)(7) should be clarified as to the types of restrictions and requirements the Agency is requiring so lenders can draft restrictions that will meet the Government's concerns. The items listed in paragraph (b)(7) of this section are the minimum items a loan or line of credit agreement should include. If the Agency tries to pinpoint every item that could be included in a loan or line of credit agreement, it would be denying the lender the ability to structure an agreement to address specific concerns of the borrower's operation. The Agency adopts this section of the proposed rule as is.

Several respondents had comments regarding the selection of appraisers by the lender for appraisal work. The proposed rule requires that the Agency concur in the selection of the appraiser and that the appraiser must meet certain qualifications. It was suggested that requiring the Agency to concur in the selection of an appraiser would lead to an appearance of favoritism. As explained in the proposed rule, there have been instances where a conflict has occurred when a question arises concerning the value of the security (i.e., the lender's loss claim based on appraised value.) This proposed rule will assure that FmHA and the lender will have agreed prior to loan approval that the appraiser is qualified. It must be remembered that the lender is the one that selects the appraiser and that this requirement only pertains to FmHA concurring in this selection. Just because the County Supervisor concurs in the selection of an appraiser in no way relieves the County Supervisor's responsibility as to questioning an appraisal that is out of line. The Agency does not adopt this recommendation.

Several respondents commented that the section regarding the qualifications of an appraiser should be clarified. One respondent suggested, "the appraiser must meet one of the qualifications in the following order of preference." This change will insure that the lender in selecting an appraiser will not immediately go to item (e) for the selection criteria but will be required to select appraisers who have a sound and

knowledgeable appraisal background. The Agency adopts this section of the proposed rule as amended.

One suggestion was that the person conducting the appraisal use the normally accepted appraisal procedure required by FmHA appraisal regulations. The appraiser is selected by the lender with the concurrence of the County Supervisor. Adoption of this suggestion would result in a reduction in the number of appraisers who would be willing to perform this function for a lender. As professionals, they will normally insist on presenting an appraisal report under their professional guidelines. To insure that the lenders be allowed to use all qualified appraisers, the Agency adopts the proposed rule as is. One of the respondents suggested that the appraiser be required to submit a recent sample of an appraisal if FmHA is not familiar with the appraiser's work. The Agency agrees and has amended this section accordingly. The Agency adopts the proposed rule as amended.

One respondent commented that requiring the lender to provide management assistance to the borrower could lead to a lawsuit if the lender provided this management assistance and later the operation failed. They went on to indicate that "once a lender provides any type of 'management assistance' to a borrower, the court may determine that the lender has become an insider to the operation. The lender then becomes liable for the obligations of the borrower and the ultimate success or failure of the operation." The respondent suggested that this section of the proposed rule be changed to where the words "and providing management assistance to the borrower" be deleted. The Agency does not agree. That phrase has been in the regulations for some time. It does not require that a lender provide management assistance to a borrower but rather that the lender inform FmHA of any plan to do so. The Agency has clarified this language and has adopted the proposed rule as amended.

Several respondents commented on the requirement in the administrative section that provides for the County Supervisor to send Attachment 1 to Exhibit D of this subpart to the borrower and the lender describing the Interest Rate Buydown Program. One respondent stated that it was their understanding that the application is between the lender and FmHA and they saw no reason for FmHA to have direct correspondence with the borrower regarding any part of the Interest Rate Buydown Program. It was the respondent's concern that almost every borrower would request the lender to write down the loan, even when the interest rate buydown is not necessary. This can also have an adverse affect on the lender's other customers who do not have guaranteed loans because they would also be demanding a break on interest rates. The respondents felt that this section should be deleted, since participation in the interest rate buydown is determined by the lender. While the Agency agrees that the determination rests with the lender on whether or not to participate in the program, the farmer has a right to know of the provisions of the whole guaranteed program. The Agency adopts the proposed rule as is.

Section 1980.114 FmHA evaluation of applications. This section provides guidance for the County Supervisor on evaluating applications and how to proceed after the evaluation is completed. One respondent commented that the proposed rule indicates that the County Supervisor will notify the lender and the loan applicant in writing within 10 calendar days of a decision to deny the loan. The concern was that FmHA should not be notifying the loan applicant as the lender is the one requesting the guarantee. The respondent felt that it would only serve to deteriorate relationships between the loan applicant and the lender by receiving correspondence from the County Supervisor. The respondent also felt that FmHA should be able to notify the lender within 5 working days of the decision to deny the guaranteed request. The Agency agrees as to the timeframe, but as mentioned before, believes that the loan applicant should know the action taken and has adopted the proposed rule as amended.

Section 1980.115 County Committee review. This section provides guidance to the field staff on the timeframe for the County Committee to review loan applications and the action that will be taken after either a favorable or unfavorable decision is made.

One respondent commented that the proposed rule required that all guaranteed applications be acted upon within 60 calendar days after receipt of completed applications. It was suggested that all guaranteed loan applications, once completed, could be acted upon within 30 calendar days. This change would further assist in streamlining the application process and reduce the excessive time involved in guaranteed loan applications. It must be pointed out that in the administrative section of this section, complete applications from approved lenders must be acted upon by the County Committee within 14 calendar days and once the County Committee has made a determination regarding eligibility, the approval official has 14 working days to render approval. The Agency agrees that once all information is received for a complete application, 60 days is too long to reach a decision. The Agency will amend the requirement that for ALP lenders the timeframe will be 14 days for County Committee action, if possible, and after County Committee action, 14 days, if possible, for approval action. This change was the result of one respondent commenting that it was not always possible to get County Committee persons out of the field during spring planting to insure a committee meeting could be held within 14 days. For non-ALP lenders, the Agency is reducing the total time from 60 days to 45 days after a complete application is received, as there is additional information required from lenders who are not ALP lenders which will normally take additional time to review. The Agency adopts the proposed rule as amended.

Several respondents commented on the requirement that a lender has to agree that if liquidation of an account becomes imminent, the lender will consider the borrower for an Interest Rate Buydown under Exhibit D of this subpart, and request a determination of the borrower's eligibility by FmHA. The lender must also agree not to initiate foreclosure action on the guaranteed loan until 60 calendar days after a determination has been made regarding eligibility of the borrower to participate in the Interest Rate Buydown Program. One respondent indicated that one lender who has fully supported the guaranteed program in the past may cease using the program due to this requirement, as the lender does not believe in having different interest rates for different borrowers. This requirement is mandated by Section 613 of the Agricultural Credit Act of 1987. Thus, the Agency cannot change this language. In order to clarify this requirement, the Agency has set forth guidelines in Exhibit D to Subpart B of Part 1980 establishing timeframes for the determination of eligibility so that lenders who will continue liquidation will be able to proceed in a timely manner. The Agency adopts this proposed rule as amended.

Section 1980.116 Review of requirements. This section sets forth the guidance regarding the review of approval conditions by the lender and the applicant and the execution of the acceptance or rejection of conditions by the lender to the County Supervisor.

One respondent commented that some lenders have a problem with the execution of a new note simultaneously with the restructure of a loan. The respondent suggested that an argument could be made that the original note has been paid and, by operation of law, the mortgage satisfied. In other words, a new note would require a new mortgage. It was suggested that consideration be given to allow the use of existing legal documents, provided a title opinion is obtained verifying the validity of the lien position, and if necessary, a new loan agreement setting forth conditions, dollar amounts, etc. Adoption of this suggestion would require extensive revision of the Agency's regulations as they do not contemplate the restructuring of a loan as a loan purpose. Refinancing a debt is a presently recognized loan purpose, when the debt is refinanced, the new debt is substituted for the old debt and new loan instruments should be taken. The Agency agrees and has amended this section by allowing eligible lenders to use a restructure agreement in lieu of a new promissory note, providing the terms and conditions of the restructure agreements meet the FmHA guaranteed loan making regulation requirements. The Agency adopts the proposed rule as is.

One respondent commented that this section sets forth the guidelines for notification of the lender and the loan applicant of an unfavorable action. The respondent suggested that it was important that Subpart B of Part 1900 of this chapter clarify that the applicant can appeal the denial without the assistance of the lender. The respondent further stated in many instances the lender will not be willing to spend the time necessary to be involved in an appeal of a denial of a loan guarantee. It must be pointed out that the applicant for a guarantee is the lender. The lender is the party that benefits from the granting of the guarantee by FmHA. The loan applicant does not make the decision to request the guarantee; it is the decision of the lender to request the guarantee if the guarantee is the only means the lender has of continuing with, or assisting, an applicant. Subpart B of Part 1900 of this chapter sets forth the guidelines regarding appeals of requests for guarantees. The majority of appeals concerning guaranteed applications involve rejections due to larger than family size farms and lack of repayment. The lender must understand that FmHA's guaranteed farm loans are subject to family size unit limitations, which are determined by the County Committee. Applications that do not cash flow indicate a weak credit risk for the lender for which obtaining a guarantee would reduce the lender's losses. The Agency has a mission to provide credit assistance to farmers who are unable to obtain credit from other sources, but it also has a mission to protect the interest of the Government. Only by involving both the lender and the loan applicant in the appeal process will the Agency be assured that both parties are honestly working together to achieve a successful operation. The Agency adopts the proposed rule as is.

Section 1980.118 Issuance of Lender's Agreement, Loan Note Guarantee, Contract of Guarantee, and Assignment Guarantee Agreement. Several respondents commented regarding paragraph (d) of this section which stated that, "Paragraph IX (C)(10) of Form FmHA 449–35 will be changed by striking the word 'semiannually,' inserting the word 'annual' in its place, and eliminating the words 'and June 30.' " The majority of the comments were that this paragraph should be deleted and the change be made in the form. One respondent felt that FmHA should continue to request semi-annual reports. This agreement is used for both Business and Industry (B&I) guaranteed loans and Farmer Program (FP) guaranteed loans. The Agency agrees that the form should be revised to indicate the difference between B&I and FP loan status reporting and has adopted the proposed rule as amended. FmHA has not been requiring the submission of semi-annual reports for Farmer Programs loans for a number of years. This additional reporting requirement would only place an additional burden on the Finance Office. The lender is already required to provide the County Supervisor with information any time a borrower is 30 days delinquent. This information allows the County Supervisor to know the status of each guaranteed loan if it becomes delinquent, thus providing more up-to-date information than a semi-annual status report from the Finance Office. The Agency has amended Form FmHA 449–35 to provide for Farmer Programs loan status to be reported annually.

Section 1980.123 Transfer and assumption of Farmer Program loans. This section provides guidance as to the actions necessary when a guaranteed loan is being transferred and assumed.

One respondent commented that paragraph (f)(1) of this section should be amended to read, "FmHA must determine that the transferor has no reasonable ability to make his scheduled debt payments considering assets and income at the time of the transfer." The respondent believes that this amendment will insure that if the borrower could pay only a few dollars but not the entire scheduled payment, then the ability to pay just a few dollars would not make the person ineligible for transfer and assumption. This paragraph deals with the release of liability by the lender with FmHA's written concurrence when the value of the collateral is less than the amount of the loan or line of credit being transferred. The ability of the transferor to pay only a few dollars will not make the transferor ineligible to transfer its loan. The Agency adopts the proposed rule.

Section 1980.124 Consolidation, rescheduling, reamortizing and deferral. This section provides guidance to allow borrowers who cannot pay as scheduled to have their loan(s) rescheduled, reamortized or deferred when it will result in the orderly collection of a loan.

Several respondents commented that many guaranteed loans were allowed to be amortized over a 22-year period with a balloon at seven years for OL loans when real estate represented a substantial portion of the security. They suggested that if it became necessary to reamortize or reschedule loans of this type that the loan should be reamortized or rescheduled within the remaining original amortization period of the loan. The Agency agrees and has incorporated this change in the final rule.

Several respondents also pointed out that there were inconsistencies in the language of this section in that a new note may be used for rescheduling and then later on it stated no new note or line of credit agreement will be allowed. They suggested that an "allonge" described within this section is sufficient for accommodating these rescheduling or reamortizations as it is more legally effective to use an "allonge" which would allow the original note to continue recitation of the original security agreements, mortgages, and other loan documents. The Agency intended that an allonge be used when a note is rescheduled. However, the Agency recognizes that when a consolidation occurs, the existing notes being consolidated are also rescheduled. In that case a new note will be taken to evidence the consolidated indebtedness. The Agency has amended this section accordingly to make this clear. The Agency adopts the proposed rule as amended.

One respondent commented that this section does not indicate whether the borrower is required to offer for sale any assets determined to be non-essential to

the farming operating as required for insured Farmer Program loans. The respondent suggested that any non-essential assets should be sold prior to processing a request for consolidation, rescheduling, reamortization, or deferral. The Agency believes that if a lender has to request FmHA's concurrence with the lender's decision to pursue a servicing option to continue with a guaranteed borrower, the lender will have explored all the possibilities of how best to service the loan. The Agency is not adopting this suggestion.

One respondent felt that the County Supervisor should approve all servicing actions in advance. The Agency agrees and has amended the proposed rule accordingly.

One respondent suggested that the term "unplanned" as it relates to farm expenses and family living expenses should be clearly defined to prevent liberal interpretations by lenders who may be encouraged to process marginal requests for debt write down for the purpose of receiving a loss payment. The Agency agrees and has deleted the word "unplanned" and inserted "unforeseen". For example, this past season has resulted in circumstances caused by the drought which were not foreseen by either the lender or the farmer and which resulted in essential expenses being incurred to protect the collateral. The agency adopts the proposed rule as amended.

One respondent suggested that the Agency clarify the concept of "untimely marketing practices" as an indication of poor financial management. The respondent felt that if a farmer made a decision to sell a crop on contract and later the price increased that this might be used as an excuse to not grant servicing actions. The Agency agrees and amended this section to indicate that if a farmer forward contracted, price differential would not be an indication of untimely marketing practices.

One respondent commented that a delinquency caused by a natural disaster be specified as circumstances beyond the farmer's control. The Agency agrees and has amended the proposed rule accordingly.

One respondent commented that §§ 1980.124 and 1980.125 of the proposed rule allow lenders to reamortize, reschedule, defer or write down the principal indebtedness of a borrower's account; with an accompanying loss payment by FmHA but that an important and attractive farm loan restructuring tool also authorized by the Agricultural Credit Act of 1987 and the Food Security Act of 1985 was absent from this proposed rule. The respondent was referring to Conservation Easements, which were enacted by section 1318(a) of the Food Security Act of 1985 and are found in section 349 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1997). This authority was further amended by section 612 of the Agricultural Credit Act of 1987. Section 349 allows the Secretary to acquire and retain an easement in real property for a term of not less than 50 years for conservation, recreation, and/or wildlife purposes. It also provides that any such easement acquired by the Secretary shall be purchased from the borrower by cancelling a part of the amount of such outstanding loans the borrower held under laws administered by the Farmers Home Administration. This requirement was designed to apply only to FmHA's insured loan borrowers. In the guaranteed program, the loans are made and serviced by the lender. FmHA is only guaranteeing the lender against a loss if the lender's borrower should default on the loan. Thus, the Agency cannot change the language of the proposed rule.

Another respondent also commented that the Agency has neglected to provide for Conservation Easements as established in the Food Security Act of 1985. For the reasons set forth above, the Agency is adopting the proposed rule.

Section 1980.125 Debt write down. This section allows lenders to write down the principal indebtedness of a borrower's account, with an accompanying loss payment by FmHA. Thus, for purposes of the guarantee, the lender shall be treated as having sustained a loss and any amount paid to a lender will be treated as payment toward satisfaction of the loan guarantee. This section also requires the borrower to enter into a shared appreciation arrangement with the lender to recapture any appreciation of any real estate security which might occur.

One respondent commented that "Typically, no lender would be able to fund a term loan of one year or longer at rates anywhere close to 90-day Treasury bill rates." This comment was in regard to the requirement that the lender will use the rate for 90-day Treasury bills in effect on the date of the write down to calculate present value. The Agency has reconsidered this issue and has deleted the requirement regarding the use of 90-day Treasury bill rate to calculate present value. The rate to be used will be the loan rate. The Agency adopts the proposed rule as amended.

One respondent commented that this section should specify that only the minimum number of loans will be written down to permit the development of a feasible plan of operation. The respondent also felt that the proposed rule was not clear as to whether the lender would be required to liquidate the borrower's accounts or initiate foreclosure action if a positive cash flow cannot be demonstrated through debt write down. The Agency agrees regarding the number of loans which may be written down and has amended the proposed rule accordingly. Regarding the comment concerning the liquidation of the account, the account would be delinquent if a positive cash flow cannot be developed and the lender would have to abide by §§ 1980.145 and 1980.146 of this subpart, which would result in an orderly liquidation of the account by the lender. The Agency adopts the proposed rule.

One respondent commented that the net recovery from a Chapter 7 bankruptcy may be similar to the net recovery from an involuntary liquidation or foreclosure under § 1980.125(b)(1)(ii). It is unclear how the lender shall determine the net recovery from a Chapter 11 or 12 bankruptcy. Section 1980.114 of this subpart explains how Chapter 11 and 12 bankruptcies will be handled as to payment of estimated losses. The Agency adopts this proposed rule as is.

One respondent commented that this section should specify the nature and extent of the documentation required to be provided by the lenders as support for the write down determination and also that a note or line of credit agreement which has been written down cannot be rescheduled or reamortized during the shared appreciation period. The Agency has amended the proposed rule to specify the necessary information which the lender will submit in requesting a write down, but the Agency believes that the proposed rule adequately addresses what a lender must consider when contemplating a write down. Paragraph (a)(1) states that the borrower must demonstrate that a positive cash flow cannot be developed after consideration is given to the authorities as set out in § 1980.124 of this subpart. If a positive cash flow can be developed showing that a debt write down will allow the borrower to remain in business, then a write down may be approved. This section requires a cash flow to be developed which will provide the documentation necessary for the write down. However, the Agency has amended the proposed rule to specify that, when a lender has both a line of credit and a loan, the line of credit will be considered for write down before the

loan will and that principal will be written down before accrued interest. The Agency also believes that the suggestion not to allow the notes to be rescheduled or reamortized during the shared appreciation period is not in accordance with the purpose of the Agricultural Credit Act of 1987. The purpose of the Act is to allow farmers to remain on the farm, if possible, and it would be unfair to force a farmer, who has had the debt written down, suffered a financial loss beyond the farmer's control 6 years down the road, and is still able to show that the plan will work, into liquidation. The Agency adopts the proposed rule as amended.

One respondent commented that § 1980.125(a)(7) was unclear as it stated no further advances may be made under a line of credit but further states the principal amount remaining after the write down becomes the new line of credit ceiling, implying that further advances up to the new ceiling are allowed. The Agency agrees and has amended this section to make it clear that the written down line of credit becomes a fixed amount loan and no new advances can be made under it. The Agency adopts the proposed rule as changed.

Several respondents commented that the lender must consider the Interest Rate Buydown program, before the lender could go to write down. The Interest Rate Buydown program, is less costly to the Government than paying losses after a write down. Therefore, FmHA requires that the lender explore all the other available servicing options, including Interest Rate Buydown, before writing down a debt. The Agency adopts this proposed rule as is.

Several respondents commented that in paragraph (b), an allowance should be provided for income received by the lender from leasing of the property while the lender has the property in inventory. The Agency agrees and has amended the proposed rule accordingly.

Several respondents commented regarding the requirement that the borrower who received a write down would have to enter into a shared appreciation agreement. One respondent felt that requiring the borrower to enter into a shared appreciation agreement would have a crippling effect on the farmer and would require further monitoring by the Agency. Another respondent in favor of the agreement suggested the appreciation value be based on the difference between the net recovery value at the time the loan is written down and the appraised value at the time of recapture. To avoid excessive losses to the Government, the Agency has adopted the shared appreciation concept. This concept will only come into play if the value of the real property increases during the agreement period. To clarify the value which will be used to calculate the appreciation, the Agency has decided to use the market value of the property. This will reduce claims at the expiration of the agreement that the original value placed on the property was incorrect, as the lender is required to utilize an independent appraiser to establish the appraised value. The Agency adopts the proposed rule as is.

One respondent commented that FmHA should require prior approval of all transfers of real property by surviving spouses to prevent circumvention of the shared appreciation agreement. This agreement provides that one of the occurrences which would affect the recapture of appreciation is the transfer of the property. Transfer of title to the property to the borrower's spouse on the borrower's death will not be treated as a conveyance for the purpose of recapture. However, if surviving spouse then transfers title to the property to someone else, then recapture would be triggered at this time of that latter transfer. The Agency adopts the proposed rule.

Section 1980.126 Mediation. This section provides guidance on the responsibilities of a lender regarding the mediation process. Several respondents commented that this section should be amended to require FmHA to review and respond during the required time period for decisions under the State mediation law; clarify the ability of the lender to discuss other servicing options during the mediation process; issue a State supplement regarding mediation; require FmHA to send to the lender and the borrower copies of Exhibit D, "Interest Rate Buydown Program," and Attachment 1 to Exhibit D; require FmHA to draft a form which indicates the different servicing actions a lender may provide to a borrower; require FmHA to participate in a meeting to discuss the servicing of the delinquent guaranteed loan; require the lender to participate in States which have "voluntary" mediation programs; and require State Director approval of any agreements reached during the mediation process. The guaranteed program depends upon commercial lenders requesting guarantees to cover their higher risk loans. If a number of the suggestions were implemented, lenders would pull out of the guarantee program, thus reducing the amount of credit available for farmers whose financial conditions are better than what FmHA deals with, but still weak enough that the lender is requesting a guarantee to continue with the borrower. Many small rural communities depend upon the farmer for their economic well being and if the commercial lender does not have a guaranteed program to fall back on, the economic conditions in these rural areas will continue to decline. A number of the suggestions are already covered in the present regulations. Requesting that FmHA participate in a meeting with the lender and the borrower when the borrower is delinquent is covered under § 1980.145 of this subpart. Before this meeting, FmHA will send the lender and the borrower Attachement 1 to Exhibit D and meet with the lender and the borrower to discuss the problems and any proposed solutions. The Agency believes this meeting provides the lender and the borrower with the necessary information needed if mediation is the next step. Besides, the lender, not FmHA, is responsible for servicing the guaranteed loan. FmHA must concur in any decisions reached by the lender but FmHA does not initiate these decisions. Therefore, the lender's participation in the mediation process is necessary, while FmHA's is not. If a State has a mediation program and the borrower requests that the lender go to mediation, the lender will be required to do so, since the Agricultural Credit Act of 1987 states that the lender shall participate in States with mediation programs. The Agency agrees with the suggestion that the section specify who in FmHA is responsible for approving any agreements reached by the lender and borrower as a result of mediation. The Agency has amended this section to specify that the State Director be responsible for approving these agreements.

Section 1980.130 Loan servicing. This section sets forth the lender's responsibilities in servicing guaranteed loans. Several respondents felt that the requirement in the Administrative portion of this section that all guaranteed loans be reviewed within 45 days after loan closing was placing too much of a burden on FmHA personnel. They suggested this time be increased to 90 days, and only be required for those guaranteed loans which were not previously reviewed. The Agency agrees and amends the proposed rule accordingly.

One respondent commented that this section should require that all requests for debt write down be approved by the State Director. The also suggested that this section set forth the levels of approval required for subsequent requests for consolidation, rescheduling, reamortization, and deferral. The

Agency agrees with this respondent as to requiring State Director approval of all write downs. The Agency has amended this section to specify that State Director approval is required for all write downs. The Agency believes the authority to approve or concur with any deferral, rescheduling, or reamortization should remain with the County Supervisor to allow for timely decisions to be made so the borrower can continue with the business. The Agency adopts the proposed rule as changed.

One respondent suggested that since this section contains administrative procedures and recommendations for the County Supervisor, it should be amended to require the County Supervisor to immediately send Exhibit D and Attachment 1 of this subpart to the lender and the borrower when the lender notifies the County Supervisor that the borrower is delinquent. The Agency believes this is adequately covered in § 1980.145 of this subpart and adopts the proposed rule.

In addition to the above changes to the proposed rule the Agency has added an additional responsibility to the County Supervisor. The County Supervisor will be required to review the Shared Appreciation Agreement with the lender at least annually. The addition was made to assure proper compliance with this agreement.

Section 1980.136 Protective advances. This section sets forth guidance regarding the use of protective advances. One respondent commented that this section should be modified to more explicitly define costs that are typically thought of as protective advances. The Agency agrees and has amended the proposed rule accordingly. Also, it requires the County Supervisor to approve the requested protective advance in writing.

Section 1980.144 Bankruptcy. This section provides guidance in the payment of loss claims when a lender's borrower files for bankruptcy and the lender requests an estimated loss payment. Several respondents commented that this action was long overdue and would result in additional utilization of the guaranteed program. One respondent commented that this section should be clarified to allow existing guaranteed loans to be serviced under this rule. The Agency has made this optional with the lender in its amendment to § 1980.67 of Subpart A of this part. Further clarification is unnecessary. One respondent commented that attorney fees should be an allowable recoverable cost, as the typical lender will remain reluctant to continue with agricultural loans and would continue to push their customers to FmHA insured loans. The Agency does not agree and does not consider attorneys' fees are a valid recoverable costs covered by the guarantee. The guarantee covers loan of principal and interest on a loan. The Agency adopts the proposed rule as is.

Another respondent commented that by only listing specific things a lender must do to protect their interests in bankruptcy cases, the implication is given that this is all they will need to do. The list is only a guideline and the Agency believes that each lender should be able to determine those items which directly affect the borrower's account. The Agency adopts the proposed rule.

These same comments are incorporated in Subpart C, "Emergency Livestock Loans;" Subpart E, "Business and Industrial Loan Program;" and Subpart F, "Economic Emergency Loans," of this part.

One respondent was upset because his reorganization plan had been submitted 15 months ago and had not been approved by the court. The Agency sympathizes with the concern of the respondent but has no control over the court or the timeframe in which the court works.

Section 1980.145 Default by borrower. This section provides guidance regarding the actions that will be taken when a borrower defaults on a loan. Several respondents commended that the timeframe of 3 days before the scheduled meeting was too short to send Attachment 1 to Exhibit D of this subpart to the lender and borrower. It was also suggested that a letter be prepared confirming the discussion and decisions made, along with all calculations and documentation used in determining the appropriate action to take. This letter should be sent to the borrower. It was also suggested that a copy of Exhibit D be sent along with notices of the servicing options. The Agency agrees with the timeframe for providing the borrower with a report concerning the determination and decisions made at the meeting and the sending of Exhibit D. The Agency disagrees as to preparing a notice to send to the lender and the borrower listing the servicing options available. It is the lender's decision as to what servicing options the lender will employ to continue with the borrower. The Agency adopts the proposed rule as changed.

Section 1980.146 Liquidation. This section provides guidance for the liquidation of guaranteed Farmer Programs loan/line of credit. One respondent commented that FmHA should specify when estimated reports of loss should be submitted by the lender. It was suggested that if the liquidation is expected to exceed 90 days, an estimated loss claim should be filed and the lender should discontinue interest accrual on the defaulted loan at the time the claim is filed. The Agency agrees except that it believes that it would be fairer to the lender to discontinue the interest accrual at the time the estimated loss claim is approved, not when it is filed. The Agency adopts the proposed rule as changed.

One respondent commented that this section should clarify the approval authority of the County Supervisor for loss payments and that the approval authority for FmHA to liquidate the account should be at the State level. The Agency agrees and has adopted these changes.

One respondent commented that this section requires the lender to obtain FmHA approval of the liquidation plan. The respondent suggested that this section be amended to provide the borrower an opportunity to appeal FmHA's decision to approve the liquidation plan. The Agency disagrees because the borrower's loan is with the lender and it is the lender's responsibility to service it. FmHA merely concurs in the lender's decision. The borrower is not entitled to appeal as the adverse decision was made by the lender, not FmHA.

One respondent commented that when choosing to liquidate a guaranteed loan, FmHA must meet all of the requirements for liquidating the guaranteed loan as it would for an insured loan. It was suggested that a reference to Subpart S of Part 1951 of this chapter be included to insure that Attachment 1 to Exhibit A of Subpart S of Part 1951 of this chapter, "Notice of the Availability of Loan Servicing Programs," be sent to these borrowers. Unless the lender assigns its portion of the loan to FmHA, the loan is still the lender's loan. Only in those cases where the lender would assign its portion of the loan to FmHA and FmHA undertakes servicing of the loan would the Agency consider the borrower for the servicing actions under the insured loan regulations. The regulations already listed which FmHA must follow if it were to liquidate such a loan refer to compliance with Subpart S of Part 1951, so it is unnecessary to list that reference here. The Agency adopts the proposed rule as is.

Section 1980.148 Appeal procedure. This section provides guidance as to the method of appealing adverse decisions. One respondent commented that this

section should be amended to require that both the lender and the applicant sign letters requesting an appeal before the situation would fall under Subpart B of Part 1900 of this chapter. The Agency believes that Subpart B of Part 1900 of this chapter sufficiently spells out the requirements for appeals. The Agency adopts the proposed rule.

Section 1980.175 Operating loans. This section sets forth guidance for the granting of a guarantee to a lender to allow the lender to provide credit to a farm customer for operating purposes.

One respondent commented that the applicant should be required to attest on the application form that they will not use the guaranteed loan proceeds to plant, cultivate, grow, produce, harvest, or store a controlled substance. The Agency has incorporated the insured and guaranteed application into one application, Form FmHA 410-1, "Request for FmHA Services," which already contains this statement regarding controlled substances.

One respondent commented that in order to receive a guaranteed operating loan, the borrower must have had training or farming experience in managing and operating a farm or ranch (within one of the last 5 years). They suggested that this requirement is an unnecessary restriction as there may be former farmers or ranchers who wish to re-enter the agricultural section who have not had training or actual experience in the farming or ranching operation in the last 5 years. They also suggested that if FmHA had concerns about the applicant having kept up with the more recent farming practices and theories, it could require the applicant to take courses or study these theories as a condition of the loan. The Agency has modified the proposed rule to allow educational or on the job training during one of the past five years to be acceptable. The Agency adopts the proposed rule as amended.

One respondent commented that paragraph (b)(1)(iv) should be clarified regarding character as to past repayment history. The Agency agrees and has amended this section to provide if a applicant has made an honest attempt to meet the obligations, this will be viewed in the applicant's favor in determining eligibility. The Agency adopts the proposed rule as amended.

One respondent commented that paragraph (b)(2), which contains the eligibility criteria for a cooperative, corporation, partnership, and joint operation is confusing. The comment stated that in one instance, where the majority interests are related by blood or marriage, that at least one of the members must operate the family farm and at the same time the entity must operate the farm. This is a statutory requirement and the Agency cannot adopt the proposed rule as is.

There were several respondents who commented in regards to lines of credit in paragraph (c)(2). One comment suggested the ability to purchase replacement foundation livestock should be reinstated as it was important that a farmer be allowed to purchase replacement animals as necessary. The Agency disagrees. To insure the farmer will retain the numbers, one should keep replacements, obtain a Loan Note Guarantee or replace with normal income. Another respondent felt that one should be allowed, under a line of credit, to pay a creditor as established in paragraph (c)(1)(ix) of this section and also to pay principal payments on real estate. The Agency does not agree, as the line of credit is established to pay current operating expenses. Interest charged may be considered as a current expense. Section 313 of the Consolidated Farm and Rural Development Act prohibits operating loan funds from being used for land purchase. The Agency adopts the proposed rule.

To obtain consistency with the insured regulation, the Agency has amended paragraph (c)(1)(viii) of this section to increase the amount of operating funds for real estate improvements from $7,500 to $15,000 per year, which is more in line with present costs. The Agency adopts the proposed rule as changed.

One respondent commented that FmHA should use the authority in this section to guarantee operating lines of credit for the purpose of refinancing existing operating debt. Under a line of credit, the lender may refinance operating debt that has been incurred for the present crop year only. The regulations currently provide for this as long as the security is adequate and a positive cash flow can be developed. The Agency believes that this is in line with the limited time period for an operating line of credit and does not adopt the suggestion.

Several respondents commented that the deletion of the provision allowing the lender to charge a one percent higher interest rate than what they charge to their average farm customer would have an adverse effect on the guaranteed program. There have been cases where some lenders will charge a lower interest rate because of the guarantee. It reduces the lender's risk and exposure, while increasing the lender's profitability and liquidity if they participate in the secondary market. Another point of view expressed was that borrowers with guaranteed loans require a greater amount of servicing, thus the lender justifies increasing the rate. There have been times when a lender has obtained a guarantee and the servicing of the account decreases, as the feeling is that if the account does not perform, FmHA will pay for any loss incurred. The Agency believes that by allowing the lender to charge an additional one percent, in many instances it places a greater financial burden on the borrower, thus increasing the possibility of failure. The Agency adopts the proposed rule.

One respondent commented that paragraph (f)(5) should be amended to delete purchasing feed while crops are being established as an eligible balloon purpose. The feed cost should always be collected when the livestock is sold. The Agency agrees and has amended the proposed rule accordingly.

One respondent commented that paragraph (h) of this section should be amended to insure that where multiple entities own the chattels, a guarantee would not be issued unless all entities guarantee and pledge security for the loan, and that FmHA and the lender would have to concur before any transfer of ownership could occur. FmHA agrees and has amended the proposed rule accordingly.

One respondent commented that the Agency should require the guaranteed borrower to obtain insurance, as applicable, on loan security prior to or at loan closing and that proof of such insurance must be documented at loan closing. The Agency agrees with the principle behind this comment and will continue to encourage lenders to have guaranteed borrowers obtain insurance. In those instances where it is apparent that insurance is necessary, the approval official will so indicate by making it a condition for the loan. The Agency adopts the proposed rule.

One respondent commented that the last sentence in paragraph (h) should be amended to allow different lien positions on chattels to be considered as separate and identifiable. The Agency disagrees, as this would allow mixing and matching of security and if a loss claim was ever processed, the security covering the guarantee would be the one that was missing. The Agency adopts the proposed rule.

One respondent commented that paragraph (j) should be amended to correspond with § 1980.180 of this subpart regarding the handling of other assets which are definitely not needed or used directly in the farming operation. The Agency agrees and has amended the proposed rule.

One respondent commented that in general it was supportive of this regulation, but additional clarification was needed regarding protecting environmental resources. One suggestion was that in §§ 1980.175, 1980.180 and 1980.185 of this subpart, a reference should be made to the "Memorandum of Understanding Between FmHA and the U.S. Fish and Wildlife Service," to be used as a guide in implementation of the Environmental Program. Exhibit M to Subpart G of Part 1940 covers much more than what this Memorandum of Understanding covers and it would be inappropriate to refer to that memorandum in the context of the paragraphs in question. The Agency adopts the language proposed in these sections as is.

Section 1980.180 Farm Ownership loans. This section sets forth guidance for granting a guarantee to a lender to allow a farmer to purchase farm real estate.

One respondent commented that the same concerns should be addressed in this section as in § 1980.175 of this subpart regarding character and farm experience. Another respondent commented that for clarification, it would be possible to combine paragraph (b) of § 1980.180 with the requirements set forth in § 1980.175(b) and § 1980.180(e)(2) and § 1980.185(e)(1) with the requirements set forth in § 1980.175(e). The Agency agrees, as this will allow the lender to go to one section for the regulations governing these requirements. The Agency adopts the proposed rule as amended.

One respondent commented that paragraph (f)(2)(i) seems to be excessive as it requires a mortgage to be taken on the entire farm owned or to be owned by the applicant. The respondent suggested that this paragraph be amended to state, "A mortgage on the entire farm will not be necessary if a mortgage on the property to be purchased or refinanced or on which improvements will be made with the loan proceeds is given and that mortgage is sufficient to adequately secure the loan." Section 307 (7 U.S.C. 1927) states that the Secretary shall take as security for the obligations entered into in connection with loans, mortgages on farms with respect to which such loans are made or such other security as the Secretary requires. A prudent lender would require a mortgage on the total farm and the Agency believes the lender should secure the loan with a mortgage on the total farm. The Agency adopts the proposed rule.

One respondent commented that paragraph (g)(2)(i) should be amended as it presently allows for the lender to take a mortgage on a borrower's dwelling when it is located somewhere other than on the farm. The respondent indicated there was no justification for automatically requiring a mortgage on the borrower's dwelliing simply because it is not located on the farm. A mortgage should only be taken if it is necessary to provide adequate security for the guaranteed FO loan. The Agency disagrees as it provides additional security for the loan and, as stated in the regulations, must be located close enough to the farm so the farm may be operated successfully. Taking a mortgage on the dwelling will insure the borrower has a desire to make the operation a success.

Section 1980.185 Soil and Water loans. This section provides guidance in the granting of a guarantee to a lender to allow a farmer to obtain a guaranteed Soil and Water loan to encourage and facilitate the improvement, protection, and proper use of farmland. The objectives should help a farmer make needed land-use adjustments and should lessen the impact of adverse weather conditions on farming operations.

One respondent commented that this section should be revised to amend the reference to character and experience as indicated in § 1980.175. The Agency amends these paragraphs and has adopted the proposed rule as changed.

One respondent commented that exception authority should be included in this subpart. This authority is inappropriate for a regulation containing various statutory requirements such as eligibility. Therefore, the Agency is not adopting this suggestion.

Exhibit A to Subpart B—Approved Lender Program/Farm Ownership and Operating loans. This section provides guidance for the making and servicing of a guaranteed loan by an Approved Lender.

Several respondents commented as to the absence of the Soil and Water program and the requirement that these agreements do not allow the ALP lender to submit loans involving subsidy payments under the ALP. The Agency agrees and has revised this section to allow ALP lenders to make soil and water loans and loans involving subsidy under this section.

One respondent suggested that the list of approved lenders be provided to the potential applicant or borrower. The statute states the County Supervisor shall make available to farmers, on request, a list of approved lenders in the area that participate in the FmHA guaranteed loan programs and other lenders in the area that express a desire to participate in the program. The Agency believes the proposed rule is in accordance with the statute and thus adopts the proposed rule.

One respondent commented on the fact that ALP status will expire at the end of any 2-year period for a FCS member institution not having acceptable loan losses. The concern was that FmHA should be attempting to get a statement from the Farm Credit Administration at the end of the normal 2-year period that the FCS member institution still maintains an acceptable loan loss level. The regulation already requires FCA to provide this information to the Agency. Once this information is received, FmHA notifies its field offices as to those FCS institutions that are eligible. The Agency adopts the proposed rule as is.

One respondent commented on paragraph II (A)(1)(b)(ii). The respondent suggested that the requirement as to the 1½ percent of the lender's total loan portfolio or the lender's total loan portfolio of all types of loans be clarified. The Agency agrees and has amended this requirement to refer to the Agricultural loan portfolio of the lender. The Agency adopts the proposed rule as amended.

One respondent commented in paragraph II (A)(2)(c) regarding the requirement that the training for the person designated to process and service guaranteed loans for an ALP lender should read as follows, "Training in Agricultural Economics and/or at least two years agricultural lending experience." The Agency agrees and has adopted this change to the proposed rule.

One respondent commented that the information required by FmHA for approving a lender for the ALP is usually only background material. The respondent suggested a more useful document would be to require the lender's audited financial statements or its most recent quarterly submission file, Report of Condition and Income. The Agency agrees and has adopted the change to require the Report of Condition and Income in the optional criteria found in paragraph II A(2)(d) of Exhibit A. The Agency adopts the proposed rule as changed.

One respondent commented that, if the cash flow statement that a lender normally uses does not list at least a debt repayment source and breakdown of income, this information should be required. When this was provided, it greatly expedited the processing of the ALP applications. The Agency agrees and has amended paragraph III A of the proposed rule to ask for a statement

similar to item 28 of the Request for Loan Note Guarantee.

One respondent commented on the need to be sure that paragraph IV of Exhibit A, Attachments 1 and 2, contain the language that allows Farm Credit System board members to obtain an FmHA guarantee under certain circumstances. The Agency agrees and has revised these paragraphs accordingly.

One respondent commented as to the ability to modify Attachments 1 and 2 to allow for an extension of less than 2 years and to provide guidance as to when a new ALP agreement is needed. Paragraph XVII of these agreements provides the guidance as to when an agreement is needed. The Agency does not understand why a lender would request an extension of less than 2 years. The Agency adopts the proposed regulation.

Exhibit D Interest Rate Buydown Program. This section provides guidance on the issuance of a buydown of interest to a lender whose borrower cannot meet a repayment schedule due to interest cost. Several comments were received on cash flow projections, 24-month cash flows, need for additional cash flows following initial cash flows, and projected financial statements.

The requirement for a 24-month cash flow is statutory. The other comments were addressed and projected financial statements deleted. The word typical was added to 24-month cash flow in order to avoid judging feasibility of 3-year buydowns on transition cash flows. Several comments were received about the need for interest rate buydowns for loans longer than 3 years. The law only provides for one buydown per loan at a time and only allows for the maximum period for a buydown to be three years.

A comment was received to clarify the .25 percent increments on buydown in paragraph IV I. The Agency has done so. A comment was received on deleting non-essential assets requirement from buydown, as experience has shown some problem areas. The Agency added it back to the Exhibit, but confined the requirement to nonfarm non-essential assets. The Agency adopts the proposed rule as amended.

Exhibit E—Demonstration Project for Purchase of Certain Farm Credit System Acquired Farm Land. This exhibit provides guidance for the operation of the program between FmHA and the Farm Credit System. A comment was received stating all lenders should be eligible to sell acquired property under this Exhibit. The statute limits the property to property owned by Farm Credit System Organizations; thus, the Agency cannot change this language of the proposed rule. A comment was received about the inconsistency of the title and the language in the body of the exhibit. The Agency has reconciled the language differences. A comment was received on the use of the preliminary applications and dropping the use of suitability, ratios, and amount of cash flow needed to be feasible. The Agency aligned the exhibit to more closely follow the preliminary procedure in § 1980.113 of this subpart, dropped the paragraph on ratios, dropped the word suitable, and adjusted needed cash flow, to allow for a cash flow from 100 percent to 110 percent once the buydown is in effect.

One respondent commented as to the ability of ALP lenders to use their forms for the demonstration project. The Agency changed its requirements to authorize ALP lenders to use their own forms.

One respondent commented that an eligible borrower should be able to buy farms at auction. It would be extremely difficult to help farmers buy land at auctions through use of guaranteed loans. The Agency does not adopt this suggestion.

A comment was received concerning publicizing the availability of farms and projects. An agreement between FmHA and Farm Credit District Banks has been developed to cover joint responsibilities in this area. This effort will be coordinated between the State Director and the FCS district where the demonstration program is available to ensure that inventory land is available.

One respondent was concerned about lenders passing on the interest rate reduction of 4 percentage points to the borrower. This has been covered in Form FmHA 1980–58, "Interest Rate Buydown Agreement," rather than in the exhibit itself.

A comment was received on criteria that would be used to determine feasibility. The concern was that the County Supervisor and the applicant would not be able to determine feasibility. Feasibility requirements are the ones established in this subpart for all guaranteed loans except for those special changes as set forth in this Exhibit.

Several respondents commented on the term "positive cash flow." The concern was the window of eligibility is very small, as a less than positive cash flow is required to get the interest assistance, but a positive cashflow (at least 110%) is required after the interest assistance is considered. The Agency agrees and has amended the proposed rule to allow borrowers to have a positive cash flow after the interest assistance is granted from 100 to 110 percent. The proposed rule is adopted as amended.

One respondent commented, regarding loans to purchase inventory property of the Farm Credit System, FCS should comply with various environmental requirements found in FmHA regulations such as those governing conservation easements. The Agency disagrees. These requirements do not apply in these cases, as the inventory property is in the possession of the Farm Credit System, not FmHA. However, both the lender and the borrower must agree to comply with various other environmental requirements found in Subpart G of Part 1940 of this chapter before FmHA will issue a guarantee.

Lender Agreements—Form FmHA 449–35 "Lender's Agreement," Form FmHA 1980–38 "Lender's Agreement (Line of Credit)," "Lender's Agreement (Loan Note Guarantee Only)," and "Lender's Agreement (Operating Line of Credit Guarantee) for Approved Lenders."

These agreements set forth guidance for lenders who are involved in both the regular guaranteed program and the approved lender program.

Several comments were received on making regulations and forms conform with each other requiring Finance Loan Status reports. The Agency agrees and has incorporated this aspect wherever possible.

Form FmHA 449–35, "Lender's Agreement," Paragraph XI K. A comment was received about making payment within 30 days after completion of review versus the existing 60-day requirement. The Agency agrees and adopts this proposal.

Form FmHA 449–35, "Lender's Agreement," Paragraph I E 2. A comment was received regarding why the Agency had 30 days to submit Report of Loss to Finance Office after the report of loss estimate had been approved. The Agency deleted the 30-day phrase and has revised the proposed rule accordingly.

Several respondents commented regarding paragraph IX of Forms FmHA 449–35 and 1980–38 and suggested the lender should be required to inspect collateral at least annually and persons having a partial ownership should provide a personal guarantee.

Section 1980.108 requires personal guarantees routinely and they must be obtained unless waived by the Agency. Paragraph IX of the forms require inspecting the collateral as often as is necessary to service the collateral. Bare farmland may not require an annual

visit, whereas in other cases a visit might be needed monthly. The Agency did not adopt these suggestions as it feels the regulations adequately address these concerns.

Comments were received on Forms FmHA 449-35 and 1980-38, paragraph XI, stating a reasonable period of time for curing default should be specifically identified. Different circumstances would dictate different time tables, which would vary when trying to determine what is reasonable. Therefore, the agency did not choose to set a specific time table for all cases. The Agency adopts the proposed rule as is.

Additionally, a comment was received stating a lender should submit an estimated Forms FmHA 449-30, "Report of Loss," when liquidation is expected to take a long time, in order to stop the accrual of interest. The Agency has amended the proposed rule advising lenders they will file an estimated loss if it will take over 90 days to liquidate the security.

An additional comment stated that interest should stop accruing within 90 days of acceleration. This is not always possible as there are times where it will take longer than 90 days to liquidate the security, which is beyond the lender's control. The Agency is not changing its statement that accruing interest is covered, provided the lender proceeds expeditiously with the approved liquidation plan. The Agency adopts the proposed rule as is.

An additional comment was received about release of liability when a guaranteed borrower transfers the loan. The suggestion was that paragraph XV of Forms FmHA 449-35 and 1980-38 should be revised to require FmHA approval of the release. Section 1980.123(f) requires FmHA written concurrence. The Agency believes the current regulations adequately address this concern.

A comment was received recommending that the ALP lender's agreements must be conformed to allow the same application of regulations when applicable. Therefore, the agency is conforming paragraph IV of both ALP lender agreements to paragraph V of Forms FmHA 449-35 and 1980-38.

One comment was received recommending that Forms FmHA 449-35 and 1980-38 be combined and also both ALP lender agreements. Form FmHA 1980-38 deals with lines of credit unlike Form 449-35 which deals with fixed loans. Also, Form FmHA 1980-38 is used with Subparts C and F of Part 1980 and, therefore, cannot be combined at this time as this would necessitate extensive revisions of those regulations. This suggestion has merit and will be considered at a later date.

One comment was received requesting some lender discretion on loaning for nonguaranteed short-term operating without FmHA concurrence on each request, which is now prohibited by paragraph XIII of Forms FmHA 449-35 and 1980-38. The Agency has modified this paragraph.

A comment was received that Forms FmHA 449-35 and 1980-38 should address the guarantee of protective advances. The guarantee of protective advances is covered on the Forms FmHA 449-34 and 1980-27. The Agency believes this adequately covers the subject.

A comment was received on paragraph IX C 2 stating the holder could possibly deny the reamortization, renewal, or rescheduling of the guaranteed portion of the loan. When a loan is sold on the secondary market the holder has certain rights. It must be pointed out that the lender has the ability to buy back a loan from the holder, if needed, to properly service the loan.

A comment was received on paragraph X A of Forms FmHA 449-35 and 1980-38 stating FmHA should list the write down of principal and interest as action which can be done to resolve a default status. The Agency has added the write down option to the paragraph.

A further comment was received on paragraph X B of the same forms about including FmHA as negotiating in good faith. The real test of good faith is between the lender and the borrower. If they can come to an agreement and the restructuring of the loan is within the scope of the regulations, the Agency will work with the lender in staying with the borrower. The ability for the lender to write down a guaranteed loan provides another tool for the lender to continue with the borrower. The Agency adopts the proposed rule.

A comment was received on paragraph X of Forms FmHA 449-35 and 1980-38 concerning the borrower's appeal rights regarding denial of servicing actions. The refusal by FmHA to concur in a lender's proposed servicing action is not appealable by the borrower alone, as the party directly affected is the lender. Both the borrower and the lender would have to join in any appeal.

A further comment was received on paragraph XI B stating that FmHA concurrence on a lender's liquidation is appealable. FmHA is not making an adverse decision and the lender's decision is not appealable under FmHA's administrative appeal procedure. The FmHA did not make the loan and has only issued a guarantee. Only adverse decisions which FmHA makes are appealable under Subpart B of Part 1900 of this chapter.

It should be further noted that there are very few circumstances where FmHA ever purchases the entire guaranteed loan. Utilizing the insured loan liquidation procedures, as one commentator suggested, is not applicable unless the lender would assign its portion of the loan to FmHA and then, and only then, would the loan be treated under Subpart S of Part 1951 of this chapter.

One commentator suggested paragraph XI K of Forms FmHA 449-35 and 1980-38 should clarify loss. All of paragraph XI refers to loss when liquidating, and Form FmHA 449-30 is the "Loan Note Guarantee Report of Loss." The Agency adopts the proposed rule.

One lender commented on the need for a subsection on bankruptcy and loan write down in lender's agreements.

The Agency had previously published proposed rules on bankruptcy in the **Federal Register** on May 7, 1988, and received comments which were positive. All lender's agreements have paragraphs added to them to cover both items.

General Comments

One respondent was concerned that there was no mention of Section 711, "Improvement of Secondary Market Operations for Loans Guaranteed by the Farmers Home Administration" in this proposed rule. This section of the law provides guidance to the Agency in the continued development of a secondary market for guaranteed loans. It allows for the Secretary to directly, or through a market maker, issue pool certificates representing ownership of part or all of the guaranteed portion of any loan guaranteed by the Secretary under this title and the process of servicing guaranteed loans that are sold on the secondary market. Due to the complexity of the requirement the Agency has determined that this requirement will be issued under a separate regulation which will be published in the near future as a proposed rule for public comment.

One respondent commented that the proposed rule did not reference Section 625, "Sense of Congress Regarding Guaranteed Loan Program." This section encouraged the Secretary to issue guarantees for loans under the Consolidated Farm and Rural Development Act, to the maximum extent practical to assist eligible borrowers whose loans are restructured

by institutions of the Farm Credit System, commercial banks, insurance companies, and other lending institutions. The Agency believes that with the past emphasis placed on the guaranteed program that the agricultural lenders who wish to participate in the program are knowledgeable about the program. The Agency has used "Operation Assist" as a means by which FmHA assisted current FmHA borrowers to apply for guarantees with local lenders. This program resulted in 2533 guaranteed loans with a value of $181.9 million being made this past spring which otherwise would have resulted in insured loans. A number of lenders have backed off of agricultural-type loans due to past experience of having to charge off a number of agricultural loans. As the farm economy improves, lenders will move back into agricultural lending and the Agency believes the effort it has put forth over the past couple of years will insure the continued growth of the guaranteed program.

List of Subjects in 7 CFR Part 1980

Agriculture, Loan program—Agriculture.

Accordingly Chapter XVIII, Title 7, of the Code of Federal Regulations is amended as follows:

PART 1980—GENERAL

1. The authority citation for Part 1980 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—General

2. Section 1980.6 is amended by revising the definition of "borrower" in paragraph (a) to read as follows:

§ 1980.6 Definitions and abbreviations.

(a) * * *

Borrower. (B&I and RH loans only). All parties liable for the loan or any part thereof. For Farmer Programs loans, see § 1980.106(b)(4) of Subpart B of this part for the definition of borrower.

* * * * *

3. Section 1980.13 is amended by revising paragraph (b) introductory text to read as follows:

§ 1980.13 Eligible lenders.

* * * * *

(b) *An eligible lender is*: Any Federal or State chartered bank, Farm Credit Bank, other Farm Credit System Institution with direct lending authority, Bank for Cooperatives, Savings and Loan Association, Building and Loan Association, mortgage company that is a part of a bank-holding company, or an insurance company that is regulated by the National Association of Insurance Commissioners. For Farmer Program loans, an Agricultural Credit Corporation which is a subsidiary of any Federal or State chartered bank is an eligible lender. The above entities must be subject to credit examination and supervision by either an agency of the United States or a State. (Credit unions that are subject to credit examination and supervision by either the National Credit Union Administration or a State agency are eligible lenders only for Farmer Program guaranteed loans). Only those lenders listed in this paragraph are eligible to make and service guaranteed loans and such lenders must be in good standing with their licensing authority and have met licensing, loan making, loan servicing, and other requirements of the State in which the collateral will be located, and the loan making and/or loan servicing office requirements in paragraph (b)(3) of this section. A lender must have the capability to adequately service the loan for which a guarantee is requested.

* * * * *

4. Section 1980.20 is revised to read as follows:

§ 1980.20 Loan guarantee limits.

(a) Lenders and applicants will propose the percentage of guarantee. Lenders and applicants will be advised in writing on Form FmHA 449–14 by FmHA of any percentage of guarantee less than proposed by the lender and applicant, and the reasons therefor. (See § 1980.80 of this subpart regarding appeals.) The maximum percentage of guarantee (as opposed to the maximum loss covered by the guarantee) on a Business and Industrial loan is defined in § 1980.420 of Subpart E of this part. The maximum percentage of guarantee for all other loans covered by this section will be 90 percent. Also, except in regards to D & D Guaranteed loans (See Subpart E of this part), the maximum loss covered by the Loan Note Guarantee, Form FmHA 449–34 or Form FmHA 1980–27, "Contract of Guarantee (Line of Credit)," can never exceed the lesser of:

(1) The percentage of guarantee of principal and interest indebtedness as evidenced by said note(s) or by assumption agreement(s), any loan subsidy due, and the percentage of guarantee of principal and interest indebtedness on secured protective advances for protection and preservation of collateral made with FmHA's authorization; or

(2) The percentage of guarantee of the principal advanced to or assumed by the borrower under said note(s) or assumption agreement(s) and any interest due (including any loan subsidy) thereon.

(b) FmHA will determine the percentage of guarantee after considering all credit factors involved, including but not limited to:

(1) *Applicant's management.* The applicant's management, and when appropriate, equity capital, history of operation, marketing plan, raw material requirements, and availability of necessary supporting utilities and services.

(2) *Collateral.* Collateral for the loan.

(3) *Financial condition.* Financial condition of applicant or applicant's principals if appropriate.

(4) *Lender's exposure.* The lender's exposure before and after the loan.

(5) *Trends and conditions.* Current trends and economic conditions.

5. Section 1980.22 is amended by revising paragraph (a) to read as follows:

§ 1980.22 Charges and fees by lender.

(a) *Routine charges and fees.* The lender may establish the charges and fees for the loan, provided they are the same as those charged other applicants for similar types of transactions. "Similar types of transactions" means those transactions involving the same type of loan requested for which a non-guaranteed loan applicant would be assessed charges and fees.

* * * * *

6. Section 1980.40 is revised to read as follows:

§ 1980.40 Environmental requirements.

The need for an Environmental Impact Statement (EIS) will be determined by the FmHA approval official. The determination will be based upon FmHA's review of Form FmHA 1940–20, "Request for Environmental Information," when required as set forth in Subpart G of Part 1940 of this chapter and other agency comments or other information available. If an EIS is necessary, applicants and lenders will be required to provide essential data for use in its preparation. FmHA State Directors will coordinate preparation and processing of any required EIS. If joint financing for the proposal is involved, the lead agency will be responsible for preparation of the EIS. In all cases, FmHA is responsible for assuring that the requirements of section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA), and Subpart G of Part 1940 of this chapter are met.

7. Section 1980.41 is amended by revising paragraph (a) to read as follows:

§ 1980.41 Equal opportunity and nondiscrimination requirements.

(a) *Equal Credit Opportunity Act.* In accordance with Title V of Pub. L. 93-495, the Equal Credit Opportunity Act, with respect to any aspect of a credit transaction, neither the lender nor FmHA will discriminate against any applicant on the basis of race, color, religion, national origin, age, sex, martial status or physical/mental handicap providing the applicant can execute a legal contract. The lender will comply with the requirements of this Act as set forth in the Federal Reserve Board's Regulation implementing this Act. (See 12 CFR Part 202.) Such compliance will be accomplished prior to loan closing.

* * * * *

§ 1980.68 [Redesignated from § 1980.67]

8. Section 1980.67 is redesignated as § 1980.68 and a new § 1980.67 is added to read as follows:

§ 1980.67 Bankruptcy.

(a) *Reference.* Refer to Subparts B, C, E, or F of this part. Form FmHA 449-30, "Loan Note Guarantee Report of Loss," will be used for calculations of all estimated and final loss determinations. Payments will be made in accordance with applicable FmHA regulations.

(b) *Lender's option.* If a lender has made a loan or line of credit guaranteed by FmHA under previous regulations, and the borrower has filed for protection under a reorganization bankruptcy, the lender has the option of requesting an estimated loss payment under the provisions of this part.

9. Section 1980.85 is revised to read as follows:

§ 1980.85 Exception authority.

The Administrator may in individual cases make an exception to any requirement or provision of this subpart which is not inconsistent with the authorizing statute or other applicable law, or opinion of the Comptroller General, provided the Administrator determines that application of the requirement or provision would adversely affect the Government's interest. Requests for exception, must be in writing by the State Director and submitted through the appropriate Assistant Administrator. Requests must be supported with documentation to explain the adverse effect on the Government's interest, propose alternative courses of action, and show how the adverse effect will be eliminated or minimized if the exception is granted. In addition, any request for an exception to § 1980.13(b) of this subpart must document that the lender involved has furnished acceptable evidence of regulation and supervision.

10. Appendix B to Subpart A is revised to read as follows:

Appendix B to Subpart A—Lender's Agreement [1]

USDA-FmHA

Form FmHA 449-35
(Rev. 1-89)
FORM APPROVED
OMB. NO. 0575-0024
Type of Loan: _____
Applicable 7 CFR
Part 1980 Subpart _____
FmHA Loan Ident. No. _____

_____ (Lender of
_____ has made a loan(s) to
_____(Borrower)
_____in the principal amount of
$_____
_____as evidenced by
_____note(s) (include Bond
as appropriate) described as follows:——

_____

_____

_____

_____

The United States of America, acting through Farmers Home Administration (FmHA) has entered into a "Loan Note Guarantee" (Form FmHA 449-34) or has issued a "Conditional Commitment for Guarantee" (Form FmHA 449-14) to enter into a Loan Note Guarantee with the Lender applicable to such loan to participate in a percentage of any loss on the loan not to exceed _____% of the amount of the principal advance and any interest (including any loan subsidy) thereon. The terms of the Loan Note Guarantee are controlling. In order to facilitate the marketability of the guaranteed portion of the loan and as a condition for obtaining a guarantee of the loan(s), the Lender enters into this agreement.

THE PARTIES AGREE:

I. The maximum loss covered under the Loan Note Guarantee will not exceed _____ percent of the principal and accrued interest including any loan subsidy on the above indebtedness.

II. Full Faith and Credit. The Loan Note Guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which the Lender has actual knowledge at the time it became such Lender or which Lender participates in or condones. Any note which provides for the payment of interest on interest shall not be guaranteed. Any Loan Note Guarantee or Assignment Guarantee Agreement attached to or relating to a note which provides for payment of interest on interest is void.

The Loan Note Guarantee will be unenforceable by the Lender to the extent any loss is occasioned by violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which FmHA acquires knowledge of the foregoing. Any losses will be unenforceable by the Lender to the extent that loan funds are used for purposes other than those specifically approved by FmHA in its Conditional Commitment for Guarantee. Negligent servicing is defined as the failure to perform those services which a reasonably prudent Lender would perform in servicing its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent lender would act up to the time of loan maturity or until a final loss is paid.

III. Lender's Sale or Assignment of Guarantee Loan.

A. The Lender may retain all of the guaranteed loan. The Lender is not permitted to sell or participate any amount of the guaranteed or unguaranteed portion(s) of the loan(s) to the applicant or Borrower or members of their immediate families, their officers, directors, stockholders, other owners, or any parent, subsidiary or affilate. If the Lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default as set forth in the terms of the notes. The Lender may proceed under the following options:

1. *Assignment.* Assign all or part of the guaranteed portion of the loan to one or more Holders by using Form FmHA 449-36, "Assignment Guarantee Agreement." Holder(s), upon written notice to Lender and FmHA, may reassign the unpaid guaranteed portion of the loan sold thereunder. Upon such notification the assignee shall succeed to all rights and obligations of the Holder(s) thereunder. If this option is selected, the Lender may not at a later date cause to be issued any additional notes.

2. *Multi-Note System.* When this option is selected by the Lender, upon disposition the Holder will receive one of the Borrower's executed notes and Form FmHA 449-34, "Loan Note Guarantee" attached to the Borrower's note. However, all rights under the security instruments (including personal and/or corporate guarantees) will remain with the Lender and in all cases insure to its and the Government's benefit notwithstanding any contrary provisions of state law.

a. *At Loan Closing:* Provide for no more than 10 notes, unless the Borrower and FmHA agree otherwise, for the guaranteed portion and one note for the unguaranteed portion. When this option is selected, FmHA will provide the Lender with a Form FmHA 449-34, for each of the notes.

[1] Public reporting burden for this collection of information is estimated to average 1½ hours per response, including the 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 this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to, Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0575-0024), Washington, D.C. 20503.

b. *After Loan Closing:*

(1) Upon written approval by FmHA, the Lender may cause to be issued a series of new notes, not to exceed the total provided in 2.a. above, as replacement for previously issued guaranteed note(s) provided:

(a) The Borrower agrees and executes the new notes.

(b) The interest rate does not exceed the interest rate in effect when the loan was closed.

(c) The maturity of the loan is not changed.

(d) FmHA will not bear any expenses that may be incurred in reference to such reissue of notes.

(e) There is adequate collateral securing the note(s).

(f) No intervening liens have arisen or have been perfected and the secured lien priority remains the same.

(2) FmHA will issue the appropriate Loan Note Guarantees to be attached to each of the notes then extant in exchange for the original Loan Note Guarantee which will be cancelled by FmHA.

3. *Participations.*

a. The Lender may obtain participation in its loan under its normal operating procedures. Participation means a sale of an interest in the loan wherein the Lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

b. The Lender is required to hold in its own portfolio or retain a minimum of 10% of Farmer Programs loans and 5% for Business and Industry Program loans of the total guaranteed loan(s) amount. The amount required to be retained must be of the unguaranteed portion of the loan and cannot be participated to another. The Lender may sell the remaining amount of the unguaranteed portion of the loan, except for Farmer Program loans, only through participation. However, the Lender will always retain the responsibility for loan servicing and liquidation.

B. When a guaranteed portion of a loan is sold by the Lender to a Holder(s), the Holder(s) shall thereupon succeed to all rights of Lender under the Loan Note Guarantee to the extent of the portion of the loan purchased. Lender will remain bound to all the obligations under the Loan Note Guarantee, and this agreement, and the FmHA program regulations found in the applicable Subpart of Title 7 CFR Part 1980, and to future FmHA program regulations not inconsistent with the express provisions hereof.

C. The Holder(s) upon written notice to the Lender may resell the unpaid guaranteed portion of the loan sold under provision III A.

IV. The Lender agrees loan funds will be used for the purposes authorized in the applicable Subpart of Title 7 CFR Part 1980 and in accordance with the terms of Form FmHA 449-14.

V. The Lender certifies that none of its officers or directors stockholders or other owners (except stockholders in a Farm Credit Bank or other Farm Credit System Institution with direct lending authority that have normal stockshare requirements for participation) has a substantial financial interest in the Borrower. The Lender certifies that neither the Borrower nor its officers or directors stockholders or other owners has a substantial financial interest in the Lender. If the Borrower is a member of the board of directors or an officer of a Farm Credit Bank or other Farm Credit System Institution with direct lending authority, the Lender certifies that an FCS institution on the next highest level will independently process the loan request and will act as the Lender's agent in servicing the account.

VI. The Lender certifies that it has no knowledge of any material adverse change, financial or otherwise, in the Borrower, Borrower's business, or any parent, subsidiaries, or affiliates since it requested a Loan Note Guarantee.

VII. Lender certifies that a loan agreement and/or loan instruments concurred in by FmHA has been or will be signed with the Borrower.

VIII. Lender certifies it has paid the required guarantee fee.

IX. Servicing.

A. The Lender will service the entire loan and will remain mortgagee and/or secured party of record, not withstanding the fact that another may hold a portion of the loan. The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. Lender may charge Holder a servicing fee. The unguaranteed portion of a loan will not be paid first nor given any preference or priority over the guaranteed portion of the loan.

B. Disposition of the guaranteed portion of a loan may be made prior to full disbursement, completion of construction and acquisitions only with the prior written approval of FmHA. Subsequent to full disbursement, completion of construction, and acquisition, the guaranteed portion of the loan may be disposed of as provided herein.

It is the Lender's responsibility to see that all construction is properly planned before any work proceeds; that any required permits, licenses or authorizations are obtained from the appropriate regulatory agencies; that the Borrower has obtained contracts through acceptable procurement procedures; that periodic inspections during construction are made and that FmHA's concurrence on the overall development schedule is obtained.

C. Lender's servicing responsibilities include, but are not limited to:

1. Obtaining compliance with the covenants and provisions in the note, loan agreement, security instruments, and any supplemental agreements and notifying in writing FmHA and the Borrower of any violations. None of the aforesaid instruments will be altered without FmHA's prior written concurrence. The Lender must service the loan in a reasonable and prudent manner.

2. Receiving all payments on principal and interest (including any loan subsidy) on the loan as they fall due and promptly remitting and accounting to any Holder(s) of their pro rata share thereof determined according to their respective interests in the loan, less only Lender's servicing fee. The loan may be reamortized, renewed, rescheduled or (for Farmer Ownership, Soil and Water, and Operating loans only) written down only with agreement of the Lender and Holder(s) of the guaranteed portion of the loan and only with FmHA's written concurrence.

3. Inspecting the collateral as often as necessary to properly service the loan.

4. Assuring that adequate insurance is maintained. This includes hazard insurance obtained and maintained with a loss payable clause in favor of the Lender as the mortgagee or secured party.

5. Assuring that: taxes, assessment or ground rents against or affecting collateral are paid; the loan and collateral are protected in foreclosure, bankruptcy, receivership, insolvency, condemnation, or other litigation, insurance loss payments, condemnation awards, or similar proceeds are applied on debts in accordance with lien priorities on which the guarantee was based, or to rebuilding or otherwise acquiring needed replacement collateral with the written approval of FmHA; proceeds from the sale or other disposition of collateral are applied in accordance with the lien priorities on which the guarantee is based, except that proceeds from the disposition of collateral, such as machinery, equipment, furniture or fixtures, may be used to acquire property of similar nature in value up to $——— without written concurrence of FmHA; the Borrower complies with all laws and ordinances applicable to the loan, the collateral and or operating of the farm, business or industry.

6. Assuring that if personal or corporate guarantees are part of the collateral, current financial statements from such loan guarantors will be obtained and copies provided to FmHA at such time and frequency as required by the loan agreement or Conditional Commitment for Guarantee. In the case of guarantees secured by collateral, assuring the security is properly maintained.

7. Obtaining the lien coverage and lien priorities specified by the Lender and agreed to by FmHA, properly recording or filing lien or notice instruments to obtain or maintain such lien priorities during the existence of the guarantee by FmHA.

8. Assuring that the Borrower obtains marketable title to the collateral.

9. Assuring that the Borrower (any party liable) is not released from liability for all or any part of the loan, except in accordance with FmHA regulations.

10. Providing FmHA Finance Office with loan status reports semiannually as of June 30 and December 31 on Form FmHA 1980-41, "Guaranteed Loan Status Report." For Farm Ownership, Soil and Water, and Operating loans, Form FmHA 1980-41 will only be submitted annually as of December 31.

11. Obtaining from the Borrower periodic financial statements under the following schedule:

Lender is responsible for analyzing the financial statements, taking any servicing actions and providing copies of statements and record of actions to the FmHA office immediately responsible for the loan.

12. Monitoring the use of loan funds to assure they will not be used for any purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural

commodity, as further explained in 7 CFR Part 1940, Subpart G, Exhibit M.

D. If a Farm Ownership, Soil and Water or Operating loan is involved the Lender shall participate in any farm credit mediation program of a state in accordance with the rules of that system and 7 CFR Part 1980, Subpart B, § 1980.126.

X. Default.

A. The Lender will notify FmHA when a Borrower is thirty (30) days (90 days for guaranteed rural housing loan) past due on a payment or if the Borrower has not met its responsibilities of providing the required financial statements to the Lender or is otherwise in default. The Lender will notify FmHA of the status of a Borrower's default on Form FmHA 1980-44, "Guaranteed Loan Borrower Default Status." A meeting will be arranged by the Lender with the Borrower and FmHA to resolve the problem. Actions taken by the Lender with written concurrence of FmHA will include but are not limited to the following or any combination thereof:

1. Deferment of principal payments (subject to rights of any Holder(s)).

2. An additional temporary loan by the Lender to bring the account current.

3. Reamortization of or rescheduling the payments on the loan (subject to rights of any Holder(s)).

4. Transfer and assumption of the loan in accordance with the applicable Subpart of Title 7 CFR Part 1980.

5. Reorganization.

6. Liquidation.

7. Subsequent loan guarantees.

8. Changes in interest rates with FmHA's, Lender's, and the Holder'(s) approval; provided, such interest rate is adjusted proportionally between the guaranteed and unguaranteed portion of the loan and the type of rate remains the same.

9. Principal and interest write down in accordance with 7 CFR Part 1980, Subpart B, § 1980.125.

B. The Lender will negotiate in good faith in an attempt to resolve any problem to permit the Borrower to cure a default, where reasonable. In the case of Farm Ownership, Soil and Water, or Operating Loans, the Lender agrees that if liquidation of the account becomes imminent, the Lender will consider the Borrower for an Interest Rate Buydown under Exhibit C of Subpart B of 7 CFR, Part 1980, and request a determination of the Borrower's eligibility by FmHA. The Lender may not initiate foreclosure action on the loan until 60 days after a determination has been made with respect to the eligibility of the Borrower to participate in the Interest Rate Buydown Program.

C. The Lender has the option to repurchase the unpaid guaranteed portion of the loan from the Holder(s) within 30 days of written demand by the Holder(s) when: (a) the Borrower is in default not less than 60 days in payment of principal or interest due on the loan or (b) the Lender has failed to remit to the Holder(s) its pro rata share of any payment made by the Borrower or any loan subsidy within 30 days of its receipt thereof. The repurchase by the Lender will be for an amount equal to the unpaid guaranteed portion of the principal and accured interest less the Lender's servicing fee. The loan note guarantee will not cover the note interest to the Holder on the guaranteed loan(s) accuring after 90 days from the date of the demand letter to the Lender requesting the repurchase. Holder(s) will concurrently send a copy of demand to FmHA. The Lender will accept an assignment without recourse from the Holder(s) upon repurchase. The Lender is encouraged to repurchase the loan to facilitate the accounting for funds, resolve the problem, and to permit the borrower to cure the default, where reasonable. The Lender will notify the Holder(s) and FmHA of its decision.

D. If Lender does not repurchase as provided by paragraph C, FmHA will purchase from Holder(s) the unpaid principal balance of the guaranteed portion herein together with accrued interest (including any loan subsidy) to date of repurchase, within 30 days after written demand to FmHA from the Holder(s). The loan note guarantee will not cover the note interest to the Holder on the guaranteed loan(s) accruing after 90 days from the date of original demand letter of the Holder(s) to the Lender requesting the repurchase. Such demand will include a copy of the written demand made upon the Lender.

The Holder(s) or its duly authorized agent will also include evidence of its right to require payment from FmHA. Such evidence will consist of either the originals of the Loan Note Guarantee and note properly endorsed to FmHA or the original of the Assignment Guarantee Agreement properly assigned to FmHA without recourse including all rights, title, and interest in the loan. FmHA will be subrogated to all rights of Holder(s). The Holder(s) will include in its demand the amount due including unpaid principal, unpaid interest (including any loan subsidy) to date of demand and interest subsequently accruing from date of demand to proposed payment date. Unless otherwise agreed to by FmHA, such proposed payment will not be later than 30 days from the date of the demand.

The FmHA office serving the Borrower will promptly notify the Lender of the Holder'(s) demand for payment. The Lender will promptly provide the FmHA office servicing the Borrower with the information necessary for FmHA's determination of the appropriate amount due the Holder(s). Any discrepancy between the amount claimed by the Holder(s) and the information submitted by the Lender must be resolved before payment will be approved. FmHA will notify both parties who must resolve the conflict before payment by FmHA will be approved. Such a conflict will suspend the running of the 30 day payment requirement. Upon receipt of the appropriate information, the FmHA office servicing the Borrower will review the demand and submit it to the State Director for verification. After reviewing the demand, the State Director will transmit the request to the FmHA Finance Office for issuance of the appropriate check. Upon issuance, the Finance Office will notify the office serving the Borrower and State Director and remit the check(s) to the Holder(s).

E. Lender consents to the purchase by FmHA and agrees to furnish on request by FmHA a current statement certified by an appropriate authorized officer of the Lender of the unpaid principal and interest then owed by the Borrower on the loan and the amount due the Holder(s). Lender agrees that any purchase by FmHA does not change, alter or modify any of the Lender's obligations to FmHA arising from said loan or guarantee, nor does such purchase waive any of FmHA's rights against Lender, and FmHA will have the right to set-off against Lender all rights inuring to FmHA from the Holder against FmHA's obligation to Lender under the Loan Note Guarantee. To the extent FmHA holds a portion of a loan, loan subsidy will not be paid the Lender.

F. Servicing fees assessed by the Lender to a Holder are collectible only from payment installments received by the Lender from the Borrower. When FmHA repurchases from a Holder, FmHA will pay the Holder only the amounts due the Holder, FmHA will not reimburse the Lender for servicing fees assessed to a Holder and not collected from payments received from the Borrower. No servicing fee shall be charged FmHA and no such fee is collectible from FmHA.

G. Lender may also repurchase the guaranteed portion of the loan consistent with paragraph 10 of the Loan Note Guarantee.

XI. Liquidation. If the Lender concludes that liquidation of a guaranteed loan account is necessary because of one or more defaults or third party actions that the Borrower cannot or will not cure or eliminate within a reasonable period of time, a meeting will be arranged by the Lender with FmHA. When FmHA concurs with the Lender's conclusion or at any time concludes independently that liquidation is necessary, it will notify the Lender and the matter will be handled as follows:

The Lender will liquidate the loan unless FmHA, at its option, decides to carry out liquidation.

When the decision to liquidate is made, the Lender may proceed to purchase from Holder(s) the guaranteed portion of the loan. The Holder(s) will be paid according to the provisions in the Loan Note Guarantee or the Assignment Guarantee Agreement.

If the Lender does not purchase the guaranteed portion of the loan, FmHA will be notified immediately in writing. FmHA will then purchase the guaranteed portion of the loan from the Holder(s). If FmHA holds any of the guaranteed portion, FmHA will be paid first its pro rata share of the proceeds from liquidation of the collateral.

A. *Lender's proposed method of liquidation.* Within 30 days after the decision to liquidate, the Lender will advise FmHA in writing of its proposed detailed method of liquidation called a liquidation plan and will provide FmHA with:

1. Such proof as FmHA requires to establish the Lender's ownership of the guaranteed loan promissory note(s) and related security instruments.

2. Information lists concerning the Borrower's assets including real and personal property, fixtures, claims, contracts, inventory (including perishables), accounts receivable, personal and corporate guarantees, and other existing and contingent assets, advice as to whether or not each item

is serving as collateral for the guaranteed loan.

3. A proposed method of making the maximum collection possible on the indebtedness.

4. If the outstanding principal B&I loan balance including accrued interest is less than $200,000, the Lender will obtain an estimate of the market and potential liquidated value of the collateral. On B&I loan balances in excess of $200,000, and all other loans regardless of the outstanding principal balance, the Lender will obtain an independent appraisal report on all collateral securing the loan, which will reflect the current market value and potential liquidation value. The appraisal report is for the purpose of permitting the Lender and FmHA to determine the appropriate liquidation actions. Any independent appraiser's fee will be shared equally by FmHA and the Lender.

B. *FmHA's response to Lender's liquidation plan.* FmHA will inform the Lender in writing whether it concurs in the Lender's liquidation plan within 30 days after receipt of such notification from the Lender. If FmHA needs additional time to respond to the liquidation plan, it will advise the Lender of a definite time for such response. Should FmHA and the Lender not agree on the Lender's liquidation plan, negotiations will take place between FmHA and the Lender to resolve the disagreement. The Lender will ordinarily conduct the liquidation; however, should FmHA opt to conduct the liquidation, FmHA will proceed as follows:

1. The Lender will transfer to FmHA all rights and interests necessary to allow FmHA to liquidate the loan. In this event, the Lender will not be paid for any loss until after the collateral is liquidated and the final loss is determined by FmHA.

2. FmHA will attempt to obtain the maximum amount of proceeds from liquidation.

3. Options available to FmHA include any one or combination of the usual commercial methods of liquidation.

C. *Acceleration.* The Lender or FmHA, if it liquidates, will proceed as expeditiously as possible when acceleration of the indebtedness is necessary including giving any notices and taking any other legal actions required by the security instruments. A copy of the acceleration notice or other acceleration document will be sent to FmHA or the Lender, as the case may be.

D. *Liquidation:* Accounting and Reports. When the Lender conducts the liquidation, it will account for funds during the period of liquidation and will provide FmHA with periodic reports on the progress of liquidation, disposition of collateral, resulting costs and additional procedures necessary for successful completion of liquidation. The Lender will transmit to FmHA any payments received from the Borrower and/or pro rata share of liquidation or other proceeds, etc. when FmHA is the holder of a portion of the guaranteed loan using Form FmHA 1980–43, "Lender's Guaranteed Loan Payment to FmHA." When FmHA liquidates, the Lender will be provided with similar reports on request.

E. *Determination of Loss and Payment.* In all liquidation cases, final settlement will be made with the Lender after the collateral is liquidated. FmHA will have the right to recover losses paid under the guarantee from any party liable.

1. Form FmHA 449–30, "Loan Note Guarantee Report of Loss," will be used for calculations of all estimated and final loss determinations. Estimated loss payments may be approved by FmHA after the Lender has submitted a liquidation plan approved by FmHA. Payments will be made in accordance with applicable FmHA regulations.

2. When the Lender is conducting the liquidation, and owns any of the guaranteed portion of the loan, it may request a tentative loss estimate by submitting to FmHA an estimate of the loss that will occur in connection with liquidation of the loan. FmHA will agree to pay an estimated loss settlement to the Lender provided the Lender applies such amount due to the outstanding principal balance owed on the guaranteed debt. Such estimate will be prepared and submitted by the Lender on Form FmHA 449–30, using the basic formula as provided on the report except that the appraisal value will be used in lieu of the amount received from the sale of collateral. For Farm Ownership, Soil and Water, and Operating loans only, if it appears the liquidation period will exceed 90 days, the Lender will file an estimated loss claim. Once this claim is approved by FmHA, the Lender will discontinue interest accrual on the defaulted loan and the loss claim will be processed in accordance with the applicable FmHA regulations.

After the Report of Loss estimate has been approved by FmHA, and within 30 days thereafter, FmHA will send the original Report of Loss estimate to FmHA Finance Office for issuance of a Treasury check in payment of the estimated amount due the Lender.

After liquidation has been completed, a final loss report will be submitted on Form FmHA 449–30 by the Lender to FmHA.

3. After the Lender has completed liquidation, FmHA upon receipt of the final accounting and report of loss, may audit and will determine the actual loss. If FmHA has any questions regarding the amounts set forth in the final Report of Loss, it will investigate the matter. The Lender will make its records available to and otherwise assist FmHA in making the investigation. If FmHA finds any discrepancies, it will contact the Lender and arrange for the necessary corrections to be made as soon as possible. When FmHA finds the final Report of Loss to be proper in all respects, it will be tentatively approved in the space provided on the form for that purpose.

4. When the Lender has conducted liquidation and after the final Report of Loss has been tentatively approved:

a. If the loss is greater than the estimated loss payment, FmHA will send the original of the final Report of Loss to the Finance Office for issuance of a Treasury check in payment of the additional amount owed by FmHA to the Lender.

b. If the loss is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from date of payment.

5. If FmHA has conducted liquidation, it will provide an accounting and Report of Loss to the Lender and will pay the Lender in accordance with the Loan Note Guarantee.

6. In those instances where the Lender has made authorized protective advances, it may claim recovery for the guaranteed portion of any loss of monies advanced as protective advances and interest resulting from such protective advances as provided above, and such payment will be made by FmHA when the final Report of Loss is approved.

F. *Maximum amount of interest loss payment.* Notwithstanding any other provisions of this agreement, the amount payable by FmHA to the Lender cannot exceed the limits set forth in the Loan Note Guarantee. If FmHA conducts the liquidation, loss occasioned by accruing interest (including any loan subsidy) will be covered by the guarantee only to the date FmHA accepts this responsibility. Loss occasioned by accruing interest (including subsidy) will be covered to the extent of the guarantee to the date of final settlement when the liquidation is conducted by the Lender provided it proceeds expeditiously with the liquidation plan approved by FmHA, except for Farm Ownership, Soil and Water, and Operating loans only, when the Lender files an estimated loss claim. For Farm Ownership, Soil and Water and Operating loans, only, when the Lender files an estimated loss claim, the Lender will discontinue interest accrual on the defaulted loan when the estimated loss claim is approved by FmHA. The balance of accrued interest (including any loan subsidy) payable to the Lender, if any, will be calculated on the final Report of Loss form.

G. *Application of FmHA loss payment.* The estimated loss payment shall be applied as of the date of such payment. The total amount of loss payment remitted by FmHA will be applied by the Lender on the guaranteed portion of the loan debt. However, such application does not release the Borrower from liability. At time of final loss settlement the Lender will notify the Borrower that the loss payment has been so applied. In all cases a final Form FmHA 449–30 prepared and submitted by the Lender must be processed by FmHA in order to close out the files at the FmHA Finance Office.

H. *Income from collateral.* Any net rental or other income that has been received by the Lender from the collateral will be applied on the guaranteed loan debt.

I. *Liquidation costs.* Certain reasonable liquidation costs will be allowed during the liquidation process. These liquidation costs will be submitted as a part of the liquidation plan. Such costs will be deducted from gross proceeds from the disposition of collateral unless the costs have been previously determined by the Lender (with FmHA written concurrence) to be protective advances. If changed circumstances after submission of the liquidation plan require a revision of liquidation costs, the Lender will procure FmHA's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the Lender will be allowed. In-house expenses include, but are not limited to, employees' salaries, staff lawyers, travel and overhead.

J. *Foreclosure.* The parties owning the guaranteed portion and unguaranteed portions of the loan will join to institute foreclosure action or, in lieu of foreclosure, to take a deed of conveyance to such parties. When the conveyance is received and liquidated, net proceeds will be applied to the guaranteed loan debt.

K. *Payment.* Such loss will be paid by FmHA within 60 days after the review of the accounting of the collateral.

XII. Protective Advances. Protective advances must constitute an indebtedness of the Borrower to the Lender and be secured by the security instrument(s). FmHA written authorization is required on all protective advances in excess of $500. Protective advances include, but all not limited to, advances made for taxes, annual assessments, ground rent, hazard or flood insurance premiums affecting the collateral, and other expenses necessary to preserve or protect the security. Attorney fees are not a protective advance.

XIII. Additional Loans or Advances.

The Lender will not make additional expenditures or new loans without first obtaining the written approval of FmHA even though such expenditures or loans will not be guaranteed.

XIV. Future Recovery.

After a loan has been liquidated and a final loss has been paid by FmHA, any future funds which may be recovered by the Lender, will be pro-rated between FmHA and the Lender. FmHA will be paid such amount recovered in proportion to the percentage it guaranteed for the loan and the Lender will retain such amounts in proportion to the percentage of the unguaranteed portion of the loan.

XV. Transfer and Assumption Cases.

Refer to the applicable Subpart of Title 7 of CFR Part 1980.

If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor-debtor (including personal guarantees) is released from personal liability, the Lender, if it holds the guaranteed portion, may file an estimated Report of Loss on Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to recover its pro rata share of the actual loss at that time. In completing Form FmHA 449–30, the amount of the debt assumed will be entered on line 24 as Net Collateral (Recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption, if not assumed by the Transferee, will be entered on Form FmHA 449–30, line 13 and 14.

XVI. Bankruptcy.

A. The Lender is responsible for protecting the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings. When the loan is involved in a reorganization bankruptcy proceeding under Chapters 11, 12 or 13 of the Bankruptcy Code, payment of loss claims may be made as provided in this paragraph XVI. For a Chapter 7 bankruptcy or a liquidation plan in a Chapter 11 bankruptcy, only paragraphs XVI B3 and B6 are applicable.

B. *Loss Payments.*

1. *Estimated Loss Payments.*

a. If a borrower has filed for protection under a reorganization bankruptcy, the Lender will request a tentative estimated loss payment of accrued interest and principal written off. This request can only be made after the bankruptcy plan is confirmed by the court. Only one estimated loss payment is allowed during the reorganization bankruptcy. All subsequent claims during the reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by FmHA, at its option, in accordance with any court approved changes in the reorganization plan. At the time the performance under the confirmed reorganization plan has been completed, the Lender is responsible for providing FmHA with the documentation necessary to review and adjust the estimated loss claim to (a) reflect the actual principal and interest reduction on any part of the guaranteed debt determined to be unsecured and (b) to reimburse the Lender for any court ordered interest rate reduction during the term of the reorganization plan.

b. The Lender will use Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment and to revise estimated loss payments during the course of the reorganization plan. The estimated loss claim as well as any revisions to this claim will be accompanied by applicable legal documentation to support the claim.

c. Upon completion of the reorganization plan, the lender will complete Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status," and forward this form to the Finance Office.

2. *Interest Loss Payments.*

a. Interest loss payments sustained during the period of the reorganization plan will be processed in accordance with paragraph XVI B1.

b. Interest loss payments sustained after the reorganization plan is completed will be processed annually when the Lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

c. Form FmHA 449–30 will be completed to compensate the Lender for the difference in interest rates specified on the Loan Note Guarantee or Interest Rate Buydown Agreement and the rate of interest specified by the bankruptcy court.

3. *Final Loss Payments.*

a. Final loss payments will be processed when the loan is liquidated.

b. If the loan is paid in full without an additional loss, the Finance Office will close out the estimated loss account at the time notification of payment in full is received.

4. *Payment Application.* The Lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guranteed portion of the debt. In the event the bankruptcy court attempts to direct the payments to be applied in a different manner, the Lender will immediately notify the FmHA servicing office.

5. *Overpayments.* Upon completion of the reorganization plan, the Lender will provide FmHA with the documentation necessary to determine whether the estimated loss paid equals the acutal loss sustained. If the actual loss sustained, as a result of the reorganization, is greater than the estimated loss payment, the Lender will submit a revised estimated loss in order to obtain payment of the additional amount owed by FmHA to the Lender. If the actual loss payment is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from the date of the payment of the estimated loss.

6. *Protective Advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, as a result of prior liquidation action, these protective advances and accrued interest will be entered on Form FmHA 449–30.

XVII. Debt Write-down. For Farm Ownership, Soil and Water, and Operating loans only, refer to Title 7 of CFR Part 1980, Subpart B, § 1980.125. The maximum amount of loss payment associated with a loan/line of credit agreement which has been written down will not exceed the percent of the guarantee multiplied by the difference between the outstanding principal and interest balance of the loan/line of credit before the write-down and the outstanding balance of the loan/line of credit after the write-down. The Lender will use Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment to receive its pro-rata share of any loss sustained.

XVIII. Other Requirements.

This agreement is subject to all the requirements of the applicable Subpart of Title 7 CFR Part 1980, and any future amendments of these regulations not inconsistent with this agreement. Interested parties may agree to abide by future FmHA regulations not inconsistent with this agreement.

XIX. Execution of Agreements.

If this agreement is executed prior to the execution of the Loan Note Guarantee, this agreement does not impose any obligation upon FmHA with respect to execution of such contract. FmHA in no way warrants that such a contract has been or will be executed.

XX. Notices.

All notices and actions will be initiated through FmHA for _____ (State) with mailing address at the date of this instrument _____

Dated this ——— day of ———, 19—

LENDER:

By _____

Title _____

United States of America
Farmers Home Administration

By _____

Title _____

Attest: ——— (Seal)

11. Appendix E to Subpart A is revised to read as follows:

Appendix E to Subpart A—Lender's Agreement (Line of Credit)

USDA-FmHA
Form FmHA 1980–38
(Rev. 1–89)
FORM APPROVED
OMB No. 0575–0079

Type of Loan: ☐ OL ☐ EL or ☐ EE
FmHA Loan ID No. ———
Applicable 7 CFR Part 1980, Subpart ———

———
(Lender) of ———
has established a line of credit to ———
(Borrower) for the fiscal period ending ———
, 19—,
for the purpose of ———
in the maximum sum of $——— as evidenced
by a "Line of Credit Agreement" dated ———
, 19—.

The United States of America, acting through Farmers Home Administration (FmHA) has entered into a "Contract of Guarantee (Line of Credit)" (Form FmHA 1980–27) or has issued a "Conditional Commitment for Contract of Guarantee (Line of Credit)" (Form FmHA 1980–15) to enter into a Contract of Guarantee with the Lender applicable to such line of credit to participate in a percentage of any loss on the loan advances not to exceed ———% of the amount of the principal and any accrued interest. The terms of the Contract of Guarantee are controlling. As a condition for obtaining a guarantee of the line of credit advances the Lender enters into this agreement.

The Parties agree:

I. The maximum loss covered under the Contract of Guarantee will not exceed ——— percent of the principal and accrued interest owed on any Operating Loan, Emergency Livestock Loan or Economic Emergency Loan advances made within the line of credit ceiling and the terms and conditions of the Contract of Guarantee.

II. *Full Faith and Credit.*

The Contract of Guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which the Lender has actual knowledge at the time it became such Lender or which Lender participates in or condones. Any line of credit agreement which provides for the payment of interest on interest shall not be guaranteed. Any Contract of Guarantee attached to or relating to the line of credit agreement which provides for the payment of interest on interest is void. The Contract of Guarantee will be unenforceable by the Lender to the extent any loss is occasioned by violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which FmHA acquires knowledge of the foregoing. Any losses will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by FmHA in its Conditional Commitment for Contract of Guarantee Line of Credit. Negligent servicing is defined as the failure to perform those services which a reasonably prudent Lender would perform in servicing its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent Lender would act up to the time of loan maturity or until a final loss is paid.

III. *Lender's Sale of Guaranteed Line of Credit by Participation.*

A. The Lender may obtain participation in its line of credit under its normal operating procedures. The Lender is required to hold in its own portfolio or retain a minimum of 10 percent of the total guaranteed line of credit amount. The amount required to be retained must be of the unguaranteed portion of the line of credit and cannot be participated to another Lender. The Lender may obtain participation of only the unguaranteed portion of its line of credit in excess of the 10 percent minimum under its normal operations procedures. Participation means a sale of an interest in the line of credit in which the Lender retains the line of credit agreement (and note, if one exists), collateral securing the line of credit, and all responsibility for servicing and liquidation of the line of credit. Participation with a lender by any entity does not make that entity a lender.

B. The Lender may retain or sell any amount of the unguaranteed portion(s) of the line(s) of credit as provided in this section only through participation. However, the Lender cannot participate any amount of the line(s) of credit to the applicant or Borrower or members of their immediate families, their officers, directors, stockholders, or owners, or any parent, subsidiary or affiliate. If the Lender desires to sell all or part of the guaranteed portion of the line of credit through participation at or subsequent to execution of the line of credit agreement, such line of credit must not be in default as set forth in the terms of the line of credit agreement(s) (and note(s), if any exist). The Lender will retain the responsibility for servicing and liquidation of the line of credit. Participation with a lender by any entity does not make the entity a holder.

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the 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 this burden estimate or any other aspect of this collection of information including suggestions for reducing this burden to, Department of Agriculture, Clearance Officer, OIRM, Room 404–W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0575–0079), Washington, D.C. 20503.

IV. The Lender agrees funds advanced under the line of credit will be used for the purposes authorized in either Subpart B, C or F of Title 7 CFR, Part 1980 as applicable in accordance with the terms of Form FmHA 1980–15.

V. The Lender certifies that none of its officers or directors, stockholders, or other owners (except stockholders in a Farm Credit Bank, other Farm Credit System institution with direct lending authority that have normal stockshare requirements for participation) has a substantial financial interest in the Borrower. The Lender certifies that neither the Borrower nor its officers or directors, stockholders or other owners has a substantial financial interest in the Lender. If the Borrower is a member of the board of directors or officer of a Farm Credit Bank or other Farm Credit System institution with direct lending authority, the Lender certifies that an FCS institution on the next highest level will independently process the loan request and will act as the Lender's agent in servicing the account.

VI. The Lender certifies that it has no knowledge of any material adverse change, financial or otherwise, in the Borrower, the Borrower's business or any parent, subsidiaries, or affiliates since it requested a Contract of Guarantee.

VII. Lender certifies that the Line of Credit Agreement and/or loan instruments concurred in by FmHA has been or will be signed with the Borrower.

VIII. If an Operating Loan line of credit is guaranteed under Subpart B of 7 CFR, Part 1980, Lender certifies it has paid the required guarantee fee.

IX. *Servicing.*

A. The Lender will service the entire line of credit and will remain mortgagee and/or secured party of record. The entire line of credit will be secured by the same security with equal lien priority of the guaranteed and unguaranteed portions of the line of credit. The unguaranteed portion of a line of credit will not be paid first nor given any preference or priority over the guaranteed portion of the line of credit.

B. It is the Lender's responsibility to see that all construction is properly planned before any work proceeds; that any required permits, licenses or authorizations are obtained from the appropriate regulatory agencies; that the Borrower has obtained contracts through acceptable procurement procedures; that periodic inspections during construction are made and that FmHA's concurrence on the overall development schedule is obtained.

C. Lender's servicing responsibilities include, but are not limited to:

1. Obtaining compliance with the covenants and provisions in the line of credit agreement (and note, if one exists), security instruments, and any supplemental agreements. None of the aforesaid instruments will be altered without FmHA's prior written concurrence. The Lender must service the line of credit in a reasonable prudent manner.

2. Receiving all payments on principal and interest on the line of credit advances as they fall due. The line of credit may be reamortized, rescheduled or (for Operating Loan lines of credit only) written down only with FmHA's written concurrence.

3. Inspecting the collateral as often as necessary to properly service the line of credit.

4. Assuring that adequate insurance is maintained. This includes hazard insurance obtained and maintained with a loss payable clause in favor of the Lender as the mortgagee or secured party.

5. Assuring that: taxes, assessment or ground rents against or affecting collateral are paid; the line of credit and collateral are protected in foreclosure, bankruptcy, receivership, insolvency, condemnation, or other litigation; insurance loss payments; condemnation awards, or similar proceeds

are applied on debts in accordance with lien priorities on which the guarantee was based, or to rebuilding or otherwise acquiring needed replacement collateral with the written approval of FmHA; proceeds from the sale or other disposition of collateral are applied in accordance with the lien priorities on which the guarantee is based, except that proceeds from the disposition of collateral such as machinery, equipment, furniture or fixtures, may be used to acquire property of similar nature in value up to $—— without written concurrence of FmHA; the Borrower complies with all laws and ordinances applicable to the line of credit, the collateral and/or operation of the farm or ranch.

6. Assuring that if personal or corporate guarantees are part of the collateral, current financial statements from such guarantors will be obtained which are not over 90 days old for both types of guarantees for operating Loan lines of credit, and for corporate guarantees for Emergency Livestock and Economic Emergency lines of credit. Financial statements of personal guarantors for Emergency Livestock and Economic Emergency lines of credit will not be over 60 days old. In the case of guarantees secured by collateral, assuring the security is properly maintained.

7. Obtaining the lien coverage and line priorities specified by the Lender and agreed to by FmHA, properly recording or filing lien or notice instruments to obtain or maintain such lien priorities during the existence of the guarantee by FmHA.

8. Assuring that the borrower obtains marketable title to the collateral.

9. Assuring that the Borrower (any party liable) is not released from liability for all or any part of the line of credit, except in accordance with FmHA regulations.

10. Providing FmHA Finance Office with loan status reports annually as of December 31 on Form FmHA 1980–41, "Guaranteed Loan Status Report".

11. Obtaining from the Borrower periodic financial statements under the following schedule:

Lender is responsible for analyzing the financial statements, taking any servicing actions needed, and providing copies of statements and record of actions to the County Supervisor.

12. Monitoring loan funds to assure they will not be used for any purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity. Failure to do so will be considered negligent servicing and any loss attributed to such negligent servicing will not be paid by FmHA, as explained in 7 CFR Part 1940, Subpart G, Exhibit M.

D. For Operating Loan lines of credit only, the Lender shall participate in any farm credit mediation program of a state in accordance with the rules of that system and 7 CFR, Part 1980, Subpart B, § 1980.126

X. *Defaults.*

A. The Lender will notify FmHA when a Borrower is thirty (30) days past due on a payment and is unlikely to bring its account current within sixty (60) days, or if the Borrower has not met its responsibilities of providing the required financial statements to the Lender or is otherwise in default. The Lender will notify FmHA of the status of a Borrower's default on Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status". A meeting will be arranged by the Lender with the Borrower and FmHA to resolve the problem. Actions taken by the Lender with concurrence of FmHA may include but are not limited to any curative actions contained in either Subpart B, C or F as applicable, or liquidation.

B. The Lender will negotiate in good faith in an attempt to resolve any problem and to permit the Borrower to cure a default, where reasonable. The Lender agrees that if liquidation of the account becomes imminent, the Lender will consider the Borrower of an Operating Loan Line of Credit for an Interest Rate Buydown under Exhibit D of Subpart B of 7 CFR, Part 1980, and request a determination of the Borrower's eligibility by FmHA. The Lender may not initiate foreclosure action on the line of credit until 60 days after a determination has been made with respect to the eligibility of the Borrower to participate in the Interest Rate Buydown Program.

XI. *Liquidation.*

If the Lender concludes that liquidation of a guaranteed line of credit account is necessary because of one or more defaults or third party actions that the Borrower cannot or will not cure or eliminate within a reasonable period of time, a meeting will be arranged by the Lender with FmHA. When FmHA concurs with the Lender's conclusion or at any time concludes independently that liquidation is necessary, it will notify the Lender and the matter will be handled as follows:

The Lender will liquidate the loan unless FmHA, at its option decides to carry out liquidation.

A. *Lender's proposed method of liquidation.* Within 30 days after the decision to liquidate is made, the Lender will advise FmHA of its proposed method of liquidation and will provide FmHA with.

1. Such proof as FmHA requires to establish the Lender's ownership of the guaranteed line of credit agreement(s) and related security instruments.

2. Information lists concerning the Borrower's assets including real and personal property, fixtures, claims, contracts, inventory (including perishables), accounts receivable, personal and corporate guarantees, and other existing and contingent assets, advice as to whether or not each item is serving as collateral for the guaranteed line of credits.

3. A proposed method making the maximum collection possible on the indebtedness.

4. Lender will obtain an independent appraisal report on all collateral securing the loan, which will reflect the current market value and potential liquidation value. The appraisal report is for the purpose of permitting the Lender and FmHA to determine the appropriate liquidation actions. Any independent appraiser's fee will be shared equally by FmHA and the Lender.

B. *FmHA's response to Lender's liquidation proposal.* FmHA will inform the Lender whether it concurs in the Lender's proposed method of liquidation within 30 days after receipt of such notification from the Lender. If FmHA needs additional time to respond to the liquidation plan, it will advise the Lender of a definite time for such response. Should FmHA and the Lender not agree on the Lender's liquidation proposal, negotiation will take place between FmHA and the Lender to resolve the disagreement. The Lender will ordinarily conduct the liquidation; however, should FmHA opt to conduct the liquidation, FmHA will proceed as follows:

1. The Lender will transfer to FmHA all its rights and interests necessary to allow FmHA to liquidate the loan. In this event, the Lender will not be paid for any loss until after the collateral is liquidated and the final loss is determined by FmHA.

2. FmHA will attempt to obtain the maximum amount of proceeds from liquidation.

3. Options available to FmHA include any one or combination of the usual commercial methods of liquidation.

C. *Acceleration.* The Lender or FmHA, if it liquidates, will proceed as expeditiously as possible when acceleration of the indebtedness is necessary including giving any notices and taking any other legal actions required by the security instruments. A copy of the acceleration notice or other acceleration document will be sent to FmHA or the Lender, as the case may be.

D. *Liquidation:* Accounting and Reports. When the Lender conducts the liquidation, it will account for funds during the period of liquidation and will provide FmHA with periodic reports on the progress of liquidation, disposition of collateral, resulting costs, and additional procedures necessary for successful completion of liquidation. When FmHA liquidates, the Lender will be provided with similar reports on request.

E. *Determination of Loss and Payment.* In all liquidation cases, a final settlement will be made with the Lender after the collateral is liquidated. FmHA will have the right to recover losses paid under the guarantee from any party liable.

1. From FmHA 449–30, "Loan Note Guarantee Report of Loss," will be used for calculations of all estimated and final determinations. Estimated loss payments may be approved by FmHA after the Lender has submitted a liquidation plan approved by FmHA. Payment will be made in accordance with the applicable FmHA regulations.

2. When the Lender is conducting the liquidation, it may request a tentative loss estimate by submitting to FmHA an estimate of the loss that will occur in connection with liquidation of the line of credit. FmHA will agree to pay an estimated loss settlement to the Lender provided the Lender applies such amount due to the outstanding principal balance owed on the guaranteed debt. Such estimate will be prepared on Form FmHA 449–30, using the basic formula as provided in the report except that the appraisal value will be used in lieu of the amount received from the sale of collateral. For Operating Loan lines of credit only, if it appears the liquidation period will exceed 90 days, the

Lender will file an estimated loss claim. Once this claim is approved by FmHA, the Lender will discontinue interest accrual on the defaulted loan and the loss claim will be promptly processed in accordance with the applicable FmHA regulations.

After the Report of Loss Estimate has been approved by FmHA, and within 30 days thereafter, FmHA will send the original Report of Loss Estimate to FmHA Finance Office for issuance of a Treasury check in payment of the estimated amount due the Lender.

After liquidation has been completed, a final loss report will be submitted on Form FmHA 449–30 by the Lender to FmHA.

3. After the Lender has completed liquidation FmHA, upon receipt of the final accounting and report of loss, may audit and will determine the actual loss. If FmHA has any questions regarding the amounts set forth in the Final Report of Loss, it will investigate the matter. The Lender will make its records available to and otherwise assist FmHA in making the investigation. If FmHA finds any discrepancies, it will contact the Lender and arrange for the necessary corrections to be made as soon as possible. When FmHA finds the Final Report of Loss to be proper in all respects, it will be tentatively approved in the space provided on the form for that purpose.

4. When the Lender has conducted liquidation and after the Final Report of Loss has been tentatively approved:

a. If the loss is greater than the estimated loss payment, FmHA will send the original of the Final Report Loss to the Finance Office for issuance of a Treasury check in payment of the additional amount owed by FmHA to the Lender.

b. If the loss is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from date of payment.

5. If FmHA has conducted liquidation, it will provide an accounting and report of loss to the Lender and will pay the Lender in accordance with the Contract of Guarantee.

6. In those instances where the Lender has made authorized protective advances, it may claim recovery for the guaranteed portion of any loss of monies advanced as protective advances and interest resulting from such protective advances as provided above, and such payment will be made by FmHA when the final Report of Loss is approved.

F. *Maximum amount of interest loss payment.* Notwithstanding any other provisions of this agreement, the amount payable by FmHA to the Lender cannot exceed the limits set forth in the Contract of Guarantee. If FmHA conducts the liquidation, loss occasioned by accruing interest will be covered by the guarantee only to the date FmHA accepts this responsiblity. Loss occasioned by accruing interest will be covered to the extent of the guarantee to the date of final settlement when the liquidation is conducted by the Lender provided it proceeds expeditiously with the liquidation plan approved by FmHA, except for Operating Loan lines of credit only, when the Lender files an estimated loss claim. For Operating Loan lines of credit only, when a Lender files as estimated Loss claim, the Lender will discontinue interest accrual on the defaulted loan when the estimated Loss claim is approved by FmHA. The balance of accrued interest payable to the Lender, if any, will be calculated on the final Report of Loss form.

G. *Application of FmHA loss payment.* The estimated loss payment shall be applied as of the date of such payment. The amount of the loss payment remitted by FmHA will be applied by the Lender on the guaranteed loan debt. However, such application does not release the Borrower from liability. At time of final loss settlement the Lender will notify the Borrower that the loss payment has been so applied. In all cases a final Form FmHA 449–30 prepared and submitted by the Lender must be processed by FmHA in order to close out the files at the FmHA Finance Office.

H. *Income from collateral.* Any net rental or other income that has been received by the Lender from the collateral will be applied on the guaranteed loan debt.

I. *Liquidation costs.* Certain reasonable liquidation costs will be allowed during the liquidation process. These liquidation costs will be submitted as a part of the liquidation plan. Such costs will be deducted from gross proceeds from the disposition of collateral unless the costs have been previously determined by the Lender (with FmHA written concurrence) to be protective advances. If changed circumstances after submission of the liquidation plan require a revision of liquidation costs, the Lender will procure FmHA's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the Lender will be allowed. In-house expenses include, but are not limited to, employees' salaries, staff lawyers, travel and overhead.

J. *Payment.* Such loss will be paid by FmHA within 60 days after the review of the account of the collateral.

XII. *Protective advances.*

Protective advances must constitute an indebtedness of the Borrower to the Lender and be secured by the security instrument(s). FmHA written authorization is required on all protective advances in excess of $500. Protective advances include, but are not limited to, advances for taxes, annual assessments, ground rent, hazard or flood insurance premiums effecting the collateral, and other expenses necessary to preserve or protect the security. Attorney fees are not a protective advance.

XIII. *Additional Loans or Advances.*

The Lender will not make additional expenses or new lines of credit or loans without first obtaining the written approval of FmHA even though such expenditures or lines of credit or loans will not be guaranteed.

XIV. *Future Recovery.*

After a loan has been liquidated and a final loss has been paid by FmHA, any future funds which may be recovered by the Lender, will be pro-rated between FmHA and the Lender. FmHA will be paid such amount recovered in proportion to the percentage it guaranteed for the loan and the Lender will retain such amount in proportion to the percentage of the unguaranteed portion of the loan.

XV. *Transfer and Assumption Cases.*

Refer to Subpart B, C or F of Title 7 of CFR, Part 1980. If a loss will occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor-debtor (including personal guarantees) is released from personal liability, the Lender may file an estimated Report of Loss on Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to recover its pro rata share of the actual loss at that time. In completing Form FmHA 449–30, the amount of the debt assumed will be entered on line 24 as Net Collateral (Recovery). Approved protective advances and accured interest thereon made during the arrangement of a transfer and assumption, if not assumed by the Transferee, will be entered on Form FmHA 449–30, lines 13 and 14.

XVI. *Bankruptcy.*

A. The Lender is responsible for protecting the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings. If the loan is involved in a reorganization bankruptcy proceeding under Chapter 11, 12 or 13 of the Bankruptcy Code, payment of loss claims may be made as provided in this paragraph XVI. For a Chapter 7 bankruptcy or a liquidation plan in a Chapter 11 bankruptcy, only paragraphs XVI B3 and B6 are applicable.

B. *Loss Payments.*

1. *Estimated Loss Payments:*

a. If a borrower has filed for protection under a reorganization bankruptcy, the Lender will request a tentative estimated loss payment of accrued interest and principal written off. This request can only be made after the bankruptcy plan is confirmed by the court. Only one estimated loss payment is allowed during the reorganization bankruptcy. All subsequent claims during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by FmHA, at its option, in accordance with any court approved changes in the reorganization plan. At the time the performance under the confirmed reorganization plan has been completed, the Lender is responsible for providing FmHA with the documentation necessary to review and adjust the estimated loss claim to (a) reflect the actual principal and interest reduction on any part of the guaranteed debt determined to be unsecured and (b) to reimburse the Lender for any court ordered interest rate reduction during the term of the reorganization plan.

b. The Lender will use Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment and to revise estimated loss payments during the course of the reorganization plan. The estimated loss claim as well as any revisions to this claim will be accompanied by applicable legal documentation to support the claim.

c. Upon completion of the reorganization plan, the Lender will complete Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status," and forward this form to the Finance Office.

2. *Interest Loss Payment:*

a. Interest loss payments sustained during the period of the reorganization plan will be processed in accordance with paragraph XVI B1.

b. Interest loss payments sustained after the reorganization plan is completed will be processed annually when the Lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

c. For FmHA 449–30 will be completed to compensate the Lender for the difference in interest rates specified on the Loan Note Guarantee or Interest Rate Buydown Agreement and the rate of interest specified by the bankdruptcy court.

3. *Final Loss Payments:*

a. Final loss payments will be processed when the loan is liquidated.

b. If the loan is paid in full without an additional loss, the Finance Office will close out the estimated loss account at the time notification of payment is received.

4. *Payment Application.* The Lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of debt. In the event the bankruptcy court attempts to direct the payments to be applied in a different manner, the Lender will immediately notify the FmHA servicing office.

5. *Overpayments.* Upon completion of the reorganization plan, the Lender will provide FmHA with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained, as a result of the reorganization, is greater than the estimated loss payment, the Lender will submit a revised estimated loss in order to obtain payment of the additional amount owed by FmHA to the Lender. If the actual loss payment is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from the date of the payment of the estimated loss.

6 *Protective Advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, as a result of prior liquidation action, these protective advances and accrued interest will be entered on Form FmHA 449–30.

XVII. *Debt Write-down.* For Operating Loan lines of credit only, refer to Title 7 of CFR, Part 1980, Subpart B, 1980.125. The maximum amount of loss payment associated with a loan/line of credit agreement which has been written down will not exceed the precent of the guarantee multiplied by the difference between the outstanding principal and interest balance of the loan/line of credit before the write-down and the outstanding balance of the loan/line of credit after the write-down. The Lender will use Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment to receive its pro-rata share of any loss sustained.

XVII. *Debt Write-down.* For Operating Loan lines of credit only, refer to Title 7 of CFR, Part 1980, Subpart B, 1980.125. The maximum amount of loss payment associated with a loan/line if credit agreement which has been written down will not exceed the percent of the guarantee multiplied by the difference between the outstanding principal and interest balance of the loan/line of credit before the write-down and the outstanding balance of loan/line of credit after the write-down. The Lender will use Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment to receive its pro-rata share of any loss sustained.

XVIII. *Other Requirements.* This agreement is subject to all the requirements of either Subpart A, B, C or F of Title 7 CFR, Part 1980 as applicable, and any future amendment of these regulations, or other FmHA regulations, not inconsistent with this agreement.

XIX. *Execution of Agreement.* If this agreement is executed prior to the execution of the Contract of guarantee, this agreement does not impose any obligation upon FmHA with respect to execution of such contract. FmHA in no way warrants that such a contract has been or will be executed.

XX. *Notices.* All notices and actions will be initiated through the FmHA County Supervisor for ——— (County) ———. (State with mailing address at the date of this instrument):

—. ———

Dated this ——— day of ———, 19 —.

LENDER:

ATTEST: ———. SEAL

By ———

Title ———

UNITED STATES OF AMERICA

Department of Agriculture

Farmers Home Administration

By ———

Title ———

11A. Appendix H to Subpart A is revised to read as follows:

Appendix H to Subpart A—Interest Rate Buydown Agreement

USDA–FmHA

Form FmHA 1980–58

(Rev. 1–89)

☐Loan Note Guarantee

☐Contract of Guarantee

Type of Loan ———

7 CFR Part 1980

Subpart B

FORM APPROVED

OMB NO. 0575–0079

State ———

County ———

Date of Note ———

Borrower ———

FmHA Loan ID No. ———

Lender ———

Lender's IRS ID Tax No. ———

Lender's Address———

Principal Amount of Loan/Line of Credit Ceiling ———

The principal amount of loan or line of credit is evidenced by ——— note(s) or line of credit agreement(s) described below. This instrument is attached to note or line of credit agreement dated ——— in the face amount of $ ——— and is number ——— of ———.

Copies of the lender's Loan Note Guarantee, or Contract of Guarantee for a line(s) of credit, and any Assignment Guarantee Agreement, if applicable (Loan Note Guarantee cases only) are attached to this Agreement as a part of it.

Lender's Note No.	Note/Line of Credit Agreement	Interest Rate (If variable calculate in accordance with Part 1980, Subpart B Exhibit D, Paragraph IV I)	Lender Write Down	FmHA Interest Rate Buydown

This agreement is effective beginning ——— and expires on ———.

In consideration of the subject lender's write down of interest rate on the above borrower's account by ——— percentage points, the United States of America, acting through the Farmers Home Administration of the United States Department of Agriculture (called FmHA) pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) agrees that in accordance with and subject to the conditions and requirements in this agreement it will reimburse the lender for ——— percentage points of the write down. The full amount of the interest rate buydown made by FmHA to the lender will be passed on to the borrower.

Public reporting burden for this collection of information is estimated to average 5 minutes per response, including the 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 this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to, Department of Agriculture, Clearance Officer, OIRM, Room 404–W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0575–0075), Washington, D.C. 20503.

CONDITIONS OF INTEREST RATE BUYDOWN

1. Buydown Rates

The buydown rate set forth in this agreement will remain constant during the term of this agreement. If a 95 percent guarantee has been issued to the lender by FmHA under Exhibit E to 7 CFR Part 1980, Subpart B, the percentage of this interest rate reduction made by the lender will be permanent.

2. Interest Rate Buydown Payments

FmHA's payments made in connection with the interest rate buydown will be calculated using 360 or 365 day year method on a declining balance. The lender will indicate on Form FmHA 1980–19, "Guaranteed Loan Closing Report," the preferred method, which may not change once established.

3. Annual Rate Buydown Claims and Payments

The intial Interest Rate Buydown claim will be prepared by the lender using form FmHA 1980–24, "Request Interest Rate Buydown/Subsidy Payment to Guaranteed Loan Lender," on or about a date 12 months from the date of this agreement, unless it is the first or last claim which may be submitted in

accordance with the first and last due date on the borrower's promissory note. Subsequent claims will be filed by the lender on or about a date 12 months thereafter but no later than the anniversary date of filing of the initial interest rate buydown claim. Upon full payment of the note or line of credit agreement the lender will immediately prepare Form FmHA 1980-24 and mail a copy to the FmHA serving office.

4. When Interest Rate Buydown Payments Cease

For Loan Note Guarantee cases, when FmHA purchases a portion of a loan, interest buydown payments on that portion will cease. Interest rate buydown payments will cease upon termination of the Loan Note Guarantee or Contract of Guarantee, upon reaching the expiration date set forth in this agreement or upon cancellation by the Government. Interest buydown payments shall cease upon the assumption/transfer of the loan if the transferee was not liable for the debt at the time the buydown was granted. The lender shall complete Form FmHA 1980-24, "Request Interest Rate Buydown/Subsidy Payment to Guaranteed Loan Lender," to request payment for the buydown/subsidy through the date of the transfer or assumption of the guaranteed loan.

5. Cash Flow

The lender certifies that the interest rate reduction to the borrower results in a reduced, equally amortized payment schedule for the term of this agreement so that the borrower's operation projects a positive cash flow on all income and expenses including debt service for the term of this agreement. A typical plan of operation must show that a positive cash flow can be expected during the initial 24 month buydown period. For those loans/lines of credit with terms less than 24 months, then the operation must show a positive cash flow for the term of the loan/line of credit. In cases where the term of the loan or line of credit agreement exceeds the term of this agreement, the lender certifies that the borrower is projected to have a positive cash flow on all income and expenses including debt service after this agreement expires. Cash flow and positive cash flow are defined in Exhibit D or Exhibit E to Subpart B of 7 CFR 1980, as applicable, and must be calculated in accordance with § 1980.113(d)(8) of Subpart B of Part 1980.

6. Cancellation of Interest

Lender certifies that the amount of interest written down on subject borrower's account will be permanently canceled as it becomes due and no attempt will be made to collect that portion of the debt.

7. Repurchase of loans presently guaranteed by FmHA eligible for interest rate buydown. (Loan Note Guarantee Cases Only). See also item 10 of Form FmHA 449-36.

In the case of converting a guaranteed loan without an interest rate buydown to one with such a buydown, the lender must obtain the holder's consent in writing. If the holder does not consent to the interest rate reduction proposed by the lender, the lender must repurchase the unpaid portion of the loan from any holder(s) before the interest rate buydown can be granted. Any repurchase will only be made after the lender obtains FmHA's written approval. In the event the lender assigns the guaranteed portion of the loan to a holder(s) the Assignment Guarantee Agreement (Form FmHA 449-36) will be amended as provided in 7 CFR, Part 1980, Subpart B, Exhibit D, paragraph VI B2 or Exhibit E, paragraph VI B2, as applicable, to reflect the reduced interest rate.

8. Regulatory Changes

This Agreement is subject to the present regulations of the FmHA and its future regulations not inconsistent with any provisions of this agreement.

9. Cancellation

The Interest Rate Buydown Agreement is in contestable except for fraud or misrepresentation of which the lender has actual knowledge at the time this Agreement is executed or for which the lender participates in or condones.

10. Excessive Interest Rate Buydown

The Government may amend or cancel this agreement and collect from the lender any amount of reduction granted as a result of incomplete or inaccurate information, computation errors, or other circumstances which resulted in interest rate buydown payments that the lender was not entitled to receive.

11. Access to Lender's Files

Lender agrees to allow FmHA access to audit findings by the lender's supervising agency when examining interest rate buydown claims.

Lender
By _____
Title _____

United States of America, Farmers Home Administration
Attest: _____

[SEAL]
Address: _____

_____
By _____
Title _____
Acknowledged:
Borrower _____
Attest: _____

[SEAL]

12. Subpart B, consisting of §§ 1980.101 through 1980.200, and Exhibits A and D of Subpart B are revised, Exhibit B is removed and reserved, and Exhibits E and F of Subpart B are added to read as follows:

Subpart B—Farmer Program Loans

Sec.
1980.101 Introduction.
1980.102—1980.105 Reserved]
1980.106 Abbreviations and definitions.
1980.107 Full faith and credit.
1980.108 General provisions.
1980.109 Promissory notes, line of credit agreements, security instruments, and financing statements.
1980.110 Loan subsidy rates, claims, and payments (for EM actual loss loans only).
1980.111—1980.112 [Reserved]
1980.113 Receiving and processing applications.
1980.114 FmHA evaluation of applications.
1980.115 County Committee review.
1980.116 Review of requirements.
1980.117 Conditions precedent to issuance of the Loan Note Guarantee or Contract of Guarantee.
1980.118 Issuance of Lender's Agreement, Loan Note Guarantee, Contract of Guarantee, and Assignment Guarantee Agreement.
1980.119—1980.121 [Reserved]
1980.122 Substitution of lenders.
1980.123 Transfer and assumption of Farmer Program loans.
1980.124 Consolidation, rescheduling, reamortizing and deferred.
1980.125 Debt write down.
1980.126 Mediation.
1980.127—1980.128 [Reserved]
1980.129 Planning and performing development.
1980.130 Loan servicing.
1980.131—1980.135 [Reserved]
1980.136 Protective advances.
1980.137—1980.138 [Reserved]
1980.139 Termination of Loan Note Guarantee or Contract of Guarantee.
1980.140 1980.143 [Reserved]
1980.144 Bankruptcy.
1980.145 Defaults by borrower.
1980.146 Liquidation.
1980.147 Graduation.
1980.148 Appeal procedure.
1980.149 Access to lender's records.
1980.150—1980.152 [Reserved]
1980.153 FmHA forms.
1980.154 1980.174 [Reserved
1980.175 Operating loans.
1980.176—1980.179 [Reserved]
1980.180 Farm Ownership loans.
1980.181—1980.184 [Reserved]
1980.185 Soil and Water loans.
1980.186—1980.199 [Reserved]
1980.200 OMB control number.
Exhibit A—Approved Lender Program—Farm Ownership, Soil and Water and Operating Loans
Exhibit B—[Reserved]

* * * * *

Exhibit D—Interest Rate Buydown Program.
Exhibit E—Demonstration Project for Purchase of Certain Farm Credit System Acquired Farm Land.
Exhibit F—Shared Appreciation Agreement.

Subpart B—Farmer Program Loans

§ 1980.101 Introduction

(a) *Policy.* This Subpart, supplemented by Subpart A of this part, contains regulations for making the following Farmer Program loans guaranteed by the Farmers Home Administration (FmHA): Operating (OL) (both loans and lines of credit), Farm Ownership (FO) and Soil and Water (SW) loans. It also contains regulations concerning the servicing of these loans as well as the servicing of Emergency (EM) and Recreation (RL) loans, which are no longer guaranteed by FmHA. It is the policy of FmHA to guarantee loans made to any otherwise qualified applicant without regard to race, color, religion, sex, national origin, marital status, age or physical/mental handicap, providing the applicant can execute a legal contract. These regulations apply to lenders, holders, borrowers, FmHA personnel, and other parties involved in making, guaranteeing, holding, servicing, or liquidating such loans. Exhibit A provides policies and procedures for an Approved Lender Program (ALP) for Guaranteed Operating (OL) loans, and Guaranteed Farm Ownership (FO) loans. Exhibit C (available in any FmHA office) provides an Application Processing guide for lenders packaging applications under this subpart. Exhibit D provides policies and procedures for an Interest Rate Buydown Program for Guaranteed Operating (OL) loans including lines of credit, Guaranteed Farm Ownership (FO) loans including lines of credit, Guaranteed Farm Ownership (FO) loans and Guaranteed Soil and Water (SW) loans. Exhibit E provides policies and procedures for a Demonstration Project for purchase of certain Farm Credit System Acquired Farm Land. Exhibit F provides the precedures for the recapturing of shared appreciation when a lender requests a write down on the debt.

(b) *Program administration.* Farmer Programs are administered by the FmHA Administrator through a State Director, who serves each State through District Directors and County Supervisors. The County Supervisor is the focal point for the program and is the local contact person for processing and servicing activities, even though this subpart refers in various places to the duties and responsibilities of other FmHA employees.

(c) *Administrative provisions.* Within this subpart there are administrative provisions which, for the benefit of the State Directors, District Directors, and County Supervisors, set out the internal duties and responsibilities of FmHA personnel and outline the procedures to be followed in carrying out the requirements of the program. These provisions are identified as "ADMINISTRATIVE" and correspond to the sections of this subpart which they follow.

(d) *References.* Sections 1980.101—1980.174 pertain to the FO, EM, OL, RL, and SW loan programs. The requirements set forth in Subpart A of Part 1980 of this chapter which are not in conflict with the provisions set forth in this subpart must be met.

(e) *Type of guarantee.*—(1) *Loan Note Guarantee.* Lenders desiring to sell the guaranteed portion of fixed amount and term loans will use the method contained in Subpart A of this part. In accordance with that method, loans may be made by a lender and guaranteed by issuance of Form FmHA 449-34, "Loan Note Guarantee."

(2) *Contract of Guarantee* (Operating Loans—Line of Credit only). Lenders desiring a guarantee on a "line of credit" will use the method contained in Subpart A of this part. Line of credit loans are guaranteed by Form FmHA 1980-27, "Contract of Guarantee (Line of Credit)." The amount of loan may not exceed the line of credit ceiling set forth in the contract. This procedure will be followed for operating purposes—line of credit only. (See § 1980.175(c)(2) of this Subpart.)

§§ 1980.102—1980.105 [Reserved]

§ 1980.106 Abbreviations and definitions.

(a) *Abbreviations.* See § 1980.6 of Subpart A of this part.

(b) *Definitions.* The following definitions are applicable to the terms used in this subpart. Additional definitions may be found in § 1980.6 of Subpart A of this part.

(1) *Applicant.* The party applying for a guaranteed loan or line of credit.

(2) *Approval official.* An FmHA field official who has been delegated loan and grant approval authorities within applicable loan programs, subject to the dollar limitations contained in tables available in any FmHA office.

(3) *Aquaculture.* The husbandry of aquatic organisms in a controlled or selected environment. An aquatic organism is any fish (as defined in this section), amphibian, reptile, or aquatic plant. An aquaculture operation is considered to be a farm only if it is conducted on the grounds which the applicant owns, leases, or has an exclusive right to use. An exclusive right to use must be evidenced by a permit issued to the applicant and the permit must specifically identify the waters available to be used by the applicant only.

(4) *Borrower.* When a loan is made to an individual, the individual is the lender's borrower. When a loan is made to an entity, the corporation, cooperative, partnership, or joint operation is the lender's borrower.

(5) *Cooperative.* An entity which has farming as its purpose and whose members have agreed to share the profits of the farming enterprise. The entity must be recognized as a farm cooperative by the laws of the State(s) in which the entity will operate a farm(s).

(6) *Corporation.* For the purpose of this subpart, a private domestic corporation recognized as a corporation by the laws of the State(s) in which the entity will operate a farm(s).

(7) *Family farm.* A farm which:

(i) Produces agricutlural commodities for sale in sufficient quantities so that it is recognized in the community as a farm rather than a rural residence.

(ii) Provides enough agricultural income by itself, including rented land, or together with any other dependable income to enable the borrower to:

(A) Pay necessary family living and operating expenses.

(B) Maintain essential chattel and real property.

(C) Pay debts.

(iii) Is managed by:

(A) The borrower when a loan is made to an individual.

(B) The members, stockholders, partners, or joint operators responsible for operating the farm when a loan is made to a cooperative, corporation, partnership, or joint operation.

(iv) Has a substantial amount of the labor requirements for the farm and nonfarm enterprise provided by:

(A) The borrower and the borrower's immediate family for a loan made to an individual.

(B) The members, stockholders, partners, or joint operators responsible for operating the farm, along with the families of these individuals, for a loan made to a cooperative, corporation, partnership, or joint operation.

(v) May use a reasonable amount of full-time hired labor and seasonal labor during peak load periods.

(8) *Farm.* A tract or tracts of land, improvements, and other appurtenances considered to be farm property which is used or will be used in the production of crops, livestock, and/or aquacultural products for sale in sufficient quantities so that the property is recognized as a farm rather than a rural residence. The term "farm" also includes any such land and improvements and facilities used in a nonfarm enterprise. It may also include a residence which, although

physically separate from the farm acreage, is ordinarily treated as part of the farm in the local community.

(9) *Fish.* Any aquatic, gilled animal commonly known as "fish" as well as mollusks, or crustaceans (or other invertebrates) produced under controlled conditions (that is, feeding, tending, harvesting and such other activities as are necessary to properly raise and market the products) in ponds, lakes, streams, or similar holding areas.

(10) *Fixture.* Generally an item attached to a building or other structure or to land in such a way that it cannot be removed without defacing or dismantling the structure, or substantially damaging the structure itself.

(11) *Joint Operation.* Individuals that have agreed to operate a farm or farms together as a business unit. The real and personal property is owned separately or jointly by the individuals. For example, husband and wife who apply for a loan together will be considered a joint operation.

(12) *Majority interest.* Any individual or a combination of individuals owning more than a 50 percent interest in a cooperative, corporation, joint operation, or partnership.

(13) *Market value.* The amount which an informed and willing buyer would pay an informed and willing but not forced seller in a completely voluntary sale.

(14) *Mortgage.* Any form of security interest or lien upon any rights or interest in real property of any kind. In Louisiana and Puerto Rico the term "mortgage" also refers to any security interest in chattel property.

(15) *Nonfarm enterprise.* Any nonfarm business enterprise, including recreation, which is closely associated with the farm operation and located on or adjacent to the farm and provides income to supplement farm income. The business must provide goods or services for which there is a need and a reasonably reliable market. This may include, but is not limited to, such enterprises as raising earthworms, exotic birds, tropical fish, dogs, and horses for nonfarm purposes, welding shops, roadside stands, boarding horses and riding stables.

(16) *Partnership.* Any entity consisting of individuals who have agreed to operate a farm. The entity must be recognized as a partnership by laws of the State(s) in which the entity will operate a farm and must be authorized to own both real estate and personal property and to incur debts in its own name.

(17) *Positive cash flow.* A positive cash flow must indicate that all of the anticipated cash farm and non-farm income equals or exceeds all the anticipated cash outflows plus the planned reserve for the planned period. Production records and prices used in the preparation of a positive cash flow will be in accordance with § 1980.113(d)(8) of this subpart. A positive cash flow must show that a borrower will be at least able to:

(i) Pay all operating expenses and all taxes which are due during the projected farm budget period.

(ii) Meet scheduled payments on all open accounts and carryover debts including delinquent taxes.

(iii) Provide a reserve of at least 10 percent in addition to the loan installments due and payable as recorded in Table K of the Farm and Home Plan or other similar plans of operation acceptable to FmHA. The reserve will allow for new investments, risk and uncertainties associated with the farming operation.

(iv) Provide living expenses for an individual borrower and that borrower's family members of for the farm operator in the case of a cooperative, corporation, partnership, or joint operation borrower and that operator's family members which is in accordance with the essential family needs. Family members include the immediate members of the family which reside in the same household.

(18) *Recreation enterprise.* An outdoor enterprise which generates income and supplements or supplants farm or ranch income.

(19) *Related by blood or marriage.* As used in this Subpart, individuals who are connected to one another as husband, wife, parent, child, brother, or sister.

(20) *Security.* Property of any kind subject to a real or personal property lien. Any reference to "collateral" or "security property" shall be considered a reference to the term "security."

(21) *State or United States.* The United States itself, each of the several States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(22) *Subsequent loans.* Any loans processed by the Finance Office after it processes an initial loan for a borrower.

(23) *Veteran.* One who has been discharged or released from the active forces of the United States Army, Navy, Air Force, Marine Corps or Coast Guard under conditions other than dishonorable, who served on active duty in such forces: (1) during the period of April 6, 1917, through March 31, 1921; (2) during the period of December 7, 1941, through December 31, 1946; (3) during the period of June 27, 1950, through January 31, 1955; or (4) for a period of more than 180 days, any part of which occurred after January 31, 1955, but on or before May 7, 1975. Discharges under conditions other than dishonorable include "clemency discharges."

§ 1980.107 Full faith and credit.

See § 1980.11 of Subpart A of this part.

§ 1980.108 General provisions.

(a) *Security, personal and corporate guarantees, and other requirements.* See §§ 1980.175(h), 1980.180(f) and 1980.185(f) of this subpart for specific security requirements for the type of loan or line of credit being considered.

(1) *Security.* (i) The lender is responsible for seeing that proper and adequate security is obtained and maintained in existence and of record to protect the interest of the lender, the holder, and FmHA.

(ii) All security must secure the entire loan/line of credit. The lender may not take separate security to secure only that portion of the loan/line of credit not covered by the guarantee. The lender may not require compensating balances or certificates of deposit as a means of eliminating the lender's exposure on the unguaranteed portion of the loan/line of credit. However, compensating balances or certificates of deposit as used in the ordinary course of business are not prohibited.

(iii) When FmHA and a guaranteed lender are involved in separate loans to the *same borrower,* separate collateral must be clearly identified for both the FmHA and the lender's loan. Different lien positions on real estate are considered separate collateral. FmHA will not subordinate any interest in property which secures as insured loan, except it may do so when crops are involved to permit a guaranteed lender to advance funds and perfect its security interest in the crop.

(iv) When the lender is involved in both a guaranteed loan and an unguaranteed loan to the same borrower and there will be like collateral for each, the guaranteed loan(s) must be adequately secured by a lien on separate collateral that is clearly identifiable or a lien of higher priority if the same collateral is used to secure both loans. When the same collateral secures both loans, the lender must agree in writing that scheduled installments on the guaranteed loan will be paid first.

(2) *Personal and corporate guarantees.* (i) for FO, SW and OL loans/lines of credit, personal

guarantees from all partners of a partnership, and all joint operators of a joint operation will be required. The lender and/or FmHA also may require that such guarantees be secured.

(ii) For OL loans/lines of credit, personal guarantees from principal members of cooperatives, and stockholders of corporations, will be required. For this purpose, any member or stockholder owning or controlling a 20 percent interest in a cooperative or corporation is considered a principal member or stockholder. If no member or stockholder owns or controls at least a 20 percent interest, all members or stockholders will be considered principal members or stockholders. For FO, and SW loans, personal guarantees from members holding a majority interest in cooperatives, and stockholders of corporations, will be required. Guarantees of parent, subsidiary, or affiliated companies may also be required. Guarantees will be required on an amount which reasonably assures repayment of the loan/line of credit and provides sufficient security. If a review of all credit factors indicates the need for additional security, the lender and/or FmHA may require additional personal and corporate guarantees. The lender and/or FmHA also require that such guarantees be secured.

(iii) The lender may ask FmHA to make an exception to the requirement for personal or entity guarantees if the proposed guarantors cannot provide such guarantees due to other existing contractual obligations or legal restrictions. Applicants will give the lender written evidence of any such obligations or restrictions. FmHA's concurrence is required before an exception is made.

(iv) *Guarantors of applicants will:*

(A) In the case of personal guarantees, provide current financial statements (not over 90 days old at time of filing) signed by the guarantors, and disclosing community or homestead property.

(B) In the case of corporate guarantees, provide current financial statements (not over 90 days old at time of filing) certified by an officer of the corporation.

(3) *Other requirements.* (i) The lender must ascertain that there are no claims or liens of laborers, materialmen, contractors, subcontractors, suppliers of machinery and equipment, or other parties against the security of the borrower, and that no suits are pending or threatened that would adversely affect the borrower's interest in the collateral when the security instruments are filed when final loan disbursement is made

(ii) Appropriate hazard insurance with a standard mortgage clause naming the lender as beneficiary may be required by the lender when deemed necessary.

(iii) The lender will encourage any borrower who grows crops to obtain and maintain Federal Crop Insurance Corporation (FCIC) crop insurance or multi-peril crop insurance, if it is available.

(iv) When the lender believes it is necessary, life insurance will be required for the individual borrower or all members of the entity borrower and will be assigned or pledged to the lender. This life insurance may be decreasing term insurance. A schedule of life insurance available will be included as part of the application.

(v) Worker's Compensation Insurance will be obtained as required by State law.

(vi) The requirements found in Exhibit M to Subpart G of Part 1940 of this chapter will be met.

(b) *Preference.* When it appears that available funds will be inadequate to meet the needs of all applicants, the following preference will apply:

(1) An application on hand from a veteran as defined in § 1980.106(b)(23) of this subpart will be given preference by the lender over an application from a nonveteran on file at the same time.

(2) An application on hand from an FmHA insured loan borrower will be given preference over one from an applicant who does not have an FmHA insured loan.

(3) An application for a loan for land purchase from an applicant who has a dependent family; or is an owner of livestock and farm implements necessary to successfully carry on a farming operation; or is able to make downpayments will be given preference over one from an applicant who does not meet any of these criteria.

(c) *Determining whether credit is available.* The lender will certify on the appropriate forms that the applicant is unable to obtain the requested loans/lines of credit without the guarantee from the Government. Property and interests in property owned and income received by an individual applicant, a cooperative and its members as individuals, a corporation and its stockholders as individuals, a joint operation and the joint operators as individuals, and a partnership and its members as individuals will be considered and used by an applicant in obtaining credit without a guarantee.

(d) *Relationship between FmHA loans, insured and guaranteed.* (1) Borrowers indebted to FmHA and/or an FmHA guaranteed lender for EE loans, may be considered for FO or SW guaranteed loans, or OL guaranteed loans/lines of credit, provided the total outstanding principal indebtedness for EE, FO, RL, SW, or OL guaranteed or insured loans/lines of credit to FmHA and/or an FmHA guaranteed lender would not exceed $650,000.

(2) A guaranteed FO or OL loan may be made to an insured borrower with the same type of loan provided:

(i) The outstanding combined insured and guaranteed FO or OL principal balance owned by the loan applicant or owed by anyone who will sign the note as cosigner may not exceed the authorized guaranteed loan limit for that type of loan.

(ii) Chattel and/or real estate security must be separate and identifiable from the security pledged to FmHA for an insured loan. Different lien positions on real estate are considered separate and identifiable collateral.

Administrative

The County Supervisor will determine whether the lender is requiring adequate security. If necessary, the assistance of the District Director or Farmer Programs Staff will be obtained.

§ 1980.109 Promissory notes, line of credit agreements, security instruments, and financing statements.

(a) *Promissory notes, line of credit agreements, mortgages, and security agreements.* The lender will use its own promissory notes, line of credit agreements, real estate mortgages (including deeds of trust and similar instruments), and security agreements (including chattel mortgages in Louisiana and Puerto Rico), provided such forms do not contain any provisions that are in conflict or are inconsistent with the provisions of this subpart or Subpart A of this part.

(1) Repayment Schedules—In order for notes to be acceptable, the principal and interest repayment schedules will be clearly shown in the note(s). Use of a note with a "payment on demand" feature is not permissible unless it is modified by a supplemental agreement in the form of an allonge to the note or other legally effective amendment which waives the demand feature and sets forth the repayment schedule.

(2) Signatures—Except in those unusual circumstances where an exemption is obtained in accordance with § 1980.108 of this subpart the promissory note will be signed as follows:

(i) Individuals. Only one person will sign the note as a borrower. If a cosigner is needed, the cosigner will also sign the note.

(ii) Partnerships or joint operations. The note will be executed by the partner or joint operator authorized to sign for the entity, and all partners in the partnership or joint operators in the joint operation, as cosigners.

(iii) Corporations or cooperatives—OL guaranteed loans/lines of credit. The promissory note(s) or line of credit agreement(s) will be executed so as to evidence liability of the entity as well as each principal member or stockholder as an individual. Any member or stockholder owning or controlling a 20 percent interest in a cooperative or corporation is considered a principal member or stockholder. If no member, partner, or stockholder owns or controls at least a 20 percent interest, all members or stockholders will be considered principal member stockholders.

(iv) Corporations or cooperatives—FO and SW guaranteed loans. The promissory note(s) will be executed so as to evidence liability of the entity as well as liability of member(s) or stockholder(s) holding a majority interest in the entity as individuals.

(b) *Financing statements.* Commercial financing statement forms that comply with State laws and regulations may be used. They must be adapted to meet FmHA requirements by inserting provisions:

(1) Covering the "proceeds and products" of the collateral described, and

(2) Stating that "disposition of the collateral is not authorized hereby."

§ 1980.110 Loan subsidy rates, claims, and payments (for EM actual loss loans only).

Loan subsides are payments made by FmHA to lenders to induce them to service and collect guaranteed EM loans.

(a) *Subsidy rates.* FmHA will establish subsidy rates periodically. Thus, the subsidy rate may vary from time to time. However, the subsidy rate set forth in the Loan Note Guarantee will remain constant during the life of the loan guarantee. The subsidy rate will be a rate equal to the difference, if any, between the interest rate charged to the borrower and any higher annual rate prevailing in the private market for similar loans as determined by the Secretary of Agriculture. The lender may contact the local County Supervisor servicing the area to obtain the current subsidy rate. (See FmHA Instruction 440.1, Exhibit B, a copy of which is available in any FmHA Office.)

(b) *Annual subsidy claims and payments.* The initial subsidy claim will be prepared by the lender using Form FmHA 1980–24, "Request Interest Rate Buydown/Subsidy Payment to Guaranteed Loan Lender," on or about 12 months from the date of the note. The original will be mailed by the lender to the County Supervisor. Subsequent subsidy claims will be filed by the lender on or about 12 months thereafter, but no later than the anniversary date of the filing of the initial subsidy claim. Upon full payment of a note the lender will immediately prepare Form FmHA 1980–24 and mail the original to the County Supervisor.

(c) *When subsidy payments cease.* When FmHA purchases a guaranteed portion of a loan, subsidy payments on that portion will cease. Loan subsidy payments will also cease when the Loan Note Guarantee terminates.

§§ 1980.111–1980.112 [Reserved]

§ 1980.113 Receiving and processing applications.

An applicant and/or lender may file either a preliminary or complete application. In either case, the requirements of § 1980.46 of Subpart A of this part must be met. A preliminary application may be used when an applicant or lender wants FmHA to determine eligibility, feasibility, or the availability of guaranteed authority before filing a complete application. Exhibit C of this subpart (available in any FmHA office) may be used by leaders for submitting applications under this subpart. The County Supervisor will cooperate with the lender and applicant and will provide appropriate assistance in connection with loan/line of credit application processes. The degree of this assistance will be determined by the lender's experience with FmHA guaranteed loan processing, the lender's farm lending experience, and the complexity of the proposal. The lender and applicant should contact the local FmHA office serving the area where the farming operation is conducted for guidance and assistance in preparing the request and for obtaining the guarantee. The County Supervisor will provide copies of all applicable FmHA forms and regulations.

(a) *Preliminary application.* This will consist of:

(1) Form FmHA 410–1, "Application for FmHA Services." For applications to be processed under the Approved Lender feature set out in Exhibit A of this subpart, Form FmHA 410–1 need only reflect the name, address, telephone number, purpose of the loan or line of credit, and date and signature of the applicant, provided the information requested on the form is provided on an attached alternative document such as the lender's application form, the FmHA Request for Loan Note Guarantee/Contract of Guarantee, etc.

(2) Verification of off-farm employment, if any.

(3) Commercial credit report or other information concerning an applicant's credit history.

(4) For a cooperative, corporation, partnership, or joint operation, those additional items listed in § 1980.113(b) of this subpart.

(5) Any proposed line of credit agreement.

(b) *Cooperative, corporation, partnership, or joint operation applicants.* If the applicant is a cooperative, corporation, partnership, or joint operation, the following additional information will be obtained and included in the loan docket:

(1) A complete list of members, stockholders, partners, or joint operators showing the address, citizenship, principal occupation, and the number of shares and percentage of ownership or of stock held in the cooperative or corporation, by each, or the percentage of interest held in the partnership or joint operation, by each.

(2) A current personal financial statement from all members of a cooperative, joint operators of a joint operation, partners of a partnership, or stockholders of a corporation.

(3) A current financial statement from the cooperative, corporation, partnership, or joint operation itself.

(4) A copy of the cooperative's or corporation's charter, or any partnership or joint operation agreement, any articles of incorporation and bylaws, any certificate or evidence of current registration (good standing), and a resolution(s) adopted by the Board of Directors or members or stockholders authorizing specified officers of the cooperative, corporation, partnership, or joint operation to apply for and obtain the desired loan and execute required debt, security, and other instruments and agreements.

(c) *Preliminary determination by FmHA.* If it appears, after a review of the preliminary application, that the applicant is not eligible, the County Supervisor will notify the loan applicant and the lender in writing within 5 calendar days of FmHA's decision of all the reasons for the decision and advise them of their opportunity for an appeal, as set out in Subpart B of Part 1900 of this chapter, if applicable. If it appears that the applicant is eligible and loan guarantee funding authority is available, the County Supervisor will inform the lender and applicant not later than 10 calendar days after receipt of the

preliminary application and request the lender to submit a complete application.

(d) *Complete application.* The complete application will consist of:

(1) Those items listed in paragraphs (a) and (b) of this section.

(2) Applicable items required by §§ 1980.40, 1980.41, 1980.42, 1980.43, 1980.44 and 1980.45 of Subpart A of this part.

(3) Form FmHA 449–12, "Request for Loan Note Guarantee (Farmer Program Loans)," or Form FmHA 1980–25, "Request for Guarantee (Operating Loan/Line of Credit, Emergency Livestock Loan, or Economic Emergency Loan)."

(4) A copy of any lease, contract or agreement entered into by the applicant which may be pertinent to the consideration of the application, or when a written lease is not obtainable, a statement setting forth the terms and conditions of the agreement will be included in the loan docket.

(5) Form FmHA 440–32, "Request for Statement of Debts and Collateral," or similar documentation provided by Approved Lenders.

(6) Notices of compliance with the Privacy Act of 1974.

(7) Proposed loan agreements or line of credit agreements when a Contract of Guarantee is requested, between the applicant and lender. (See paragraph VII of Form FmHA 449–35, "Lender's Agreement," or paragraph VII of Form FmHA 1980–38, "Lender's Agreement.") Loan Agreements of Line of Credit Agreements will include *at least the following*:

(i) Any improved management practices to be implemented.

(ii) Requirements for accounting and recordkeeping and periodic financial reporting. Line of credit agreements will require the borrower to submit annual financial statements and cash flow projections prepared in accordance with paragraph (d)(3) of this section.

(iii) A list of security for the loan/line of credit and plans for at least an annual accounting for security.

(iv) Prohibitions against assuming liabilities or obligations of others.

(v) Restrictions on patronage refunds, if the applicant is a cooperative; dividend payments, if the applicant is a corporation; or distribution of net income, if the applicant is a partnership or joint operation.

(vi) Limitations on purchase or sale of equipment and/or fixed assets.

(vii) Limits on compensation of officers and/or owners if not a sole proprietorship.

(viii) Minimum working capital requirements.

(ix) Maximum debt to asset ratio.

(x) Restrictions concerning consolidation, mergers or other circumstances if the applicant is a corporate entity.

(xi) Purposes for which loan funds or funds advanced under the line of credit will be used.

(xii) Interest rate.

(xiii) The plan for repayment, reamortization, or rescheduling of the loan or line of credit.

(xiv) Establishment of the period of time (1, 2 or 3 years) and the ceiling ($ amount) for lines of credit.

(8) Production history and operation forecast must also be provided by the lender and/or applicant. Financial and production history must include the past 5 years. The information will also include current financial condition; projected production; income and expenses; and loan/line of credit repayment plan. Forms ordinarily used by the lender or Form FmHA 431–2, "Farm and Home Plan," Form FmHA 431–1, "Long-Time Farm and Home Plan," or Form FmHA 1924–1, "Development Plan," may be used, or other similar plans of operation acceptable to FmHA.

(i) Lenders will use the following sources of price information to develop operation forecast projections:

(A) Futures market price less the recognized basis points for the area, documented by date, location, time and degree of use.

(B) Government loan rates, i.e., ASCS target prices.

(C) Published current market prices.

(D) The negotiated price in any forward contract.

(E) Prices developed by the State land grant university for the time of crop sale.

(F) For specialty crops, the average of three previous years' prices, *only* if the above data is not available.

(ii) Lenders will use the following guidelines for estimating crop yields:

(A) for existing farmers, actual production/yields for the past 5 years will be utilized.

(B) For those farmers with less than a 5 year production/yield history, the actual production history will be utilized.

(C) For those beginning farmers, consider the use of Agricultural and Stabilization Conservation Service (ASCS) records, Cooperative Extension Service (CES) data, State averages, County averages or any other reliable sources of information that are agreeable with the lender and the applicant.

(D) When an accurate projection cannot be made because the applicant's production history has been affected by a disaster(s) declared by the President or designated by the Secretary of Agriculture, County average yields will be used for the disaster year(s). If the applicant's disaster year's(s') yields are less than the County average yields, County average yields will be used for that year(s). If County average yields are not available yields will be used.

(9) Appraisals—(i) *Appraisal Report.* (A) Real estate or chattel property that will serve as collateral for a loan/line of credit will be appraised. Appraisal reports may be on forms approved by the lender and/or Form FmHA 422–1, "Appraisal Report Farm Tract," and Form FmHA 440–21, "Appraisal of Chattel Property."

(B) A real estate appraisal report will be based on at least two comparable sales made within 2 years. If the real estate has been appraised by FmHA or by a qualified appraiser within the last 12 months and if no significant changes in the market value of real estate have occurred in the area within the past 12-month period, a new appraisal does not have to be made.

(C) A chattel appraisal is required when an initial loan is made and chattels are taken as security.

(ii) *Appraiser Qualifications.* The lender is responsible for substantiating the appraiser's qualifications. The lender will obtain FmHA's concurrence that the appraiser has the necessary qualifications and experience before the lender will utilize the appraiser in any appraisal work. If FmHA is not familiar with the appraiser, the lender will submit a recent appraisal completed by the appraiser. The appraiser completing the report must meet *one* of the following qualifications in the following order of preference:

(A) Certification by a National or State appraisal society.

(B) If a certified appraiser is not available, the lender may use other qualified appraisers, if the lender can establish that the appraiser meets the criteria for certification in a National or State appraisal society.

(C) The appraiser has recent, relevant, documented appraisal experience or training, or other factors clearly establish the appraiser's qualifications.

(10) The lender's plan for servicing the loan/line of credit and any plan for providing management assistance to the borrower, including the steps necessary to see that the requirements of the loan agreement are met.

(11) Notices of compliance with the Privacy Act of 1974.

(12) Applicable items required in Subpart G of Part 1940 of this chapter, including SCS Form CPA–26, "Highly Erodible Land and Wetland

Conservation Determination," and Form AD-1026, "Highly Erodible Land and Wetland Conservation Certification," as specified in Exhibit M to Subpart G of Part 1940 of this chapter.

Administrative

A. Regardless of whether the applicant is acting as an individual or as a representative of a cooperative, corporation, partnership, or joint operation, when FmHA solicits personal information, the individual will be given FmHA 401-9, "Statement Required by the Privacy Act."

B. If FmHA desires to obtain information concerning an individual from any source, FmHA will provide such source with Form FmHA 410-10, "Privacy Act Statement to References."

C. Immediately after a preliminary or complete application is received, and prior to County Committee action, the County Supervisor will send Attachment 1 to Exhibit D of this subpart to the borrower and lender describing the Interest Rate Buydown Program.

§ 1980.114 FmHA evaluation of applications.

When the County Supervisor receives a complete application, the proper independent investigations, inspections, and appraisal reviews will be made to determine whether the applicant is eligible, whether the proposed loan/line of credit is for authorized purposes, whether there is reasonable assurance of a positive cash flow projection, and whether there is sufficient collateral and equity. The determination will be recorded on Form FmHA 449-23, "Guaranteed Loan Evaluation (Farmer Programs)." This evaluation is for the benefit of FmHA, not the lender. The County Supervisor will notify participants in the Approved Lender Program within three working days whether an application submitted is complete and acceptable. Nonapproved lenders will be advised on the completeness of applications within 14 working days. This requirement is contingent upon the availability of a County Supervisor during the prescribed timeframe, and employment ceilings affecting FmHA.

(a) *Indication of unacceptability.* If the application for a guarantee cannot be approved for reasons that would not be affected by the County Committee certification, the County Supervisor will so inform the lender and the loan applicant in writing within 5 working days of the decision. Factual reasons for the decision will be clearly set forth along with notice of the opportunity for an appeal as set out in Subpart B of Part 1900 of this chapter.

(b) *Indication of acceptability.* If the evaluation indicates that the guarantee may be approved, the County Supervisor will present the application to the County Committee for certification or rejection.

Administrative

The County Supervisor will:

A. Determine if the material and information submitted is complete.

B. Determine that a positive cash flow projection as defined in § 1980.106(b)(17) of this subpart can be reasonably achieved.

C. Determine if the proposed collateral is adequate, repayment plan realistic, and loan agreement is satisfactory.

D. Determine that the requirements of §§ 1980.40 through 1980.45 of Subpart A of this part and those found in Exhibit M to Subpart G of Part 1940 of this chapter are met.

E. Follow the requirements of Subpart G of Part 1940 of this chapter.

§ 1980.115 County Committee review.

The County Committee will review completed loan applications within 30 calendar days (or 14 calendar days when possible, if a participant in the Approved Lender Program is involved) to determine whether the applicants meet FmHA eligibility requirements. The County Supervisor will promptly notify the lender and applicant in writing of the County Committee's determination. (See § 1980.115 Administrative paragraph B of this subpart.)

(a) *Favorable action.* If the County Committee finds the applicant eligible, the members will sign form FmHA 440-2, "County Committee Certification or Recommendation." This form will be retained in the County Office file. When the applicant has been determined eligible for assistance and additional information becomes available before issuance of the conditional commitment that indicates the original determination may be in error, the applicant will be reconsidered by the County Committee taking the new information into account. The County Committee will then recertify whether or not the applicant continues to meet eligibility requirements by the use of Form FmHA 440-2. Proper notification as to action taken will be sent to the applicant.

(b) *Unfavorable action.* If the County Committee finds the applicant ineligible, the members will complete Form FmHA 440-2 and the County Supervisor will inform the lender and the loan applicant in writing within 10 calendar days of FmHA's decision of the reasons for disapproval and of their opportunity for an appeal as set out in Subpart B of Part 1900 of this chapter.

Administrative

A. After County Committee certification is obtained, the County Supervisor will:

1. Prepare Form FmHA 1940-1, "Request for Obligation of Funds," and, for initial loans/lines of credit only, Form FmHA 1980-50, "Add, Delete, or Change Guaranteed Loan Borrower Information," in accordance with the Forms Manual Insert (FMI).

2. Prepare Form FmHA 449-14, "Conditional Commitment for Guarantee," or Form FmHA 1980-15, Conditional Commitment for Contract of Guarantee (Line of Credit)." In no case will Form FmHA 449-14 or 1980-15 be executed prior to the determination of availability of funds for the loan/line of credit. Any special conditions of approval will be listed in the space provided on the form, including requirements for security, improved management practices, and the type and frequency of financial report required by FmHA but not required by the lender. An attachment to the form may be used if necessary.

3. Forward the loan docket to the appropriate approval official if the loan/line of credit is not within the County Supervisor's approval authority.

B. The approval official will:

1. Approve or disapprove all guaranteed applications not later than 45 calendar days after receipt of completed applications, execute Forms FmHA 1940-1, 449-14 and/or 1980-15 and distribute the copies in accordance with the FMI. In order to meet the prompt approval requirement when funds are temporarily exhausted and the loan will be approved, Form FmHA 1940-1 must be signed. The following approval condition will be included, under Section 41, "Comments and Requirements of Certifying Official," for guaranteed Farmer Program loans.

"This loan guarantee is approved subject to the availability of funds. If this loan guarantee is not issued for any reason within 90 calendar days from the date of approval on this document, the approval official may request updated information concerning the lender and the loan applicant. The approval official will have 14 working days to review any updated information and decide whether to submit this document for obligation of funds."

When funds are exhausted, a Conditional Commitment for Guarantee *will not* be executed until such time as funds become available and have been obligated in connection with the guarantee request.

2. Set forth in the space provided on Form FmHA 449-14 (A.2. above) or Form FmHA 1980-15 (A.2. above) any special conditions of approval, including requirements for security, improved management practices relating to highly erodible land and conversion of wetland found in Exhibit M of Subpart G of Part 1940 of this chapter, and type and frequency of financial reports required by FmHA but not required by the lender. When Form FmHA 1980-15 is executed, the approval official will add the the requirement that the lender will submit to FmHA a current financial statement and cash flow prepared in accordance with § 1980.113(d)(8) of this subpart for prior approval of advances to be made for the second and third years of a line of credit. The loan approval official will also include the following requirement as condition of approval for either Conditional Commitment:

"The lender agrees that, if liquidation of the account becomes imminent, the lender will consider the borrower for an Interest Rate Buydown under Exhibit D of Subpart B of 7 CFR Part 1980, and request a determination of the borower's eligibility by FmHA. The lender may not initiate foreclosure action on the loan (or line of credit if Form FmHA 1980-15 is used) until 60 calendar days after a determination has been made with respect to the eligibility of the borrower to participate in the Interest Rate Buydown Program."

3. An attachment to the form may be used, if necessary. Return Forms FmHA 449-14 or FmHA 1980-15 to the County Supervisor for execution and proper distribution. When Form FmHA 1980-15 is executed the approval official will add the requirement that the lender will submit to FmHA a current financial statement and cash flow prepared in accordance with § 1980.113(d)(8) of this Subpart for prior approval of advances made for the second and third years of a line of credit.

4. Forward the loan docket to the appropriate approval official if the loan/line of credit exceeds the State Director's approval authority or when the State Director needs assistance in handling any complaints of noncompliance.

5. In addition to the requirements in paragraph B.1. above, determinations will be made within 14 working days of County Committee Certification for Approved Lenders, if possible, and within 45 calendar days of receipt of a completed application for nonapproved lenders.

§ 1980.116 Review of requirements.

The lender and applicant, after reviewing approval conditions and security requirements as set forth in Form FmHA 449-14 or Form FmHA 1980-15 will complete and execute the "Acceptance or Rejection of Conditions" and return a copy to the County Supervisor. If the conditions cannot be met, the lender and applicant may propose alternatives to the County Supervisor. These alternatives will be considered and the lender will be advised of FmHA's decision to accept or reject the alternatives. If accepted, Form FmHA 449-14 or FmHA 1980-15 will be so revised. If rejected, the County Supervisor will notify the loan applicant and the lender in writing within 10 calendar days of FmHA's decision as set out in Subpart A of Part 1910 of this chapter, of all the specific reasons for the decision, and advises them of their opportunity for appeal as set out in Subpart B of Part 1900 of this chapter.

§ 1980.117 Conditions precedent to issuance of the Loan Note Guarantee or Contract of Guarantee.

See § 1980.60 of Subpart A of this part. The provisions of § 1980.60(a)(2) and (8) are *not* applicable to Farmer Program loans.

Administrative

The County Supervisor will:

A. Consult with the lender and applicant concerning any changes made to the initially issued or revised Form FmHA 449-14 or FmHA 1980-15. A copy of Form FmHA 449-14 or FmHA 1980-15 and any amendments will be included in the file.

B. Review the loan agreement between the borrower and lender which provides for the periodic submission of financial statements to the County Supervisor. *An annual analysis report of the farming operation will be required.* In line of credit cases, the County Supervisor will review the lender the requirement that the lender is to submit a current financial statement and cash flow prepared in accordance with § 1980.113(d)(8) of this subpart for prior approval of advances made in the second and third years of a line of credit.

C. Review plans for inspection on construction projects.

D. Review basic credit requirements of all loans/lines of credit.

E. Review cost overruns, if any, and how they will be met.

§ 1980.118 Issuance of Lender's Agreement, Loan Note Guarantee, Contract of Guarantee, and Assignment Guarantee Agreement.

(a) See § 1980.61 of Subpart A of this part.

(b) A guaranteed portion of the loan may not be sold by the lender until the loan has been fully disbursed to the borrower. The guaranteed portion of a line of credit will never be sold or assigned by the lender except as provided in paragraph III of Form FmHA 1980-38, "Lender's Agreement (Line of Credit)."

(c) The amount to be entered in the blank in paragraph IX. C.5. of Form FmHA 449-35 "Lender's Agreement," or paragraph IX. C.5. of Form FmHA 1980-38 for a loan secured by chattels, will be the lesser of $10,000 or 20 percent of the loan/line of credit for OL loan/line of credit purposes.

Administrative

A. *Section 1980.61(a).* The original Form FmHA 449-35 or Form FmHA 1980-83 will be kept in the County Office.

B. *Section 1980.61(b)(1).* Copy(ies) of the Loan Note Guarantee(s) or Contract of Guarantee(s) will be kept in the County Office. Additional copy(ies) may be retained by the State Office.

C. *Section 1980.61(b)(3).* For reporting purposes where multi-notes are issued, the loan will be counted as one loan regardless of the number of notes issued.

§§ 1980.119-1980.121 [Reserved]

§ 1980.122 Substitution of lenders.

With prior written approval of the FmHA State Director, a new eligible lender may be substituted for the original provided the new lender agrees in writing to assume all servicing and other responsibilities *of the original lender* and acquires the unguaranteed portion of the loan. Such substitution may be made without the holder's consent but not without notice to holder(s) by the substituted lender. The new lender will execute Form FmHA 449-35 or Form FmHA 1980-38 at the same time of the substitution. After approval of the lender, Form FmHA 1980-42, "Notice of Substitution of Lender," will be completed by the FmHA servicing representative and mailed to the Finance Office.

§ 1980.123 Transfer and assumption of Farmer Program loans.

(a) All transfers and assumptions must be approved in writing by FmHA. Such transfers and assumptions must be to an eligible applicant. EM actual loss loans may only be transferred to a co-obligor. All transfers and assumptions must meet the requirements of Exhibit M of Subpart G of Part 1940 of this chapter.

(b) The transferee will submit Form FmHA 410-1 "Application for FmHA Services," and other needed information to the lender for evaluation.

(c) In accordance with the Food Security Act of 1985 (Pub. L. 99-198), after December 23, 1985, if an individual transferee or any member, stockholder, partner, or joint operator of an entity transferee is convicted under Federal or State law of planting, cultivating, growing, producing, harvesting or storing a controlled substance (see 21 CFR Part 1308, which is Exhibit C to Subpart A of Part 1941 of this chapter and is available in any FmHA office, for the definition of "controlled substance") prior to the approval of the transfer and assumption in any crop year, the individual or entity shall be ineligible for a transfer and assumption for the crop year in which the individual or member, stockholder, partner, or joint operator of the entity was convicted and the four succeeding years. Applicants will attest on Form FmHA 410-1 that as individuals or that its members, if an entity, have not been convicted of such crime after December 23, 1985.

(d) When a transfer and assumption occurs and the transferee has an outstanding insured or guaranteed FO, SW or RL loan, the borrower's total unpaid principal insured and guaranteed indebtedness for these loans may not exceed the lesser of $300,000 or the market value of the farm or other security. When the transferee is indebted for an OL loan/line of credit, the transferee's total insured and guaranteed OL principal balance may not exceed $400,000 at the time of the transfer and assumption.

(e) Available transfer and assumption options to eligible applicants include transferring the *total* indebtedness to another borrower on the same terms, or on different terms not to exceed those terms for which an initial loan/line of credit can be made.

(f) In any transfer and assumption case, the transferor, including any guarantor(s), may be released from liability by the lender with FmHA written concurrence only when the value of the collateral being transferred is at least equal to the amount of the loan or the

line of credit ceiling for Contracts of Guarantee. If the transfer is for less than this:

(1) FmHA must determine that the transferor has no reasonable debt-paying ability considering assets and income at the time of the transfer.

(2) FmHA County Committee must certify that the transferor has cooperated in good faith, used due diligence to maintain the collateral against loss, and has otherwise fulfilled all of the regulations of this subpart to the best of the transferor's ability.

(g) Any proceeds received from the sale of security before a transfer and assumption will be credited to the transferor's guaranteed loan debt in inverse order of maturity before the transfer and assumption transaction is closed.

(h) The lender is responsible for getting an appraisal of the fair market value of all the collateral securing the loan/line of credit. Subject to the approval of the transferor and transferee, an appraisal can be made by either independent fee appraisers or qualified appraisers on the lender's staff. Appraisers must meet the qualifications outlined in § 1980.113(d)(9)(ii) of this subpart. The appraisal report fee and other related costs will be paid by the transferor and the transferee, as they agree.

(i) The market value of the security being acquired by the transferee, plus any additional security the transferee proposes to give, must be adequate to secure the balance of the total guaranteed loan/line of credit ceiling for Contracts of Guarantee, plus any prior liens.

(j) If any cash downpayment is made, it may be paid directly to the transferor as payment for the transferor's equity in the project provided:

(1) The lender recommends and FmHA approves the cash downpayment be released to the transferor.

(2) Any downpayment that is made by the transferee to the transferor does not suspend the transferee's obligation to continue to make the guaranteed loan/line of credit payments as they come due under the terms of the assumption.

(3) The transferor agrees not to take any actions against the transferee in connection with such transfer in the future without first obtaining the approval of FmHA and the lender.

(4) The lender determines that the transferee has the ability to repay the guaranteed debt assumed and any other indebtedness.

(k) The lender will issue a statement to FmHA that the debt can be properly transferred and the conveyance instruments must be filed, registered, or recorded, as appropriate, and must be legally sufficient.

(l) FmHA will not guarantee any additional loans to provide equity funds for a transfer and assumption.

(m) The assumption will be made on the lender's form of assumption agreement.

(n) The assumption agreement must contain the FmHA case number of the transferor and transferee.

(o) The assumption agreement may change loan terms and/or interest rates only if a new Loan Note Guarantee or Contract of Guarantee will be executed.

(p) In the case of a transfer and assumption at the same rates and terms the lender must give any holder(s) notice of the transfer and notice that future payments will be made under a different name and case number. It is the lender's responsibility to see that the transfer and assumption is noted on all originals of the Loan Note Guarantee or Contract of Guarantee. The lender must provide FmHA with a copy of the transfer and assumption agreement.

(q) Before allowing a transfer and assumption at *different* rates and terms, the lender must consult with any holder(s). If the holder(s) consents in writing to the change in rates and terms, the lender must provide FmHA with documentation of the holders concurrence and a copy of the transfer and assumption agreement and must note the transfer and assumption on all originals of the Loan Note Guarantee or Contract of Guarantee.

Administrative

A. *Loan approval officials may consent:*

1. To all transfer and assumption cases.

2. To the release of the transferor and guarantor(s) from liability on the loan or line of credit agreement. The approval official will notify the lender and the appropriate parties of the decision in writing.

3. To any changes in the loan or line of credit terms and/or interest rates provided the holder(s), if any, and lender agree.

B. The Loan Note Guarantee or Contract of Guarantee will be endorsed in the space provided on the form.

C. A copy of the Assumption Agreement will be retained in the County Office file. The County Supervisor will notify the Finance Office of all approved transfer and assumption cases so that Finance Office records may be adjusted accordingly. This will be accomplished by sending completed Forms FmHA 1980-7, "Notification of Transfer and Assumption of a Guaranteed Loan," FmHA 1980-51, "Add, Change, or Delete Guaranteed Loan Record," and, for new borrowers, FmHA 1980-50 to the Finance Office.

§ 1980.124 Consolidation, rescheduling, reamortizing and deferral.

(a) *General requirements.* All borrowers are expected to repay their loans according to the planned repayment schedule. However, circumstances may arise which will not permit borrowers to pay as scheduled. When rescheduling, reamortization, or deferral will assist in the orderly collection of a loan, such action *may* be taken upon prior concurrence given by FmHA provided:

(1) The borrower meets the eligibility requirements for an initial loan guarantee and the lender's security position would not be adversely affected. For FO, SW loans and OL loans/lines of credit refer to this subpart for these requirements. For EM loans refer to Subpart D of Part 1945 of this chapter for eligibility and security requirements. For RL loans refer to SW eligibility and security requirements as set out in this subpart.

(2) The action will ensure that the borrower will be able to continue the farming or ranching operation.

(3) Any delinquency is due to circumstances beyond the borrower's control. Circumstances beyond the borrower's control are limited to one of the following:

(i) A reduction in income has occurred which is not due to inadequate or poor financial management decisions, such as untimely marketing practices which might occur when a borrower has forward contracted and the price continues to increase.

(ii) Unforseen, but essential, farm expenses and/or, in the case of individual borrowers and the partners, joint operators, stockholders and members who operate the farm, essential family living expenses.

(iii) A natural disaster, such as a drought or flood, regardless of whether the area has been declared a disaster area.

(4) The borrower has acted in good faith by demonstrating sincerity and honesty in meeting agreements with, and promises made to, the lender. This includes cooperating in servicing the account and maintaining the security;

(5) The lender determines that a positive cash flow cannot be developed with the existing repayment schedule, but can be developed with revised repayment terms;

(6) Any holder(s) agrees in writing to the rescheduling, reamortization, and deferral. The holder(s) must understand that they will not receive any payments from the lender or from FmHA during any deferral period.

(7) No interest is ever charged on interest.

(b) *Consolidation and rescheduling.* (1) The term "consolidate" means to combine the outstanding principal and interest balances of two or more EM loans *made for operating (Subtitle B) purposes or two or more OL Loans.* An existing OL line of credit loan may only be consolidated with a new OL line of credit loan if the terms (to make advances as well as final maturity date) of the new OL line of credit are within the terms of the existing OL line of credit agreement.

(2) The term "rescheduling" means to rewrite the rates and/or terms of a single note or line of credit agreement which acknowledges indebtedness for a loan made for operating purposes (EM loan or OL loan/line of credit).

(3) EM loans made for operating loan purposes may be consolidated only with other EM loans made for operating loan purposes, including EM loans for annual operating purposes and EM major adjustment loans for operating (Subtitle B) purposes. OL Loan Note Guarantee

loans may be consolidated only with other OL Loan Note Guarantee loans.

(4) An EM loan made for operating loan purposes or an OL loan/line of credit may be rescheduled when it is in the best interest of the borrower and the lender to do so.

(5) EM loans for actual losses, EM major adjustment loans for real estate purposes, OL loans secured by real estate, OL Contract of Guarantee line of credit with unlike terms and OL loans/lines of credit with outstanding interest rate buydown agreement or shared appreciation agreement will *not* be consolidated.

(6) There is no limit on the number of times a consolidation or rescheduling action may take place provided all the interest payments are being made and a principal payment is made which is at least equal the amount of depreciation on the security.

(7) Unless a note or line of credit agreement being rescheduled is consolidated with one or more notes or lines of credit agreements at the time of the rescheduling, no new note or line of credit agreement will be taken when a loan/line of credit is rescheduled. Instead, the existing note or line of credit agreement will be modified by attaching an "allonge" or other legally effective amendment, evidencing the revised repayment schedule and any interest rate change. When a note or line of credit agreement being rescheduled is also being consolidated with one or more other notes or lines of credit agreement, then a new note evidencing the consolidated indebtedness will be taken.

(8) The interest rate for a consolidated or rescheduled EM loan for operating purposes will be the current rate established by the Secretary of Agriculture for similar type loans in effect at the time of action. This information is available from any FmHA office (See FmHA Instruction 440.1, Exhibit B).

(9) The interest rate for a consolidated OL loan or rescheduled OL loan/line of credit will be the negotiated rate agreed upon by the lender and the borrower subject to the limitations set out in § 1980.175(e) of this subpart. If the consolidated OL loan or rescheduled OL loan/line of credit still has an outstanding interest rate buydown agreement in effect at the time of consolidation or rescheduling, the interest rate will remain the same during the balance of the buydown agreement period.

(10) A rescheduled note or the new note which exists after a consolidation of two or more loans must be repaid over a period not to exceed fifteen (15) years from the date of the action, unless the note evidences a loan made solely for recreation and/or nonfarm enterprise purposes, in which case it must be repaid over a period not to exceed seven (7) years from the date of the action. A rescheduled OL line of credit agreement must be repaid over a period not to exceed seven (7) years from the date of the action; however, a new OL line of credit agreement that exists after consolidating an existing line of credit with a new line of credit cannot exceed the terms (to make advances as well as final maturity date) of the existing line of credit agreement. Balloon payments are prohibited, however, the loan can be rescheduled in unequal amortized installments, provided the current year and any typical year plan(s) demonstrate that these installments will be used only in those cases where a new enterprise is being established, developing a farm, or during recovery from economic reverses. The consolidation will be reported to the Finance Office with Form FmHA 1980-19, "Guaranteed Loan Closing Report," along with a memorandum identifying which loans are being consolidated.

(11) When a consolidation occurs, a new Form FmHA 449-34 will be executed.

(12) When a consolidation occurs, the new note or line of credit agreement will describe the note(s) or line of credit agreement(s) being consolidated and will state that the indebtedness evidenced by such note(s) or line of credit agreement(s) is not satisfied. The original note(s) or line of credit agreement(s) will be retained for identification purposes.

(c) *Reamortization.* The term "reamortize" means to rearrange the rates and/or terms of a loan(s) made for real estate purposes, i.e., FO, SW, RL, EM actual loss loans having basic security consisting of real estate, and EM major adjustment loans *made for real estate (Subtitle A) purposes.* Scheduled payments may be rearranged over the remaining term of the original repayment period established for the loan or assumption agreement (new terms), or be rearranged over a period not to exceed the maximum statutory period which is set at 40 years from the date of the original note.

(1) No new note will be taken when a loan is reamortized. Instead, the existing note will be modified by attaching an "allonge" or other legally effective amendment, evidencing the revised repayment schedule and any interest rate change.

(2) The interest rate for a reamortized EM actual loss loan will be at the same rate as the original loan.

(3) The interest rate for a reamortized EM major adjustment loan for real estate purposes will be the current market rate in effect for similar type loans at the time of reamortization as established by the Secretary of Agriculture. This information is available from any FmHA office. (See FmHA Instruction 440.1, Exhibit B).

(4) The interest rate for a reamortized FO or SW loan will be the negotiated rate agreed upon by the lender and the borrower at the time of the action subject to the limitations set out in §§ 1980.180 and 1980.185 of this subpart, as applicable. The interest rate limitation set out in these sections will also apply when RL loans are reamortized. If the reamortized FO or SW loan still has an outstanding interest rate buydown agreement in effect at the time of reamortization, the interest rate will remain the same during the balance of the buydown agreement period.

(d) *Deferral.* The term "defer" means to postpone the payment of principal and/or interest on an FO, SW, RL, OL or EM loan or OL line of credit. Principal may be deferred in whole or in part. Interest may be deferred only in part. A partial payment of interest will be required during the deferment period.

(1) Deferred interest will not be capitalized.

(2) Payments may be deferred for no more than five years, but in no case will the deferral period extend beyond the final due date of the note.

(3) The lender must determine, and FmHA must concur, that scheduled payments cannot be made for reasons beyond the borrower's control as defined in paragraphs (a)(3)(i) and (ii) of this section and must also determine that there are reasonable prospects that the borrower will be able to resume full payments at the end of the deferral period.

(e) *Principal limit.* The rescheduled/reamortized note or line of credit agreement which exists after a consolidation occurs will not increase the amount of principal which the borrower would have been required to pay if the rescheduling, reamortization or consolidation had not been made.

(f) *Lien priority.* Additional security instruments will be required if needed to maintain lien priority or to protect the interests of the lender and FmHa.

§ 1980.125 Debt write down.

(a) *General requirements.* In addition to the authorities available in § 1980.124 of this subpart to consolidate, reschedule, reamortize and/or defer a guaranteed loan/line of credit, whether or not that loan/line of credit agreement

is delinquent, and the authority available in Exhibit D concerning an Interest Rate Buydown, a lender may only write down a *delinquent* guaranteed loan/line of credit agreement in amounts sufficient to permit the borrower to develop a feasible plan of operation. Such action may be taken with the written approval of FmHA provided:

(1) The borrower cannot demonstrate a positive cash flow projection on all income and expenses, including debt service, after consideration is given to servicing the loan or line of credit agreement using the authorities provided in § 1980.124 of this subpart. If a positive cash flow projection can be achieved using these authorities, then the loan or line of credit agreement will be consolidated, rescheduled, reamortized and/or deferred, and no write down will take place. If a positive cash flow cannot be achieved and the lender contemplates an interest rate reduction in connection with the write down, the borrower may be considered for an Interest Rate Buydown under Exhibit D of this subpart. If the proposed interest rate reduction results in a positive cash flow and the lender can achieve a positive cash flow at the end of the Interest Rate Buydown period, the interest rate reduction and the write down may be approved, providing the remaining requirements in this paragraph can be met.

(2) The loan or line of credit agreement, if written down, will result in a net recovery to the lender, during the term of the loan or line of credit agreement as written down, that would be more than or equal to the net recovery to the lender from the borrower through bankruptcy or from an involuntary liquidation or foreclosure of the security for the loan or line of credit. The calculations to be used in making this determination are found in paragraph (b) of this section.

(3) The requirements found in § 1980.124(a)(2) through (a)(5) of this subpart are met.

(4) After being asked by the lender, other creditors of the borrower may agree to voluntarily adjust their debts as outlined in Subpart A of Part 1903 of this chapter. If other major creditors of the borrower, other than those that are fully collateralized, agree to participate in developing a restructuring plan or agree to participate in a State's farm mediation program, then the write down may be approved, providing the remaining requirements in this paragraph can be met. Failure of such creditors to agree to participate will not preclude use of a write down if the lender, with FmHA's concurrence, determines that a write down results in the least cost to the lender.

(5) If the borrower owns real estate which secures the loan, the borrower must sign a shared appreciation agreement, as further specified in paragraph (c) of this section, covering the amount written down.

(6) Any holder must agree to the write down in writing. If the holder does not agree to this action, the leader must repurchase the unpaid portion of the loan from the holder before the write down may be approved.

(7) If a line of credit is written down, no further advances may be made under that agreement and the principal amount remaining after the write down fixes the principal amount covered by the guarantee.

(8) The lender will obtain FmHA approval of the proposed write down by submitting to the County Supervisor the following:

(i) A cash flow statement indicating the borrower can pay all necessary expenses and service all debt after the write down.

(ii) A current appraisal of the property securing the loan.

(iii) An estimate of lender's cost relating to an involuntary liquidation or bankruptcy including disposal of any property taken into inventory.

(iv) A proposed estimated loss claim.

(v) A current balance sheet for the borrower.

(9) If the borrower has both a line of credit and a loan, the lender will write down the line of credit before consideration will be given to a write down of the loan.

(10) The debt write down will be on principal first and then accrued interest, if needed.

(b) *Value determination.* The lender must determine the recovery value of the security and the value of the written down loan or line of credit agreement in order to determine the net recovery from a bankruptcy or an involuntary liquidation of the loan or line of credit. These determinations will be done as follows:

(1) The recovery value of the security will be based on the amount of the current appraised value of the security *less* the estimated costs associated with liquidation and disposition of the loan/line of credit security.

(i) The current appraised value will be determined by an independent appraiser selected by the lender and approved by FmHA. The appraisal fee will be shared equally by the lender and FmHA.

(ii) Any lease income estimated to be generated while the property is in the lender's inventory will be calculated to offset any of the estimated cost items listed in paragraph (iii) below.

(iii) The estimated costs associated with liquidation and disposition include the following:

(A) The payment of prior liens;

(B) Taxes and assessments, depreciation, management costs, yearly percentage decrease or increase in the value of the property, and lost interest income, each calculated for the lender's average holding period, in the State in which the property is located, for the type of property involved;

(C) Resale expenses, such as repairs, commissions, and advertising; and

(D) Other reasonable and necessary administrative costs and expenses, including attorney's fees, that customarily are incurred in such liquidation and disposition.

(2) The value of the written down loan/line of credit agreement will be based on the present value of payments that the borrower would make to the lender if the loan/line of credit terms were modified using any combination of the authorities provided in §§ 1980.124 and 1980.125 of this subpart or an interest rate buydown as provided in Exhibit D of this subpart.

(3) The loan may be written down with FmHA's approval if the calculations specified in paragraphs (b)(1) and (2) of this section show that the net recovery to the lender, during the term of the loan or line of credit agreement as written down, would be more than or equal to the net recovery to the lender from the borrower through bankruptcy or from an involuntary liquidation or foreclosure of the security.

(c) *Shared Appreciation Agreement.* If the loan/line of credit agreement is to be written down in accordance with this section and there is real estate which is security for the loan/line of credit agreement, then the borrower must enter into an agreement that provides for recapture of a portion of any appreciation in the value of the real estate securing the remaining loan/line of credit after write down. This agreement is Exhibit F to this subpart and is entitled "Shared Appreciation Agreement." The lender will provide a copy of the shared appreciation agreement to FmHA.

(1) The shared appreciation agreement will have a term not to exceed 10 years from the date of the shared appreciation agreement and provide for the recapture of appreciation on real estate based on the difference between the appraised market value of the real estate at the time the loan/line of credit agreement is written down and at the time of recapture.

(2) The shared appreciation agreement will provide that the amount recaptured will be 75 percent of the appreciated value of the real estate if the events described in paragraph (c)(3) of this section occur within 4 years of the write down, and 50 percent of such value if the recapture occurs during the remainder of the term of the agreement.

(3) Recapture of the appreciated value of the real estate will occur either at the end of the term of the shared appreciation agreement or at the time the real estate is conveyed, the loan/line of credit agreement is repaid, or the borrower ceases farming, whichever occurs earlier. Transfer of title to the borrower's spouse on the borrower's death will not be treated as a conveyance for the purpose of recapture.

(4) Any amount recaptured will be shared on a pro-rata basis between the lender and FmHA as provided in paragraph XIV of Form FmHA 449–35 or paragraph XIV of Form FmHA 1980–38.

(5) In no case will the amount recaptured exceed the amount of debt written down.

(d) *Additional requirements.* (1) The lender will use an addendum to the existing note or line of credit agreement which reflects the write down of the debt and the existence of any shared appreciation agreement.

(2) If the interest rate is changed, the interest rate will be the negotiated rate agreed upon by the lender and the borrower, subject to the provisions of § 1980.124 (b) (8) and (9) and (c) (2), (3), and (4) of this subpart, depending on the type of loan involved.

(3) The lender must attach the original of Exhibit F of this Subpart to the promissory note or line of credit agreement which evidences a loan/line of credit agreement that is written down and to the Loan Note Guarantee or Contract of Guarantee. If a holder is involved, a copy of Exhibit F will be attached to the original Form FmHA 449–36, "Assignment Guarantee Agreement," along with a copy of the note and Loan Note Guarantee. A copy of Exhibit F will be kept in the County Office and attached to the appropriate Loan Note Guarantee or Contract of Guarantee.

(4) As provided by paragraph XI C 2 of Form FmHA 449–35, the lender will remit to the holder the holder's pro-rata share of any estimated loss claim payments made by FmHA after the write down.

(5) Additional security instruments will be required if needed to maintain lien priority or to protect the interests of the lender and FmHA. In addition, if Exhibit F is executed, the lender is responsible for making sure that the security instruments also assure future collection of any appreciation in the real property covered by Exhibit F.

(6) The maximum amount of loss payment associated with a loan/line of credit agreement which has been written down will not exceed the percentage of the guarantee multiplied by the difference between the outstanding principal and interest balance of the loan/line of credit before the write down and the outstanding balance of the loan/line of credit after the write down. The lender will complete Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to receive its pro-rata share of any loss sustained.

(7) During the period of time in which the shared appreciation agreement is in effect, a note or line of credit agreement which has been written down cannot be consolidated.

§ 1980.126 Mediation.

Various States have mediation programs, which are designed to assist farm borrowers and their creditors in resolving financial disputes through the process of mediation. Where a State has such a farm credit mediation program, the lender shall participate in accordance with the rules of that system. The lender must not agree to any proposals concerning the rewriting of the terms of the guaranteed loan which do not comply with the provisions of Subpart A of this Part and this Subpart, especially §§ 1980.124 and 1980.125. Any agreements reached as a result of such mediation must have prior concurrence by the State Director or designee. FmHA is not bound by any agreements developed in mediation or findings of the mediator unless FmHA agrees to them in writing.

§§ 1980.127—1980.128 [Reserved]

§ 1980.129 Planning and performing development.

The lender is responsible for seeing that any buildings or other improvements or major land development to be paid for with loan funds are properly completed within a reasonable period of time. The security must be free of any mechanic's, materialmen's or other liens which would affect the priority of the lien which the lender told FmHA would be taken on the security. All major construction, major repairs, and major land development must be performed under contract. As soon as such construction, repair, or land development involving the use of loan funds has been completed in accordance with the plans and specifications, Form FmHA 449–11, "Certificate of Acquisition or Construction," will be completed and given to the County Supervisor. This form will be used by a lender, borrower, and/or contractor to certify that the security has been acquired or the construction completed.

In connection with construction the lender is responsible for:

(a) Making sure there is compliance with applicable laws, ordinances, codes and regulations, including FmHA regulations, which affect all phases of construction. The lender may inspect the site and any construction or development work at any stage whenever the lender considers it necessary.

(b) Seeing that the plans, specifications, and estimates are adequate.

(c) Making sure of the rights to an adequate water supply of sufficient quantity and quality.

(d) Identifying whether the construction or development will be performed by contract or other method.

(e) Checking to see that any necessary bonds covering contractors are in proper form.

(f) Seeing that all equal opportunity and nondiscrimination requirements are met. (See § 1980.41 of Subpart A of this part.)

(g) Limiting periodic or partial payments for construction or development to a reasonable percentage of the actual value of work and material in place. The lender will make final payment only after seeing that the final inspection has been made.

(h) Ascertaining that after planned development is completed, the requirements of § 1980.108(a)(3)(i) of this Subpart are met.

Administrative

The County Supervisor will:

1. Check to see that the construction, repair or land development has been completed.

2. Forward Form FmHA 449–11 to the lender for completion and execution by the lender, borrower, and contractor.

§ 1980.130 Loan servicing.

The lender is responsible for loan servicing as required by paragraph IX of Form FmHA 449–35, or paragraph IX of Form FmHA 1980–38.

Administrative

A. The lender has the responsibility for loan servicing and protecting the collateral. Prompt followup on delinquent payments and early recognition of problems are keys to resolving many delinquent loans. Contacts with the borrower when determined necessary by the County Supervisor will be made with the lender present. If the borrower also has an insured loan, normal servicing contacts will only be made by FmHA;

however, FmHA should provide the lender with a summary of the results of the visit.

B. The County Supervisor is responsible for monitoring the lender's servicing activities as follows:

1. Unless previously reviewed, the lender's borrower case files will be reviewed within 90 days after loan closing. The lender will be reminded of the lender's responsibilities in servicing the loan as required in paragraph IX of Form FmHA 449-35 or paragraph IX of Form FmHA 1980-38 when deficiencies are noted. Any deficiencies will be discussed with the lender and the discussion will be confirmed in writing with a copy to the State Director through the District Director.

2. Contact the State Office when the case file review indicates the lender or the borrower has failed to fulfill any of the loan approval conditions and the resulting problem cannot be resolved by the County Supervisor and the lender.

3. Take the action required in paragraph X of Form FmHA 449-35 or paragraph X of Form FmHA 1980-38.

4. Use an office management system for guaranteed loans to assure timely followup on all required financial statements, and to make sure any special requirements for loan servicing conditions are met.

5. Review at least 20 percent of the existing loan(s)/line of credit(s) which each lender has each year and any problem loan(s)/line of credit(s) which were previously identified.

6. Submit to the Finance Office immediately after December 31 of each year, the Lender's statement required in paragraph IX C 10 of Form FmHA1980-38 or paragraph IX C 10 of Form FmHA 449-35 as modified by requirements set out in § 1980.118(c) of this subpart, reflecting the unpaid principal balance on the loan or line of credit.

7. Contact, at least annually, all lenders with active shared appreciation agreements for borrowers who have received debt write down. When making this contact, the County Supervisor will ascertain if any collection has been made from property covered by such agreement. Findings will be recorded in the County Office file. If any unauthorized collection is made by the lender, a report will be forwarded to the State Director.

C. The State Director will approve all debt write downs. Approval will be evidenced by a letter to the lender with a copy to the borrower and signed by the State Director.

D. The District Director will:

1. Provide guidance and assistance to the County Supervisor in monitoring guaranteed loans/lines of credit.

2. Review all field visit reports and make recommendations or comments and transmit them to the State Director, if necessary.

3. In the case of a debt write down, the District Director will review for concurrence and forward to the State Director as appropriate.

E. County Supervisors are authorized to approve or concur in:

1. Alterations in the approval conditions which will not prejudice the Government's interest.

2. Any replacement of collateral for the loan/line of credit.

3. All lien coverage and lien priorities on the collateral established by the lender before issuance of the Loan Note Guarantee or Contract of Guarantee.

4. Any deferral, rescheduling, or reamortization of the loan.

5. For debt write down, the County Supervisor will recommend State Director approval through the District Director.

6. The use of proceeds from the disposition of collateral complying with the provisions of paragraph IX of Form FmHA 449-35 or paragraph IX of Form FmHA 1980-38.

§§ 1980.131-1980.135 [Reserved]

§ 1980.136 Protective advances.

Protective advances are advances made by a lender when the borrower is in liquidation or close to being liquidated to protect or preserve the collateral itself from loss or deterioration. Examples of protective advances are: payment of delinquent taxes, assessments, ground rents, hazard or flood insurance premiums against or affecting the collateral, harvesting costs, cost for emergency measures to protect the collateral, etc., attorney fees are not a protective advance. It is not intended that protective advances be made in lieu of additional loans. See paragraph XII of Form FmHA 449-35 or paragraph XII of Form FmHA 1980-38.

Administrative

The County Supervisor is authorized, under paragraph XII of Form FmHA 449-35 or paragraph XII of Form FmHA 1980-38, to approve protective advances in excess of $500 and will consult with the lender on future servicing of the account. Such protective advances must be approved in writing by the County Supervisor.

§§ 1980.137-1980.138 [Reserved]

§ 1980.139 Termination of Loan Note Guarantee or Contract of Guarantee.

See paragraph 12 of Form FmHA 449-34, or paragraph 5 of Form FmHA 1980-27.

Administrative

The County Supervisor will advise the Finance Office by memorandum when a Loan Note Guarantee or Contract of Guarantee is terminated.

§§ 1980.140-1980.143 [Reserved]

§ 1980.144 Bankruptcy.

(a) *General.* In bankruptcies, there are two separate proceedings: liquidation and reorganization under the bankruptcy court's protection. It is the lender's responsibility to protect the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings (refer to paragraph IX C 5 of Form FmHA 449-35 or Form 1980-38). These responsibilities include, but are not limited to:

(1) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(2) The lender will attend and where necessary participate in meetings of the creditors and all court proceedings.

(3) The lender, whose collateral is subject to being used by the bankruptcy estate, will immediately seek adequate protection of the collateral, including petitioning for a super priority. Adequate protection of the collateral, depending on interpretation, may take several forms. In a bankruptcy, the trustee is authorized to sell, lease or use the collateral if the borrower's business is in operation. The only collateral the trustee cannot utilize is cash collateral unless the secured creditor grants permission or the bankruptcy court authorizes the use of such after giving a proper hearing and notice.

(i) Cash collateral means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, such as accounts receivable.

(ii) Concerning machinery, equipment and real estate, adequate protection can be interpreted differently under reorganization. The bankruptcy trustee could dispose of certain collateral and grant to the secured party a replacement lien on some other collateral which may or may not have the same value. For example, the lender may hold a first lien on a good saleable piece of real estate and could find replacement of this particular parcel of property with a second or possibly a third lien on another parcel of land that the lender may find undesirable for adequate protection. There are no guarantees to the lender when the borrower is in reorganization that the collateral will be protected to the lender's satisfaction. The lender should be fully aware of what is taking place with the collateral and resist any adverse changes that may be made in the collateral securing the FmHA guaranteed loan.

(4) When permitted by the Bankruptcy Code, the lender will request a modification of any plan of reorganization whenever it appears that additional recoveries are likely. In Chapters 11, 12, and 13 bankruptcy cases, the lender will monitor the plans to determine whether the borrower is fulfilling the requirements of the plan and take appropriate action to obtain dismissal of the case if the borrower fails to comply with the requirements of the plan. A dismissal of the plan by the bankruptcy court would restore the original outstanding indebtedness at the

time the reorganization plan was approved.

(5) FmHA will be kept adequately and regularly informed in writing on all aspects of the proceedings.

(b) *Reorganization bankruptcy cases.* (1) In Chapters 11, 12, or 13 reorganization, if an independent appraisal of collateral is necessary in FmHA's opinion, FmHA and the lender will share the appraisal fee equally.

(2) Lender expenses, in Chapters 11, 12, or 13 reorganization cases, are not deducted from the proceeds of the collateral because a reorganization is not a liquidation. All expenses incurred by the lender (including attorney's fees), while the borrower is in reorganization, are considered normal expenses of servicing the account, and therefore are the responsibility of the lender and are not deductible from the proceeds of the collateral or covered under the FmHA guarantee.

(c) *Liquidation bankruptcy cases.* (1) Reasonable and customary liquidation expenses may be deducted from the proceeds of the collateral in liquidation bankruptcy cases provided the lender is doing the actual liquidation of the collateral and presents adequate written justification for each expense and secures FmHA's written concurrence prior to incurring the expense.

(2) If a trustee is appointed by the bankruptcy court to sell the collateral under a conversion of a reorganization plan to a liquidation plan or Chapter 7, the trustee rather than the lender, in this instance, is responsible for liquidating the collateral. Normally, any expenses incurred by the lender during this period are not considered liquidation expenses and cannot be deducted from collateral proceeds. The lender is not engaged in the actual liquidation but is performing in a manner considered to be normal servicing of the loan under the circumstances.

(3) If the property is abandoned by the trustee and the lender is actually engaged in actual liquidation, reasonable liquidation expenses would be recoverable from liquidation proceeds with prior written concurrence for each expense from FmHA before the expense is incurred.

(d) *Loss payments.* See paragraph XVI of Form FmHA 449-35 or Form FmHA 1980-38.

Administrative

A. The lender is responsible for advising FmHA of the completion of the reorganization plan. The lender is also responsible for advising FmHA if the borrower does not comply with the plan and servicing action the lender will take to protect the interest of the lender and FmHA. However, the FmHA servicing office will monitor the lender's files to ensure timely notification of servicing actions.

B. When an estimated loss claim is paid during the operation of the reorganization plan, and the borrower repays the loan in full without an additional loss sustained by the lender, a Final Report of Loss is not necessary. The Finance Office will close out the estimated loss account as a Final Loss at the time notification of payment in full is received.

C. If the bankruptcy court attempts to direct that loss payments will be applied to the account other than the unsecured principal first and then to unsecured accrued interest, the lender is responsible for notifying the FmHA servicing office immediately. The FmHA servicing office will then obtain advice from OGC on what actions FmHA should take.

D. Protective Advances—Authorized Protective Advances may be included with the estimated loss payment associated with the reorganization bankruptcy provided they were incurred in connection with liquidation of the account prior to the borrower filing bankruptcy. Protective advances during a bankruptcy reorganization are not authorized.

E. Accrued interest owed to the lender should be supported by documentation as to how the accrued interest amount was calculated by the lender. A copy of the promissory note and ledger should also be attached. As part of the review of the final loss claim, FmHA should be assured that the lender has not accrued interest on the principal and interest amount of the loan that was paid by the estimated loss payment. The approval official is responsible for verifying the accuracy of the interest calculations on the final report of loss before submission to the Finance Office.

F. Repurchase of Notes—In cases where a default on the guaranteed note does not exist, the State Director may approve the repurchase of the unpaid guaranteed portion of the loan(s) from any holder(s) to reduce interest accrual during a Chapter 7 proceeding, or after a Chapter 11 proceeding becomes a liquidation proceeding. (Refer to paragraph X C of Form FmHA 449-35 or Form FmHA 1980-38).

G. County Supervisors are authorized to approve Report of Estimated Loss or Final Loss Payments on Form FmHA 449-30 in those cases where the loss payment will not exceed $55,000. The State Director is authorized to accept the determination in all other cases. A copy of Form FmHA 449-30, when approved by the County Supervisor, will be sent to the District Director. The State Director will submit Form FmHA 449-30 to the Finance Office for payment of any losses.

§ 1980.145 Defaults by borrower.

(a) See paragraph X of Form FmHA 449-35 or paragraph X of Form FmHA 1980-38.

(b) The lender will prepare current financial information including a cash flow and will schedule a meeting with the County Supervisor and the borrower to discuss possible solutions including interest rate buydown to resolve the borrower's financial problems. The lender must notify the County Supervisor of the meeting at least 10 working days in advance. At least 10 working days prior to the meeting, the County Supervisor will mail Exhibit D and Attachment 1 of this subpart to the lender and the borrower.

(c) A record of the meeting will be prepared by the lender, which will at least include a list of the individuals who attend, and a summary of the problem and proposed solutions. The original will be retained in the lender's loan file and a copy will be submitted to the County Supervisor and the borrower.

(d) If the lender and the borrower's proposed action is either denied or partially denied, the County Supervisor will notify the lender and the borrower in writing within 10 days of FmHA's decision of all the reasons for the decision and advise them of their opportunity to jointly appeal the decision as set out in Subpart B of Part 1900 of this chapter.

Administrative

A. The County Supervisor will review and distribute Form FmHA 1980-44, "Guaranteed Loan Borrower Default Status," in accordance with the preparation instructions in the FMI upon receipt of the lender's default notification in accordance with paragraph X A of Form FmHA 449-35 or paragraph X A of Form FmHA 1980-38. The County Supervisor will coordinate and process any request for FmHA to purchase (as outlined in paragraph X D of Form FmHA 449-35) when the holder(s) is located in close proximity to the local lender. If any holder is located ouside the area, the State Director will designate an employee to handle the repurchase arrangements. If the employee is not the County Suprevisor, the County Supervisor will be notified of the transaction.

B. The County Supervisor will verify the amounts due the holder(s), and transmit the holder's demand for paymant by memorandum to the State Director. Copies of evidence of the holder's ownership will be included. Any original evidence of ownership will be retained in the County Office. A proposed payment date will be established in order to calculate the interest due the holder(s).

C. In the event of default or servicing problems, the County Supervisor will use Form FmHA 1980-37, "FmHA purchase of a Guaranteed Loan Portion," to request a check to pay the guaranteed portion of a loan(s) to the holder(s) when necessary. The Finance Office will forward the check within 10 days after receipt of the request.

D. Any evidence of ownership retained in the County Office will be considered in any future report of loss calculations. A record of any purchase will be maintained in the loan file.

§ 1980.146 Liquidation.

(a) *General.* The general requirements for liquidating a guaranteed Farmer Program loan/line of credit are set out in § 1980.64 of Subpart A of this part and in paragraph XI of Form FmHA 449-35 or paragraph XI of Form FmHA 1980-38. The lender may use any method of liquidation customary to the farm lending industry so long as the method will result in the maximum collection possible on the debt. All liquidations must receive prior concurrence by the appropriate FmHA official. Estimated or final loss claims will be submitted using Form FmHA 449-30, "Loan Note Guarantee Report of Loss," along with the required supporting documentation set out in the instructions for preparing the form.

(b) *Estimated loss claims.* (1) Estimated loss claims will only be approved after the lender has obtained FmHA approval of a liquidation plan, a debt write-down plan or a reorganization plan which has been approved by the bankruptcy court. Once a liquidation plan is approved and it appears the liquidation period will exceed 90 days, the lender will file an estimated loss claim. Once this claim is approved by FmHA, the lender will discontinue interest accrual on the defaulted loan and the loss claim will be promptly processed in accordance with Administrative paragraph D of this section. The County Supervisor may approve loss payments up to $55,000, or the State Director for loss payments in excess of $55,000. Estimated loss payments will be inserted under "Amount Due Lender"on Form FmHA 449-30. The Director, Finance Office, will forward loss payment checks within 30 days of receipt of the request.

(2) If the actual loss is less than the estimated loss payment, the lender will reimburse FmHA for the overpayment, plus interest at the note or line of credit agreement rate from the point of initial check issuance. Variable interest notes or line of credit agreements will bear interest at the average note or line of credit agreement rate paid during the loan/line of credit term.

(c) *Allowable liquidation costs.* In the preparation of a liquidation plan, reasonable liquidation costs will be allowed. Reasonable is defined as the prevailing rate charged in the area for like services. Liquidation costs are paid from the sale of collateral when the lender has conducted the liquidation. Therefore, if liquidation never occurs or if liquidation is conducted by someone other than the lender (a bankruptcy trustee, for example), there can be no allowable liquidation costs.

(1) *In-house expenses.* In-house expenses of the lender *are not allowable* costs under a liquidation plan. In-house expenses include, but are not limited to, employee salaries, staff lawyers, travel and overhead.

(2) *Appraisals.* If an appraisal is required, the fee is shared by FmHA and the lender in accordance with Paragraph XI A 4 of Form FmHA 449-35 or paragraph XI A 4 of Form FmHA 1980-38, this is an allowable liquidation cost. Both the lender and FmHA recover this cost from the first collateral sales proceeds received, each taking half of the proceeds until the cost of the appraisal is recovered. The funds that are collected as recovery of an appraisal fee will be forwarded to the Finance Office along with Form FmHA 1980-40, "Reverse a Report of Liquidation Expenses."

Administrative

A. *Meetings.* The County Supervisor will meet with the lender when the lender or FmHA determines that liquidation is necessary and will inform the District Director and the State Director of the results.

B. *Form FmHA 449-35, paragraph XI B or paragraph XI B of Form FmHA 1980-38.* FmHA will exercise the option to liquidate only when there is reason to believe the lender's liquidation plan is not likely to provide a reasonably adequate recovery. If FmHA liquidates, all of the requirements for liquidating an FmHA insured loan will be followed (see Subpart A of Part 1955, Subpart A of Part 1962 and Subpart A of Part 1965 of this chapter). The County Supervisor will approve lender liquidation plans. The District Director or State Office may be consulted on complex cases for advice if necessary. When FmHA exercises the option to liquidate, the State Director or designee will be the approval official. When such a decision is made, submit Form FmHA 1980-45, "Notice of Liquidation Responsibility," to the Finance Office.

C. *Fom FmHA 449-35, paragraph XI D or paragraph XI D of Form FmHA 1980-38.* County Supervisors are responsible for seeing that the lender complies with the requirements of paragraph XI D. The County Supervisor will accept or reject the accounting reports as submitted by the lender and will obtain the advice of the District Director or State Office when necessary. When FmHA liquidates the security, the County Supervisor will submit these reports to the lender and will send copies to the District Director and the State Office.

D. *Form FmHA 449-35, paragraph XI E 2 or paragraph XI E 2 of Form FmHA 1980-38.* County Supervisors are authorized to approve Report of Estimated Loss or Final Loss Payment determinations on form FmHA 449-30 in those cases where the loss payment will not exceed $55,000. The State Director is authorized to accept the determinations in all other cases. A copy of the form will be given to the District Director. The State Director will submit form FmHA 449-30 to the Finance Office for payment of any losses. The Finance Office will forward loss payment checks within 10 days of receipt of the request to the County Supervisor for delivery to lender.

E. *Form FmHA 449-35, paragraph XI E 3 or paragraph XI E 3 of Form FmHA 1980-38.* Final loss payments will be made within 60 days after the review of the accounting of the collateral. These payments will be reduced, if necessary, after considering the Conditions of Guarantee in Form FmHA 449-34 or Form FmHA 1980-27. State Directors are responsible for seeing that such reviews are accomplished in time to be evaluated and accepted or otherwise resolved within the 60-day period. The County Supervisor may conduct such reviews when the loss payment does not exceed $55,000. The State Director will conduct all other reviews. The State Director may request National Office assistance in conducting any review. If a lender's final loss claim is either denied or reduced, the County Supervisor will notify the lender in writing within 10 days of FmHA's decision, of all the reasons for the decision, and advise the lender of its opportunity for an appeal as set out in Subpart B of Part 1900 of this chapter.

F. The County Supervisor will establish a follow-up to contact lenders in writing who have received final loss claim payments to report any collections made on the guaranteed loans. Such follow-up will be made annually for 5 years after the final loss claim is paid. The County Supervisor will report the results of the follow-up to the State Director no later than 10 working days after the end of the fiscal year. The State Director will consolidate the County Office reports and report the results to the Administrator by November 1 of each year. The information to be reported will be: lender, borrower, case number, loss claim amount, amount collected, and amount submitted to FmHA.

§ 1980.147 Graduation.

There is no graduation requirement for guaranteed loans/lines of credit.

§ 1980.148 Appeal procedure.

Refer to Subpart B of Part 1900 of this chapter for the method of appealing adverse decisions of County Committees, County Supervisors, District Directors, and State Directors.

§ 1980.149 Access to lender's records.

See § 1980.81 of Subpart A of this part for this requirement.

§§ 1980.150-1980.152 [Reserved]

§ 1980.153 FmHA forms.

See § 1980.83 of Subpart A of this part and Exhibit C (available in any FmHA office) of this subpart.

General Administrative

A. *Office of the General Counsel (OGC):* In performing administrative functions with respect to Farmer Program loans, FmHA may ask for the advice and assistance of OGC on any legal matter. However, it is the responsibility of the lender to ascertain that

all requirements for making, securing, and servicing the loan are met. If FmHA has any questions concerning the lender's resolution of these matters, it should consult with OGC.

B. *Delegation of Authority:* State Directors should delegate to their staff members those administrative duties and responsibilities stipulated in the Administrative sections of this subpart.

§§ 1980.154-1980.174 [Reserved]

§ 1980.175 Operating loans.

(a) *Objectives.* The basic objective of the guaranteed OL loan program is to provide credit for family farmers and ranchers to conduct operations when credit is not available without a guarantee. This assistance provides family farm operators an opportunity to make efficient use of their land, labor and other resources, to improve their living conditions and to improve their overall economic situation.

(b) *Loan eligibility requirements.* In accordance with the Food Security Act of 1985 (Pub. L. 99-198) after December 23, 1985, if an individual or any member, stockholder, partner, or joint operator of an entity is convicted under Federal or State law of planting, cultivating, growing, producing, harvesting or storing a controlled substance (see 21 CFR Part 1308, which is Exhibit C to Subpart A of Part 1941 of this chapter and is available in any FmHA office, for the definition of "controlled substance") prior to the issuance of the Loan Note Guarantee or the Contract of Guarantee in any crop year, the individual or entity shall be ineligible for a guaranteed loan for the crop year in which the individual or member, stockholder, partner, or joint operator of the entity was convicted and the four succeeding crop years. Applicants will attest on Form FmHA 410-1, "Application for FmHA Services," that as individuals or that its members, if an entity, have not been convicted of such crime after December 23, 1985. In addition, the following requirements must be met:

(1) An individual must:

(i) Be a citizen of the United States (See § 1980.106(b)(21) of this subpart for the definition of "United States") or an alien lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act. Aliens must provide INS Forms I-151 or I-551, "Alien Registration Receipt Card." Indefinite parolees are not eligible. If the authenticity of the information shown on the alien's identification document is questioned, the County Supervisor may request the Immigration and Naturalization Service (INS) to verify the information appearing on the alien's identification card by completing INS Form G-641, "Application for Verification of Information from Immigration and Naturalization Records," obtainable from the nearest INS district. (See Exhibit B of Subpart A of Part 1944 of this chapter.) Mail the completed form to INS. The payment of a service fee by FmHA to INS is waived by inserting in the upper right hand corner of INS Form G-641, the following: "INTERAGENCY LAW ENFORCEMENT REQUEST."

(ii) Possess the legal capacity to incur the obligations of the loan.

(iii) Have sufficient applicable educational and/or on the job training or farming experience in managing and operating a farm or ranch (within 1 of the last 5 years) which indicates the managerial ability necessary to assure reasonable prospects of success in the proposed plan of operation.

(iv) Have the character (emphasizing credit history, past record of debt repayment and reliability), and industry to carry out the proposed operation. Past record of debt repayment will not be cause for a determination that the applicant is not eligible if an honest attempt has been made to meet the obligation.

(v) Honestly try to carry out the conditions and terms of the loan.

(vi) Be unable to obtain sufficient credit without a guarantee to finance actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

(vii) Be an owner-operator or tenant-operator of not larger than a family farm after the loan is closed.

(2) A cooperative, corporation, partnership or joint operation must:

(i) Be unable to obtain sufficient credit without a guarantee to finance actual needs at reasonable rates and terms, taking into account prevailing private and cooperative rates and terms in or near the community for loans for similar purposes and periods of time. This applies to the entity and all of its members, stockholders, partners, or joint operators, as individuals.

(ii) Be controlled by farmers or ranchers engaged primarily and directly in farming or ranching in the United States after the loan is made.

(iii) Consist of members, stockholders, partners or joint operators who are individuals and not a cooperative(s), corporation(s), partnership(s), or joint operation(s).

(iv) If the members, stockholders, partners, or joint operators holding a majority interest are related by marriage or blood:

(A) They must be citizens of the United States (see § 1980.106(b)(21) of this subpart for the definition of "United States") or an alien lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act. Aliens must provide INS Forms I-151 or I-551, "Alien Registration Receipt Card." Indefinite parolees are not eligible. If the authenticity of the information shown on the alien's identification document is questioned, the County Supervisor may request INS to verify the information appearing on the alien's identification card by completing INS Form G-641, "Application for Verification of Information from Immigration and Naturalization Records," obtainable from the nearest INS district (see Exhibit B of Subpart A of Part 1944 of this chapter). Mail the completed form to INS. The payment of a service fee by FmHA to INS is waived by inserting in the upper right hand corner of INS Form G-641, the following: "INTERAGENCY LAW ENFORCEMENT REQUEST."

(B) They must have sufficient educational or on the job training or farming experience in managing and operating a farm or ranch (within 1 of the last 5 years) which indicates the managerial ability necessary to assure reasonable prospects of success in the proposed plan of operation.

(C) They and the entity itself must have the character (emphasizing credit history, past record of debt repayment and reliability), and industry to carry out the proposed operation. Past record of debt repayment will not be cause for a determination that the applicant is not eligible if an honest attempt has been made to meet the obligation.

(D) They and the entity itself will honestly try to carry out the conditions and terms of the loan.

(E) At least one member, stockholder, partner or joint operator must operate the family farm.

(F) The entity must operate the farm and be authorized to own or operate a farm in the State(s) in which the farm is located.

(v) If the members, stockholders, partners or joint operators holding a majority interest are *not* related by marriage or blood:

(A) The requirements of paragraphs (b)(2)(iv) (A) through (D) must be met.

(B) They and the entity itself must operate the family farm.

(C) The entity must operate the farm and be authorized to do so in the State(s) in which the farm is located.

(vi) If each member's, partner's, stockholder's or joint operator's ownership interest does *not* exceed the

family farm definition limits, their collective interests can exceed the family farm definition limits only if: all of the members of the entity are related by blood or marriage, all of the members are or will be operators of the entity, and the majority interest holders of the entity meet the requirements of paragraphs (b)(2)(iv) (A) through (D) and (F) of this section.

(c) *Loan purposes.*—(1) *Loan Note Guarantee.* Loans may be made for farm, forestry, recreation and nonfarm enterprises for the following purposes, when such purposes are essential to the operation:

(i) Purchase of farm machinery and equipment, livestock, poultry, fur bearing and other farm animals, aquaculture, worms, birds, bees, tools, and inventories, or to purchase an individual undivided interest in such items.

(ii) Payment of annual operating expenses.

(iii) Payment of family living expenses.

(iv) Refinancing debt incurred for any authorized operating loan purpose, including FmHA insured loans.

(v) Purchase of membership and stock in a farm purchasing, marketing, or service-type cooperative association, including a grazing association.

(vi) Purchase and repair of essential home equipment.

(vii) Purchase of milk base or milk quota with or without cows.

(viii) Not more than $15,000 in a fiscal year for real estate improvements or repairs. The following determinations must be made by the lender before a guaranteed OL loan is made for real estate improvement:

(A) Loans will not be needed year after year for this purpose.

(B) The applicant owns the farm or has tenure arrangements, including a compensation agreement, sufficient to obtain a reasonable return on the investment.

(ix) Payments to a creditor. In any one year, OL funds used to make these payments cannot exceed 20 percent of the appraised market value of the essential farm and nonfarm equipment and livestock under a prior lien to the creditor, or 20 percent of the amount owed to such creditor, whichever is less.

(x) Purchase of a franchise, contract or privilege when necessary to the operation of the planned enterprise.

(xi) Partial payment for the purchase and construction of crop, storage and drying facilities when the Commodity Credit Corporation (CCC), through the ASCS, is providing a part of the credit under the Commodity Credit Corporation Farm Storage and Drying Equipment Loan Program.

(2) *Contract of Guarantee—Line of Credit.* Lines of credit may be advanced for farm, forestry, recreation and nonfarm enterprises for the following purposes, when such purposes are essential to the operation:

(i) Payment of annual operating expenses, which may include the purchase of feeder animals, and family living expenses.

(ii) Payment of debts incurred by the borrower for current annual operating expenses that were advanced by the lender and/or other creditors/suppliers prior to the issuance of the guarantee. In no case will carryover debts from previous crop years be refinanced.

(d) *Loan limitations.* (1) The total outstanding insured and guaranteed OL principal balance owed by the loan applicant or owed by anyone who will sign the note/line of credit agreement as a cosigner may not exceed a total of $400,000 at loan closing. The amount of principal outstanding at any time on a guaranteed line of credit also must never exceed the ceiling set out on the Contract of Guarantee.

(2) Loans may not be made for: (i) The purchase of real estate, or (ii) Making principal payments on real estate.

(3) Guaranteed lines of credit *will not* be used for capital expenditures.

(4) Loans also may not be made for any purpose that will contribute to excessive erosion or highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in Exhibit M to Subpart G of Part 1940 of this chapter. A decision by FmHA to reject an application for this reason is appealable. However, an appeal questioning either the presence of a wetland, converted wetland, or highly erodible land must be filed directly with the USDA agency making the determination in accordance with its appeal procedures.

(5) Multiple Guarantees. More than one Loan Note Guarantee or Contract of Guarantee may be executed with the same or different lenders to a borrower so long as each loan/line of credit is secured with separate collateral that is clearly identified. This requirement does not preclude cross-collateralization of loans/lines of credit with other guaranteed loans/lines of credit to obtain additional collateral provided that the loans/lines of credit are held by the same lender. Total loans or line of credit ceilings must not exceed $400,000 at any time.

(e) *Interest rates.* (1) The interest rate will be a fixed or variable rate agreed upon by the borrower and the lender. The lender will charge the same rate on both the guaranteed and the non-guaranteed portions of the note.

(2) The lender may charge a rate *not to exceed* the rate the lender charges its average farm customer. Average farm customers are those conventional borrowers who are required to pledge their crops, livestock and other chattel and real estate security for the loan. This does not include those high risk farmers with limited security and management ability that are generally charged a higher interest rate by conventional agricultural lenders. Also, this does not include those low risk farm customers who obtain financing on a secured or unsecured basis who have as collateral items such as saving accounts, time deposits, certificates of deposit, stocks and bonds, and life insurance which they are able to pledge for the loan. At the request of FmHA the lender will provide evidence of the rate charged the average farm customers. Such evidence may consist of average yield data, or documented administrative differential rate schedule formulas used by the lender.

(3) Except for Farm Credit System member institutions, if a variable rate is used, it must be tied to a rate specifically agreed to by the lender and borrower. Such agreement on interest rate must be documented in the borrower/lender's loan agreement. The interest rate on loans made by a Farm Credit System member institution will be a fixed or variable rate based on their administrative and borrowing costs. Variable rates may change according to the normal practices of the lender for its average farm customers, but frequency of change must be set forth in the loan/line of credit intstrument.

(4) The lender, borrower and holder (if any) may collectively effect a temporary reduction in the interest rate when processing an Interest Rate Buydown under Exhibit D of this subpart. The reduced rate of interest must be a fixed rate for the term of the buydown. The lender is responsible for the legal documentation of interest rate changes by an "allonge" attached to the promissory note(s) or line of credit agreement or other legally effective amendment of the interest rate; however, no new note(s) or line of credit agreement(s) may be issued. If the amendment is attached to a variable rate note or line of credit agreement, the fixed rate of interest charged during the buydown period will be calculated not to exceed the average variable rate charged the lender's average farm customer over the past 90 days.

(5) Interest will be charged only on the actual amount of funds loaned and for the actual time the loan is outstanding. Interest on protective advances made by the lender to protect the security may be charged at the rate specified in the security instruments.

(f) *Terms.* (1) The final maturity date for each loan/line of credit cannot exceed 7 years from the date of the promissory note/line of credit agreement.

(2) All advances on a line of credit must be made within 3 years from the date of the Contract of Guarantee.

(3) Ordinarily, loan funds used to pay annual operating expenses or bills incurred for such purposes for the crop year being financed will be scheduled for payment when the income from the year's operation is to be received. Under certain circumstances these payments may be scheduled over longer periods. Circumstances which warrant an extended repayment schedule are factors such as establishing a new enterprise, developing a farm, or during recovery from disaster or economic reverses. Crops only are not sufficient security when repayment is scheduled over the longer period.

(4) Advances for purposes other then those for annual operating expenses will be scheduled for payment over the minimum period necessary considering the applicant's ability to pay and the useful life of the security, but not in excess of seven years.

(5) When conditions warrant, installments scheduled in accordance with paragraph (f)(4) of this section may include equal, unequal, or balloon installments. In each case warranting balloon installments there must be adequate collateral for the loan/line of credit at the time the balloon installment becomes due. In no case will annual crops and/or machinery be used as the sole collateral securing a loan with a balloon installment. Circumstances which warrant balloon payments are factors such as establishing a new enterprise, developing a farm, or during recovery from a disaster or economic reverses. The amount ballooned should not exceed that which the borrower could reasonably expect to pay during a maximum additional 15-year period except for NFE loans, which will be a maximum additional 7 years. The applicant must be advised before the loan is closed that the lender will review each case at the end of the initial loan term to determine if such rescheduling is warranted. (See § 1980.124 of this subpart.)

(g) *Security.* Ordinarily, the security must be adequate in the opinion of the lender and FmHA to assure repayment of the loan/line of credit. If the security alone is inadequate, then the applicant's repayment ability will also be considered by the lender and FmHA (provided the FmHA approval official's opinion is based on the evaluation set forth in § 1980.114 of this subpart) in determining whether the loan/line of credit should be made. However, when a loan is made for refinancing purposes, the amount refinanced may not exceed the value of the security. The loan/line of credit must be secured by a first lien on all property or products acquired or produced with loan funds and by any additional security needed. Any loans made for refinancing when the debt refinanced is secured by real estate or chattels will be secured by a first lien on the property securing the debt which is being refinanced or when the debt refinanced is secured by real estate by a junior lien which is no lower than the lien presently held on the property securing the debt being refinanced, and by any additional security needed. Additional security may consist of the best lien obtainable on chattels, real estate or other property.

(h) *Special security requirements.* (1) Operating loans shall not be guaranteed where multiple entities own the chattel unless all entities guarantee and pledge security for the loan and no entity may transfer ownership or security value to another entity without the lender and FmHA concurrence.

(2) When guaranteed OL loans are made to eligible *entities* that consist of members, stockholders, partners or joint operators who are presently indebted for a guaranteed OL loan(s) as individual(s) *or* when guaranteed OL loans are made to eligible *individuals,* who are members, stockholders, partners or joint operators of an entity which is presently indebted for a guaranteed OL loans(s), security must consist, of chattel and/or real estate security that is separate and identifiable from the security pledged to FmHA for any other farmer program insured or guaranteed loans. Different lien positions on real estate are considered separate and identifiable collateral.

(i) *Insurance.* Insurance for property, public liability, and crops should be obtained before or at the time of loan closing.

(1) *Chattel property.* Borrowers should be encouraged to carry insurance on chattel property, including growing crops, which serves as security for a loan and on other chattel or real property, in order to protect themselves against losses resulting from hazards existing in an area. It is especially desirable that insurance be obtained by applicants who receive large loans and have considerable chattel property including feed, supplies, and inventory centrally stored over an extended period. Such insurance may be required by the loan approval official in individual cases.

(2) *Real estate.* If essential insurable buildings are located on the property, or improvements are to be made to existing buildings, the applicant, when required, will provide adequate property insurance coverage at the time of the loan closing or as of the date materials are delivered to the property, whichever is appropriate.

Real property insurance will not be required when a real estate appraisal report shows that both the present market value of the land (after deducting the value of buildings) and the owner's equity in the land exceed the amount of the debt, including the debts for the loan being made. However, the applicant will be encouraged to carry insurance. If insurance claims for loss or damage to buildings to be replaced or repaired with loan funds are outstanding at the time the guarantee is approved, the applicant will be required to agree in writing that when settlement of these is made, the proceeds will be used to replace or repair buildings, to apply to debts secured by prior liens, or to apply to the guaranteed OL loan/line of credit being made.

(3) *Public liability and property damage.* Borrowers, receiving loans for farm, recreational, or nonfarm enterprises should be advised of the possibilities of incurring liability and encouraged to obtain public liability and property damage insurance, including insurance on a customer's property in the custody of the borrower.

(j) *Other considerations.* (1) Applicants will be advised by the lender that they are expected to comply with any applicable special laws and regulations.

(2) Applicants receiving loans for nonfarm enterprises will be advised of the possibility of incurring liability and encouraged to obtain public liability and property damage insurance.

§§ 1980.176–1980.179 [Reserved].

§ 1980.180 Farm Ownership loans.

(a) *Objectives.* The basic objectives of the Farmers Home Administration (FmHA) in guaranteeing farm ownership (FO) loans are to assist eligible applicants who cannot get credit without a guarantee to become owner-operators of family farms. The operations may include establishment or

enlargement of nonfarm enterprises to supplement the farm income.

(b) *Farm ownership loan eligibility requirements.* The farm ownership loan eligibility requirements are the same as the operating loan eligibility requirements as defined in § 1980.175(b) of this subpart except as follows:

(1) Section 1980.175(b)(1)(vii) does not apply. Instead an individual must be the owner-operator of not larger than a family farm after the loan is closed.

(2) Section 1980.175(b)(2)(iv)(F) does not apply. Instead a cooperative, corporation, partnership or joint operation must own *and* operate the farm and be authorized to do so in the State(s) in which the farm is located.

(c) *Loan purposes.* Loans that are consistent with all Federal, State and local environmental quality standards may be made for the following authorized loan purposes:

(1) Purchase or enlarge a farm, including any land for recreation or other nonfarm enterprise. This may include:

(i) Purchasing easements and rights-of-way needed to operate the farm or nonfarm enterprise.

(ii) An applicant's portion of the cost of land which is being subdivided.

(iii) Making a downpayment on the purchase of land under the following conditions:

(A) A deed is obtained by the applicant and the unpaid balance on the loan is secured by a note and mortgage or an acceptable land purchase contract or similar instrument.

(B) The applicant can meet the loan terms under normal farm conditions.

(C) The conditions and the requirements of any prior mortgage or contract meet the security requirements for taking a junior lien as shown in paragraph (f)(2)(iii) of this section.

(D) A purchase contract is signed which obligates the purchaser or contract to meet the security requirements for the rights of present possession, control, and beneficial use of the property, and entitles the purchaser to a deed upon paying all or a specific part of the purchase price.

(2) Construct, buy, or improve buildings and facilities needed on the applicant's farm, including:

(i) The construction of an essential farm dwelling and service buildings of modest design and cost, including facilities and structures for nonfarm enterprise uses or aquaculture such as docks, fish hatcheries, shooting blinds, refreshment or marketing stands, processing or assembly plants, sales buildings, repair shops, lodging facilities, trailer parks, picnic areas, target ranges, tennis courts, shuffleboard courts, golf driving ranges, campsites, and modest rental housing. For dwelling improvement or construction, consideration may be given to additional space required for facilities used for food preparation and storage, vehicle storage, or laundry and office space, the size and cost of which will not exceed that owned by typical family farmers in the area.

(ii) The improvement, alteration, repair, replacement, relocation or purchase and transfer of such essential dwellings and service buildings, facilities, structures and fixtures that become part of the real estate or customarily pass with the farm when it is sold. This includes pollution control and energy saving devices.

(3) Provide land and water development, pollution control and energy saving measures, acquire water supplies and rights, and promote the use and conservation essential to the operation of the farm and any nonfarm enterprise facilities. This includes providing fencing, drainage and irrigation facilities, basic applications of lime and fertilizer, and facilities for land clearing. This also includes establishing approved forestry practices, fish ponds, trails and lakes; improving orchards; and establishing and improving permanent hay or pasture. Sources of water may be located outside the land owned provided appropriate rights or easements are obtained to ensure that the water rights will pass with the farm when it is sold. The funds for land and water development may include the costs of machinery and equipment needed to do the development only when the total cost of the development and machinery or equipment would not exceed the cost of hiring someone to do the development work. Also, loan funds may be used to pay that part of the cost of facilities, improvements and "practices" which will be paid for in connection with participation in such programs as the Agricultural Conservation or Great Plains programs only when such costs cannot be covered by purchase orders or assignments to material suppliers or contractors. If loan funds are advanced and the portion of the payment for which the funds were advanced is likely to exceed $1,000, the applicant will assign the payment to the lender.

(i) Funds may be used to pay for development costs on land owned with defective title (see paragraph (f)(2) of this section) or on land in which the applicant owns an undivided interest, provided:

(A) The amount of loan funds used on such land is limited to $25,000;

(B) There is adequate security for the loan; and

(C) The tract with defective title or undivided interest is not included in the appraisal report.

(ii) Funds may be used to pay for development costs on land leased by the applicant provided:

(A) The terms of the lease are such that there is reasonable assurance the applicant will have use of the improvement over its useful life;

(B) A written lease provides for payment to the tenant or assignee of any unexhausted value of the improvement if the lease is terminated;

(C) There is adequate security for the loan; and

(D) The amount of loan funds used for improvements on leased land will not exceed $10,000.

(4) Refinance debts subject to the following:

(i) The applicant's present creditors will not furnish credit at rates and terms the applicant can meet.

(ii) The lender will verify the need to refinance all secured debts and major unsecured debts. The unpaid balance on the debts to be refinanced will also be verified.

(5) Pay reasonable expenses incidental to obtaining, planning, closing and making the loan, such as fees for legal, architectural and other technical services, first year insurance premiums, and loan fees authorized in § 1980.22 of Subpart A of this part, which are required to be paid by the borrowers and which cannot be paid from other funds. Loan funds also may be used to pay the borrower's share of Social Security taxes for labor hired by the borrower in connection with land and building development.

(6) Finance a nonfarm enterprise when it will provide another source of necessary income even though the owned or purchased acreage for such enterprise is not physically located on the farmland.

(7) Purchase any stock in a cooperative lending agency that is necessary to obtain the loan.

(d) *Loan limitations.* A guaranteed FO loan will not be approved if:

(1) The total outstanding insured or guaranteed FO, Soil and Water (SW) or Recreation (RL) loan principal balance owed by the applicant or by anyone who will sign the note as a cosigner will exceed the lesser of $300,000 or the market value of the farm or other security.

(2) The noncontiguous character of a farm containing two or more tracts is such that an efficient farming operation and nonfarm enterprise cannot be

conducted due to the distance between tracts or due to inadequate rights-of-way or public roads between tracts.

(3) The loan purpose will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in Exhibit M to Subpart G of Part 1940 of this chapter. A decision by FmHA to reject an application for this reason is appealable. However, an appeal questioning either the presence of a wetland, converted wetland, or highly erodible land on a particular property must be filed directly with the USDA agency making the determination in accordance with its appeal procedures.

(e) *Rates and terms.* Each loan will be scheduled for repayment over a period not to exceed 40 years from the date of the note or such shorter period as may be necessary to assure that the loan will be adequately secured, taking into account the probable depreciation of the security.

(1) *Interest rates.* The interest rate requirements are the same as set forth for operating loans in § 1980.75(e) of this subpart.

(2) Installments on loans may be deferred in accordance with § 1980.124(d) of this subpart.

(3) At the request of FmHA, the lender will provide evidence of the rate charged the average farm customer. Such evidence may consist of average yield data, or documented administrative differential rate schedule formulas used by the lender.

(f) *Security.* (1) Each guaranteed FO loan will be secured by real estate only or by a combination of real estate and chattels or other security.

(2) When obtaining real estate security the following will apply:

(i) A mortgage will be taken on the entire farm owned or to be owned by the applicant, including land in which the applicant owns an undivided interest, except a portion of the farm will be excluded when:

(A) The applicant's title to that part of the farm is defective, and cannot be cleared at a reasonable cost provided:

(*1*) The lender determines the applicant's interest is of such nature that it is not mortgageable;

(*2*) To include the land would complicate loan servicing or liquidation; and

(*3*) Any land on which title is defective will not be included in the appraisal of the farm whether or not it is described on the mortgage.

(*4*) State law prohibits taking a lien on homestead property, except for a purchase money interest in such property. In that case, the State Director will issue a State supplement exempting taking a lien on homestead property, where a purchase money interest is involved.

(B) The present lienholder on that part of the farm will not permit a junior lien or State law will not recognize or permit a lien when the security is not included in the appraisal report.

(C) Soundness of the loan will not be affected if there is defective title or part of the farm is not included as security for the loan.

(ii) When the farm alone will not provide enough security, other real estate owned by the applicant may also be taken as security.

(iii) Loans may be secured by a junior lien on real estate provided:

(A) Prior lien instruments do not contain provisions for future advances (except for taxes, insurance, other costs needed to protect the security, or reasonable foreclosure costs), cancellation, summary forfeiture, or other clauses that may jeopardize the Government's or the lender's interest or the applicant's ability to pay the guaranteed FO loan unless any such undesirable provisions are limited, modified, waived or subordinated insofar as the Government and the lender are concerned.

(B) Agreements are obtained from prior lienholders to give notice of foreclosure to the lender whenever State law or other arrangements do not require such a notice.

(iv) Any loan of $10,000 or less may be secured by the best lien obtainable without title clearance or legal services normally required, provided the lender believes from a search of the county records that the applicant can give a mortgage on the farm. This exception to title clearance will not apply when land is to be purchased.

(3) Loans may be secured by chattels subject to the following conditions:

(i) There is not enough real estate security for the loan and the best lien obtainable on the farm has been taken.

(ii) Taking a lien on chattels will not prevent the borrower from obtaining operating credit from other sources or the FmHA.

(iii) Junior liens on chattels may be taken when there is enough equity in the property. However, when practical, a first lien on selected chattel items should be obtained.

(iv) A first lien will be taken on equipment or fixtures bought with loan funds whenever such property cannot be included in the real estate lien and this additional security is needed to secure the loan.

(v) The lender is responsible for obtaining the lien on chattel security and keeping it effective as notice to third parties.

(4) Other items or property may be taken as additional security when needed. These include:

(i) Items such as land, buildings, fixtures, fences, water, water stock and facilities, other improvements, easements, rights-of-way, and other appurtenances that are considered part of the farm and usually pass with the farm in a change of ownership. If any of these do not pass with a change of ownership, the lender will identify such items and include them in an appropriate security instrument or assignment.

(ii) Other property that cannot be converted to cash without jeopardizing the borrower's farm operation such as the cash value of insurance policies, stock, memberships or stock in associations or water stocks. Any such property must have security value and be transferable.

(5) For the State of Hawaii—FO loans on leasehold interests on real property. The term owner-operator as used in this subpart shall include in the State of Hawaii the lessee-operator of real property in any case in which the County Supervisor determines that such real property cannot be acquired in fee simple by the lessee-operator. The leasehold must provide adequate security for the loan. A leasehold is the right to use property for a specific period of time under conditions provided in a lease agreement. The determination of value will be made by an appraisal of the present market value of the leasehold by an approved appraiser of the lender. The terms and conditions of the lease must be such as to allow the lessee-operator to have a reasonable probability of accomplishing the objectives and repayment of the loan. The FmHA Hawaii State Office will issue a State supplement for this subpart addressing leasehold interest and providing the requirements (including forms) for obtaining the required security. The amendment to the State supplement and forms, and any revisions to them, must have prior National Office approval before being issued.

(g) *Special requirements.* (1) The lender is responsible for making a preliminary determination as to whether a loan can be made on the farm. This determination will be based on a personal inspection of the farm and an evaluation of such factors as productivity of the land; location, conditions, and adequacy of the buildings; approximate value of the farm; roads, schools, markets, or other

community facilities; and tax rates and adequacy of the water supply. A decision also will be made on the suitability of the farm for a nonfarm enterprise facility or specialized farm operation, and development needed to make it a suitable farm.

(2) Buildings adequate for the planned operation of the farm, including any nonfarm enterprise, must be available for the applicant's use after the loan is made. The necessary buildings ordinarily will be located on the applicant's farm. Exceptions to this requirement are when:

(i) The applicant already owns an adequate, decent, safe, and sanitary dwelling, suitable for the family's needs, and is located close enough to the farm so the farm may be operated successfully. A real estate lien will be taken on such dwelling.

(ii) The applicant has a long-term lease on acceptable rented buildings that are adjacent to or near the farm, or the applicant occupies suitable buildings which the applicant will eventually inherit or be permitted to purchase from a relative.

(iii) The farm does not have an adequate dwelling and the applicant owns a suitable mobile home which will be used as the applicant's home. A mobile home will not be considered to add value to the farm but FO guaranteed loan funds may be used to finance anchoring the home.

(3) Development needed to make the farm and any nonfarm enterprise ready for a successful operation will be planned during loan processing. The plans should provide for completing the development at the earliest practicable date. The applicant should obtain the recommendations of representatives of the Forest Service, Soil Conservation Service, State Agricultural Extension Service, and State Planning and Development Agency or local planning groups to be included in the development plan and in the operating plan. In planning such development with the applicant, the lender will encourage the applicant to use any cost-sharing assistance that may be available through any sources such as the ASCS programs.

(4) Insurance on buildings and other property, and insurance available in flood and mudslide hazard areas, will be obtained as required by the lender. Applicants receiving loans for nonfarm enterprises will be advised by the lender of the possibility of incurring liability and will be encouraged to obtain public liability and property damage insurance. Chattel security should be insured against losses caused by hazards customarily insured against in the area if the loss of such security would jeopardize the interests of the lender and the Government.

(5) When loan soundness depends on income from other sources in addition to income from owned land, it will be necessary for the lender to determine that:

(i) There is reasonable assurance that any rented land which the applicant depends on will be available; and/or

(ii) Any off-farm employment the applicant depends on is likely to continue.

(6) Nonfarm enterprises will be analyzed by the lender to determine soundness.

(7) Other assets not used directly in the farming operation will be handled as follows:

(i) A guaranteed FO loan may be made when essential real estate is owned, either in whole or as an undivided interest, that will not be part of the farm provided:

(A) The real estate furnishes employment or income which is essential to the applicant's success.

(B) Sale of the property will not eliminate the need for FmHA guaranteed credit.

(C) Retention of the real estate will not cause the operation to be larger than a family farm.

(ii) An applicant will dispose of nonessential real estate or an undivided interest in real estate no later than loan closing. If this is not feasible, the applicant must agree in writing to dispose of the property as soon after closing as possible. Under no circumstances may the property be held for more than three years after closing.

(iii) The applicant must agree to use the proceeds from the sale of other real estate to:

(A) Pay costs and taxes connected with the sale;

(B) Reduce the FmHA guaranteed debt or any prior lien;

(C) Make essential capital purchases; or

(D) Pay essential farm and home expenses.

(iv) Real estate or an interest in real estate which is retained after loan closing, but which is not part of the farm will not be included in:

(A) The appraisal report.

(B) The security instrument for the loan.

(C) The total debt against the security.

(8) When life estates are involved, loans may be made:

(i) To both the life estate holder and the remainderman, provided:

(A) Both have a legal right to occupy and operate the farm; and

(B) Both are eligible for the loan; and

(C) Both parties sign the note and mortgage.

(ii) To the remainderman only, provided:

(A) The remainderman has a legal right to occupy and operate the farm; and

(B) The lien instrument is signed by the remainderman, life estate holder, and any other party having any interest in the security.

(iii) To the life estate holder only, provided:

(A) There is no legal restriction placed on a life estate holder who occupies and operates a farm; and

(B) The lien instrument is signed by the life estate holder, remainderman, and any other party having any interest in the security.

(9) A loan will not be approved if a lien junior to the lender's lien securing the guaranteed loan is likely to be taken simultaneously with or immediately subsequent to the loan closing to secure any debt the borrower may have at the time of loan closing or any debt that may be incurred in connection with the guaranteed loan such as for a portion of the purchase price of the farm or money borrowed from others for payments on debts against the farm, unless the total debt against the security would be within its market value.

(10) When guaranteed FO loans are made to eligible *entities* that consist of members, stockholders, partners or joint operators who are presently indebted for a guaranteed FO loan(s) as individual(s) *or* when guaranteed FO loans are made to eligible *individuals*, who are members, stockholders, partners or joint operators of an entity which is presently indebted for a guaranteed FO loan(s), security must consist of chattel and/or real estate security that is separate and identifiable from the security pledged to FmHA for any other farmer program insured or guaranteed loans. Different lien positions on real estate are considered separate and identifiable collateral.

§§ 1980.181-1980.184 [Reserved].

§ 1980.185 Soil and Water loans.

(a) *Objectives.* The basic objectives of the guaranteed SW loan program are to encourage and facilitate the improvement, protection, and proper use of farmland by providing financing for soil conservation; water development, conservation, and use; forestation; drainage of farmland; establishment and improvement of permanent pasture; pollution abatement and control; and other related measures consistent with all Federal, State, and local

environmental quality standards. Achieving these objectives should help farmers to make needed land-use adjustments and should lessen the impact of adverse weather conditions on farming operations.

(b) *Soil and Water loan eligibility requirements.* In accordance with the Food Security Act of 1985 (Pub. L. 99-198) after December 23, 1985, if an individual or any member, stockholder, partner, or joint operator of an entity is convicted under Federal or State law of planting, cultivating, growing, producing, harvesting or storing a controlled substance (see 21 CFR Part 1308, which is Exhibit C of Subpart A of Part 1941 of this chapter and is available in any FmHA office, for the definition of "controlled substance") prior to the issuance of the Loan Note Guarantee in any crop year, the individual or entity shall be ineligible for a loan guarantee for the crop year in which the individual or member, stockholder, partner, or joint operator of the entity was convicted and the four succeeding crop years. Applicants will attest on Form FmHA 410-1, "Application for FmHA Services," that as individuals or that its members, if an entity, have not been convicted of such crime after December 23, 1985. In addition, the following requirements must be met:

(1) An individual must:

(i) Be a citizen of the United States (see § 1980.106(b)(21) of this subpart for the definition of "United States") or an alien lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act. Aliens must provide INS Forms I-151 or I-551, "Alien Registration Receipt Card." Indefinite parolees are not eligible. If the authenticity of the information shown on the alien's identification document is questioned, the County Supervisor may request the INS to verify the information appearing on the alien's identification card by completing INS Form G-641, "Application for Verification of Information from Immigration and Naturalization Records," obtainable from the nearest INS district (see Exhibit B of Subpart A of Part 1944 of this chapter). Mail the completed form to INS. The payment of a service fee by FmHA to INS is waived by inserting in the upper right hand corner of INS Form G-641, the following: "INTERAGENCY LAW ENFORCEMENT REQUEST."

(ii) Possess the legal capacity to incur the obligations of the loan.

(iii) Have the character (emphasizing credit history, past record of debt repayment and reliability) and industry to carry out the proposed operation. Past record of debt repayment will not be cause for a determination that the applicant is not eligible if an honest attempt has been made to meet the obligation.

(iv) Honestly try to carry out the conditions and terms of the loan.

(v) Be unable to obtain sufficient credit without a guarantee to finance actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

(vi) Be the owner or operator of a farm after the loan is closed.

(vii) If a tenant, have a satisfactory written lease for a sufficient period of time and under terms that will enable the operator to obtain reasonable returns on the improvements to be made with the guaranteed loan. In addition, the lease or separate agreement should provide for compensating the tenant for any unexhausted value of the improvements upon termination of the lease.

(2) A cooperative, corporation, partnership or joint operation must:

(i) Along with all of its members, stockholders, partners, or joint operators have the character (emphasizing credit history, past record of debt repayment and reliability) and industry to carry out the proposed operation. Past record of debt repayment will not be cause for a determination that the applicant is not eligible if an honest attempt has been made to meet the obligation.

(ii) Along with all of its members, stockholders, partners, or joint operators, honestly try to carry out the conditions and terms of the loan.

(iii) Consist of members, stockholders, partners or joint operators holding a majority interest who are citizens of the United States (see §1980.106(b)(21) of this subpart for the definition of "United States"), or an alien lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act. Aliens must provide INS Forms I-151 or I-551, "Alien Registration Receipt Card." Indefinite parolees are not eligible. If the authenticity of the information shown on the alien's identification document is questioned, the County Supervisor may request the INS to verify the information appearing on the alien's identification card by completing INS Form G-641, "Application for Verification of Information from Immigration and Naturalization Records," obtainable from the nearest INS district (see Exhibit B of Subpart A of Part 1944 of this chapter). Mail the completed form to INS. The payment of a service fee by FmHA to INS is waived by inserting in the upper right hand corner of INS Form G-641, the following: "INTERAGENCY LAW ENFORCEMENT REQUEST."

(iv) Be authorized to own and/or operate a farm in the State(s) in which the farm is located.

(v) Be unable to obtain sufficient credit without a guarantee, either as an entity or as individual members, stockholders, partners, or joint operators, to finance actual needs at reasonable rates and terms, taking into account prevailing private and cooperative rates and terms in or near the community for loans for similar purposes and periods of time.

(vi) Be controlled by individuals engaged primarily and directly in farming or ranching in the United States after the loan is made.

(vii) Be the owner or operator of a farm after the loan is made.

(viii) If a tenant, have a satisfactory written lease for a sufficient period of time and under terms that will enable the applicant to obtain reasonable returns on the improvements made with the loan. In addition, the lease or separate agreement should provide for compensating the tenant for any unexhausted value of the improvements upon termination of the lease.

(ix) Consist of members, stockholders, partners or joint operators who are *individuals* and not corporation(s), partnership(s), cooperative(s), or joint operations.

(c) *Loan purposes.* Loan purposes must be consistent with all Federal, State and local environmental quality standards and funds may be used to:

(1) Pay the costs for construction, materials, supplies, equipment, and services related to land and water development, use, and conservation; and energy saving measures related to soil and water conservation, such as:

(i) Terraces, dikes, reservoirs, ponds, tanks, cisterns, liquid and solid waste disposal facilities, wells, pipelines, pumping and irrigation equipment, ditches and canals for drainage, waterways, and erosion control structures.

(ii) Drainage of land which is part of an operating farm unit.

(iii) Land clearing.

(iv) Sodding, subsoiling, land leveling, liming and fencing.

(v) Fertilizer and seed used in connection with a soil conservation practice or to establish or improve permanent vegetation.

(vi) Forestation for sustained yield and tree planting for erosion control or shelter belt purposes.

(vii) Gasoline, oil, and equipment rental or hire connected with

establishing or completing the development.

(viii) Reasonable expenses incidental to obtaining, planning closing and making the loan, such as fees for legal, engineering or other technical services, hazard insurance premiums, and loan fees authorized in § 1980.22 of Subpart A of this part, which are required to be paid by the borrower and which cannot be paid from other funds. Loan funds may also be used to pay the borrower's share of Social Security taxes for labor hired by the borrower in connection with making any planned improvements.

(ix) Purchase or repair of special-purpose equipment such as terracing, land leveling and ditching equipment, provided:

(A) Such equipment is needed and will facilitate the completion or maintenance of the planned improvement, and

(B) The cost of the equipment plus the other costs related to the improvement will not be more than if performed by a contractor or by another method.

(2) Pay the costs of meeting Federal, State and local requirements for agricultural, animal, or poultry waste pollution abatement and control facilities, including construction, modification, or relocation of the farm or farm structures if necessary to comply with such pollution abatement requirements.

(3) Acquire a source of water to be used on land the applicant owns, will acquire, or operates including:

(i) The purchase of water stock or membership in an incorporated water user association.

(ii) The acquisition of a water right through appropriation, agreement, permit, or decree.

(iii) The acquisition of water supply or right, and the land on which it is presently being used, when the water supply or right cannot be purchased without the land, provided:

(A) The value of the land without the water supply or right is only an incidental part of the total price; and

(B) The water supply and right will be transferred to, and used more effectively on, other land owned or operated by the applicant.

(4) Refinance debts subject to the following:

(i) The debts were incurred for authorized guaranteed SW loan purposes.

(ii) All development or repair work conforms to FmHA standards or those standards will be met with the guaranteed loan.

(iii) The applicant's present creditors will not furnish credit at rates and terms the applicant can meet.

(iv) The lender will verify the need to refinance all secured and major unsecured debts. The unpaid balance on the debts to be refinanced will also be verified.

(5) Purchase land or an interest therein for sites or rights-of-way and easements upon which a water or drainage facility will be located.

(6) Pay that part of the cost of facilities, improvements, and "practices" which will be paid for in connection with participation in programs administered by agencies such as the ASCS or the Soil Conservation Service (SCS) only when such costs cannot be covered by purchase orders or assignments to material suppliers or contractors. If loan funds are advanced and the portion of the payment for which the funds were advanced is likely to exceed $1,000, the applicant will assign the payment to the lender.

(7) Provide water supply facilities for dwellings and farm buildings, including such facilities as wells, pumps, farmstead distribution systems, and home plumbing.

(8) Pay costs of land and water development, use, and conservation essential to the applicant's farm, subject to the following:

(i) Such a loan may be made on land with defective title owned by the applicant (see paragraph (f) of this section) or on land in which the applicant owns an undivided interest providing:

(A) The amount of funds used on such land is limited to $25,000,

(B) There is adequate security for the loan, and

(C) The tract is not included in the appraisal report.

(ii) Such a loan may be made on land leased by the applicant providing:

(A) The terms of the lease are such that there is reasonable assurance the applicant will have use of the improvement over its useful life.

(B) A written lease provides for payment to the tenant or assignee any unexhausted value of the improvement if the lease is terminated.

(C) There is adequate security for the loan.

(9) Purchase any stock in a cooperative lending agency that is necessary to obtain the loan.

(d) *Loan limitations.* A guaranteed SW loan will not be approved if:

(1) The total outstanding insured or guaranteed SW, FO or RL loan principal balance owed by the applicant or owed by anyone who will sign the note as a cosigner will exceed the lesser of $300,000 or the market value of the farm or other security.

(2) The noncontiguous character of a farm containing two or more tracts is such that an efficient farming operation and nonfarm enterprise cannot be conducted due to the distance between tracts or due to inadequate rights-of-way or public roads between tracts.

(3) The loan purpose will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in Exhibit M to Subpart G of Part 1940 of this chapter. A decision by FmHA to reject an application for this reason is appealable. However, an appeal questioning either the presence of a wetland, converted wetland, or highly erodible land on a particular property must be filed directly with the USDA agency making the determination in accordance with its appeal procedures.

(e) *Rates and terms.* Each loan will be scheduled for repayment over a period not to exceed 40 years from the date of the note or such shorter period as may be necessary to assure that the loan will be adequately secured, taking into account the probable depreciation of the security.

(1) The interest rates requirements are the same as set forth for operating loans in § 1980.175(e) of this subpart.

(2) Installments may be deferred in accordance with § 1980.124(d) of this subpart.

(f) *Security.* (1) Each guaranteed SW loan will be secured by real estate, chattels, other security, leaseholds, or a combination of these.

(2) When obtaining real estate security, the following will apply:

(i) A mortgage will be taken on the entire farm to be improved which is owned by the applicant, including land in which the applicant owns an undivided interest, except a portion of the farm will be excluded when:

(A) The applicant's title to that part of the farm is defective, and cannot be cured at a reasonable cost, provided:

(*1*) The lender determines the applicant's interest is of such nature that it is not mortgageable; and

(*2*) To include the land would complicate loan servicing or liquidation: and

(*3*) Any land on which title is defective will not be included in the appraisal of the farm whether or not it is described on the mortgage.

(*4*) State law prohibits taking a lien on homestead property, except for a purchase money interest in such property. The State Director will issue a State supplement exempting taking a lien on homestead property where purchase money interest is involved.

(B) The present lienholder on that part of the farm will not permit a junior lien or State law will not recognize or permit a lien provided the part excluded from the security is not included in the appraisal report.

(C) Soundness of the loan will not be affected if there is defective title or part of the farm is not included as security.

(ii) When the farm alone will not provide enough security, other real estate owned by the applicant may also be taken as security.

(iii) Loans may be secured by a junior lien on real estate provided:

(A) Prior lien instruments do not contain provisions for future advances (except for taxes, insurance, other costs needed to protect the security, or reasonable foreclosure costs), cancellation, summary forfeiture, or other clauses that may jeopardize the Government's or the lender's interest or the applicant's ability to pay the guaranteed loan unless any such undesirable provisions are limited, modified, waived or subordinated insofar as the Government and the lender are concerned.

(B) Agreements are obtained from prior lienholders to give notice of foreclosure to the lender whenever State law or other arrangements do not require such a notice.

(iv) Any loan of $10,000 or less may be secured by the best lien obtainable without title clearance or legal services normally required, provided the lender believes from a search of the county records that the applicant can give a mortgage on the farm. This exception to title clearance will not apply when land is to be purchased.

(3) Loans may be secured by chattels subject to the following conditions:

(i) Real estate security is inadequate to secure the loan or is not available at all.

(ii) Taking a lien on chattels will not prevent the borrower from obtaining operating credit from other sources or the FmHA.

(iii) Junior liens on chattels may be taken when there is enough equity in the property. However, when practical, a first lien on selected chattel items should be obtained.

(iv) A first lien will be taken on equipment or fixtures bought with loan funds whenever such property cannot be included in the real estate lien and this additional security is needed to secure the loan.

(v) When a loan is made only for the purchase of shares of water stock, such stock will be pledged or assigned as security for the loan. No other security need be required if the stock represents the right to receive water and is transferable separately from the land, provided:

(A) There is a market for the stock.

(B) The purchase price is no greater than the price at which stock in the water company is normally sold.

(vi) If secured by chattels only, the loan cannot be over $100,000 and must be scheduled for repayment within 20 years or the useful life of the security, whichever is less.

(vii) The lender is responsible for obtaining the lien on chattel security and keeping it effective as notice to third parties.

(4) Other items or property may be taken as additional security when needed. These include:

(i) Items such as land, buildings, fixtures, fences, water, water stock and facilities, other improvements, easements, rights-of-way, and other appurtenances that are considered part of the farm and usually pass with the farm in a change of ownership. If any of these do not pass with a change of ownership, the lender will properly identify such items and include them in an appropriate security instrument or assignment.

(ii) Other property that cannot be converted to cash without jeopardizing the borrower's farm operation such as the cash value of insurance policies, stock, memberships or stock in associations, or water stocks. Any such property must have security value and be transferable.

(5) A loan may be secured by a mortgage on the leasehold if it has negotiable value and is able to be mortgaged, subject to the following:

(i) The unexpired term of the lease should extend beyond the repayment period of the loan for a period sufficient to ensure that the objectives of the loan will be achieved. It the loan repayment period is equal to or greater than the period covered by the lease, the borrower must provide other security to secure the loan or the lessor must agree in writing to compensate the borrower for any unexhausted value of the improvements when the lease expires or is terminated.

(ii) The lessor must have good and marketable title to the real estate, which may be subject to a prior lien, or the lessor must have signed a contract to purchase the real estate. The contract to sell and the lien instruments must not contain covenants, such as short redemption periods or rights to cancel, which may jeopardize the lender's security. Any provisions which may jeopardize the lender's security must be limited, modified, waived or subordinated in favor of the lender.

(iii) With respect to achieving the purpose of the loan, obtaining adequate security, and being able to service the loan and enforce its rights, the lender, as holder of a mortgage upon a lease or leasehold interest, must be in a position substantially as good as if it held a second mortgage on the real estate. Besides the lessor's consent to the mortgage on the leasehold interest, the lender should consider whether or not:

(A) There is reasonable security of tenure. The borrower's interest should not be subject to summary forfeiture or cancellation.

(B) The right to foreclose the mortgage and sell without restriction would adversely affect the saleability or market value of the security.

(C) The lender has a right to bid at a foreclosure sale or to accept voluntary conveyance in lieu of foreclosure.

(D) The lender has the right, after acquiring the leasehold through foreclosure or voluntary conveyance in lieu of foreclosure, or in event of abandonment by the borrower, to occupy the property or sublet it, and to sell it for cash or credit.

(E) The borrower has the right, in the event of default or inability to continue with the lease and the loan, to transfer the leasehold, subject to the mortgage, to an eligible transferee who will assume the guaranteed SW debt.

(F) Advance notice will be given to the lender of the lessor's intention to cancel, terminate or foreclose upon the lease. Such advance notice should be long enough to permit the lender to ascertain the amount of delinquencies, the total amount of the lessor's and any other prior interest, the market value of the leasehold interest and, if litigation is involved, permit appropriate action by the lender to be taken.

(G) There are express provisions covering the question of the lender's obligation to pay unpaid rental or other charges accrued at the time it acquires possession of the property or title to the leasehold, and those which become due during the lender's occupancy or ownership, pending further servicing or liquidation.

(H) There are any necessary provisions to assure fair compensation to the lessee for any part of the premises taken by condemnation.

(I) Any other provisions are necessary to obtain an interest which can be mortgaged.

(iv) The following language or similar language which is legally adequate will be inserted on the lien instrument:

All Borrower's right, title, and interest in and to the leasehold estate for a term of ____ years beginning on _____, 19____.

created and established by a certain Lease dated _____, 19____, executed by _____ as lessor(s), recorded on _____, 19____, in Book _____, page ____ of the _____ Records of said County and State, and any renewals and extensions thereof, and all Borrower's right, title, and interest in and to said Lease, covering the following real estate: (To be inserted just before the legal description.)

This additional covenant will be inserted in the mortgage:

Borrower will pay when due all rents and all other charges required by said Lease, will comply with all other requirements of said Lease, and will not surrender or relinquish without the lender's written consent, any of the Borrower's right, title or interest in or to said leasehold estate or under said Lease while this instrument remains in effect.

(g) *Special requirements.* (1) When possible, recommendations for land development will be obtained from the Forest Service, State Agricultural Extension Service, and the Soil Conservation Service and included in the development plan and in the operating plans. In planning such development with the applicant, the lender will encourage the applicant to use any cost-sharing assistance that may be available through any source such as the ASCS programs.

(2) Applicants are responsible for obtaining all the technical assistance required in connection with a guaranteed SW loan, such as that needed to plan, construct, or establish the improvement or facility to be financed.

(3) Evidence or documentation of the following should be obtained when loan funds are to be used for irrigation purposes:

(i) The land to be irrigated is suitable for irrigation.

(ii) The applicant has a right to use water for irrigation.

(iii) The water is suitable to use for irrigation and is available in sufficient quantities to irrigate a specified amount of land.

(iv) If irrigation specialists have prepared any feasibility studies, copies of these studies should be submitted to the lender.

(4) Insurance on building and other property, and insurance available in flood and mudslide hazard areas, will be obtained as required by the lender. Chattel security should be insured against losses caused by hazards customarily insured against in the area if the loss of such security would jeopardize the interests of the lender and the Government.

(5) When life estates are involved, loans may be made:

(i) To both the life estate holder and the remainderman, provided:

(A) Both have a legal right to occupy and operate the farm; and

(B) Both are eligible for the loan; and

(C) Both parties sign the note and mortgage.

(ii) To the remainderman only, provided:

(A) The remainderman has a legal right to occupy and operate the farm; and

(B) The lien instrument is signed by the remainderman, life estate holder, and any other party having any interest in the security.

(iii) To the life estate holder only, provided:

(A) There is no legal restriction placed on a life estate holder who occupies and operates a farm; and

(B) The lien instrument is signed by the life estate holder, remainderman, and any other party having any interest in the security.

(6) A loan will not be approved if a lien junior to the lender's lien securing the guaranteed loan is likely to be taken simultaneously with or immediately subsequent to the loan closing to secure any debt the borrower may have at the time of loan closing or any debt that may be incured in connection with the guaranteed loan, unless the total debt against the security would be within its market value.

(7) When guarantees SW loans are made to eligible *entities* that consist of members, stockholders, partners or joint operators who are presently indebted for a guaranteed SW loan(s) are made to eligible *individual(s), or* when guaranteed SW loans are made to eligible *individuals,* who are members, stockholders, partners or joint operators of an entity which is presently indebted for a guaranteed SW loan(s), security must consist of chattel and/or real estate security that is separate and identifiable from the security pledged to FmHA for any other farmer program insured or guaranteed loans. Different lien positions on real estate are considered separate and indentifiable collateral.

§§ 1980.186–1980.199 [Reserved].

§ 1980.200 OMB control number.

The collection of information requirements in this regulation have been approved by the Office of Management and Budget and assigned OMB control number 0575–0079.

Exhibit A—Approved Lender Program—Farm Ownership, Soil and Water and Operating Loans

I. *General:* This Exhibit provides policies and procedures to establish an Approved Lender Program (ALP) for Guaranteed Operating Loans (OL) described in § 1980.175, Farm Ownership (FO) Loans described in § 1980.180 and Soil and Water (SW) loans described in § 1980.185 of this subpart. The objectives are to minimize time required by approved lenders in obtaining response to request for a guarantee, eliminate the requirement of having Form FmHA 449–35, "Lender's Agreement," or Form FmHA 1980–38, "Lender's Agreement (Line of Credit)," executed for each loan or line of credit guaranteed by Farmers Home Administration (FmHA), permit maximum use of forms normally used by the lender, require lender to provide FmHA a credit analysis and reduce the workload responsibilities of FmHA. FmHA will make the final determination on eligibility, loan purposes and repayment terms. The ALP agreements, Attachments 1 and 2, will serve as the "Lender's Agreement" for guarantees issued by FmHA under this Exhibit. Attachment 1 is the Lender's Agreement to be executed in relation to regular term loans. Attachment 2 is the Lender's Agreement that is to be executed in relation to lines of credit. The lender, in its application, should indicate the type(s) of advances to be made.

A. *Authority.* The authorizations contained in this Exhibit provide: (1) Methods for initial approval period, subsequent approval period(s) and revocation of ALP status; (2) Methods an ALP lender will use to process, service and conclude guaranteed OL, SW, and FO loans; (3) Methods FmHA will use to consider an ALP lender's request for guarantee and monitor guaranteed OL, SW, and FO loan activities.

B. *Policy.* The purpose of an ALP is to expand the guaranteed OL, SW, and FO programs, supplement present insured loan authority, and make credit available to not larger than family farm owners and/or operators who are presently in a "credit availability gap." The "credit availability gap" farmers are those who slightly exceed FmHA's insured loan eligibility criteria but who face a degree of financial stress which renders them unable to fully qualify for adequate credit based upon standards required by the commercial agricultural lender.

C. *List of Lenders.* The County Supervisor will maintain a current list of approved lenders and other lenders who express a desire to participate in the guaranteed program. This list will be made available to farmers upon request.

II. *Lender Approval, Subsequent Approval Period(s) and Revocation of ALP Status.* Lenders who meet the required and other criteria may be granted ALP status for a period not to exceed 2 years by the State Director for the State in which the lender is authorized to do business. All initial and any subsequent approvals of ALP status will be in the form of an agreement signed by the State Director and the lending institution. The agreement will be Attachment 1 and/or Attachment 2 of the Exhibit. The agreement will not apply to branches or suboffices of the lender unless specifically named in the Agreement. In cases involving the Farm Credit System (FCS), the State Director shall

give ALP status, within the State Director's area of jurisdiction, to any FCS member institution provided such members do not have loan losses exceeding 6 percent per year for each of the three previous years or 18 percent of the institution's average loan portfolio computed for the three previous years. FCS member institutions having an acceptable loan loss percentage as specified above are exempt from complying with requirements of paragraph II A (1)(a) through (d) and (2). The Farm Credit Administration (FCA) will notify the FmHA Administrator in writing annually or sooner of any FCS member institution that has loan losses exceeding the acceptable percentage specified above.

To obtain ALP status, an FCS member institution with an acceptable loan loss percentage need only execute the agreement (Attachment 1 and/or Attachment 2 of this Exhibit) and satisfy the State Director that it is using acceptable forms as provided in paragraph II A (1)(e). Even if an FCS member institution is not identified by FCA as having an acceptable loan loss percentage, that institution may still request the State Director to consider it for ALP status under paragraphs II A (1) and (2). When FCS member institutions reorganize into one association, the reorganized association must be considered for ALP status as an initial applicant with unacceptable loan losses. Except for those FCS member institutions identified by FCA as having an acceptable loan loss percentage, ALP status will expire at the end of any approved 2-year period unless the lender applies for a new agreement which can be approved by the appropriate State Director. The ALP status of *any* lender may be revoked by the FmHA State Director as outlined in paragraph C. State Directors will keep their respective FmHA County and District Offices fully informed, by use of State supplements, of the names and addresses of all lending institutions, branches or suboffices that hold ALP status. The name of each ALP lender's designated person or agricultural loan officer who will process and service guaranteed loans for the ALP lender will be included.

A. *Lender Approval.* Any lender who desires to apply for ALP status must also be an "Eligible Lender" as defined in § 1980.13(b) of Subpart A of this part. Except for FCS member institutions having an acceptable loan loss percentage as specified in the introductory text to paragraph II, lenders who meet this requirement and desire ALP status will prepare a written request to the State Director for the State in which they desire to have ALP status. The written request will address each item of "required criteria" and "optional criteria," contained in paragraphs II A (1) and (2) and may be accompanied by any supporting evidence or other information the applicant lender believes will be helpful to the State Director in making a decision on the application for ALP status. Any FmHA County, District or State Office may provide a lender who desires to apply for ALP status, a complete copy of Subparts A and B of this part, including a copy of this Exhibit, and will assist in completion of the request. The State Director will make any necessary investigation or inquiry to determine accuracy of information and notify the applicant lender within 15 days of receipt of a request that the request is approved, denied, or requires additional information. The application material will be retained by the State Director for all approved lenders and periodic checks will be made by FmHA personnel to insure the lender's performance is as outlined in the application.

(1) *Required Criteria.* Other than as noted in paragraph II A above, before a State Director approves a lender, including an FCS member institution that is not identified by FCA as having as having an acceptable annual percentage of loan losses, for ALP status, the requirements listed in paragraphs II A (1) (a) through (f) must be met. However, upon the request of a lender asking for ALP status, the State Director may exempt that lender from complying with the requirement of paragraph II A (1)(b) provided the lender complies with all the other requirements listed in paragraph II A (1) if the State Director is satisfied that the lender—without regard to the requirement for which the exemption is being requested—is an acceptable agricultural lender with the ability to adequately make and service agricultural loans.

(a) Provide evidence of being an "Eligible Lender" as defined in Subpart A of this part.

(b) Provide information to show that agricultural loan losses—net of recovery—do not exceed the following:

(i) For FCS member institutions, either 6 percent per year of the institution's total loan portfolio for each of the three previous years or 18 percent of the institution's average loan portfolio computed for the three previous years; *or*

(ii) For all other lenders, either 1½ percent per year of the lender's total agricultural loan portfolio computed for the three previous years or 4½ percent of the lender's average agricultural loan portfolio computed for the three previous years.

(c) Have the capacity to process and service FmHA guaranteed FO and SW loans and OL loans/lines of credit.

(d) Designate a person(s) who will process and service FmHA guaranteed OL loans/lines of credit and SW and FO loans and agree for the person(s) to attend training sessions provided by FmHA.

(e) Agree to use forms acceptable to FmHA for processing, analyzing, securing and servicing FmHA guaranteed loans/lines of credit. Copies of financial statements, cash flow plans, budgets, loan agreements, analysis sheets, recordkeeping methods, collateral control sheets, security and other forms to be used must be submitted for FmHA acceptability with request for ALP status. See § 1980.109 and § 1980.113 of this subpart for required forms.

(f) Agree to abide by all applicable conditions of § 1980.60 of Subpart A of this part for all loan guarantees.

(2) *Optional Criteria.* Exceptions to the following criteria may be made at the discretion of the State Director.

(a) Have experience and familiarity with FmHA insured and guaranteed loan programs. State length of time and types of loans/lines of credit.

(b) Establish that at least $2.5 million or 50 percent (whichever is less) of total loan portfolio is in agricultural loans.

(c) Provide a resume of designated person who will process and service guaranteed FmHA loans/lines of credit. Minimum of 30 college hours in agricultural science, training in Agriculture Economics and/or at least two (2) years experience in making and servicing agricultural type loans for production and for real estate purposes is required. If the designated person also performs appraisal duties a qualification statement will be included.

(d) Provide a copy of its most recent Report of Condition and Income (Call Report) and description of current level of agricultural and other leading activities.

(e) Demonstrate a potential capacity for guaranteed OL loan/line of credit and guaranteed FO and SW loan activity in trade area. Must have ability to process and service at least 10 guaranteed OL loans/lines of credit and/or SW and/or FO loans, subject to availability of funds, per fiscal year (October 1–September 30).

(f) Provide comments on experience or ability to comply with regulatory requirements, e.g., Environmental Assessments, Equal Opportunity, Flood and Mudslide, Clean Air, etc. (See §§1980.40 through 1980.46 of Subpart A of this part.)

(g) Agree to submit requests for guaranteed OL loans/lines of credit and/or SW and/or FO loans to county official(s) in service areas after application is complete to coincide with scheduled meetings of the local FmHA County Committee.

(h) Provide any other supplemental information the lender desires to submit.

B. *Subsequent Approval Period(s).* Except for those FCS member institutions that have acceptable loan losses as specified in the introductory text of paragraph II, a new 2-year period of ALP status is not automatic. Lenders who desire to continue in ALP status are required to submit a request for subsequent approved periods at least 60 days prior to the expiration of any existing approved period. At least 30 days prior to the expiration of any approved ALP period, the State Director will complete a review of the ALP criteria, the lender's past performance, consult appropriate FmHA county and district personnel, and, if requested by the lender, determine if a new 2-year period of ALP status can be approved. The lender's request will be in writing to the State Director and contain, as a minimum, the following:

(1) A brief summary of activity as an ALP lender including number and dollar amount of guaranteed OL loan/lines of credit, SW loans, and/or FO loans extant, number and dollar amount processed during tenure as ALP, number and dollar amount now under consideration, potential guaranteed OL, SW, and/or FO lending activity and recap of any loss settlements.

(2) A current update of data required in paragraphs IIA(1) (a) and (b) and IIA(2)(d) of this Exhibit and any proposed changes in agricultrual loan officer(s), forms used, or operating methods used in guaranteed OL loan/line of credit, SW loan, and/or FO loan processing and servicing.

(3) Request for a new 2-year period of ALP status.

The State Director will promptly review the request, make any inquiry needed to arrive at a decision; and notify the ALP lender of approved ALP status for two years, or required conditions for approval, or denial with reasons. An ALP lender who has not participated in the guaranteed program during the previous 2 year approved period must submit a request as outlined in paragraph II A of this Exhibit.

C. *Revocation of ALP Status.* Except for those FCS member institutions that have acceptable loan losses as specified in the introductory text of paragraph II, ALP status will lapse upon expiration of any 2-year period unless the lender obtains a new agreement under paragraph II B.

The State Director will revoke ALP status of any approved lender who fails to maintain "required criteria" as approved in the application for ALP status and may revoke status for failure to meet any "optional criteria" as agreed. Status shall also be revoked if the lender violates the terms of the ALP agreement, or fails to properly service any guaranteed loan or line of credit, or to protect adequately the interests of the lender and the Government. Furthermore, status, at the option of the State Director, may also be revoked if an FCS member institution that previously had acceptable loan losses as specified in the introductory text of paragraph II above is no longer identified by FCA as having acceptable losses.

State Directors will provide all County Office named in paragraph XVIII of the ALP agreement (Attachment 1 and/or Attachment 2 of this Exhibit) with a copy of the agreement and complete application material approved in connection with ALP status. State Directors will monitor ALP lenders' loan making and security servicing activities, with the assistance of the District Director and periodic reports from the County Supervisor, to determine compliance with the ALP Agreement and Subparts A and B of this part pertaining to guaranteed OL, SW and FO loans. County Supervisors will use their copy of the ALP Agreement to duplicate and place in the County Office file for each loan guaranteed. In the event the State Director determines an ALP lender is not adequately fulfilling all obligations of the agreement, the lender will be contacted and notified of any discrepancies. A maximum of 30 days will be provided to correct any deficiencies. If corrections are not made within 30 days, the lender's ALP status may be revoked in writing by the State Director. The revocation will be in the form of a letter, sent by certified mail, and state reasons for the action. Any outstanding guaranteed loan(s) or line(s) of credit shall continue to be serviced by a lender whose ALP status has expired or been revoked. The lender cannot submit requests for any new guarantees pursuant to this Exhibit, but may submit requests under the regular method outlined in this subpart for consideration.

III. *ALP Lender Responsibilities to Process, Service and Liquidate Guaranteed OL, SW and FO Loans.*

A. *Processing.* Before accepting an application for a guaranteed loan or line of credit, the ALP lender will review Part 1980, Subparts A and B of this part. If the lender concludes that an application will be considered, a written statement of basis for the conclusion will be placed in the applicant's file maintained by the lender addressing each of the loan eligibility requirements in §§ 1980.175(b), 1980.180(b) or 1980.185(b) of this subpart. The lender must abide by limitations on loan purposes, loan limitations, interest rates, and terms set forth for OL loans/lines of credit and SW and FO loans in §§ 1980.175, 1980.180 and 1980.185 of this subpart. All requests for guaranteed loans or lines of credit, will be processed under Subparts A and B of this part except as modified by this Exhibit. The ALP lender will, for each application for a guaranteed loan or line of credit, obtain a Form FmHA 410–1, "Application for FmHA Services," signed by the applicant's borrower. The applicant's borrower must complete and sign all parts of the Form FmHA 410–1 except information on crops, livestock and financial information obtained by the lender on forms of a similar nature. ALP lenders will process all guaranteed OL loans/lines of credit or SW or FO loans as a "complete application" by obtaining and completing all required items described in § 1980.113(d) of this subpart except Form FmHA 449–12, "Request for Loan Note Guarantee (Farmer Programs Loans)," and the applicable environmental review requirements contained in Subpart G of Part 1940 of this chapter. These latter requirements remain the responsibility of the FmHA loan approval official. However, ALP lenders are responsible for meeting the lender's requirements contained in Exhibit M to Subpart G of Part 1940 of this chapter. Attachment 3 to this Exhibit will be used by ALP lenders to request a guarantee from FmHA. An ALP lender will only be required to submit Form FmHA 410–1 and information on crops, livestock and financial condition on forms previously approved for use under paragraph II A of this Exhibit and Attachment 3 of this Exhibit, with any supportive information attached, to FmHA for making application for a guarantee. If the lender's cash flow statement does not lend itself to providing a debt repayment source and use breakdown of income the lender will submit a statement similar to item 28 of Form FmHA 449–12. A guaranteed OL loan/line of credit or SW or FO loan will not be closed by an ALP lender prior to receipt of Form FmHA 449–14, "Conditional Commitment for Guarantee," or Form FmHA 1980–15, "Conditional Commitment for Contract of Guarantee (Line of Credit)," and the determination that all conditions, including the certification required by § 1980.60 of Subpart A of this part can be met. The ALP lender will be responsible for fully securing the OL loan or line of credit under § 1980.175(g), FO loan under § 1980.180(f) or SW loan under § 1980.185(f) of this subpart. ALP lenders may consult with the FmHA County Supervisor at any time during the processing and will make all material relating to any guarantee application available to FmHA for review upon request.

B. *Servicing.* ALP lenders will be fully responsible for servicing and protecting the collateral for all loans/lines of credit guaranteed.

C. *Liquidation of Loans/Lines of Credit:* Any liquidation of guaranteed OL loans/lines of credit, SW loans or FO loans will be completed by the lender. Loss claims will be submitted in accordance with the ALP agreement on Form FmHA 449–30, "Loan Note Guarantee Report of Loss." The Report of Loss will be accompanied by supporting information to outline disposition of all security and proceeds pledged to secure the loan/line of credit.

IV. *FmHA Actions.* FmHA will complete the evaluation described in § 1980.114 of this subpart in any case where the approval official determines an independent analysis is needed before approval or denial of a request for guarantee. FmHA County Supervisor will complete the required environmental review and will review each Form FmHA 410–1 and request for a guarantee, compare material with the county office copy of ALP agreement, approved forms, and methods, and immediately contact the ALP lender within three working days if the information is not in accord with the approved agreement, is not clear or is inadequate for County Committee review. County Supervisors may request additional information, review the lender's "complete application" file or make an independent evaluation of an application on Form FmHA 449–23, "Guaranteed Loan Evaluation, Farmer Programs," if needed, to determine whether the applicant is eligible, the loan/line of credit is for authorized purposes, there is reasonable assurance of repayment ability, and sufficient collateral and equity is available. FmHA will make the final determinations on the eligibility of applicants for a guaranteed OL loan/line of credit, SW loan or FO loan, and the purposes and terms of such loans/lines of credit.

A. If the County Supervisor's evaluation indicates the application is complete and acceptable, FmHA will provide the lender a County Committee determination of the borrower's eligibility within 14 days. This 14-day period will be contingent upon:

(1) Request for a guarantee being received by the appropriate FmHA County Office at least 2 days before scheduled County Committee meetings. County Supervisors will keep ALP lenders advised of scheduled County Committee meetings.

(2) Employment ceilings affecting County Committee meetings.

(3) Availability of a quorum of the FmHA County Committee.

B. FmHA will monitor each ALP lender's guaranteed loan/line of credit files to assure that the lender is complying with requirements of § 1980.113 of this subpart. The FmHA County Supervisor will make a complete review of the first three loans or lines of credit developed by a new ALP lender before the loan/line of credit is closed. FmHA will examine the lender file on each guaranteed loan/line of credit within 90 days of loan closing and will review 20 percent of the lender's guaranteed portfolio annually. The FmHA official who conducts these reviews will document the review in the FmHA County office file. Any discrepancies noted and not resolved will be discussed with the lender and confirmed in writing with

a copy to the State Director through the District Director. State Directors may establish additional reviews and reporting systems as necessary to insure the guaranteed program complies with Subparts A and B of this part.

Each Approved Lender who currently has an Approved Lender Agreement executed prior to January 6, 1988, will be required to execute a new Approved Lender Agreement (Attachments 1 and/or 2 to this Exhibit) so that the Lender recognizes that, if liquidation of the account becomes imminent, the Lender will consider the Borrower for an Interest Rate Buydown under this Exhibit D and request a determination of the Borrower's eligibility by FmHA. The Lender may not initiate foreclosure action on the loan until 60 days after a determination has been made with respect to the eligibility of the borrower to participate in the Interest Rate Buydown.

Each Loan Note Guarantee issued will contain the statement "This Loan Note Guaranteed is issued under the Lender's Agreement for Guaranteed Operating Loans (OL), Guarantee Farm Ownership Loans (FO) and Guaranteed Soil and Water Loans (SW) dated ———." The date will be the same date entered in paragraph XX of the Approved Lender's Agreement, Attachment 1.

Each Contract of Guarantee issued will contain the statement "This Contract of Guarantee is issued under Lender's Agreement for Operating Line of Credit Guarantee dated ———." The date will be the same date entered in paragraph XX of the Approved Lender's Agreement, Attachment 2.

The Lender's Agreement will be duplicated and a copy will be placed in the FmHA County Office file maintained for each Loan Note Guarantee and Contract of Guarantee issued.

Attachment 1—Farmers Home Administration Approved Lender Program (ALP)

Lender's Agreement (Loan Note Guarantee Only) for Guaranteed Operating Loans (OL) and Guaranteed Farm Ownership Loans (FO) Guaranteed Soil and Water Loans (SW)

(Lender) of _____

is designated as an Approved Lender for the purpose of processing and requesting Loan Note Guarantee(s) authorized by Exhibit A to 7 CFR Part 1980, Subpart B. This does not apply to loan types other than those specifically named in this agreement. The agreement applies to the following offices of the Lender:

The United States of America, acting through the Farmers Home Administration (FmHA), agrees to enter into Loan Note Guarantees with the Lender as may be issued pursuant to the regulations for operating, soil and water, and/or farm ownership loans and to participate in a percentage of any loss on any such operating, soil and water and/or farm ownership loan not to exceed the amount established in the particular loan note guarantee as the percentage of the amount of the principal and any accrued interest. The terms of any Loan Note Guarantee are controlling. As a condition for obtaining a guarantee of the loan(s), the Lender enters into this Agreement.

THE PARTIES AGREE:

I. The maximum loss covered under the Loan Note Guarantee will not exceed the amount established in the particular loan guarantee as to percentage of the principal and accrued interest on any operating, soil and water and/or farm ownership loan guaranteed.

II. *Lender's Sale or Assignment of Guaranteed Loan.*

A. The Lender may retain all of any guaranteed loan. The Lender is not permitted to sell or participate any amount of the guaranteed or unguaranteed portion(s) of loan(s) to the applicant or Borrower or members of their immediate families, their officers, directors, stockholders, other owners, or any parent, subsidiary or affiliate. If the Lender desires to market all or part of the guaranteed portion of loan at or subsequent to loan closing, such loan must not be in default as set forth in the terms of the notes. The Lender may proceed under the following options:

1. *Assignment.* Assign all or part of the guaranteed portion of any loan to one or more Holders by using Form FmHA 449-36, "Assignment Guarantee Agreement." Holder(s), upon written notice to Lender and FmHA, may reassign the unpaid guaranteed portion of the loan sold under Form FmHA 449-36. Upon such notification the assignee shall succeed to all rights and obligations of the Holder(s) under Form FmHA 449-36.

2. *Multinote System.* When this option is selected by the Lender, upon disposition the Holder will receive one of the Borrower's executed notes and Form FmHA 449-34, "Loan Note Guarantee," attached to the Borrower's note. However, all rights under the security instruments (including personal and/or corporate guarantees) will remain with the Lender and in all cases insure to its and the Government's benefit not withstanding any contrary provisions of State law.

a. *At Loan Closing:* Provide for no more than 10 notes, unless the borrower and FmHA agree otherwise, for the guaranteed portion and one note for the unguaranteed portion. When this option is selected, FmHA will provide the lender with a Form FmHA 449-34, for each of the notes.

b. *After Loan Closing:* (1) Upon written approval by FmHA, the Lender may cause to be issued a series of new notes, not to exceed the total provided in 2.a. above, as replacement for previously issued guaranteed note(s) provided:

(a) The Borrower agrees and executes the new notes.

(b) The interest rate does not succeed the interest rate in effect when the loan was closed.

(c) The maturity of the loan is not changed.

(d) FmHA will not bear any expenses that may be incurred in reference to such re-issue of notes.

(e) There is adequate collateral securing the note(s).

(f) No intervening liens have arisen or have been perfected and the secured lien priority remains the same.

(2) FmHA will issue the appropriate Loan Note Guarantees to be attached to each of the notes then exchanged for the original Loan Note Guarantee which will be cancelled by FmHA.

3. *Participations.* a. The lender is required to hold in its own portfolio or retain a minimum of 10 percent of the total guaranteed loan(s) amount. The amount required to be retained must be of the unguaranteed portion of the loan and cannot be participated to another lender.

b. The lender may obtain participation of only the unguaranteed portion of its loan in excess of the 10 percent minimum under its normal operating procedures. Participation means a sale of an interest in the loan in which the Lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation. Participation with a lender by any entity does not make that entity a holder or a lender.

B. When a guaranteed portion of a loan is sold by the Lender to a Holder(s), the Holder(s) shall upon the sale succeed to all rights of Lender under the Loan Note Guarantee to the extent of the portion of the loan purchased. Lenders will remain bound to all the obligations under the Loan Note Guarantee, and this agreement, and the FmHA program regulations found in Title 7 CFR, Part 1980, Subparts A and B, and to future FmHA program regulations not inconsistent with the express provisions of this Agreement.

III. The Lender agrees loan funds will be used for the purposes authorized in 7 CFR Part 1980, Subparts A and B as set forth in Form FmHA 449-14, "Conditional Commitment for Guarantee," for the particular loan.

IV. The Lender certifies that none of its officers or directors, stockholders (except stockholders in a Farm Credit Bank or other Farm Credit System institutions with direct lending authority that have normal stockshare requirements for participating) or other owners has, or will have, a substantial financial interest in any guaranteed loan Borrower. The lender certifies that neither any guaranteed loan Borrower nor its officers or directors, stockholders or other owners have a substantial financial interest in the Lender. If the borrower is a member of the board of directors of a Farm Credit Bank or other Farm Credit System institution with direct lending authority the lender certifies that an FCS institution on the next highest level will independently process the loan request and will act as the Lender's agent in servicing the account.

V. The Lender will certify to FmHA, prior to the issuance of a Loan Note Guarantee for each loan, that there has been no adverse change(s) in the Borrower's condition during the period of time from FmHA's issuance of the Conditional Commitment for Guarantee to issuance of the Loan Note Guarantee. The Lender's certification must address all adverse changes and be supported by financial statements of the Borrower and its guarantors not more than 90 days old at the

time of certification. As used in this paragraph only, the term "Borrower" includes any parent, affiliate, or subsidiary of the Borrower.

VI. Lender will submit the required guarantee fee with a Guaranteed Loan Closing Report at the time a Loan Note Guarantee is issued.

VII. *Servicing.* A. The Lender will service the entire loan and will remain mortgagee and/or secured party of record, notwithstanding the fact that another may hold a portion of the loan. The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portion of the loan. Lender may charge Holder a servicing fee. The unguaranteed portion of a loan will not be paid first nor given any preference or priority over the guaranteed portion of the loan. The Lender shall perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are guaranteed.

B. Disposition of the guaranteed portion of a loan may be made prior to full disbursement, completion of construction and acquisitions only with the prior written approval of FmHA. Subsequent to full disbursement, completion of construction, and acquisition, the guaranteed portion of the loan may be disposed of as provided in this Agreement.

It is the Lender's responsibility to see that all construction is properly planned before any work proceeds; that any required permits, licenses or authorizations are obtained from the appropriate regulatory agencies; that the Borrower has obtained contracts through acceptable procurement procedures; that periodic inspections during construction are made and the FmHA's concurrence on the overall development schedule is obtained.

C. Lender's servicing responsibilities include, but are not limited to: 1. Obtaining compliance with the covenants and provisions in the note, loan agreement, security instruments, and any supplemental agreements and notifying in writing FmHA and the Borrower on any violations.

2. Receiving all payments on principal and interest on the loan as they fall due and promptly remitting and accounting to any Holder(s) of their pro rata share thereof determined according to their respective interests in the loan, less only Lender's servicing fee. The loan may be reamortized, rescheduled or written down only with agreement of the Lender and Holder(s) of the guaranteed portion of the loan and only with FmHA's written concurrence.

3. Inspecting the collateral as often as necessary to properly service the loan.

4. Assuring that adequate insurance is maintained. This includes hazard insurance obtained and maintained with a loss payable clause in favor of the Lender as the mortgagor or secured party.

5. Assuring that:

a. taxes, assessment or ground rents against or affecting collateral are paid;

b. the loan and collateral are protected in foreclosure, bankruptcy, receivership, insolvency, condemnation, or other litigation;

c. Insurance loss payments, condemnation awards, or similar proceeds are applied on debts in accordance with lien priorities on which the guarantee was based, or to rebuilding or otherwise acquiring needed replacement collateral with the written approval of FmHA;

d. Proceeds from the sale or other disposition of collateral are applied in accordance with the lien priorities on which the guarantee is based, except that proceeds from the disposition of collateral, such as machinery, equipment, furniture or fixtures, may be used to acquire property of similar nature without written concurrence of FmHA;

e. The Borrower complies with all laws and ordinances applicable to the loan, the collateral and/or operation of the farm.

6. Assuring that if personal or corporate guarantees are part of the collateral, financial statements from such loan guarantors will be obtained which are not over 90 days old. In the case of guarantees secured by collateral, assuring the security is properly maintained.

7. Obtaining the lien coverage and lien priorities specified by the Lender and agreed to by FmHA, properly recording or filing lien or notice instruments to obtain or maintain such lien priorities during the existence of the guarantee by FmHA.

8. Assuring that the Borrower obtains marketable title to the collateral.

9. Assuring that the Borrower (as defined in 7 CFR Part 1980, Subpart B, § 1980.106(b)(4)) is not released from liability for all or any part of the loan, except in accordance with FmHA regulations.

10. Providing the FmHA Office with loan status reports annually as of December 31 on Form FmHA 1980–41, "Guaranteed Loan Status Report."

11. Obtaining financial statements from each chattel loan secured borrower at least annually. Lender is responsible for analyzing the financial statements, taking any servicing actions and providing copies of statements and record of action to the FmHA office upon request.

12. Monitoring the use of loan funds to assure they will not be used for any purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 CFR Part 1980, Subpart G, Exhibit M.

D. The lender shall participate in any farm credit mediation program of a state in accordance with the rules of that system and 7 CFR Part 1980, Subpart B, § 1980.126.

VIII. *Default by Borrower.*

A. The Lender will notify FmHA when a Borrower is thirty (30) days past due on a payment or if the Borrower has not met its responsibilities of providing the required financial statements to the Lender or is otherwise in default. The Lender will notify FmHA of the status of a Borrower's default on Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status." A meeting will be arranged by the Lender with the Borrower and FmHA to resolve the problem. Actions taken by the Lender with written concurrence of FmHA may include but are not limited to the following or any combination of the following:

1. Deferment of principal payments (subject to rights of any Holder(s)).

2. An additional temporary loan by the lender to bring the account current.

3. Reamortization or rescheduling of the payments on the loan (subject to rights of any Holder(s)).

4. Transfer and assumption of the loan.

5. Reorganization.

6. Liquidation.

7. Changes in fixed interest rates with FmHA's, Lender's, and the Holder'(s) written approval; provided, such interest rate is adjusted proportionally between the guaranteed and unguaranteed portion of the loan.

8. Principal and interest writedown in accordance with 7 CFR Part 1980, Subpart B, § 1980.125.

B. The Lender will negotiate in good faith in an attempt to resolve any problem to permit the Borrower to cure a default, where reasonable. The Lender agrees that if liquidation of the account becomes imminent, the Lender will consider the Borrower for an Interest Rate Buydown under Exhibit D of Subpart B of 7 CFR, Part 1980, and request a determination of the Borrower's eligibility by FmHA. The Lender may not initiate foreclosure action on the loan until 60 days after a determination has been made with respect to the eligibility of the Borrower to participate in the Interest Rate Buydown Program.

C. The Lender has the option to repurchase the unpaid guaranteed portion of the loan from the Holder(s) within 30 days of written demand by the Holder(s) when: (a) the Borrower is in default not less than 60 days in payment of principal or interest due on the loan or (b) the Lender has failed to remit to the Holder(s) its pro rata share of any payment made by the borrower within 30 days of its receipt of the payment. The repurchase by the Lender will be for an amount equal to the unpaid guaranteed portion of the principal and accrued interest less the Lender's servicing fee. The Loan Note Guarantee will not cover the note interest to the Holder on the guaranteed loan(s) accruing after 90 days from the date of the demand letter to the Lender requesting the repurchase. The Lender will accept an assignment without recourse from the Holder(s) upon repurchase. The Lender is encouraged to repurchase the loan to facilitate the accounting for funds, resolve the problem, and to permit the borrower to cure the default, where reasonable. The Lender will notify the Holder(s) and FmHA of its decision.

D. If Lender does not repurchase as provided by Paragraph C, FmHA will purchase from Holder(s) the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase, within 30 days after written demand to FmHA from the Holder(s). The Loan Note Guarantee will not cover the note interest to the Holder on the guaranteed loan(s) accruing after 90 days from the date of original demand letter of the Holder(s) to the Lender requesting the repurchase. Such demand will include a copy of the written demand made upon the Lender.

The Holder(s) or its duly authorized agent will also include evidence of its right to require payment from FmHA. Such evidence will consist of either the originals of the Loan

Note Guarantee and note properly endorsed to FmHA or the original of the Assignment Guarantee Agreement properly assigned to FmHA without recourse including all rights, title, and interest in the loan. FmHA will be subrogated to all rights of Holder(s). The Holder(s) will include in its demand the amount due including unpaid principal, unpaid interest to date of demand and interest subsequently accruing from date of demand to proposed payment date. FmHA will verify the amount of unpaid principal and interest with the Lender. Unless otherwise agreed to by FmHA, such proposed payment will not ordinarily be later than 30 days from the date of the demand to FmHA.

FmHA will promptly notify the Lender of the Holder(s)'s demand for payment. The Lender will promptly provide the FmHA with the information necessary for FmHA's determination of the appropriate amount due the Holder(s). Any discrepancy between the amount claimed by the Holder(s) and the information submitted by the Lender must be resolved before payment will be approved. FmHA will notify both parties who must resolve the conflict before payment by FmHA will be approved. Such a conflict will suspend the running of the 30 day payment requirement. Upon receipt of the appropriate information, FmHA will review the demand and submit it to the State Director for verification. After reviewing the demand, the State Director will transmit the request to the FmHA Finance Office for issuance of the appropriate check. Upon issuance, the Finance Office will notify the State Director and remit the check(s) to the Holder(s).

E. Lender consents to the purchase by FmHA and agrees to furnish on request by FmHA a current statement certified by an appropriate authorized officer of the Lender of the unpaid principal and interest then owed by the Borrower on the loan and the amount due the Holder(s). Lender agrees that any purchase by FmHA does not change, alter or modify any of the Lender's obligations to FmHA arising from said loan or guarantee, nor does such purchase waive any of FmHA's rights against Lender, and FmHA will have the right to set-off against Lender all rights inuring to FmHA from the Holder against FmHA's obligation to Lender under the Loan Note Guarantee.

F. Servicing fees assessed by the Lender to a Holder are collectible only from payment installments received by the Lender from the Borrower. When FmHA repurchases from a Holder, FmHA will pay the Holder only the amounts due the Holder. FmHA will not reimburse the Lender for servicing fees assessed to a Holder and not collected from payments received from the Borrowers. No service fee shall be charged FmHA and no such fee is collectible from FmHA.

G. Lender may also repurchase the guaranteed portion of the loan consistent with Paragraph 10 of the Loan Note Guarantee.

IX. *Liquidation.* If the Lender concludes the liquidation of a guaranteed Loan account is necessary because of one or more defaults or third party actions that the Borrower cannot or will not cure or eliminate within a reasonable period of time, a meeting will be arranged by the Lender with FmHA. When FmHA concurs with the Lender's conclusion or at any time concludes independently the liquidation is necessary, it will notify the Lender and the matter will be handled as follows:

The Lender will liquidate the loan unless FmHA, at its option, decides to carry out liquidation.

When the decision to liquidate is made, the Lender may proceed to purchase from Holder(s) the guaranteed portion of the loan. The Holder(s) will be paid according to the provisions in the Loan Note Guarantee or the Assignment Guarantee Agreement.

If the Lender does not purchase the guaranteed portion of the loan, FmHA will be notified immediately in writing. FmHA will then purchase the guaranteed portion of the loan from the Holder(s). If FmHA holds any of the guaranteed portion, FmHA will be paid first its pro rata share of the proceeds from liquidation of the collateral.

A. *Lender's proposed method of liquidation.* Within 30 days after the decision to liquidate, the Lender will advise FmHA in writing of its proposed detailed method of liquidation called a liquidation plan and will provide FmHA with:

1. Such proof as FmHA requires to establish the Lender's ownership of the guaranteed loan promissory note(s) and related security instruments.

2. Information lists concerning the Borrower's assets including real and personal property, fixtures, claims, contracts, inventory (including perishables), accounts receivable, personal and corporate guarantees, and other existing and contingent assets, advice as to whether or not each item is serving as collateral for the guaranteed loan.

3. A proposed method of making the maximum collection possible on the indebtedness.

4. The Lender will obtain an independent appraisal report on all collateral securing the loan, which will reflect the current market value and potential liquidation value. The appraisal report is for the purpose of permitting the Lender and FmHA to determine the appropriate liquidation actions. Any independent appraiser's fee will be shared equally by FmHA and the Lender.

B. *FmHA's response to Lender's liquidation plan.* FmHA will inform the Lender in writing whether it concurs in the Lender's liquidation plan within 30 days after receipt of such plan from the Lender. If FmHA needs additional time to respond to the liquidation plan, it will advise the Lender of a definite time for such response. Should FmHA and the Lender not agree on the Lender's liquidation plan, negotiation will take place between FmHA and the Lender to resolve the disagreement. The Lender will ordinarily conduct the liquidation; however, should FmHA opt to conduct the liquidation, FmHA will proceed as follows:

1. The Lender will transfer to FmHA all rights and interests necessary to allow FmHA to liquidate the loan. In this event, the Lender will not be paid for any loss until after the collateral is liquidated and the final loss is determined by FmHA.

2. FmHA will attempt to obtain the maximum amount of proceeds from liquidation.

3. Options available to FmHA include any one or combination of the usual commercial methods of liquidation.

C. *Acceleration.* The Lender or FmHA, if it liquidates, will proceed as expeditiously as possible when acceleration of the indebtedness is necessary including giving any notices and taking any other required legal action. A copy of the acceleration notice or other acceleration document will be sent to FmHA or the Lender, as the case may be.

D. *Liquidation: Accounting and Reports.* When the Lender conducts the liquidation, it will account for funds during the period of liquidation and will provide FmHA with periodic reports on the progress of liquidation, disposition of collateral, resulting costs and additional procedures necessary for successful completion of liquidation. The Lender will transmit to FmHA any payment received from the Borrower and/or pro rata share of liquidation or other proceeds, when FmHA is the holder of a portion of the guaranteed loan using Form FmHA 1980–43, "Lender's Guaranteed Loan Payment." When FmHA liquidates, the Lender will be provided with similar reports on request.

E. *Determination of Loss and Payment.* In all liquidation cases, final settlement will be made with the Lender after the collateral is liquidated. FmHA will have the right to recover losses if paid under the guarantee from any party liable.

1. Form FmHA 449–30, "Loan Note Guarantee Report of Loss," will be used for calculation of all estimated and final loss determinations. Estimated loss payments may be approved by FmHA after the Lender has submitted a liquidation plan approved by FmHA. Payment will be made in accordance with 7 CFR 1980, Subpart B.

2. When the Lender is conducting the liquidation and owns any of the guaranteed portion of the loan, and it is anticipated liquidation will take longer than 90 days it will request a tentative loss estimate by submitting to FmHA an estimate of the loss that will occur in connection with liquidation of the loan. FmHA will agree to pay an estimated loss on the outstanding principal balance owed on the guaranteed debt (See G. below). The Lender will discontinue interest accrual on the defaulted loan when the estimated loss claim is approved by FmHA. Such estimate will be prepared and submitted by the Lender on Form FmHA 449–30, using the basic formula as provided on the report except that the appraisal value will be used in lieu of the amount received from the sale of collateral.

After the Report of Loss estimate has been approved by FmHA, FmHA will send the original Report of Loss estimate to the FmHA Finance Office for issuance of a Treasury check in payment of the estimated amount due the Lender.

After liquidation has been completed, a final loss report will be submitted on Form FmHA 449–30 by the Lender to FmHA.

3. After the Lender has completed liquidation, FmHA upon receipt of the final accounting and Report of Loss, may audit and will determine the actual loss. If FmHA has any questions regarding the amounts set forth in the final Report of Loss, it will investigate

the matter. The Lender will make its records available to and otherwise assist FmHA in making the investigation. If FmHA finds any discrepancies, it will contact the Lender and arrange for the necessary corrections to be made as soon as possible. When FmHA finds the final Report of Loss to be proper in all respects, it will be tentatively approved in the space provided on the form for that purpose.

4. When the Lender has conducted liquidation and after the final Report of Loss has been tentatively approved:

a. If the loss is greater than the estimated loss payment, FmHA will send the original of the final Report of Loss to the Finance Office for issuance of a Treasury check in payment of the additional amount owed by FmHA to the Lender.

b. If the loss is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from date of overpayment.

5. If FmHA has conducted liquidation, it will provide an accounting and Report of Loss to the Lender and will pay the Lender in accordance with the Loan Note Guarantee.

6. In those instances where the Lender has made authorized protective advances, it may claim recovery for the guaranteed portion of any loss of monies advanced as protective advances and interest resulting from such protective advances as provided above, and such payment will be made by FmHA when the final Report of Loss is approved.

F. *Maximum amount of interest loss payment.* Notwithstanding any other provisions of this agreement, the amount payable by FmHA to the Lender cannot exceed the limits set forth in the Loan Note Guarantee. If FmHA conducts the liquidation, loss occasioned by accruing interest will be covered by the guarantee only to the date FmHA accepts the responsibility for liquidation. Loss occasioned by accruing interest will be covered to the extent of the guarantee to the date of final settlement when the liquidation is conducted by the Lender provided it proceeds expeditiously with the liquidation plan approved by FmHA except when an estimated loss claim is filed. When a Lender files an estimated loss claim, the Lender will discontinue interest accrual on the defaulted loan when the estimated loss claim is approved by FmHA. The balance of accrued interest payable to the Lender, if any, will be calculated on the final Report of Loss form.

G. *Application of FmHA loss payment.* The estimated loss payment shall be applied as of the date of such payment. The total amount of the loss payment remitted by FmHA will be applied by the Lender on the guaranteed portion of the loan debt. However, such application does not release the Borrower from liability. Such amounts are only to compensate the Lender for the loss. (See XII below.) In all cases a final Form FmHA 449-30 prepared and submitted by the Lender must be processed by FmHA in order to close out the files.

H. *Income from collateral.* Any net rental or other income that has been received by the Lender from the collateral will be applied on the guaranteed loan debt.

I. *Liquidation costs.* Certain reasonable liquidation costs will be allowed during the liquidation process. These liquidation costs will be submitted as part of the liquidation plan. Such costs will be deducted from gross proceeds from the disposition of collateral unless the costs have been previously determined by the Lender (with FmHA written concurrence) to be protective advances. If circumstances have changed after submission of the liquidation plan which require a revision of liquidation costs, the Lender will procure FmHA's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the Lender will be allowed. In-house expenses include, but are not limited to, employee's salaries, staff lawyers, travel and overhead.

J. *Payment.* Final loss payments will be made within 30 days after the review of the accounting of the collateral.

X. *Protective Advances.* Protective advances must constitute an indebtedness of the Borrower to the Lender and be secured by the security instrument(s). FmHA written authorization is required on all protective advances in excess of $3,000. Protective advances include advances made for property taxes, annual assessments, ground rent, hazard or flood insurance premiums affecting the collateral, and other expenses necessary to preserve or protect the security. Attorney fees are not a protective advance.

XI. *Additional Loans or Advances.* Except as provided for in each borrower's loan agreement which was specifically approved by FmHA for that specific borrower, the Lender will not make additional expenditures or new loans without first obtaining the written approval of FmHA even though such expenditures or loans will not be guaranteed.

XII. *Future Recovery.* After a loan has been liquidated and a final loss has been paid by FmHA, any future funds which may be recovered by the Lender, will be pro-rated between FmHA and the Lender. FmHA will be paid such amount recovered in proportion to the percentage it guaranteed for the loan and the Lender will retain such amount in proportion to the percentage of the unguaranteed portion of the loan.

XIII. Transfer and Assumption Cases. Refer to 7 CFR Part 1980, Subpart B.

If a loss will occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor debtor (including personal guarantees) is released from personal liability, the Lender, if it holds the guaranteed portion, may file an estimated Report of Loss on Form FmHA 449-30, "Loan Note Guarantee Report of Loss," to recover its pro rata share of the actual loss at that time. In completing Form FmHA 449-30, the amount of the debt assumed will be entered on line 24 as Net Collateral (Recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption, if not assumed by the Transferee, will be entered on Form FmHA 449-30, lines 13 and 14.

XIV. *Bankruptcy.*

A. The Lender is responsible for protecting the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings. When the loan is involved in a reorganization bankruptcy proceeding under Chapters 11, 12 or 13 of the Bankruptcy Code, payment of loss claims may be made as provided in paragraph XIV. For a Chapter 7 bankruptcy or a liquidation plan in a Chapter 11 bankruptcy, only paragraphs XIV B 3 and B 6 are applicable.

B. *Loss Payments.*

1. *Estimated Loss Payments.*

a. If a borrower has filed for protection under a reorganization bankruptcy, the Lender will request a tentative estimated loss payment of accrued interest and principal written off. This request can only be made after the bankruptcy plan is confirmed by the court. Only one estimated loss payment is allowed during the reorganization bankruptcy. All subsequent claims during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by FmHA at its option in accordance with any court approved changes in the reorganization plan. At the time the performance under the confirmed reorganization plan has been completed, the Lender is responsible for providing FmHA with the documentation necessary to review and adjust the estimated loss claim to (a) reflect the actual principal and interest reduction on any part of the guaranteed debt determined to be unsecured and (b) to reimburse the Lender for any court ordered interest rate reduction during the term of the reorganization plan.

b. The Lender will use Form FmHA 449-30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment and to revise estimated loss payments during the course of the reorganization plan. The estimated loss claim as well as any revisions to this claim will be accompanied by applicable legal documentation to support the claim.

c. Upon completion of the reorganization plan, the lender will complete Form FmHA 1980-44, "Guaranteed Loan Borrower Default Status," and forward this form to the Finance office.

2. *Interest Loss Payments.*

a. Interest loss payments sustained during the period of the reorganization plan will be processed in accordance with paragraph XIV B 1.

b. Interest loss payments sustained after the reorganization plan is completed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

c. Form FmHA 449-30 will be completed to compensate the lender for the difference in interest rates specified on the Loan Note Guarantee or Interest Rate Buydown Agreement and the rate of interest specified by the bankruptcy court.

3. *Final Loss Payments.*

a. Final loss payments will be processed when the loan is liquidated.

b. If the loan is paid in full without an additional loss, the Finance Office will close out the estimated loss account at the time notification of payment in full is received.

4. *Payment Application.* The Lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest

of the guaranteed portion of the debt. In the event the bankruptcy court attempts to direct the payment to be applied in a defferent manner, the Lender will immediately notify the FmHA servicing office.

5. *Overpayments.* Upon completion of the reorganization plan, the Lender will provide FmHA with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained, as a result of the reorganization, is greater than the estimated loss payment, the Lender will submit a revised estimated loss in order to obtain payment of the additional amount owed by FmHA to the Lender. If the actual loss payment is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from the date of the payment of the estimated loss.

6. *Protective Advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, as a result of prior liquidationn action, these protective advances and accrued interest will be entered on Form FmHA 449-30.

XV. *Debt write down.* Refer to Title 7 of CFR Part 1980, Subpart B, § 198.125. The maximum amount of loss payment associated with a loan/line of credit agreement which has been written down will not exceed the percent of the guarantee multiplied by the difference between the outstanding principal and interest balance of the loan/line of credit before the write-down and the outstanding balance of the loan/line of credit after the write-down. The lender will use Form FmHA 449-30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment to receive its pro-rata share of any loss sustained.

XVI. *Other Requirements.* This agreement is subject to all the provisions of 7 CFR Part 1980, Subparts A and B, and any future amendments of these regulations not inconsistent with this agreement.

XVII. *Execution of Agreements.* This agreement is executed prior to the execution of any Loan Note Guarantee under 7 CFR Part 1980, Subpart A and B and does not impose any obligation upon FmHA with respect to execution of any such contract. FmHA in no way warrants that such a contract has been or will be executed. Each request for a Loan Note Guarantee under Exhibit A of 7 CFR Part 1980. Subpart B will be considered by FmHA on a case-by-case basis.

XVIII. *Notices.* All requests for Loan Note Guarantee and any notices or action will be initiated through the following FmHA County Offices

_____

_____

_____

XIX. *Termination of Agreement.* Except for FCS Member institutions that have acceptable loan losses as specified in the introductory text of paragraph II of Exhibit A, 7 CFR Part 1980, Subpart B, this agreement will terminate as to the Lender's submission of request for Loan Note Guarantee(s) under Exhibit A, 7 CFR Part 1980, Subpart B two (2) years from the date set forth in paragraph XX unless otherwise earlier revoked by FmHA. This agreement will remain in force as to any Loan Note Guarantee(s) issued pursuant to Exhibit A, 7 CFR Part 1980, Subpart B and remaining extant at time of expiration or revocation until those loan note guarantees still extant are concluded.

XX. This Agreement is dated _____.

Lender _____
(Name)

_____
(IRS) I.D. Tax No.)

BY _____
Title _____
Attest: _____
(SEAL)

United States of America, Farmers Home Administration.

By _____
Title _____

Farmers Home Administration Approved Lender Program (ALP)

Lender's Agreement for Operating Line of Credit Guarantee (Contract of Guarantee Cases)

—(Lender) of ____ is designated as an Approved Lender for the purpose of processing and requesting Contract(s) of Guarantee authorized by Exhibit A to 7 CFR Part 1980, Subpart B. This agreement does not apply to lines of credit types other than those specifically named in this agreement. The agreement applies to the following officers of the Lender: _____

_____

_____

The United States of America, acting through Farmers Home Administration (FmHA), agrees to enter into Contract of Guarantees with the Lender for Operating loan lines of credit and to participate in a percentage of any loss on any such operating loan line of credit advance(s) not to exceed the amount established in the particular contract of guarantee as to percentage of the amount of the principal and any accrued interest. The terms of any Contract of Guarantee are controlling. As a condition for obtaining a guarantee of the line of credit advance(s) the Lender enters into this agreement.

THE PARTIES AGREE:

I. The maximum loss covered under the Contract of Guarantee will not exceed the amount established in the particular line of credit guarantee as to percentage of the principal and accrued interest on any Operating Loan line of credit advances made within the line of credit ceiling and the terms and conditions of the Contract of Guarantee.

II. *Lender's Sale of Guarantee Line of Credit by Participation.*

A. The Lender may obtain participation in its line of credit under its normal operating procedures. The lender is required to hold in its own portfolio or retain a minimum of 10 percent of the total guaranteed line(s) credit amount. The amount required to be retained must be of the unguaranteed portion of the line of credit and cannot be participated to another Lender. The Lender may obtain participation of only the unguaranteed portion of its line of credit in excess of the 10 percent minimum under its normal operations procedure. Participation means a sale of an interest in the line of credit in which the Lender retains the line of credit agreement (and note, if one exists), collateral securing the line of credit, and all responsibility for servicing and liquidation of the line of credit. Participation with a lender by any entity does not make that entity a lender.

B. The Lender may retain or sell any amount of the unguaranteed portion(s) of the line(s) of credit as provided in this section only through participation. However, the Lender cannot participate any amount of the line(s) of credit to the applicant or borrower or members or their immediate families, their officers, directors, stockholders, other owners, or any parent, subsidiary or affiliate. If the Lender desires to sell all or part of the guaranteed portion of the line(s) of credit through participation at or subsequent to execution of the line of credit agreement(s), such line(s) of credit must not be in default as set forth in the terms of the Line of Credit agreement(s) (and note(s), if any exist). The Lender will retain the responsibility for servicing and liquidation of the line(s) of credit. Participation with a lender by an entity does not make the entity a holder.

III. The Lender agrees funds advanced under the line(s) of credit will be used for the purposes authorized in Subpart B of Title 7 CFR Part 1980 as set forth in Form FmHA 1980-15, "Conditional Commitment for Contract Guarantee (Line of Credit)," for the particular line of credit.

IV. The Lender certifies that none of its officers or directors, stockholders (except stockholders in a Farm Credit Bank or other Farm Credit System institutions with direct lending authority that have normal stockshare requirements for participating) or the other owners have or will have a substantial financial interest in any guaranteed line of credit Borrower. The Lender certifies that neither any guaranteed line of credit Borrower nor its officers or directors, stockholders or other owners have a substantial financial interest in the Lender. If the borrower is a member of the board of directors of a Farm Credit Bank or other Farm Credit System institution with direct lending authority, the Lender certifies that a FCS institution on the next highest level will independently process the loan request and will act as the Lender's agent in servicing the account.

V. The Lender will certify to FmHA, prior to the issuance of a contract of guarantee for each line of credit agreement, that there has been no adverse change(s) in the Borrower's financial condition, nor any other adverse change in the Borrower's condition during the period of time from FmHA's issuance of the Conditional Commitment for Contract of Guarantee to issuance of the Contract of Guarantee. The Lender's certification must address all adverse changes and be supported by financial statements of the Borrower and its guarantors not more than 90 days old at the time of certification. As used in this paragraph only, the term "Borrower"

includes any parent, affiliate, or subsidiary of the Borrower.

VI. The Lender will submit the required guarantee fee with a Guaranteed Loan Closing Report at the time a Contract of Guarantee is issued.

VII. *Servicing.*

A. The lender will service the entire line of credit and will remain mortgagee and/or secured party of record. The entire line of credit will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of a line of credit. The unguaranteed portion of a line of credit will not be paid first nor given any preference or priority over the guaranteed portion of the line of credit. The Lender shall perform those services which a reasonable prudent lender would perform in servicing its own portfolio of lines of credit or loans that are not guaranteed.

B. It is the Lender's responsibility to see that all construction is properly planned before any work proceeds; that any required permits, licenses or authorizations are obtained from the appropriate regulatory agencies; that the borrower has obtained contracts through acceptable procurement procedures; that periodic inspections during construction are made and that FmHA's concurrence on the overall development schedule is obtained.

C. Lender's servicing responsibilities include, but are not limited to:

1. Obtaining compliance with the covenants and provisions in the line of credit agreement (and note, if one exists), security instruments, and any supplemental agreements and notifying both FmHA and the Borrower in writing of any violations.

2. Receiving all payments on principal and interest on the line of credit advances as they fall due. The line of credit may be reamortized, rescheduled, or written down only with FmHA's written concurrence.

3. Inspecting the collateral as often as necessary to properly service the line of credit.

4. Assuring that adequate insurance is maintained. This includes hazard insurance obtained and maintained with a loss payable clause in favor of the Lender as the mortgagee or secured party.

5. Assuring that:

(a) Taxes, assessments or ground rents against or affecting collateral are paid;

(b) The line of credit and collateral are protected in foreclosure, bankruptcy, receivership, insolvency, condemnation, or other litigation;

(c) Insurance loss payments, condemnation awards, or similar proceeds are applied on debts in accordance with lien priorities on which the guarantee was based, or to rebuilding or otherwise acquiring needed replacement collateral with the written approval of FmHA;

(d) Proceeds from the sale or other disposition of collateral are applied in accordance with the lien priorities on which the guarantee is based, except that proceeds from the disposition of collateral, such as machinery, equipment, furniture or fixtures, may be used to acquire property of similar nature which will serve as collateral without written concurrence of FmHA;

(e) The Borrower complies with all laws and ordinances applicable to the line of credit, the collateral and/or operation of the farm.

6. Assuring that if personal or corporate guarantees are part of the collateral, financial statements from such guarantors will be obtained which are not over 90 days old. In the case of guarantees secured by collateral, assuring the security is properly maintained.

7. Obtaining the lien coverage and lien priorities specified by the Lender and agreed to by FmHA, properly recording or filing lien or notice instruments to obtain or maintain such lien priorities during the existence of the guarantee by FmHA.

8. Assuring that the Borrower obtains marketable title to the collateral.

9. Assuring that the Borrower (as defined in 7 CFR Part 1980, Subpart A, Section 1980.106(b)(4)) is not released from liability for all or any part of the line of credit except in accordance with FmHA regulations.

10. Providing the FmHA Finance Office with loan status reports annually as of December 31 on Form FmHA 1980–41, "Guaranteed Loan Status Report."

11. Obtaining financial statements from each chattel loan secured Borrower at least annually. Lender is responsible for analyzing the financial statements, taking any servicing actions needed, and providing copies of statements and record of actions to the County Supervisor.

12. Monitoring the use of loan funds to assure they will not be used for any purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 CFR Part 1940, Subpart G, Exhibit M.

D. The lender shall participate in any farm credit mediation program of a State in accordance with the rules of that system and 7 CFR Part Part 1980, Subpart B, § 1980.126.

VIII. *Default by Borrower.*

A. The Lender will notify FmHA when a Borrower is thirty (30) days past due on a payment and is unlikely to bring its account current within sixty (60) days, or if the Borrower has not met its responsibilities of providing the required financial statements to the Lender or is otherwise in default. The Lender will notify FmHA of the status of a Borrower's default on Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status." A meeting will be arranged by the Lender with the Borrower and FmHA to resolve the problem. Actions taken by the Lender with concurrence of FmHA may include but are not limited to any curative actions contained in Subpart B of Part 1980 or liquidation.

B. The Lender will negotiate in good faith in an attempt to resolve any problem and to permit the Borrower to cure a default, where reasonable.

The Lender agrees that, if liquidation of the account becomes imminent, the Lender will consider the Borrower for an Interest Rate Buydown under Exhibit D of Subpart B of 7 CFR, Part 1980, and request a determination of the Borrower's eligibility by FmHA. The Lender may not initiate foreclosure action on the loan until 60 days after a determination has been made with respect to the eligibility of the Borrower to participate in the Interest Rate Buydown Program.

IX. *Liquidation.*

If the Lender concludes that liquidation of a guaranteed line of credit account is necessary because of one or more defaults or third party actions that the Borrower cannot or will not cure or eliminate within a reasonable period of time, a meeting will be arranged by the Lender with FmHA. When FmHA concurs with the Lender's conclusion or at any time concludes independently that liquidation is necessary, it will notify the Lender and the matter will be handled as follows:

The Lender will liquidate the line of credit unless FmHA, at its option, decides to carry out liquidation.

A. *Lender's proposed plan of liquidation.* Within 30 days after the decision to liquidate is made, the Lender will advise FmHA of its proposed plan of liquidation and will provide FmHA with:

1. Such proof as FmHA requires to establish the Lender's ownership of the guaranteed line of credit agreements and related security instruments.

2. Information lists concerning the Borrower's assets including real and personal property, fixtures, claims, contracts, inventory (including perishables), accounts receivable, personal and corporate guarantees, and other existing and contingent assets, advice as to whether or not each item is serving as collateral for the guaranteed line of credit.

3. A proposed method of making the maximum collection possible on the indebtedness.

4. The Lender will obtain an independent appraisal report on all collateral securing the line of credit which will reflect the current market value and potential liquidation value. The appraisal report is for the purpose of permitting the Lender and FmHA to determine the appropriate liquidation action. Any independent appraiser's fee will be shared equally by FmHA and the Lender.

B. *FmHA's response to Lender's liquidation plan.* FmHA will inform the Lender in writing whether it concurs in the Lender's liquidation plan within 30 days after receipt of such plan from the Lender. If FmHA needs additional time to respond to the liquidation plan, it will advise the Lender of a definite time for such response. Should FmHA and the Lender not agree on the Lender's liquidation plan, negotiation will take place between FmHA and the Lender to resolve the liquidation; however, should FmHA opt to conduct the liquidation, FmHA will proceed as follows:

1. The Lender will transfer to FmHA all its rights and interests necessary to allow FmHA to liquidate the line of credit. In this event, the Lender will not be paid for any loss until after the collateral is liquidated and the final loss is determined by FmHA.

2. FmHA will attempt to obtain the maximum amount of proceeds from liquidation.

3. Options available to FmHA include any one or combination of the usual commercial methods of liquidation.

C. *Acceleration.* The Lender or FmHA, if it liquidates, will proceed as expeditiously as possible when acceleration of the indebtedness is necessary including giving

any notices and taking any other required legal action. A copy of the acceleration notice or other acceleration document will be sent to FmHA or the Lender, as the case may be.

D. *Liquidation: Accounting and Reports.* When the Lender conducts the liquidation, it will account for funds during the period of liquidation and will provide FmHA with periodic reports on the progress of liquidation, disposition of collateral, resulting costs, and additional procedures necessary for successful completion of liquidation. When FmHA liquidates, the Lender will be provided with similar reports on request.

E. *Determination of Loss and Payment.* In all liquidation cases, final settlement will be made with the Lender after the collateral is liquidated. FmHA will have the right to recover losses if paid under the guarantee from any party liable.

1. Form FmHA 449-30, "Loan Note Guarantee Report of Loss," will be used for calculation of all estimated and final loss determinations. Estimated loss payments may be approved by FmHA after the Lender has submitted a liquidation plan approved by FmHA. Payment will be made in accordance with 7 CFR Part 1980, Subpart B.

2. When the Lender is conducting the liquidation, and it is anticipated liquidation will take longer than 90 days it will request a tentative loss estimate by submitting to FmHA an estimate of the loss that will occur in connection with liquidation of the line of credit. FmHA will agree to pay an estimated loss settlement to the Lender provided the Lender applies such amount due to the outstanding principal balance owed on the guarantee debt (See G. below). The Lender will discontinue interest accrual on the defaulted loan when the estimated loss claim is approved by FmHA. Such estimate will be prepared and submitted by the Lender on Form FmHA 449-30, using the basic formula as provided on the report except that the appraisal value will be used in lieu of the amount received from the sale of collateral.

After the Report of Loss estimate has been approved by FmHA, FmHA will send the original Report of Loss estimate to FmHA Finance Office for issuance of a Treasury check in payment of the estimated amount due the Lender.

After liquidation has been completed, a final loss report will be submitted on Form FmHA 449-30 by the Lender to FmHA.

3. After the Lender has completed liquidation, FmHA upon receipt of the final accounting and report of loss, may audit and will determine the actual loss. If FmHA has any questions regarding the amounts set forth in the final Report of Loss, it will investigate the matter. The Lender will make its records available to and otherwise assist FmHA in making the investigation. If FmHA finds any discrepancies, it will contact the Lender and arrange for the necessary corrections to be made as soon as possible. When FmHA finds the final Report of Loss to be proper in all respects, it will be tentatively approved in the space provided on the form for that purpose.

4. When the Lender has conducted liquidation and after the final Report of Loss has been tentatively approved:

(a) If the loss is greater than the estimated loss payment, FmHA will send the original of the final Report of Loss to the Finance Office for issuance of a Treasury check in payment of the additional amount owed by FmHA to the Lender.

(b) If the loss is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from date of overpayment.

5. If FmHA has conducted liquidation, it will provide an accounting and Report of Loss to the Lender and will pay the Lender in accordance with the Contract of Guarantee.

6. In those instances where the Lender has made authorized protective advances, it may claim recovery for the guaranteed portion of any loss monies advanced as protective advances and interest resulting from such protective advances as provided above, and such payment will be made by FmHA when the final Report of Loss is approved.

F. *Maximum amount of interest loss payment.* Notwithstanding any other provisions of the agreement, the amount payable by FmHA to the Lender cannot exceed the limits set forth in the Contract of Guarantee. If FmHA conducts the liquidation, loss occasioned by accruing interest will be covered by the guarantee only to the date FmHA accepts the responsibility for liquidation. Loss occasioned by accruing interest will be covered to the extent of the guarantee to the date of final settlement when the liquidation is conducted by the Lender provided it proceeds expeditiously with the liquidation plan approved by FmHA, except when an estimated loss claim is filed. When a Lender files an estimated loss claim, the Lender will discontinue interest accrual on the defaulted loan when the estimated loss claim is approved by FmHA. The balance of accrued interest payable to the Lender, if any, will be calculated on the final Report of Loss form.

G. *Application of FmHA loss payment.* The estimated loss payment shall be applied as of the date of such payment. The total amount of the loss payment remitted by FmHA will be applied by the Lender on the guaranteed portion of the debt. However, such application does not release the Borrower from liability. Such amounts are only to compensate the Lender for the loss. (See XII below.) In all cases a final Form FmHA 440-30 prepared and submitted by the Lender must be processed by FmHA in order to close out the files.

H. *Income from collateral.* Any net rental or other income that has been received by the Lender from the collateral will be applied on the guaranteed debt.

I. *Liquidation costs.* Certain reasonable liquidation costs will be allowed during the liquidation process. These liquidation costs will be submitted as a part of the liquidation plan. Such costs will be deducted from gross proceeds from the disposition of collateral unless the costs have been previously determined by the Lender (with FmHA written concurrence) to be protective advances. If circumstances have changed after submission of the liquidation plan which require a revision of liquidation costs, the Lender will procure FmHA's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the Lender will be allowed. In-house expenses include, but are not limited to, employees' salaries, staff lawyers, travel and overhead.

J. *Payment.* Loss settlements will be paid by FmHA within 30 days after the review of the accounting of the collateral.

X. *Protective Advances.* Protective advances must constitute an indebtedness of the Borrower to the Lender and be secured by the security instrument(s). FmHA written authorization is required on all protective advances in excess of $3,000. Protective advances include advances made for property taxes, annual assessments, ground rent, hazard or flood insurance premiums affecting the collateral, and other expenses necessary to preserve or protect the security. Attorney fees are not a protective advance.

XI. *Additional Loans or Advances.* Except as provided for in each Borrower's loan agreement which was specifically approved by FmHA for that specific borrower, the Lender will not make additional expenditures or new lines of credit or loans to any borrower which has financial assistance guaranteed by FmHA without first obtaining the written approval of FmHA even though such expenditures or lines of credit or loans will not be guaranteed.

XII. *Future Recovery.* After a line of credit has been liquidated and a final loss has been paid by FmHA, any future funds which may be recovered by the Lender will be prorated between FmHA and the Lender. FmHA will be paid such amount recovered in proportion to the percentage it guaranteed for the line of credit and the Lender will retain such amount in proportion to the percentage of the unguaranteed portion of the line of credit.

XIII. *Transfer and Assumption Cases.* Refer to 7 CFR Part 1980, Subpart B. If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor-debtor (including personal guarantees) is released from personal liability, the Lender, if it holds the guaranteed portion, may file and estimated Report of Loss on Form FmHA 449-30, "Loan Note Guarantee Report of Loss," to recover its pro rata share of the actual loss at that time. In completing Form FmHA 449-30, the amount of the debt assumed will be entered on line 24 as Net Collateral (Recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption, it not assumed by the Transferee, will be entered on Form FmHA 449-30, line 13 and 14.

XIV. *Bankruptcy.*

A. The Lender is responsible for protecting the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings. When the loan is involved in a reorganization bankruptcy proceeding under Chapters 11, 12 or 13 of the Bankruptcy Code, payment of loss claims may be made as provided in this paragraph XIV. For a Chapter 7 bankruptcy or a liquidation plan in a Chapter 11 bankruptcy, only paragraphs XIV B3 and B6 are applicable.

B. *Loss Payments.*

1. *Estimated Loss Payments.*

a. If a borrower has filed for protection under a reorganization bankruptcy, the

Lender will request a tentative estimated loss payment of accrued interest and principal written off. This request can only be made after the bankruptcy plan is confirmed by the court. Only one estimated loss payment is allowed during the reorganization bankruptcy. All subsequent claims during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by FmHA at its option in accordance with any court approved changes in the reorganization plan. At the time the performance under the confirmed reorganization plan has been completed, the Lender is responsible for providing FmHA with the documentation necessary to review and adjust the estimated loss claim to (a) reflect the actual principal and interest reduction on any part of the guaranteed debt determined to be unsecured and (b) to reimburse the Lender for any court ordered interest rate reduction during the term of the reorganization plan.

b. The Lender will use Form FmHA 449-30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment and to revise estimated loss payments during the course of the reorganization plan. The estimated loss claim as well as any revisions to this claim will be accompanied by applicable legal documentation to support the claim.

c. Upon completion of the reorganization plan, the lender will complete Form FmHA 1980-44, "Guaranteed Loan Borrower Default Status," and forward this form to the Finance office.

2. *Interest Loss Payments.*

a. Interest loss payments sustained during the period of the reorganization plan will be processed in accordance with paragraph XIV B 1.

b. Interest loss payments sustained after the reorganization plan is completed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

c. Form FmHA 449-30 will be completed to compensate the lender for the difference in interest rates specified on the Contract of Guarantee or Interest Rate Buydown Agreement and the rate of interest specified by the bankruptcy court.

3. *Final Loss Payments.*

a. Final loss payments will be processed when the loan is liquidated.

b. If the loan is paid in full without an additional loss, the Finance Office will close out the estimated loss account at the time notification of payment in full is received.

4. *Payment Application.* The Lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event the bankruptcy court attempts to direct the payment to be applied in a different manner, the Lender will immediately notify the FmHA servicing office.

5. *Overpayments.* Upon completion of the reorganization plan, the Lender will provide FmHA with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained, as a result of the reorganization, is greater than the estimated loss payment, the Lender will submit a revised estimated loss in order to obtain payment of the additional amount owed by FmHA to the Lender. If the actual loss payment is less than the estimated loss, the Lender will reimburse FmHA for the overpayment plus interest at the note rate from the date of the payment of the estimated loss.

6. *Protective Advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, as a result of prior liquidation action, these protective advances and accrued interest will be entered on Form FmHA 449-30.

XV. *Debt write down.* Refer to title 7 of CFR Part 1980, Subpart B, § 1980.125. The maximum amount of loss payment associated with a loan/line of credit agreement which has been written down will not exceed the percent of the guarantee multiplied by the difference between the outstanding principal and interest balance of the loan/line of credit before the write-down and the outstanding balance of the loan/line of credit after the write-down. The lender will use Form FmHA 449-30, "Loan Note Guarantee Report of Loss," to request an estimated loss payment to receive its pro-rata share of any loss sustained.

XVI. *Other Requirements.* This agreement is subject to all the provisions of 7 CFR Part 1980, Subparts A and B, and any future amendments of these regulations not inconsistent with this agreement.

XVII. *Execution of Agreements.* This agreement is executed prior to the execution of any Contract of Guarantee(s) under 7 CFR Part 1980, Subparts A and B and does not impose any obligation upon FmHA with respect to execution of any such contract. FmHA in no way warrants that such a contract has been or will be executed. Each request for a Contract Guarantee under Exhibit A of 7 CFR Part 1980, Subpart B will be considered by FmHA on a case-by-case basis.

XVIII. *Notice.* All requests for Contract of Guarantee(s) and any notices or actions will be initiated through the following FmHA County Offices

_____

_____

_____

XIX. *Termination of Agreement.* Except for FCS member institutions that have acceptable loan losses as specified in the introductory text of paragraph II of Exhibit A, 7 CFR Part 1980, Subpart B, this agreement will terminate as to the Lender's submission of requests for Contracts of Guarantee(s) under Exhibit A, 7 CFR Part 1980, Subpart B two (2) years from the date set forth in paragraph XX unless earlier revoked by FmHA. This agreement will remain in force as to any Contract of Guarantee(s) issued pursuant to Exhibit A, 7 CFR Part 1980, Subpart B and remaining extant at time of expiration or revocation until those Contracts of Guarantees still extant are concluded.

XX. This Agreement is dated

_____.

Lender: _____

(Name)

_____

(IRS I.D. Tax No)

By _____

Title _____

ATTEST: _____ (Seal)

UNITED STATES OF AMERICA, Farmers Home Administration.

By

_____

Title

_____

Exhibit B—[Reserved]

Exhibit D—Interest Rate Buydown Program

I. *General.*

This exhibit contains the policies and procedures pertaining to an Interest Rate Buydown Program for guaranteed Operating (OL) loans and lines of credit, described in § 1980.175 of this subpart, guaranteed Farm Ownership (FO) loans described in Section 1980.180 of this subpart and Soil and Water (SW) loans described in Section 1980.185 of this subpart. Subparts A and B of Part 1980 are applicable to this Exhibit except as modified by Exhibit A and E of this subpart and this exhibit. Authority to enter into the Interest Rate Buydown agreement is provided for in this Exhibit and expires September 30, 1993.

II. *Introduction.*

The authorities contained in this exhibit provide lenders with a tool to enable them to continue to provide credit to operations of not larger than family farms who are temporarily unable to project a positive cash flow on all income and expenses including debt service without a reduction in the interest rate. This exhibit also provides that a lender that has a guaranteed loan/line of credit which is not already involved in the Interest Rate Buydown program must agree if liquidation of the account becomes imminent, the lender will consider the borrower for an Interest Rate Buydown under this exhibit and request a determination of the borrower's eligibility by FmHA. The lender may not initiate foreclosure action on the loan until 60 days after a determination has been made with respect to the eligibility of the borrower to participate in this program.

Lenders that participate in this program enter into an agreement with FmHA to reduce the interest rate paid on a loan/line of credit. In return, FmHA will make annual interest rate buydown payments to the lender in an amount not more than 50 percent of the cost of reducing the interest rate on the loan. Payments made to a lender under this exhibit will in no case exceed 2 percentage points.

III. *Definitions.*

A. *Cash flow*—A projection listing on a typical 24-month basis, of all anticipated cash inflows (including all farm and non-farm income) and all expenses to be incurred by the borrower during such period (including all farm and non-farm debt service and other expenses). Production records and prices used in the preparation of a cashflow will be calculated in accordance with § 1980.113(d)(8) of this subpart.

B. *Interest Rate Buydown Agreement*—(Form FmHA 1980-58) The signed agreement

between FmHA, the lender, and the borrower, setting forth the terms and conditions of the interest rate buydown.

C. *Positive Cash Flow*—A cash flow projection, as defined in § 198.106(b)(17) of this subpart. Except the reserve requirement as outlined in § 1980.106(b)(17)(iii) of this subpart may be from 0 up to 10 percent.

IV. *Program Administration.*

County Supervisors are authorized to approve interest rate buydown agreements providing the following requirements are met by the lender:

A. For those borrowers currently indebted for an FmHA guaranteed loan(s) or line(s) of credit where the guaranteed loan/OL line of credit is to be considered for an interest rate buydown under this exhibit, the lender must demonstrate that a positive cash flow projection on all income and expenses, including debt service, is not possible by rescheduling or reamortizing the account in equally amortized installments as described in § 1980.124 of this subpart. If a positive cash flow can be achieved using rescheduling or reamortizing authorities, subject to the requirements outlined in § 1980.124, the borrowers account will be rescheduled or reamortized. If a positive cash flow projection is then possible, the borrower is not eligible for an interest rate buydown.

1. As required in Form FmHA 449–35, "Lender's Agreement," or Form FmHA 1980–38, "Lender's Agreement (Line of Credit)," a lender will notify FmHA when a borrower is thirty (30) days past due on a payment and it is unable to bring the account current within 30 days. The lender will request that FmHA make a determination as to the borrower's eligibility for an interest rate buydown. The lender will submit a plan of operation projecting the repayment ability of the borrower with or without an interest rate buydown. FmHA will make the eligibility determination and will notify the lender in writing within 10 calendar days of receipt of the request. Upon receipt of FmHA's determination of the borrower's eligibility for interest rate buydown, the lender will submit a request for Interest Rate Buydown as set forth in Attachment 2 to this exhibit. If the lender declines to utilize interest rate buydown, the lender will notify the County Supervisor in writing.

2. In addition, the following information will be submitted by the lender:

(a) Verification of off-farm equipment, if any.

(b) Form FmHA 440–32, "Request for Statement of Debts and Collateral," or similar documentation provided by approved lenders.

(c) Documentation of the borrower's and lender's compliance with the requirements of Exhibit M to Subpart G of Part 1940 of this chapter, if the affected loan is not already subjected to this provision.

B. Applications from individuals who are not presently indebted for an FmHA guaranteed loan/line of credit shall be processed in accordance with § 1980.113 of this subpart and this exhibit. In addition, the lender will submit Attachment 2 of this exhibit with the application. The lender must demonstrate that a positive cash flow projection is not possible without reducing the interest rate on the borrower's loan(s)/line(s) of credit.

C. In all cases, the lender and County Supervisor must determine whether the borrower owns any nonfarm assets which do not contribute to essential family living expenses or to the maintenance of a sound farming operation. The lender must determine whether the borrower could sell these assets and, if so, for how much. The lender will then prepare new cash flow projections which take into account the sale of these assets. If a positive cash flow can then be achieved, the borrower is not eligible for an interest rate buydown.

D. If a positive cash flow cannot be achieved, the lender may ask other creditors to voluntarily adjust their debts as outlined in Subpart A of Part 1903 of this chapter. If other creditors adjust their debts and the proposed interest rate buydown results in a positive cash flow, interest rate buydown may be approved.

E. If a positive cash flow cannot be achieved, even with other creditors voluntarily adjusting their debts and the interest rate buydown, the interest rate buydown will not be approved.

F. In order for a borrower's loan to be eligible for an interest rate buydown, a typical plan of operation must show that a positive cash flow can be expected during the initial 24-month buydown period. For those loans with terms less than 24 months then the operation must show a positive cash flow for the term of the loan. All loans/lines of credit with terms exceeding the buydown period must demonstrate that the borrower will be able to project a positive cash flow on all income and expenses, including debt service, after the buydown agreement expires. Further, if the lender proposes a term for the interest rate buydown which exceeds 24 months, the lender will provide FmHA with a typical 12-month cash flow documenting the necessity for the increased term. In no case will the Federal Buydown period exceed three years.

G. Any holder(s) must agree to the interest rate reduction in writing. If the holder does not consent to the interest rate reduction proposed by the lender, the lender must repurchase the unpaid portion of the loan from any holder(s) before the interest rate buydown can be granted. When FmHA purchases a portion of a guaranteed loan, buydown payments on that portion shall cease.

H. The Interest Rate Buydown Agreement will be attached to the promissory note(s) or line of credit agreement. The promissory note(s) or line of credit agreement, cannot exceed the interest rate the lender charges its average farm customer, *prior* to any write down by the lender, as outlined in § 1980.175(e) of this subpart. The lender may only charge a fixed rate of interest during the term of the buydown agreement. The lender is responsible for the legal documentation of interest rate changes by an "allonge" attached to the promissory note(s) or line of credit agreement or other legally effective amendment of the interest rate when needed; however, no new notes or line of credit agreements may be issued. If the lender elects to use a variable rate note or line of credit agreement, the fixed rate of interest charged during the buydown period will be calculated *not to exceed* the average variable rate charged the lender's average farm customer (as defined in § 1980.175(e)), over the past 90 days. The promissory note(s), line of credit agreements and any attachments to these agreements, must schedule repayment in accordance with the terms for the applicable loan type set forth in §§ 1980.175(f) and (g), 1980.180(e) and (f), or 1980.185(e) and (f) of this subpart.

I. FmHA will pay the lender any interest rate buydown equal to one-half of the lender's write down of interest percentage points, except that such payments will in no case exceed the cost of reducing such interest by more than two percentage points. The lender will adjust its interest rate in increments of .25%. Once eligibility is established the lender may reduce the interest rate paid on a loan/line of credit to a point equal or exceeding that necessary to achieve a positive cash flow. When a lender requests an interest rate buydown along with a write down, the interest reduction will at least be one full percentage point.

V. *Approval of Interest Rate Buydown.*

If the approval official determines the buydown will be approved in accordance with Paragraph IV of this exhibit, in addition to the determinations required in § 1980.115 Administrative paragraphs A and B, *the approval official will:*

A. Prepare Form FmHA 1940–1, "Request for Obligation of Funds." This form will be used to obligate the buydown portion for those loans presently guaranteed where the interest rate is subsequently bought down, and to obligate the loan and interest rate buydown for initial loans.

B. The approval official will execute Form FmHA 1940–1 and distribute copies in accordance with the Forms Manual Insert (FMI). The Finance Office will enter the obligation of funds on their records for the interest rate buydown and/or loan and notify the approval official by forwarding the original and one copy of Form FmHA 440–57, "Acknowledgement of Obligated Funds/Check Request."

C. A loan or line of credit for which the interest rate was previously reduced under this exhibit, may receive a subsequent buydown provided the total buydown term(s) over the life of the loan does not exceed 3 years and the buydown is approved on or before September 30, 1993.

VI. *Interest Rate Buydown Closing.*

A. The lender will prepare and deliver a Form FmHA 1980–19, "Guaranteed Loan Closing Report," for each initial and existing guaranteed loan/line of credit in which the interest rate is bought down under this Exhibit.

B. See § 1980.61(b)(1) and § 1980.118(c) and Administrative paragraph B of this subpart.

1. If FmHA finds that all requirements have been met, the lender, FmHA and the borrower will execute Form FmHA 1980–58, "Interest Rate Buydown Agreement." In NO CASE will Form FmHA 1980–58 be executed prior to the determination of availability of funds for the loan/line of credit and buydown as evidenced on Form FmHA 440–57.

2. An original Form FmHA 1980-58 will be prepared for each note or line of credit agreement executed. All originals of Form FmHA 1980-58 will be provided to the lender and attached to the note(s) with the original Loan Note Guarantee or Contract or Guarantee. In the event the lender assigns the guaranteed portion of the loan to holder(s), or the holder(s) agree(s) to any reduction in interest rate, a copy of Form FmHA 1980-58 will be attached to the original Form FmHA 449-36, "Assignment Guarantee Agreement," along with a copy of the borrower's note(s) with "allonge" and Loan Note Guarantee. Form FmHA 449-36 will be revised to reflect the note amounts. At the top of the face of the document type: "This Assignment Guarantee Agreement is subject to an attachment(s) to the promissory note dated ____ and Form FmHA 1980-58, "Interest Rate Buydown Agreement," which temporarily reduces the interest rate on the promissory note to an effective interest rate of ____ %." This revision will be initialed and dated by the lender, holder, and FmHA. Copy(ies) of the Interest Rate Buydown Agreement will be kept in the County Office, attached to the appropriate Loan Note Guarantee or Contract of Guarantee. Additional copies may be retained by the State Office. Copies of all issued Interest Rate Buydown Agreements will be kept in the file.

3. Repurchase of loans presently guaranteed by FmHA eligible for interest rate buydown (Loan Note Guarantee cases only). See Item number 10 of Form FmHA 449-36 and Item number 6 of Form FmHA 1980-58. When FmHA purchases a portion of the guaranteed loan, buydown payments on that portion shall cease. The interest rate reduction shall remain in effect.

VII. *Interest Rate Buydown Claims and Payments.*

Claims and payments will be processed in accordance with Paragraphs 2 and 3 of Form FmHA 1980-58.

VIII. *Term of Buydown Agreement.*

The term of a buydown agreement entered into under this exhibit shall not exceed 3 years or the outstanding term of the loan involving the interest rate buydown, whichever is less.

IX. *Cancellation of Interest Rate Buydown.*

Form FmHA 1980-58, "Interest Rate Buydown Agreement," is incontestable except for fraud or misrepresentation, of which the lender has actual knowledge at the time the Interest Rate Buydown Agreement is executed, or for which the lender participates in or condones.

X. *Excessive Interest Rate Buydown.*

Upon written notice to the lender, borrower and any holder(s), the Government may amend or cancel the Interest Rate Buydown Agreement and collect from the lender any amount of reduction granted which resulted from incomplete or inaccurate information (of which the lender was aware), an error in computation, or any other reason which resulted in payment that the lender was not entitled to receive.

XI. *Transfer and Assumption of Loans Involving Interest Rate Buydown.*

Transfers will be processed in accordance with § 1980.123 of this subpart. The loan/line of credit will be transferred with the Interest Rate Buydown Agreement only in cases where the transferee was liable for the debt at the time the buydown was granted. Under no other circumstances will the buydown be transferred. If the buydown is necessary for the transferee to achieve a positive cash flow, the lender must make application for an initial buydown under this exhibit.

XII. *Review by FmHA Employees.*

The lender will submit Form FmHA 1980-24, "Request Interest Rate Buydown/Subsidy Payment to Guaranteed Loan Lender," annually along with detailed calculations and a statement of activity on the borrower's account to support the claim. The County Supervisor will approve, if correct, and forward to the Finance Office for payment. FmHA may review audit reports by the lender's supervising agency when buydown claims are involved.

XIII. *List of Eligible Lenders.*

The County Supervisor will maintain a current list of eligible lenders and other lenders who express a desire to participate in the guaranteed program. This list will be made available to farmers upon request.

Attachment 1—Buydown Information Letter

United States Department of Agriculture
Farmers Home Administration (location)

Dear _____:

The Farmers Home Administration (FmHA) has authority under the Food Security Act of 1985 (P.L. 99-198) to temporarily make payments to lenders to reduce borrower interest rates on a guaranteed loan to eligible applicants and borrowers. The Interest Rate Buydown Program provides lenders with a tool to enable them to continue to provide credit to family farm operators who are temporarily unable to project a positive cash flow on all income and expenses, including debt service, without a reduction in the interest rate.

Lenders that participate in this program enter into an agreement with FmHA to reduce the interest rate paid on a loan. In return, FmHA will make annual payments to the lender in an amount of not more than 50 percent of the cost of reducing the interest rate on the loan. Payment made to a lender under this authority may not exceed two percentage points.

Borrowers with existing guaranteed Farm Operating (OL), Farm Ownership (FO) and Soil and Water (SW) guaranteed loans, may have the interest rate on their loans bought down by FmHA.

If you would like additional information regarding the Interest Rate Buydown Program for guaranteed loans and how to apply, you should contact this office.

I will be glad to discuss this program in detail with you.

Sincerely,

_____

County Supervisor

Attachment 2—Request for Interest Rate Buydown

To County Supervisor, FmHA

_____

Subject: Request for Interest Rate Buydown

Borrower's Name:

_____

In connection with the subject application for an interest rate buydown, this lending institution certifies:

(1) The loan balance of $_____ is the amount requested for an interest rate buydown. If a line of credit, the line of credit balance is $_____, and the line of credit ceiling amount of $_____ is the amount requested for an interest rate buydown.

(2) (a) The interest rate charged the lender's average farm customer, determined in accordance with §1980.175(e) of this subpart, is _____%. (Specify fixed or variable. If variable rates are used, the average farm customer's variable rate for the past 90 days shall be inserted.)

(b) The lender's interest rate to the subject borrower prior to writedown is _____% (may not exceed (2)(a)).

(c) The lender's writedown is _____%.

(d) The interest rate to be charged with the writedown to the borrower is _____%.

(3) The amount of interest written down is permanently cancelled as it becomes due and no attempt will be made to collect that portion of the debt.

(4) The lender's interest rate reduction to the borrower will result in a reduced payment schedule for the term of the buydown and that a positive cash flow on all income and expenses, including debt service, will be expected during the buydown period. In cases where the term of the loan exceeds the term of the buydown, the borrower must project a positive cash flow on all income and expenses, including debt service, after the buydown period terminates.

(5) The borrower's cash flow projections have been prepared in accordance with Part 1980, Subpart B, §1980.113(d)(8), and are attached to this document.

Warning: Section 1001 of Title 18, United States Code provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up . . . a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

_____

(Name of Lender)

By

_____

Title

_____

Lender's IRS ID No.

Date

_____

Exhibit E—Demonstration Project for Purchase of Certain Farm Credit System Acquired Farmland

I. *General.*

This Exhibit contains the policies and procedures pertaining to a Demonstration Project for purchase of certain Farm Credit System acquired farmland (FCS Demonstration Project) for guaranteed Farm Ownership (FO) loans described in § 1980.180 of this subpart. Subparts A and B of this part are applicable to this Exhibit except as modified by Exhibit A of this subpart and this Exhibit. Authority to enter into the FCS Demonstration Project expires January 6, 1991. Attachment 1 is the Farm Credit Bank Agreement to be executed by the Administrator of the Farmers Home Administration (FmHA) and the President of each Farm Credit Bank of those Districts which are certified to participate in the "Demonstration Project for the Purchase of Farm Credit System Land." When a District is certified by the Farm Credit System Assistance Board (FCSAB), the President of the District will sign the Agreement and forward it to the FmHA Administrator for signature. The original Agreement will be retained by FmHA with a conformed copy to the District and the FCSAB.

II. *Introduction.*

This Exhibit contains a means by which the Farm Credit System (FCS) can make available for sale certain acquired lands to eligible FO applicants, as provided by § 351(h) of the Consolidated Farm and Rural Development Act. Each FCS District President and FmHA State Director, who will be involved in the Demonstration Project will provide ample notice of the project as outlined in Attachment 1 of this Exhibit. Only those properties owned by FCS member institutions certified to issue preferred stock under § 6.27 of the Farm Credit Act of 1971 may be purchased under this Exhibit. The Farm Credit Administration (FCA) will provide the Farmers Home Administration (FmHA) with a list of these certified FCS member institutions, as further explained in Memorandum of Understanding between FmHA and FCA found in FmHA Instruction 2000-MM (available in any FmHA office). FmHA may issue certificates of eligibility to eligible borrowers to reduce the interest rate paid by such borrowers on FmHA guaranteed loans obtained from eligible Farmer Program lenders to purchase properties owned by the Farm Credit System. The sale of land by the Farm Credit System under this program is limited to an aggregate land value not to exceed $250,000,000 at fair market value each fiscal year.

Lenders that participate in this FCS Demonstration Project may enter into an agreement with FmHA to reduce the interest rate paid on a loan. In return, FmHA will make annual interest rate buydown payments to the lender in the amount of 4 percentage points. Those lenders who permanently reduce the interest rate charged on the guaranteed loan by at least 1 full percentage point will receive a 95 percent guarantee. The reduction of interest by FmHA will be in effect for a term equal to the outstanding term of such loan, or 5 years, whichever is less.

III. *Definitions.*

A. *Cash Flow*—A projection listing on a typical 24-month basis, of all anticipated cash inflows (including all farm and non-farm income) and all expenses to be incurred by the borrower during such period (including all farm and non-farm debt service and other expenses). Production records and prices used in the preparation of a cash flow will be calculated in accordance with Section 1980.113(d)(8) of this subpart.

B. *Certificate of Eligibility*—The County Committee will certify on Form FmHA 440-2, "County Committee Certification or Recommendation" the following:

(1) That the borrower is eligible for a guaranteed FO loan.

(2) The farm is eligible for the program in accordance with § 1980.106(b)(7) of this subpart.

(3) The borrower is eligible for an interest rate reduction.

C. *Interest Rate Buydown Agreement*—(Form FmHA 1980-58) The signed agreement between FmHA, the lender, and the borrower, setting forth the terms and conditions of the interest rate reduction.

D. *Personal Funds*—Any funds listed on a borrower's financial statement or obtained through a loan, whether or not secured by other property.

E. *Positive Cash Flow*—A cash flow projection, as defined in § 1980.106(b)(17) of this subpart.

IV. *Program Administration.*

County Supervisors are authorized to approve Interest Rate Buydown Agreements for the FCS Demonstration Project providing the following requirements are met by the applicant, FCS and the lender.

A. Applications from individuals who are seeking to purchase FCS acquired farmlands with a guaranteed FO loan shall be processed in accordance with § 1980.113 of this subpart and this Exhibit. In addition, the lender will submit Attachment 2 of Exhibit D with the application. The lender must demonstrate that a positive cash flow projection is not possible without reducing the interest rate on the FO loan, except the reserve requirement as outlined in § 1980.106(b)(17)(iii) of this subpart may be from zero to 10 percent.

B. Prospective borrowers who seek to purchase FCS acquired farmlands and who do not have a lender involved in that purchase will submit an application to FmHA. The County Committee will review the application, which will also include a description of the property, and render a decision as to the eligibility of the prospective borrower and farm. If the County Committee determines the prospective borrower is eligible and that the farm meets the requirements of § 1980.106(b)(6) of this subpart, then the County Supervisor will determine if the request is feasible. If the request is rejected by either the County Committee or the County Supervisor, the prospective borrower and the lender will be advised of the opportunity for an appeal as set out in Subpart B of Part 1900 of this chapter.

C. Prospective borrower must provide a down payment equal to at least 15 percent of the land purchase price using personal funds, as defined in paragraph III D of this Exhibit.

D. Prospective borrowers must meet the applicable requirements of Subpart G of Part 1940 of this chapter, including providing SCS Form CPA-26, "Highly Erodible Land and Wetland Conservation Determination," and Form AD-1026, "Highly Erodible Land and Wetland Conservation Certification," as required by Exhibit M to Subpart G of Part 1940 of this chapter.

E. The FCS must price suitable farmland (family farm size as determined by the County Committee) to eligible prospective borrowers at fair market value.

F. FmHA will pay the lender an interest rate reduction of 4 percentage points.

G. The loan will be guaranteed at 90 percent in connection with a 4 percentage point interest rate reduction.

H. A lender who permanently reduces the interest rate currently charged on the loan by at least 1 full percentage point will receive a 95 percent guarantee.

I. The terms of the reduction will not exceed the outstanding term of such loan, or 5 years, whichever is less.

J. In order for the prospective borrower to qualify for a loan and an interest rate reduction, a typical plan of operation must show that a positive cash flow as defined in § 1980.106(b)(17) of this subpart can be expected during the reduction period and after the Interest Rate Buydown Agreement expires.

K. The Interest Rate Buydown Agreement will be attached to the promissory note(s). The promissory note(s) cannot exceed the interest rate the lender charges the average farm customer, *prior* to any write down by the lender, as outlined in § 1980.175(e)(2) of this subpart. The lender may only charge a fixed rate of interest during the term of the buydown agreement. The lender is responsible for the legal documentation of interest rate changes by an "allonge" attached to the promissory note(s) or other legally effective amendment of the interest rate; however, no new notes may be issued. If the lender elects to use a variable rate note, the fixed rate of interest charged during the reduction period will be calculated *not to exceed* the average variable rate charged the lender's average farm customer (as defined in § 1980.175(e)(2)) of this subpart over the past 90 days. The promissory note(s) and any attachments to these agreements, must schedule repayment in accordance with the terms for the loan set forth in Section 1980.180(e) and (f) of this subpart.

V. *Approval of Loan Guarantees and Interest Rate Reduction.*

Authority to approve loan guarantees and Interest Rate Buydown Agreements expires January 6, 1991. If the FmHA approval official determines the reduction will be in accordance with paragraph VI of this Exhibit, in addition to the determinations required in § 1980.115, Administrative paragraphs A and B, of this subpart *the approval official will:*

A. Prepare Form FmHA 1940-1, "Request for Obligation of Funds." The request for obligation of funds must include the amount of the loan and its respective buydown.

B. Execute Form FmHA 1940-1 and distribute copies in accordance with the FMI. The Finance Office will enter the obligation of funds on their records for the interest rate reduction and notify the approval official by forwarding the original and one copy of Form

FmHA 440-57, "Acknowledgement of Obligated Funds/Check Request."

VI. *Interest Rate Reduction Closing.*

A. The lender will prepare and deliver a Form FmHA 1980-19, "Guaranteed Loan Closing Report," for each guaranteed loan in which the interest rate is reduced under this Exhibit.

B. See § 1980.61(b)(1), § 1980.118(c) and Administrative paragraph B of this subpart.

1. If FmHA finds that all requirements have been met, the lender, FmHA and the borrower will execute Form FmHA 1980-58, "Interest Rate Buydown Agreement." In NO CASE will Form FmHA 1980-58 be executed prior to the determination of availability of funds for the loan and interest reduction as evidenced on Form FmHA 440-57.

2. An original Form FmHA 1980-58 will be prepared for each note executed. All originals of Form FmHA 1980-58 will be provided to the lender and attached to the note(s) with the original Loan Note Guarantee. In the event the lender assigns the guaranteed portion of the loan to holder(s), a copy of Form FmHA 1980-58 will be attached to the original Form FmHA 449-36, "Assignment Guarantee Agreement," along with a copy of the borrower's note(s) with "allonge" and Loan Note Guarantee. Form FmHA 449-36 will be revised to reflect the note amounts. At the top of the face of the document type: "This Assignment Guarantee Agreement is subject to an attachment(s) to the promissory note dated_____ and Form FmHA 1980-58, "Interest Rate Buydown Agreement," which reduces the interest rate on the promissory note to an effective interest rate of ____%. This reduction is _____ (insert "temporary" if there is no 95 percent guarantee involved or "permanent" if a 95 percent guarantee is involved.)" This revision will be initialed and dated by the lender, holder, and FmHA. Copy(ies) of the Interest Rate Buydown Agreement will be kept in the County Office, and attached to the appropriate Loan Note Guarantee. Additional copies may be retained by the State Office. Copies of all issued Interest Rate Buydown Agreements will be kept in the file. Copies may be retained by the State Office. Copies of all issued Interest Rate Buydown Agreements will be kept in the file.

3. Repurchase of guaranteed loans having interest rate reduction under this FCS Demonstration Project. See item number 10 of Form FmHA 449-36 and item number 6 of Form FmHA 1980-58. When FmHA purchases a portion of the guaranteed loan, buydown payments on that portion shall cease, but the interest rate reduction shall remain in effect. The lender shall complete Form FmHA 1980-24, "Request Interest Rate Buydown/Subsidy Payment to Guaranteed Loan Lender," to request payment for the buydown/subsidy through the date of the FmHA purchase.

VII. *Interest Rate Reduction Claims and Payments.*

Claims and payments will be processed in accordance with paragraphs 2 and 3 of Form FmHA 1980-58.

VIII. *Term of Buydown Agreement.*

The term of a buydown agreement entered into under this Exhibit shall not exceed 5 years or the outstanding term of the loan involving the interest rate reduction, whichever is less.

IX. *Cancellation of Interest Rate Reduction.*

Form FmHA 1980-58 is incontestable, except for fraud or misrepresentation, of which the lender has actual knowledge at the time the Interest Rate Buydown Agreement is executed, or for which the lender participates in or condones.

X. *Excessive Interest Rate Reduction.*

Upon written notice to the lender, borrower and any holder(s), the Government may amend or cancel the Interest Rate Buydown Agreement and collect from the lender any amount of reduction granted which resulted from incomplete or inaccurate information (of which the lender was aware), an error in computation, or any other reason which resulted in payment that the lender was not entitled to receive.

XI. *Transfer and Assumption of Loans Involving Interest Rate Reduction.*

Transfers will be processed under this Exhibit. The lender shall complete Form FmHA 1980-24, "Request Interest Rate Buydown/Subsidy Payment to Guaranteed Loan Lender," to request payment for the buydown/subsidy through the date of the transfer or assumption of the guaranteed loan under the transferor's case number. If the reduction is necessary for the transferee to achieve a positive cash flow, the lender must make application for an initial reduction under this Exhibit.

XII. *Review by FmHA Employees.*

The lender will submit Form FmHA 1980-24 annually along with detailed calculations and a statement of activity of the borrower's account to support forward to the Finance Office for payment. FmHA may review audit reports by the lender's supervising agency when reduction claims are involved.

Attachment 1—Farmers Home Administration Demonstration Project for the Purchase of Farm Credit System Land

Farm Credit Bank Agreement

I. *General:* This agreement provides the guidelines for the implementation of the Demonstration Project for the Purchase of Certain Farm Credit System Acquired Land (FCS Demonstration Project) between Farmers Home Administration (FmHA) and the Farm Credit Bank of _____ (Bank) to carry out the goals and objectives of Section 351(h) of the Consolidated Farm and Rural Development Act (7 U.S.C. § 1999(h)) as described in Exhibit E of 7 CFR Part 1980, Subpart B.

The Parties Agree That:

I. The Bank will make available for purchase by qualified borrowers property eligible for the FCS Demonstration Project as further explained in Paragraph II of Exhibit E of 7 CFR Part 1980, Subpart B.

II. The Bank may, at its discretion and for the purpose of maximizing the economic return on the sale of acquired property, subdivide tracts of land to make available parcels that permit eligible borrowers to purchase the parcels consistent with limits placed on the size of loans made, insured, or guaranteed under the Consolidated Farm and Rural Development Act.

III. The Bank will periodically provide the FmHA State Director with current inventories of properties that may be eligible for the FCS Demonstration Project.

IV. The Bank, through private sale, will sell land at fair market value, as determined by the Bank, to eligible borrowers.

V. The Bank reserves the right to market and sell its acquired property to any qualified individual until, under the terms of the FCS Demonstration Project, FmHA has determined the eligibility of the borrower and suitability of the property, and a purchase agreement has been executed between the eligible borrower and the Bank.

VI. The Bank will provide technical assistance to the extent possible in connection with the implementation of the FCS Demonstration Project.

VII. The Bank will dispose of properties listed under the FCS Demonstration Project in a manner consistent with the applicable provisions of Section 4.36 of the Farm Credit Act of 1971, as amended, governing the rights of first refusal of former owners.

VIII. The FmHA will process applications for participation in the FCS Demonstration Project in accordance with FmHA regulations, including those set out in 7 CFR Part 1980, Subparts A and B.

IX. The FmHA will determine the eligibility of the prospective borrower and the property for the FmHA guaranteed program.

X. The FmHA will provide certificates of eligibility to eligible borrowers on a timely basis consistent with the availability of acquired property owned by institutions of the Farm Credit System certified to issue preferred stock under Section 6.27 of the Farm Credit Act of 1971.

XI. The Bank and FmHA are independently responsible for providing adequate media coverage of the FCS Demonstration Project. Media coverage will include news releases for local newspapers, radio, and television.

This Agreement is effective upon signing by both the Administrator of the Farmers Home Administration and President of the Farm Credit Bank of _____. This Agreement may be amended at any time by written agreement of both parties, and shall terminate with the expiration of the authority for the FCS Demonstration Project.

By _____
Administrator, Farmers Home Administration

Date: _____

By: _____
President of the Farm Credit Bank of

_____

Date: _____

Exhibit F—(Prepare One for Each Loan/Line of Credit to be Written Down) Shared Appreciation Agreement

This Agreement is entered into between (Lender's name) (called "Lender") and (Borrower's name) (called "Borrower") on (date) and expires on (Date) (maximum term of ten (10) years).

Borrower is indebted to Lender for a loan or line of credit as evidenced by the note(s) or line of credit agreement(s) described below:

Date	Principal amount	Interest rate	Due date

This Agreement is attached to the note(s) or line of credit agreement(s) described above. As of the date of this Agreement, before write down, the unpaid principal balance on this note or line of credit agreement was $_____ and the unpaid interest balance was $_____. If a line of credit agreement is involved, the new line of credit ceiling is $_____, and no increase will be made under the line of credit agreement(s). The value of the security covered by this agreement at the time of write down is $_____.

The note or line of credit agreement described above is secured by the following real estate security instruments:

Grantor	Date of security instrument	Records of		Book or reel	Page
		County	State		

Lender agrees to write down $_____ of principal and accrued interest of the above-described note or line of credit agreement. After the write down, there is now due and owing the principal sum of $_____ plus interest in the sum of $_____ together with interest accruing from the date of this agreement on the unpaid principal balance at the rate of ____%.

As a condition to, and in consideration of, Lender writing down the above amounts and restructuring the loan, Borrower agrees to recapture by the Lender an amount according to one of the following schedules:

1. Seventy-five (75) percent of any positive appreciation in the market value of the property securing the loan or line of credit agreement as described in the above security instrument(s) between the date of this Agreement and either the expiration date of this Agreement or the date Borrower pays all guaranteed loan(s) or lines of credit in full, ceases farming or transfers title of the security, if such event occurs four (4) years or less from the date of this Agreement.

2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan or line of credit agreement above as described in the security instruments between the date of this Agreement and either the expiration date of this Agreement or the date Borrower pays all guaranteed loans or lines of credit in full, ceases farming or transfers title of the security, if such event occurs after four (4) years but before the expiration date of this Agreement.

The amount of recapture by Lender will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time this Agreement is entered into. Both values will be determined thorough an appraisal conducted by Lender. The amount of recapture will not exceed the amount of write down as stated on this form. Repayment of the recapture amount may be rescheduled or reamortized if the borrower is unable to pay the recapture amount at the expiration date of this agreement.

_____
(Borrower signature)

_____
(Lender signature)

Subpart C—Emergency Livestock Loans

13. Section 1980.284 is added to read as follows:

§ 1980.284 Bankruptcy.

(a) *General.* In bankruptcies, there are two separate proceedings: liquidation and reorganization under the bankruptcy court's protection. It is the lender's responsibility to protect the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings (refer to paragraph IX C 5 of Form FmHA 449–35 or Form FmHA 1980–38). These responsibilities include, but are not limited to:

(1) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(2) The lender will attend and where necessary participate in meetings of the creditors and all court proceedings.

(3) The lender, whose collateral is subject to being used by the bankruptcy estate, will immediately seek adequate protection of the collateral, including petitioning for a super priority. Adequate protection of the collateral, depending on interpretation, may take several forms. In a bankruptcy, the trustee is authorized to sell, lease or use the collateral if the borrower's business is in operation. The only collateral the trustee cannot utilize is cash collateral unless the secured creditor grants permission or the bankruptcy court authorizes the use of such after giving a proper hearing and notice.

(i) Cash collateral means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, such as accounts receivable.

(ii) Concerning machinery, equipment and real estate, adequate protection can be interpreted differently under reorganization. The bankruptcy trustee could dispose of certain collateral and grant to the secured party a replacement lien on some other collateral which may or may not have the same value. For example, the lender may hold a first lien on a good saleable piece of real estate and could find replacement of this particular parcel of property with a second or possibly a third lien on another parcel of land that the lender may find undesirable for adequate protection. There are no guarantees to the lender when the borrower is in reorganization that the collateral will be protected to the lender's satisfaction. The lender should be fully aware of what is taking place with the collateral and resist any adverse changes that may be made in the collateral securing the FmHA guaranteed loan.

(4) When permitted by the Bankruptcy Code, the lender will request a modification of any plan of reorganization whenever it appears that additional recoveries are likely. In Chapters 11, 12, and 13 bankruptcy cases, the lender will monitor the plan to determine whether the borrower is fulfilling the requirements of the plan and take appropriate action to obtain dismissal of the case if the borrower fails to comply with the requirements of the plan. A dismissal of the plan by the bankruptcy court would restore the original outstanding indebtedness at the time the reorganization plan was approved.

(5) FmHA will be kept adequately and regularly informed in writing of all aspects of the proceedings.

(b) *Reorganization bankruptcy cases.* (1) In Chapter 11, 12, or 13 reorganization, if an independent appraisal of collateral is necessary in FmHA's opinion, FmHA and the lender will share the appraisal fee equally.

(2) Lender expenses, in a Chapter 11, 12, or 13 reorganization case, are not deducted from the proceeds of the collateral because a reorganization is not a liquidation. All expenses incurred by the lender (including attorney's fees) while the borrower is in reorganization are considered normal expenses of servicing the account and therefore are

the responsibility of the lender and are not deductible from the proceeds of the collateral or covered under the FmHA guarantee.

(c) *Liquidation bankruptcy cases.* (1) Reasonable and customary liquidation expenses may be deducted from the proceeds of the collateral in liquidation bankruptcy cases provided the lender is doing the actual liquidation of the collateral, presents adequate written justification for each expense, and secures FmHA's written concurrence prior to incurring the expense.

(2) If a trustee is appointed by the bankruptcy court to sell the collateral under a conversion of a reorganization plan to a liquidation plan or Chapter 7, the trustee rather than the lender in this instance is responsible for liquidating the collateral. Normally, any expenses incurred by the lender during this period are not considered liquidation expenses and cannot be deducted from collateral proceeds. The lender is not engaged in the liquidation but is performing in a manner considered to be normal servicing of the loan under the circumstances.

(3) If the property is abandoned by the trustee and the lender is actually engaged in liquidation, reasonable liquidation expenses would be recoverable from liquidation proceeds with prior written concurrence for each expense from FmHA before the expense is incurred.

(d) *Loss payments.* See paragraph XVI of Form FmHA 449-35 or Form FmHA 1980-38.

Administrative

A. The lender is responsible for advising FmHA of the completion of reorganization plan. The lender is also responsible for advising FmHA if the borrower does comply with the plan and the servicing action the lender will take to protect the interest of the lender and FmHA. However, the FmHA servicing office will monitor the lender's files to ensure timely notification of servicing actions.

B. When an estimated loss claim is paid during the operation of the reorganization plan, and the borrower repays in full the remaining balance of the loan as set forth in the plan without an additional loss sustained by the lender, a Final Report of Loss is not necessary. The Finance Office will close out the estimated loss account as a Final Loss at the time notification of payment in full is received.

C. If the bankruptcy court attempts to direct that loss payments will be applied to the account other than the unsecured principal first and then to unsecured accrued interest, the lender is responsible for notifying the FmHA servicing office immediately. The FmHA servicing office will then obtain advice from OGC on what actions FmHA should take.

D. Protective Advances—Authorized protective advances may be included with the estimated loss payment associated with the reorganization bankruptcy provided they were incurred in connection with liquidation of the account prior to the borrower filing bankrutcy.

E. Accrued interest owed to the lender should be supported by documentation as to how the accrued interest amount was calculated by the lender. A copy of the promissory note and ledger should also be attached. As part of the review of the final loss claim, FmHA should be assured that the lender has not accrued interest on the principal and interest amount of the loan that was paid by the estimated loss payment. The approval official is responsible for the accuracy of the interest calculations on the final report of loss before submission to the Finance Office.

F. Repurchase of Notes.—In cases where a default on the guaranteed note does not exist, the State Director may approve the repurchase of the unpaid guaranteed portion of loan(s) from any holder(s) to reduce interest accrual during a Chapter 7 proceeding, or after a Chapter 11 proceeding becomes a liquidation proceeding. (Refer to paragraph X C of Form 449-35 or Form FmHA 1980-38.)

G. County Supervisors are authorized to approve Report of Estimated Loss or Final Loss Payments on Form FmHA 449-30 in those cases where the loss payment will not exceed $55,000. The State Director is authorized to approve the determination in all other cases. A copy of the form will be given to the District Director. The State Director will submit Form FmHA 449-30 to the Finance Office for payment of any losses.

Subpart E—Business and Industrial Loan Program

14. Section 1980.475 is amended by redesignating paragraph (a)(5) as (a)(6), adding new paragraph (a)(5), revising paragraph (b), adding new paragraph (d), and revising the Administrative section, to read as follows:

§ 1980.475 Bankruptcy.

(a) * * *

(5) When permitted by the Bankruptcy Code, the lender will request modification of any plan of reorganization whenever it appears that additional recoveries are likely.

* * * * *

(b) In a Chapter 11 reorganization, if an independent appraisal of collateral is necessary in FmHA's opinion, FmHA and the lender will share such appraisal fee equally.

* * * * *

(d) *Estimated loss payments.* See paragraph XVI of Form FmHA 449-35.

Administrative

Refer to Appendix G of this subpart (available in any FmHA office) for advice on how to interact with the lender on liquidation and property management.

A. It is the responsibility of the State Program Chief to see that FmHA is being fully informed by the lender in all bankruptcy cases.

B. All bankruptcy cases should be reported immediately to the National Office by utilizing and completing a problem/delinquent status report. The Regional Attorney must be informed promptly of the proceedings.

C. Chapter 11 pertains to a reorganization of a business contemplating an ongoing business rather than a termination and dissolution of the business where legal protection is afforded to the business as defined under Chapter 11 of the Bankruptcy Code. Consequently, expenses incurred by the lender in a Chapter 11 reorganization can never be liquidation expenses unless the proceeding becomes a Liquidating 11. If the proceeding should become a Liquidating 11, reasonable and customary liquidation expenses may be deducted from proceeds of collateral provided the lender is doing the actual liquidation of the collateral as provided by the Lender's Agreement. Chapter 7 pertains to a liquidation of the borrower's assets. If and when liquidation of the borrower's assets under Chapter 7 is conducted by the bankruptcy trustee, the lender cannot claim expenses.

D. The State Director may approve the repurchase of the unpaid guaranteed portion of the loan from the holder(s) to reduce interest accruals during Chapter 7 proceedings or after a Chapter 11 proceeding becomes a liquidation proceeding. On loans in bankruptcy, any loss payment must be halted in accordance with the Lender's Agreement and carry the approval of the State Director.

E. The State Director must approve in advance and in writing the lender's estimated liquidation expenses on loans in liquidation bankruptcy. These expenses must be reasonable and customary and not in-house expenses of the lender.

F. The lender is responsible for advising FmHA of the completion of the Chapter 11 reorganization plan; however, the FmHA servicing office will monitor the lender's files to ensure timely notification of servicing actions.

G. If an estimated loss claim is paid during the operation of the reorganization plan, and the borrower repays in full the remaining balance of the loan as set forth in the plan without an additional loss sustained by the lender, a Final Report of Loss is not necessary. The Finance Office will close out the estimated loss account as a Final Loss at the time notification of payment in full is received.

H. If the bankruptcy court attempts to direct that loss payments will be applied to the account other than the unsecured principal first and then to unsecured accrued interest, the lender is responsible for notifying the FmHA servicing office immediately. The FmHA servicing office will then obtain advice from OGC on what actions FmHA should take.

I. Protective Advances—Authorized protective advances may be included with the estimated loss payment associated with

the Chapter 11 reorganization provided they were incurred in connection with liquidation of the account prior to the borrower filing bankruptcy.

J. Adequate Protection—The bankruptcy court can order protection of the collateral while the borrower is in a reorganization bankruptcy. The lender whose collateral is subject to being used by the trustee in bankruptcy should immediately seek adequate protection of the collateral, including petitioning for a super priority.

14a. Subpart E is amended by adding Exhibit G.

Exhibit G

Note.—The Exhibit is not published in the Code of Federal Regulations. It is available in any FmHA office.

Subpart F—Economic Emergency Loans

15. Section 1980.583 is added to read as follows:

§ 1980.583 Bankruptcy.

(a) *General.* In bankruptcies, there are two separate proceedings: liquidation and reorganization under the bankruptcy court's protection. It is the lender's responsibility to protect the guaranteed loan debt and all collateral securing the loan in bankruptcy proceedings (refer to paragraph IX C 5 of Form FmHA 449-35 or Form FmHA 1980-38). These responsibilities include, but are not limited to:

(1) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(2) The lender will attend, and where necessary, participate in meetings of the creditors and all court proceedings.

(3) The lender whose collateral is subject to being used by the bankruptcy estate will immediately seek adequate protection of the collateral, including petitioning for a super priority. Adequate protection of the collateral, depending on interpretation, may take several forms. In a bankruptcy, the trustee is authorized to sell, lease or use the collateral if the borrower's business is in operation. The only collateral the trustee cannot utilize is cash collateral unless the secured creditor grants permission or the bankruptcy court authorizes the use of such after giving a proper hearing and notice.

(i) Cash collateral means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, such as accounts receivable.

(ii) Concerning machinery, equipment and real estate, adequate protection can be interpreted differently under reorganization. The bankruptcy trustee could dispose of certain collateral and grant to the secured party a replacement lien on some other collateral which may or may not have the same value. For example, the lender may hold a first lien on a good saleable piece of real estate and could find replacement of this particular parcel of property with a second or possibly a third lien on another parcel of land that the lender may find undesirable for adequate protection. There are no guarantees to the lender when the borrower is in reorganization that the collateral will be protected to the lender's satisfaction. The lender should be fully aware of what is taking place with the collateral and resist any adverse changes that may be made in the collateral securing the FmHA guaranteed loan.

(4) When permitted by the Bankruptcy Code, the lender will request a modification of any plan of reorganization whenever it appears that additional recoveries are likely. In Chapters 11, 12, and 13 bankruptcy cases, the lender will monitor the plan to determine whether the borrower is fulfilling the requirements of the plan and take appropriate action to obtain dismissal of the case if the borrower fails to comply with the requirements of the plan. A dismissal of the plan by the bankruptcy court would restore the original outstanding indebtedness at the time the reorganization plan was approved.

(5) FmHA will be kept adequately and regularly informed in writing of all aspects of the proceedings.

(b) *Reorganization bankruptcy cases.* (1) In a Chapter 11, 12, or 13 reorganization, if an independent appraisal of collateral is necessary in FmHA's opinion, FmHA and the lender will share the appraisal fee equally.

(2) Lender expenses in a Chapter 11, 12, or 13 reorganization case are not deducted from the proceeds of the collateral because a reorganization is not a liquidation. All expenses incurred by the lender (including attorney's fees) while the borrower is in reorganization are considered normal expenses of servicing the account, and therefore are the responsibility of the lender and are not deductible from the proceeds of the collateral or covered under the FmHA guarantee.

(c) *Liquidation bankruptcy cases.* (1) Reasonable and customary liquidation expenses may be deducted from the proceeds of the collateral in liquidation bankruptcy cases, provided the lender is doing the actual liquidation of the collateral, presents adequate written justification for each expense, and secures FmHA's written concurrence prior to incurring the expense.

(2) If a trustee is appointed by the bankruptcy court to sell the collateral under a conversion of a reorganization plan to a liquidation plan or Chapter 7, the trustee rather than the lender in this instance is responsible for liquidating the collateral. Normally, any expenses incurred by the lender during this period are not considered liquidation expenses and cannot be deducted from collateral proceeds. The lender is not engaged in the liquidation but is performing in a manner considered to be normal servicing of the loan under the circumstances.

(3) If the property is abandoned by the trustee and the lender is actually engaged in liquidation, reasonable liquidation expenses would be recoverable from liquidation proceeds with prior written concurrence for each expense from FmHA before the expense is incurred.

(d) *Loss payments.* See paragraph XVI of Form FmHA 449-35 or Form FmHA 1980-38.

Administrative

A. The lender is responsible for advising FmHA of the completion of the reorganization plan. The lender is also responsible for advising FmHA if the borrower does not comply with the plan and the servicing action the lender will take to protect the interest of the lender and FmHA. However, the FmHA servicing office will monitor the lender's files to ensure timely notification of servicing actions.

B. When an estimated loss claim is paid during the operation of the reorganization plan, and the borrower repays in full the balance of the loan as set forth in the plan without an additional loss sustained by the lender, a Final Report of Loss is not necessary. The Finance Office will close out the estimated loss account as a Final Loss at the time notification of payment in full is received.

C. If the bankruptcy court attempts to direct that loss payments will be applied to the account other than the unsecured principal first and then to unsecured accrued interest, the lender is responsible for notifying the FmHA office immediately. The FmHA servicing office will then obtain advice from OGC on what actions FmHA should take.

D. Protective Advances—Authorized protective advances may be included with the estimated loss payment associated with the reorganization bankruptcy provided they were incurred in connection with liquidation of the account prior to the borrower filing bankruptcy.

E. Accrued interest owed to the lender should be supported by documentation as to how the accrued interest amount was calculated by the lender. A copy of the promissory note and ledger should also be attached. As part of the review of the final loss claim, FmHA should be assured that the lender has not accrued interest on the

principal and interest amount of the loan that was paid by the estimated loss payment. The approval official is responsible for the accuracy of the interest calculations on the final report of the loss before submission to the Finance Office.

F. Repurchase of Notes—In cases where a default on the guaranteed note does not exist, the State Director may approve the repurchase of the unpaid guaranteed portion of the loan(s) from any holder(s) to reduce interest accrual during a Chapter 7 proceeding, or after a Chapter 11 proceeding becomes a liquidation proceeding. (Refer to paragraph X C of Form FmHA 1980-35 or Form FmHA 1980-38.)

G. County Supervisors are authorized to approve Report of Estimated Loss or Final Loss Payments to Form FmHA 449-30 in those cases where the loss payment will not exceed $55,000. The State Director is authorized to approve the determination in all other cases. A copy of the form will be given to the District Director. The State Director will submit Form FmHA 449-30 to the Finance Office for payment of any losses.

Dated: January 5, 1989.

Roland R. Vautour,

Under Secretary for Small Community and Rural Development.

[FR Doc. 89-573 Filed 1-12-89; 8:45 am]

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federal register

Friday
January 13, 1989

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 880

Medical Devices; Patient Examination Glove; Revocation of Exemptions from the Premarket Notification Procedures and the Current Good Manufacturing Practice Regulations; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 880

[Docket No. 88N-0044]

Medical Devices; Patient Examination Glove; Revocation of Exemptions From the Premarket Notification Procedures and the Current Good Manufacturing Practice Regulations

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is revising the patient examination glove classification regulation, set forth in 21 CFR 880.6250, by revoking exemptions from the premarket notification procedures and certain current good manufacturing practice (CGMP) requirements identified in the regulation. The revocations are necessary because of the importance of this device in helping to prevent the transmission between patients and health-care workers of the HIV (human immunodeficiency virus) virus that causes AIDS (acquired immunodeficiency syndrome).

DATES: The rule becomes effective on April 13, 1989.

A premarket notification submission is required for any patient examination glove intended to be introduced or delivered for introduction into commerce on or after April 13, 1989, pursuant to section 510(k) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360(k)), and the procedures in Subpart E of 21 CFR Part 807. A manufacturer, or an initial distributor of an imported patient examination glove, that has already begun commercial distribution under FDA's existing exemption from premarket notification, is required to submit to FDA a premarket notification on or before April 13, 1989.

All patient examination gloves, whether made in the United States or imported, that are introduced or delivered for introduction into commerce after April 13, 1989, must have been manufactured in compliance with the CGMP regulations in 21 CFR Part 820.

Submit any written comments by March 14, 1989.

ADDRESS: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Les Weinstein, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 21, 1980 (45 FR 69678 at 69723), FDA published a final rule classifying into class I the patient examination glove (21 CFR 880.6250) using procedures in section 513(b) of the act (21 U.S.C. 360c(b)). In that regulation, FDA identified the patient examination glove as a disposable device intended for medical purposes, that is worn on the examiner's hand or finger to prevent contamination between the patient and examiner. The generic device may be made of various materials, such as vinyl or latex rubber.

As part of the regulation, FDA exempted manufacturers of the device (1) from the premarket notification procedures in Subpart E of 21 CFR Part 807 and, (2) if the device is not labeled or otherwise represented as sterile, the CGMP regulations in 21 CFR Part 820, with the exception of §§ 820.180 and 820.198, relating to the keeping of records and complaint files and related procedures, respectively. In the 1980 regulation, FDA granted these exemptions because no adverse experiences had been related to patient examination gloves. Also, the role of the gloves as a protective barrier against HIV transmission was not the public health concern then that it is today, because AIDS and the HIV virus were not recognized at that time and the risks associated with glove failure were not as well understood as they are today.

Since publication of the final classification regulation for the patient examination glove, AIDS has become a major public health problem. In the United States, an estimated 1 to 1.5 million persons are infected with HIV and the number of those persons who will develop AIDS is unknown (Ref. 1). As of November 7, 1988, the Centers for Disease Control (CDC) report that there have been 77,994 reported cases of AIDS in the United States, and over half of these persons have died (Ref. 2). It is projected that, by the end of 1991, a cumulative total of 270,000 cases of AIDS will have been reported in the United States and a projected total of 179,000 deaths will have occurred from the disease (Ref. 3).

HIV is contacted primarily through sexual contract; however, a number of cases have been contracted through transfusions of infected blood or blood products, contact with infected blood or blood products, and from use of contaminated needles, typically by intravenous drug users. HIV has been isolated from body fluids, such as blood, semen, vaginal secretions, saliva, tears, breast milk, cerebrospinal fluid, amniotic fluid, and body excretions, such as urine. As the prevalence of HIV infection increases, health-care workers are subjected to an increasing potential of HIV exposure by virtue of treating and caring for larger numbers of HIV-infected persons.

Health-care workers are those persons, including students and trainees, whose activities in a health-care setting involve contact with blood or other body fluids or excretions from patients. Because a patient's typical medical history and patient examination currently cannot readily identify whether the patient is infected with HIV or other blood-borne pathogens, CDC and others recommend that health-care workers should use appropriate barrier precautions when handling a patient's blood or other body fluids or excretions to prevent exposure to pathogens.

On August 21, 1987, CDC published a report that emphasized the need for all health-care workers to routinely use appropriate barrier precautions when contact with blood or body fluids of any patient is anticipated to prevent skin and mucous membrane exposure (Ref. 4). The CDC report recommended that health-care workers wear patient examination gloves (1) when touching blood and body fluids, mucous membranes, or nonintact skin of all patients, (2) in handling items or surfaces soiled with blood or body fluids, and (3) in performing venipuncture and other vascular access procedures.

Because of the risk of exposure to HIV, there now is a need for greater assurance that contamination between patients and health-care workers does not occur. Accordingly, FDA believes that it is imperative that patient examination gloves worn by health-care workers provide an effective barrier to contamination. An effective barrier can be provided only if the gloves are intact, i.e., do not contain or develop holes while being used. FDA has determined that defects (holes) in patient examination gloves are not always readily detectable by the users of the device. Holes in the gloves, which may compromise the effectiveness of the barrier, may result in contamination between health-care workers and patients, leading to HIV exposure.

FDA believes that revocation of the exemption from certain of the CGMP requirements will help provide assurance that manufacturers provide an acceptable manufacturing quality level for patient examination gloves, thus improving the safety and

effectiveness of the device for its intended use.

FDA believes that revocation of the exemption from the premarket notification procedures is necessary to assure that FDA will be able to monitor the introduction into commerce, by manufacturers and importers, of patient examination gloves.

In revoking the exemption from premarket notification, FDA has included individuals presently marketing patient examination gloves among those persons who must file 510(k) notifications. Under 21 CFR 807.81(a)(3)(ii), any person responsible for a major change or modification in a marketed device's intended use is subject to the 510(k) requirement to file a premarket notification.

Current health needs and recommendations from health authorities relating to the use of the device as the an in preventing the transmission of HIV from patients to health-care practitioners has created a new highly specific intended use for patient examination gloves. Due to the new primary use of the gloves and the potential risk of their failure, FDA believes it is entirely proper to require premarket notification for the devices now on the market, inasmuch as the 1980 exemption from premarket notification did not contemplate the present HIV-related intended use of the gloves.

Quality control measures used by manufacturers an product testing are of special concern to FDA. Thus, the premarket notifications submitted to FDA should include a description of the product testing, the methodology and the standard employed, and the acceptable quality level (AQL).

Accordingly, to provide an increased level of public health protection from HIV, FDA is revoking the exemptions from certain requirements of the CGMP regulations and from premarket notification procedures for the patient examination glove. After the requirements for premarket notification and CGMP's have been in effect for a period of time, if the quality levels of nonsterile patient examination gloves are determined by FDA to be satisfactory and the risks of glove failure have been reduced to minimal levels, FDA may reconsider whether exemptions should again be granted to manufacturers of nonsterile patient examination gloves.

Under sections 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. 553(b) and (d)) and FDA's administrative practices and procedures regulations (21 CFR 10.40(e)), FDA finds that notice and public procedure for amending 21 CFR 880.6250 are contrary to the public interest considering the public health interests that are at stake. FDA believes that it needs to revoke the existing exemptions as quickly as possible to protect the public health. The revocation of the exemptions will provide FDA (1) notification by manufacturers and importers of the devices that are intended for commercial distribution and (2) assurance that manufacturers will follow CGMP regulations, thereby increasing the reliability of patient examination gloves as an effective barrier to the transmission of HIV between patients and health-care workers. FDA, therefore, believes it has good cause to proceed directly to a final rule.

FDA is aware of reports of shortages of patient examination gloves caused by increasing demand. Weighing the public's need for protection from HIV transmission in the medical context against additional glove shortages, it any, attributable to FDA's revocation of exemptions, the agency is providing glove manufacturers and importers 90 days prior to the final regulation's effective date in order to permit orderly compliance with regulatory requirements. The agency intends to provide expedited review of all submission received, to help ensure that these revisions in regulatory requirements will not adversely affect the availability of patient examination gloves that provide reliable, effective protection against HIV exposure.

Although the agency is publishing this rule as a final rule without an opportunity for prior notice and comment as a proposed rule, FDA is providing for comment on this final rule.

FDA advises that the generic type of device surgeon's glove intended to be worn by operating room personnel to protect a surgical wound from contamination was classified into class I without exemptions in a separate regulation (21 CFR 878.4460; 53 FR 23856, June 24, 1988). Thus, manufacturers and importers of the surgeon's glove must comply with the premarket notification requirements and the CGMP regulations.

Effective Dates

Any person that is required to register and list under 21 CFR 807.20 because of the manufacture or importation of the patient examination glove is subject to this final rule.

A premarket notification submission is required for any patient examination glove intended to be introduced or delivered for introduction into commerce on or after April 13, 1989, pursuant to section 510(k) of the act (21 U.S.C. 360(k)) and the procedures in Subpart E of 21 CFR Part 807. A manufacturer, or an initial distributor of an imported patient examination glove that has already begun commercial distribution under FDA's existing exemption for premarket notification is required to submit to FDA a premarket notification on or before April 13, 1989.

All patient examination gloves, whether made in the United States or imported, that are introduced or delivered for introduction into commerce after April 13, 1989, must have been manufactured in compliance with the CGMP regulations in 21 CFR Part 820.

References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. "Quarterly Report to the Domestic Policy Council on Prevalence and Rate of Spread of HIV and AIDS—United States," Vol. 37, No. 36, September 16, 1988, pp. 551–559.

2. "Centers for Disease Control AIDS Weekly Surveillance Report—United States," November 7, 1988.

3. "Human Immunodeficiency Virus Infection in the United States: A Review of Current Knowledge," *Morbidity and Mortality Weekly Report*, December 18, 1987, Vol. 36, No. S–6.

4. "Recommendations for Prevention of HIV Transmission in Health-Care Settings," *Morbidity and Mortality Weekly Report*, Centers for Disease Control, August 21, 1987, Vol. 36, No. 2S.

Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) and (10) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Economic Impact

The agency has examined the economic impact of this rule and has determined that the rule will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act (Pub. L. 96–395). In accordance with section 3(g)(1) of Executive Order 12291, the impact of this rule has been analyzed, and it has been determined that this final rule is not a major rule as defined in section 1(b) of the Executive Order.

The final rule simply brings any manufacturer or initial distributor of a

patient examination glove under the same requirements that most other manufacturers of medical devices must meet. The original implementation of the premarket notification and CGMP regulations involved assessment of their economic impact, and so no special analyses are needed for this one segment of the device manufacturing community.

Interested persons may, on or before March 14, 1989, submit to the Dockets Management Branch (address above), written comments regarding this rule. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. The agency will review any comments submitted with respect to this final rule to determine whether the rule should be further amended or revoked, and the agency may provide additional opportunity for comment.

List of Subjects in 21 CFR Part 880

General hospital and personal use devices, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 880 is amended as follows:

PART 880—GENERAL HOSPITAL AND PERSONAL USE DEVICES

1. The authority citation for 21 CFR Part 880 continues to read as follows:

Authority: Secs. 501(f), 510, 513, 515, 520, 701(a), 52 Stat. 1055, 76 Stat. 794–795 as amended, 90 Stat. 540–546, 552–559, 565–574, 576–577 (21 U.S.C. 351(f), 360, 360c, 360e, 360j, 371(a)); 21 CFR 5.10.

2. Section 880.6250 is amended by revising paragraph (b) to read as follows:

§ 880.6250 Patient examination glove.

* * * * *

(b) *Classification.* Class I (general controls).

Dated: December 17, 1988.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 89–626 Filed 1–12–89; 8:45 am]

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federal register

Friday
January 13, 1989

Part V

Environmental Protection Agency

40 CFR Part 60

Standards of Performance for New Stationary Sources; Industrial-Commercial Institutional Steam Generating Units; Proposed Revision of Rule and Denial of Petitions for Reconsideration

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3483-2]

Standards of Performance for New Stationary Sources; Industrial-Commercial-Institutional Steam Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed revision of rule.

SUMMARY: On November 25, 1986, standards of performance were promulgated limiting emissions of particulate matter (PM) and nitrogen oxides (NO_x) from industrial-commercial-institutional steam generating units with heat input capacities greater than 29 MW (100 million Btu/hour) (51 FR 42768). Petitions for reconsideration of the NO_x standards were submitted by the Utility Air Regulatory Group (UARG) and owners of the William H. Zimmer Generating Station (Cincinnati Gas & Electric Company, Columbus and Southern Ohio Electric Company, and the Dayton Power and Light Company; hereafter "Zimmer owners"), which presented information pertaining to steam generating units that operate at very low annual capacity factors. Consideration of these data and information has led to today's proposal to establish revised NO_x performance testing and monitoring requirements for steam generating units with heat input capacities of greater than 73 MW (250 million Btu/hour) that fire natural gas, distillate oil, and low nitrogen residual oil and that operate at very low annual capacity factors (i.e., less than 10 percent). In addition, today's proposal would also exempt steam generating units with heat input capacities of less than 73 MW (250 million Btu/hour) that fire natural gas, distillate oil, and low nitrogen residual oil and that operate at very low annual capacity factors (i.e., less than 10 percent) from the NO_x standards and performance testing and monitoring requirements.

DATES: *Comments.* Comments on the proposed changes must be received by March 10, 1989.

Public hearing. If anyone requests to speak at a public hearing by February 2, 1989, a public hearing will be held on February 9, 1989, beginning at 10:00 a.m. Persons interested in attending the hearing should call Ms. Ann Eleanor at (919) 541-5578 to verify that a hearing will be held. Assistance will be available for persons with hearing impairments.

Request to speak at hearing. Persons wishing to present oral testimony must request to speak at the public hearing by February 2, 1989.

ADDRESSES: *Comments.* Comments on the proposed changes should be submitted (in duplicate, if possible) to: Central Docket Section (LE-131), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Attention: Docket Number A-79-02.

Public hearing. If anyone requests a public hearing, it will be held at the EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Ms. Ann Eleanor, Standards Development Branch (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5578.

Docket. Docket Number A-79-02, containing supporting information used in developing the proposed revision, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at the EPA's Central Docket Section, South Conference Center, Room 4, Waterside Mall, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Fred Porter [(919) 541-5251] Standards Development Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

Criteria for Review of the Petitions for Reconsideration

The standards were promulgated under the procedures of section 307 of the Clean Air Act. The petitioners (i.e. UARG and Cincinnati Gas & Electric Company) have requested reconsideration under section 307(d)(7)(B) of the Act. Section 307(d)(7)(B) provides that "if the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the comment period] if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule [ ]." As the relevant House report explains, the purpose of section 307(d)(7)(B) is to provide the Agency an opportunity "to pass on the significance of the [new] materials and determine whether supplementary proceedings are called for or not." Legislative History of the Clean Air Act Amendments of 1977, Volume 4, p. 2790.

In EPA's view, such objections are of central relevance only if they provide substantial support for the argument that the standards should be revised. *See* Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653 (December 11, 1980); Response to Petition for Reconsideration and Final Amendments, NSPS for Petroleum Dry Cleaners, 50 FR 49022 (November 27, 1985).

In reviewing the reconsideration petitions of UARG and Cincinnati Gas & Electric Company, EPA has considered whether under section 307(d)(7)(B) of the Act, the petitions presented EPA with new material of central relevance to the rule that could not have been presented before.[1] As is discussed in detail elsewhere in today's **Federal Register**, it has decided that none of the petitions present that kind of material. Nevertheless, the Administrator has discretionary authority to reconsider or amend a rule at any time. The Administrator has determined that with respect to one issue raised by Cincinnati Gas & Electric and UARG—the NO_x standard as applied to low capacity steam generating units burning certain oils or natural gas—EPA agrees with UARG and the Zimmer owners. The proposed rule exempted all units, regardless of size or fuel consumed, from continuous emission monitors (CEM) requirements for NO_x if they operated at 30 percent capacity or less. The final rule modified the CEM exemption. It deleted the capacity factor criterion and substituted criteria related to size and fuel consumption in order to better fit the CEM requirement to the units most likely to generate large

[1] Section 4(d) of the Administrative Procedure Act (APA), U.S.C. 553(e), states "Each agency shall give an interested person the right to petition for issuance, amendment or repeal of a rule." Although section 4(d) of the APA also establishes a right to petition for administrative reconsideration, that provision almost certainly does not apply to petitions for reconsideration of regulations that are promulgated pursuant to the rulemaking provisions of section 307(d) of the Clean Air Act. *See* section 307 (d)(1)(N), 42 U.S.C. 7607(d)(1)(N). ("The provision of section 553 through 557 * * * of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to action to which evaluating the petition for reconsideration under the APA are essentially the same as those for section 307(d)(7)(B) petitions. *See* Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54, and decision cited therein.

quantities of NO_x. Upon further consideration, EPA agrees that it is not reasonable to require continuous emission monitoring of emissions from very low capacity factor steam generating units—even large ones—using certain low nitrogen fuels (very low nitrogen residual oil, distillate oil and natural gas). For that reason, EPA is proposing to revise the rule to require initial performance testing and annual testing of large steam generating units and is proposing to exempt small steam generating units from NO_x standards. The basis for and the details of the proposed action are discussed below.

Rationale for Proposed Amendments

The UARG and the Zimmer owners submitted petitions for reconsideration requesting changes to the promulgated NO_x standards as they applied to utility auxiliary steam generating units. As promulgated, the standards limited NO_x emissions from industrial-commercial-institutional steam generating units with heat input capacity greater than 29 MW (100 million Btu/hour) for which consideration commenced after June 19, 1984 (51 FR 42768).

As identified by the petitioners, utility auxiliary units are used at power plants to assist in start-up of the main steam generating unit. These auxiliary units operate infrequently and typically exhibit very low annual capacity factor levels. The petitions stated that the NO_x standards would impose an unreasonable burden on these steam generating units. They, therefore, requested that the final NO_x standards be amended to either: (1) Exempt utility auxiliary steam generating units from the NO_x standards; (2) exempt steam generating units from the NO_x standards that operate at very low annual capacity factor levels, such as 10 percent or less; or (3) reduce the burden imposed by the performance testing and monitoring requirements associated with the NO_x standards on steam generating units that operate at such very low annual capacity factors.

In support of its petition, UARG submitted data for 20 utility auxiliary steam generating units planned for construction in the 1985 to 1995 time period which would be subject to the NO_x standards, as promulgated. The annual capacity factor of these units was generally in the range of 5 to 8 percent, although several were as low as 2 and 3 percent.

Review of a survey of owners/operators of new industrial steam generating units constructed between 1981 and 1984, which the Agency conducted in 1986–1987, indicates that utility auxiliary units are not the only type of steam generating units that operate at such low capacity factors. A limited number of industrial steam generating units also operate at very low annual capacity factors of 10 percent or less. These industrial units function as stand-by or back-up steam generating units that are operated only when the primary steam generating unit must be taken out of operation for some reason. The impacts of the promulgated NO_x standards on steam generating units that operate at very low annual capacity factors are essentially the same whether the units are utility auxiliary units or industrial stand-by or back-up units. Consequently, the same provisions should apply to both utility auxiliary and industrial-commercial-institutional steam generating units.

Review of the data submitted by the petitioners, as well as that contained in the survey mentioned above, indicates that very low annual capacity factor steam generating units tend to fire "clean" fuels such as natural gas, distillate oil, or low nitrogen residual oils (i.e., residual oils with nitrogen contents of 0.30 weight percent or less). Combustion of these "clean" fuels results in much lower NO_x emissions than combustion of "dirty" fuels, such as high nitrogen residual oils or coal. Therefore, special provisions applicable to very low annual capacity factor steam generating units should be limited to those units firing "clean" fuels in order to minimize NO_x emissions from such units.

With these considerations in mind, the impacts associated with the promulgated NO_x standards were reviewed for steam generating units firing natural gas, distillate oil, and low nitrogen residual oil at very low annual capacity factors (i.e., less than 10 percent). The impacts were reviewed in terms fo the annual cost of NO_x control (including the performance testing and monitoring requirements), the potential NO_x reduction from these units, and the cost effectiveness of the NO_x standards.

As promulgated, the NO_x standards for a typical steam generating unit with a heat input capacity of 73 MW (250 million Btu/hour) or less and firing natural gas, distillate oil, or low nitrogen residual oil are based on low excess air (LEA) operation. The standards require a 30-day intitial performance test, continuous monitoring of either NO_x emissions or combustion parameters indicative of NO_x emissions, and the submittal of quarterly excess emission reports (semiannual reports if no excess emissions occurred). The NO_x standards for a large steam generating unit with a heat input capacity greater than 73 MW (250 million Btu/hour) and firing natural gas, distillate oil, or low nitrogen residual oil are based on staged combustion and low NO_x burners. The standards require a 30-day initial performance test, continuous monitoring of NO_x emissions using a continuous emission monitoring system (CEMS) for continuous compliance (including Appendix F quality assurance procedures), and the submittal of quarterly reports including emissions data and the results of the Appendix F procedures.

Thus, the population of industrial-commercial-institutional steam generating units subject to the promulgated NO_x standards can be divided into two groups for analysis. The impacts on a typical steam generating unit [i.e., one with heat input capacities between 29 MW (100 million Btu/hour) and 73 MW (250 million Btu/hour)] can be considered by examining a steam generating unit with a heat input capacity of 44 MW (150 million Btu/hour). The impacts on a large steam generating unit [i.e., one with a heat input capacity of greater than 73 MW (250 million Btu/hour)] can be considered by examining a steam generating unit with a heat input capacity of 117 MW (400 million Btu/hour).

For a typical steam generating unit with a heat input capacity of 44 MW (150 million Btu/hour), operating at 10 percent annual capacity factor, using LEA as the NO_x control technique, and firing natural gas, distillate oil, or low nitrogen residual oil, the annual cost associated with the NO_x standards (control equipment, performance test, and monitor) would be $65,000 to $75,000 per year. For a large-sized steam generating unit with a heat input capacity of 117 MW (400 million Btu/hour), operating at 10 percent annual capacity factor, using staged combustion or low NO_x burners to control NO_x emissions, and firing natural gas, distillate oil, or low nitrogen residual oil, the annual cost would be $130,000 to $150,000 per year. The NO_x reductions that would be achieved by these steam generating units would be less than 2 tons per year for the typical unit and approximately 20 tons per year for the large unit.

The estimated emission reductions associated with the standards are notable for the large steam generating unit. The cost effectiveness of NO_x control for these very low capacity units, however, appears to be quite high [i.e., $5,000 to $8,000 per ton of NO_x for the large 117 MW (400 million Btu/hour) unit and $43,000 to $49,000 per ton of NO_x for the typical 44 MW (150 million

Btu/hour) unit]. Since the cost effectiveness of NO_x control is "driven,"in this case, by the cost of the performance testing and monitoring requirements, the impacts associated with alternative and less burdensome performance testing and monitoring requirements were analyzed.

To derive these cost estimates, EPA assumed that all very low capacity factor units would vent to the atmosphere 100 percent of the steam generated in performance tests. Thus, the fuel used to fire these units is a major component of the cost of complying with the performance testing requirements of the current standards. The EPA solicits comments on the approach used to determine the cost effectiveness, especially the assumption that all steam would be vented to the atmosphere.

The application of NO_x control through the use of techniques such as LEA or staged combustion generally makes combustion more difficult to sustain in a steam generating unit. Thus, the unit generally becomes more difficult to operate and requires more frequent and greater operator attention. The natural tendency, therefore, is for the operator to decrease the amount of LEA or staged combustion in order to make operation of the steam generating unit easier. As this occurs, NO_x emissions increase and NO_x emission reductions decrease.

As a result, continuous monitoring of NO_x emissions (either directly by the use of a continuous emission monitor, or indirectly by monitoring combustion parameters indicative of NO_x emissions) is necessary to provide complete assurance of NO_x emission reductions. As the frequency of NO_x monitoring decreases, the assurance of actual NO_x emission reductions decreases, and the NO_x standards become less meaningful.

The only alternative to continuous monitoring of NO_x is periodic, short-term NO_x performance tests. Because this alternative is less rigorous than continuous monitoring, however, it will undoubtedly lead to some increase in NO_x emissions above the levels that could be maintained through the use of continuous monitoring. Despite this drawback, periodic short term performance tests are a useful tool for enforcement and will permit enforcement personnel to monitor periodically the compliance status of steam generating units operating at very low annual capacity factors.

The requirement of an initial 24-hour NO_x performance test followed by 3-hour NO_x performance tests (conducted annually or after every 400 hours of operation, whichever comes first) reduces the cost effectiveness of the NO_x standards to about $300 per ton for a large steam generating unit. For a typical steam generating unit, however, even these requirements result in a NO_x cost effectiveness greater than $3,000 per ton.

The changes being proposed today, therefore, would amend the promulgated NO_x standards in two ways. First, less burdensome performance testing and monitoring requirements for NO_x emissions are proposed for large steam generating units [i.e., those greater than 73 MW (250 million Btu/hour) heat input] firing natural gas, distillate oil, or low nitrogen residual oil (either alone or in combination), and operating at 10 percent annual capacity factor or less. These units would be required to perform an initial short-term performance test (minimum 24-hour) for NO_x emissions within 60 days after achieving the maximum production rate, but not later than 180 days after initial start-up to demonstrate compliance with the NO_x standards and to confirm their maximum heat input capacity. This initial test would be followed by a short-term (minimum 3-hour) NO_x performance test (conducted annually or after every 400 hours of operation, whichever comes first) to verify continued compliance using Method 7, 7A, or other approved methods, or using a CEMS.

Second, an exemption from the NO_x standards and monitoring requirements is proposed for typical steam generating units [i.e., those of less than 73 MW (250 million Btu/hour) heat input] that fire natural gas, distillate oil, or low nitrogen residual oil (either alone or in combination), and operate at 10 percent annual capacity factor or less. The reason for the exemption is the lack of a cost-effective method of monitoring No_x emissions. These units would be required, however, to perform an initial short-term test (minimum 24-hour) to confirm their maximum heat input capacity. This is necessary to ensure that these steam generating units will, in fact, operate at 10 percent annual capacity factor or less. Sources will also be required to maintain fuel records to demonstrate that they are using the "clean" fuels.

The estimated increase in No_x emissions resulting from the proposed exemption for typical steam generating units is less than 50 tons per year. The promulgated standards projected approximately 25,000 tons of NO_x reduction per year in the fifth year following promulgation. This proposed revision would affect fewer than 30 steam generating units out of the 604 units projected to be constructed in the 5 years following promulgation. No solid waste or liquid waste environmental impacts are associated with these proposed revisions.

Miscellaneous

Under Executive Order 12291, a rulemaking action must be examined to determine if it is a "major rule" and, therefore, subject to certain requirements of the Order. Today's rulemaking action would result in none of the adverse economic effects set forth in section 1 of the Order as grounds for finding a regulation to be a "major rule." This rulemaking action would result in a reduced burden on the industrial-commercial-institutional steam generating unit source category. It would not result in any increase in costs or prices and would not disrupt market competition. This revision, therefore, would not be a "major rule" under Executive Order 12291.

Under section 317 of the Clean Air Act, an economic impact assessment must be prepared for revisions that are determined to be substantial. These revisions are not substantial; as a result, an economic impact assessment has not been prepared.

Pursuant to 5 U.S.C. 605(b), the Administrator certifies that these revisions would not have a significant impact on a substantial number of small entities. The revisions would reduce the burden on this source category, and it has already been determined that, in the absence of these revisions, the standards would not affect a substantial number of small entities (51 FR 42787 and 42788, November 25, 1986).

Paperwork Reduction Act

Changes to the information requirements as proposed in today's notice 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. 1088) and a copy may be obtained by writing Carla Levesque, Information Policy Branch, Environmental Protection Agency, 401 M Street, SW. (PM-223), Washington, DC 20460 or by calling (202) 382-2468.

Public reporting burden for this collection of information is estimated to decrease 800 hours for large steam generating units [i.e., those greater than 73 MW (250 million Btu/hour) heat input] that fire natural gas, distillate oil, or low nitrogen residual oil (either alone or in combination), and operate at 10 percent annual capacity factor or less and 3,700 hours for steam generating

units with less than 73 MW (250 million Btu/hour) heat input that also fire natural gas, distillate oil, or low nitrogen residual oil (either alone or in combination), and operate at 10 percent annual capacity factor or less.

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, Paperwork Reduction Project (2060-1088), 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 60

Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Date: January 6, 1989.

Lee M. Thomas,

Administrator.

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

1. The authority citation for Part 60 continues to read as follows:

Authority: 42 U.S.C. 7411, 7414, and 7601(a).

2. Section 60.44b is amended by revising the first phase of paragraphs (a) and (b) and adding paragraphs (i), (j), and (k) as follows:

§ 60.44b Standard for nitrogen oxides.

(a) Except as provided under paragraph (k) of this section, * * *

(b) Except as provided under paragraph (k) of this section, * * *

* * * * *

(i) Except as provided under paragraph (j) of this section, compliance with the emission limits under this section is determined on a 30-day rolling average basis.

(j) Compliance with the emission limits under this section is determined on a 24-hour average basis for the initial performance test and on a 3-hour average basis for subsequent performance tests for any affected facilities meeting the following three criteria:

(1) combust, alone or in combination, only natural gas, distillate oil, or residual oil with a nitrogen content of 0.30 weight percent or less;

(2) have a combined annual capacity factor of 10 percent or less for natural gas, distillate oil, and residual oil with a nitrogen content of 0.30 weight percent or less; and

(3) are subject to a Federally enforceable requirement limiting operation of the affected facility to the firing of natural gas, distillate oil, and/or residual oil with a nitrogen content of 0.30 weight percent or less and limiting operation of the affected facility to a combined annual capacity factor of 10 percent or less for natural gas, distillate oil, and residual oil with a nitrogen content of 0.30 weight percent or less.

(k) Affected facilities that meet the criteria described in paragraph (j) of this section, and that have a heat input capacity of 73 MW (250 million Btu/hour) or less, are not subject to the nitrogen oxides emission limits under this section.

3. Section 60.46b is amended by revising paragraph (c) and adding paragraphs (g) and (h) as follows:

§ 60.46b Compliance and performance test methods and procedures for particulate matter and nitrogen oxides.

* * * * *

(c) Compliance with the nitrogen oxides emission standards under § 60.44b shall be determined through performance testing under paragraph (e), (f), or (g) and (h) of this section, as applicable.

* * * * *

(g) The owner or operator of an affected facility described in § 60.44b(j) or 60.44b(k) shall demonstrate the maximum heat input capacity of the steam generating unit by operating the facility at maximum capacity for 24 hours. This demonstration will be made during the initial performance test for affected facilities that meeting the criteria of § 60.44b(j). It will be made within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial start-up of each facility, for affected facilities meet the criteria of § 60.44b(k). Subsequent demonstrations may be required at any other time. If this demonstration indicates that the maximum heat input capacity of the affected facility is less than that stated by the manufacturer of the affected facility, the maximum heat input capacity determined during this demonstration shall be used to determine the capacity utilization rate for the affected facility. Otherwise, the maximum heat input capacity provided by the manufacture is used.

(h) The owner or operator of an affected facility described in § 60.44b(j) shall:

(1) conduct an initial performance test as required under § 60.8 over a minimum of 24 consecutive steam generating unit operating hours at maximum heat input capacity to demonstrate compliance with the nitrogen oxides emission standards under § 60.44b using Method 7, Method 7A, or other approved reference methods, or using a continuous emission monitoring system (CEMS); and

(2) determine nitrogen oxides emissions after the initial performance test once per calendar year or every 400 hours of operation (whichever comes first) using Method 7, Method 7A, or other approved reference methods, or using a continuous emission monitoring system (CEMS).

4. Section 60.48b is amended by revising paragraph (b) and adding paragraph (i) as follows:

§ 60.48b Emission monitoring for particulate matter and nitrogen oxides.

* * * * *

(b) Except as provided under paragraphs (g), (h), and (i) of this section, the owner or operator of an affected facility subject to the nitrogen oxides standards under § 60.44b shall install, calibrate, maintain, and operate a continuous monitoring system for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system.

* * * * *

(i) The owner or operator of an affected facility described in §§ 60.44b(j) or 60.44b(k) is not required to install or operate a continuous monitoring system to measure nitrogen oxides emissions.

5. Section 60.49b is amended by revising paragraphs (a)(2), (b), (e), and the introductory text of paragraph (g) and adding paragraphs (p) and (q) as follows:

§ 60.49b Reporting and recordkeeping requirements.

(a) * * *

(2) if applicable, a copy of any Federally enforceable requirement that limits the annual capacity factor for any fuel or mixture of fuels under §§ 60.42b(d)(1), 60.43b(a)(2), 60.43b(a)(3)(iii), 60.43b(c)(2)(ii), 60.43b(d)(2)(iii), 60.44b(c), 60.44b(d), 60.44b(e) 60.44b(i), 60.44b(j), 60.44b(k), 60.45b(d), 60.46b(g), 60.46b(h), or 60.48b(i),

* * * * *

(b) The owner or operator of each affected facility subject to the sulfur dioxide, particulate matter, and/or

nitrogen oxides emission limits under §§ 60.42b, 60.43b, and 60.44b, shall submit to the Administrator the performance test data from the initial performance test and the performance evaluation of the CEMS using the applicable performance specifications in Appendix B. The owner or operator of each affected facility described in §§ 60.44b(j) or 60.44b(k) shall submit to the Administrator the maximum heat input capacity data from the demonstration of the maximum heat input capacity of the affected facility.

* * * * *

(e) For an affected facility that combusts residual oil and meets the criteria under §§ 60.46b(e)(4), 60.44b(j), or 60.44b(k), the owner or operator shall maintain records of the nitrogen content of the residual oil combusted in the affected facility and calculate the average fuel nitrogen content on a per calendar quarter basis. The nitrogen content shall be determined using ASTM Method D3431-80, Test Method for Trace Nitrogen in Liquid Petroleum Hydrocarbons (IBR—see § 60.17), or fuel suppliers. If residual oil blends are being combusted, fuel nitrogen specifications may be prorated based on the ratio of residual oils of different nitrogen content in the fuel blend.

* * * * *

(g) Except as provided under paragraph (p) of this section, the owner and operator of an affected facility subject to the nitrogen oxides standards under § 60.44b shall maintain records of the following information for each steam generating unit operating day:

* * * * *

(p) The owner or operator of an affected facility described in §§ 60.44b(j) or 60.44b(k) shall maintain records of the following information for each steam generating unit operating day:

(1) Calendar date.

(2) The number of hours of operation.

(q) The owner or operator of an affected facility that meets the criteria under §§ 60.44b(j) or 60.44b(k) shall submit to the Administrator on a quarterly basis:

(1) Results of any nitrogen oxides emission tests required during the quarter,

(2) The annual capacity factor over the previous twelve months,

(3) The average fuel nitrogen content during the quarter, if residual oil was fired; and,

(4) If the affected facility meets the criteria described in § 60.44b(j), the hours of operation during the quarter and the hours of operation since the last nitrogen oxides emission test.

[FR Doc. 89-700 Filed 1-12-89; 8:45 am]
BILLING CODE 6560-50-M

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40 CFR Part 60

[AD-FRL-3504-9]

Standards of Performance for New Stationary Sources; Industrial-Commercial-Institutional Steam Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Denial of petitions for reconsideration.

SUMMARY: New source performance standards (NSPS) for new, modified, and reconstructed industrial-commercial-institutional steam generating units with heat input capacities of more than 29 MW (100 million Btu/hour) [other than those subject to Subpart Da] were promulgated on November 25, 1986 (51 FR 42768), as Subpart Db of 40 CFR Part 60. These standards limited emissions of particulate matter (PM) from industrial-commercial-institutional steam generating units firing coal, wood, and municipal solid waste, and nitrogen oxides (NO_x) emissions from steam generating units firing natural gas, oil, coal, and waste by-product fuels. Additional standards promulgated on December 16, 1987 (52 FR 47826), limited emissions of sulfur dioxide (SO_2) from industrial-commercial-institutional steam generating units firing coal and oil, and PM emissions from units firing oil.

Petitions requesting reconsideration of the standards of performance promulgated on November 25, 1986, were submitted to the Agency in January 1987 by the Council of Industrial Boiler Owners (CIBO), Utility Air Regulatory Group (UARG), and the owners of the William H. Zimmer Generating Station (Cincinnati Gas & Electric Company, Columbus and Southern Ohio Electric Company, and the Dayton Power and Light Company, referred to hereinafter as the Zimmer owners). Petitions requesting reconsideration of the standards of performance promulgated on December 16, 1987, were submitted to the Agency in February, March, and May 1988, by CIBO, Hawaiian Electric Company (HECO), the Zimmer owners, and the American Paper Institute (API) together with the National Forest Products Association (NFPA).

The issues raised by these petitioners do not meet the criteria for reconsideration of the rule as set out in section 307(d)(7)(B) of the Clean Air Act (CAA or the Act). The petitioners neither raised new objections that were impractical to present during the specified comment period nor presented new material of central relevance to the outcome of the rule. Because these petitions do not provide substantial support for revising the standards of performance promulgated on November 25, 1986, and December 16, 1987, they are being denied in today's notice. However, using his discretionary authority to reconsider and amend a rule, the Administrator has decided that sufficient reason exists and, therefore, is proposing revisions to parts of the NO_x rule. (The rationale for this decision is explained more fully in a separate **Federal Register** notice.) These proposed revisions are discussed elsewhere in today's **Federal Register.**

DATES: The denial of the petitions to reconsider these standards is a final action under sections 307(b)(1) and 307(d)(7)(B) of the CAA. Review of the denial is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia within 60 days of today's publication, as provided in section 307(b)(1).

ADDRESSES: Docket Nos. A-79-02 (PM/NO_x) and A-83-27 (SO_2) are available for public inspection and copying between 8:00 a.m. and 4:30 p.m., Monday through Friday, at Central Docket Section, South Conference Center, Room 4, Waterside Mall, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information contact Mr. Fred Porter [(919) 541-5251], Standards Development Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

Standards of performance for PM and NO_x emissions from industrial-commercial-institutional steam generating units were promulgated on November 25, 1986 (51 FR 42768), and for SO_2 emissions on December 16, 1987 (52 FR 47826). Subsequently, seven groups petitioned the Administrator pursuant to section 307(d)(7)(B) of the CAA to reconsider certain requirements of these standards.

These standards of performance implement section 111 of the Clean Air

Act and are based on the Administrator's determination that industrial-commercial-institutional steam generating units cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. Industrial-commercial-institutional steam generating units, as a source category, are the second largest stationary source of PM, NO_x, and SO_2 emissions from fuel combustion in the nation, ranking only behind electric utility steam generating units. Further, they were the highest ranked source of PM and SO_2 emissions and the second highest ranked source of NO_x emissions in the NSPS priority list adopted in 1980. The standards, as promulgated, reflect the Administrator's determination of the reduction in emissions (i.e., PM, NO_x, and SO_2) achievable by the best demonstrated system of continuous emission reduction considering costs, nonair quality health and environmental impacts, and energy requirements. [*See* CAA section 111(a)(1)(C).] The basis for specific components of the standards as promulgated were set forth in the preambles to the final rules (51 FR 47268 and 52 FR 47826) and the various background documents referred to in the promulgation notices and contained in the record. In certain cases, specific percentage reduction requirements were determined to be unreasonable. Emission limits, however, remain applicable.

By and large, the petitions submitted by the parties challenge various individual pieces of data, conclusions made by the Agency, or interpretations of the data. For the most part, the petitions simply restate or expand on issues raised and considered during the comment period or present issues that could have been raised during the comment period. To the extent that new issues are raised (e.g., the effect of the "new boiler survey" on the PM standards), the petitioners' contentions are either without merit, or even if true, do not affect the outcome of the rule. Although most of the contentions raised in the petitions could be rejected summarily, the Agency, in the notice below, has endeavored to provide a comprehensive response to the contentions.

Three groups petitioned for reconsideration of the promulgated PM/NO_x standards. CIBO (Docket No. A-79-02, Docket Item VI-D-2) sought reconsideration on the basis that the interrelationship with the SO_2 standards was not considered, the environmental and economic impacts of the standards were overstated, new information gathered in the Agency's own "Survey of New Industrial Boiler Projects 1981-1984" (referred to hereinafter as the "new boiler survey") (Docket No. A-83-27, Item IV-A-4) was not considered, and certain aspects of the Industrial Fuel Choice Analysis Model (IFCAM) were not valid. The Zimmer owners (Docket No. A-79-02, Docket Item VI-D-6) petitioned for reconsideration of the PM/NO_x standards on the basis that NO_x limits on electric utility auxiliary steam generating units are unreasonable and distillate oil NO_x standards cannot be achieved. UARG (Docket No. A-79-02, Docket Items VI-D-1 and IV-D-4) petitioned for reconsideration on the basis that NO_x limits on electric utility auxiliary steam generating units are unreasonable.

Five groups petitioned for reconsideration of the promulgated SO_2 standards. CIBO (Docket No. A-83-27, Item VI-A-1) petitioned on the basis that the standards are inconsistent with the 1977 amendments to the CAA, national energy policy was not considered, the performance of fluidized bed combustion (FBC) and lime spray drying flue gas desulfurization (FGD) systems was not demonstrated, new information on waste disposal impacts was discovered after the comment period closed, the exemption from percent reduction requirements for noncontinental areas is arbitrary, new analyses made available after proposal of the standard (especially information from the "new boiler survey") were not given sufficient consideration, and informal vendor statements were used to support the requirement for 90 percent SO_2 reduction. The Zimmer owners (Docket No. A-83-27, Item VI-A-4) petitioned on the basis that the impacts of a 130 ng/J (0.30 lb/million Btu) heat input emission limit for SO_2 on two oil-fired electric utility auxiliary steam generating units at the Zimmer Station are unreasonable. HECO (Docket No. A-83-27, Item VI-A-5) requested reconsideration on the basis that the impacts of a 130 ng/J (0.30 lb/million Btu) heat input emission limit for SO_2 on oil-fired steam generating units in Hawaii are unreasonable. API and NFPA (Docket No. A-83-27, Item VI-A-6) sought reconsideration on the basis that the lack of provisions for start-up, shutdown, and malfunction is unreasonable.

The next section of today's notice discusses the content of each petition relative to the criteria set forth in section 307(d)(7)(B) of the CAA for requiring the Administrator to convene a proceeding to reconsider the promulgated standards. Following that section, the notice addresses the technical merit of each issue raised in the petitions.

This notice is organized as follows:

I. Review of Petitions for Reconsideration Under Section 307 of the Clean Air Act.

A. Criteria for Reconsideration Under Section 307.

B. Summary of PM/NO_x Reconsideration Petitions.

1. UARG.
2. Zimmer Owners.
3. CIBO.

C. Summary of SO_2 Reconsideration Petitions.

1. CIBO.
2. Zimmer Owners.
3. HECO.
4. API/NFPA.

II. Petitions Submitted Concerning the PM/NO_x Standards

A. Achievability of the PM/NO_x Standards.

1. Achievability of the NO^x Standards by Distillate Oil-Fired Electric Utility Auxiliary Steam Generating Units.
2. Special Monitoring Problems Associated with Electric Utility Auxiliary Steam Generating Units.

B. Interrelationship of PM/NO_x and SO_2 Standards.

1. Effect of SO_2 Control Techniques on PM/NO_x.
2. Achievability of NO_x Standards by Pulverized Coal-Fired Units When Using Back-Up Fuel to Meet SO_2 Standards.

C. Projected Environmental and Economic Impact

1. Overstatement of Impacts.
2. Legal Basis for and Economic Impacts of Controls on Electric Utility Auxiliary Steam Generating Units.

D. "New Boiler Survey".

E. IFCAM National Impacts Model.

III. Petitions Submitted Concerning the SO_2 Standards

A. Legal Basis for Establishing the SO_2 Standards.

1. Consistency of SO_2 Standards with Congressional Intent.
2. Impacts of the SO_2 Standards on the National Energy Policy.

B. Projected Economic Impacts.

1. Cost Effectiveness of a 130 SO_2 ng/J (0.30 lb SO_2/million Btu) Heat Input Emission Limit on Electric Utility Auxiliary Steam Generating Units at the Zimmer Owners' Generating Station.
2. Exemption for Noncontinental Areas.
3. Failure to Analyze Economic Impacts on the Paper Industry.
4. Inadequate Analysis of the Economic Impact of Start-up, Shutdown, and Malfunction Provisions.
5. Legal Requirement for Consideration of Start-up, Shutdown, and Malfunction Costs.
6. Availability of 130 ng SO_2/J (0.30 lb SO_2/million Btu) Oil in Hawaii.
7. Need for New Oil Transportation System in Hawaii.
8. Increased Use of Large Steam Generating Units or Gas Turbine Generators in Hawaii.
9. Economic Impacts of Firing Low Sulfur Oil in the Hawaiian Outer Islands.

C. Post-Proposal Developments.
1. New Docket Material.
2. Analysis of the "New Boiler Survey".
3. Reevaluation of SO_2 Emission Reductions.
4. Information on Impacts of Waste Disposal.
5. Ability of FBC and FGD System to Achieve 90 Percent SO_2 Reduction.
6. Use of Vendor Statements to Support 90 Percent SO_2 Reduction.
IV. Summary

I. Review of Petitions for Reconsideration Under Section 307 of the Clean Air Act

A. Criteria for Reconsideration under Section 307

Review of these petitions for reconsideration was carried out according to the procedures of section 307 of the Clean Air Act. Section 307(d)(7)(B) provides that:

> [i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule. . . .

As the relevant House report explains, the purpose of section 307(d)(7)(B) is to provide the Agency an opportunity "to pass on the significance of the [new] materials and determine whether supplementary proceedings are called for or not." (See "Legislative History of the Clean Air Act Amendments of 1977," Volume 4, p. 2790.)

Objections are of central relevance only if they provide substantial support for the argument that the standards should be revised. [See Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653 (December 11, 1980); Response to Petition for Reconsideration and Final Amendments, NSPS for Petroleum Dry Cleaners, 50 FR 49022, (November 27, 1985).] Using the section 307(d)(7)(B) criteria, each of the seven petitions was reviewed to determine whether material of central relevance to the rule was presented that could not have been presented during the comment period. For reasons summarized below and detailed later in this notice, it is apparent that none of the petitions presents this kind of material. In a separate notice in today's **Federal Register**, however, the Administrator is exercising his discretionary authority to propose revised rules for monitoring NO_x emission from very low capacity factor steam generating units.[1]

B. Summary of PM/NO_x Reconsideration Petitions

1. UARG

UARG submitted a petition contending that EPA did not respond to the specifics of arguments it had made on the proposed rule. Further, UARG supplemented this petition with arguments that no standards should be imposed on very low capacity factor utility auxiliary steam generating units. UARG also sought deletion of the monitoring requirements on the grounds that the requirements cannot be applied readily to units that are used infrequently.

These arguments do not compel reconsideration under section 307. First, a claim that EPA's response to comments was incomplete does not trigger section 307 reconsideration. Second, the information provided in UARG's "supplement" could have been provided during the comment period. The same is true of the arguments concerning monitoring. UARG's comments are discussed in Section III below.

2. Zimmer Owners

The Zimmer owners argued that EPA failed to address their comments on the proposed standards. In a supplement dated June 29, 1987, 7 months after the standards were promulgated, the Zimmer owners argued that the standards should not apply to utility auxiliary units for legal and economic reasons.

As the Zimmer owners themselves seemed to recognize, their reconsideration comments generally repeated and expanded on arguments raised during the comment period. Such comments do not compel reconsideration under section 307. The Zimmer owners' comments are discussed in Section III below.

3. CIBO

CIBO argued that two post-proposal developments in the SO_2 proceeding compel reconsideration of the PM/NO_x rule under section 307. The two developments were EPA's proposal of an "interrelated" SO_2 standard after proposal (but before promulgation) of the PM/NO_x standards and the imminent (in early 1987) completion of a "new boiler survey" in the SO_2 rulemaking.

These developments do not compel reconsideration under section 307 because they do not constitute information of central relevance to the outcome of the PM/NO_x rulemaking. EPA has long recognized and taken into account the interrelated character of the PM/NO_x and SO_2 rules. CIBO's argument, therefore, does not provide new information. The only respect in which the argument could be considered new is in CIBO's conjecture that the NO_x standard could be violated in steam generating units designed for firing pulverized coal (PC) when using natural gas or oil. As explained below in Section III, however, EPA believes that compliance with the NO_x standards can be readily accomplished by such units, and CIBO has provided no data to support its comments. CIBO's comments on the interrelationship of the PM/NO_x and SO_2 rules are discussed in Section III below.

CIBO's claims that the projections of new units were too high and its conjectures regarding the "new boiler survey" do not compel reconsideration under section 307. As explained in Section III below, new projections of the absolute number of new and replacement steam generating units are informative, but far less important in regulatory analysis than the relative balance between costs and benefits. When deciding whether or not to regulate, it is the relative balance between costs and benefits that is of primary importance rather than the absolute numbers. However, even with lower projections of the number of new units, the emission reductions achieved by the standards are significant. Conjecture regarding the methods of the "new boiler survey" is also not a basis for mandatory reconsideration absent compelling indications that the survey methods affected the results. CIBO's critiques are not, therefore, of central relevance to the outcome of the rule.

[1] Section 4(d) of the Administrative Procedure Act (APA), U.S.C. 553(e), states, "Each agency shall give an interested person the right to petition for issuance, amendment or repeal of a rule." Although Section 4(d) of the APA also establishes a right to petition for administrative reconsideration, that provision almost certainly does not apply to petitions for reconsideration of regulations that are promulgated pursuant to the rulemaking provisions of Section 307(d) of the Clean Air Act. See section 307(d)(1)(N), 42 U.S.C. 7607(d)(1)(N). ("The provisions of section 553 through 557 * * * of Title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to action to which this subsection applies.") In any event, the criteria for evaluating a petition for reconsideration under APA are essentially the same as those for section 307(d)(7)(B) petitions. *See* Denial of Petitions to Revise NSPS for Stationary Gas Turbines, 45 FR 81653–54, and decisions cited therein.

C. Summary of SO_2 Reconsideration Petitions

1. CIBO

CIBO argued that (1) the SO_2 standards are inconsistent with the 1977 amendments to the CAA, (2) national energy policy was not considered, (3) EPA erroneously analyzed the results of a "new boiler survey," (4) the "new boiler survey" produced important new information, (5) post-proposal waste disposal information showed that flue gas desulfurization (FGD) on coal-fired units is not cost effective, (6) post-proposal fluidized bed combustion (FBC) and spray dryer information did not show that they constitute "demonstrated technologies, (7) EPA did not provide notice of the extent of its reliance on vendor guarantees, and (8) EPA should have extended its unanticipated exemption from percent reduction requirements for noncontinental areas to the continental United States. CIBO argued that these post-proposal developments compel reconsideration under section 307(d)(7)(B).

This is not the case. The issues of consistency with the 1977 amendments to the CAA and national energy policy were raised and discussed at length prior to proposal as well as during the comment period. [See e.g., "Background Information Document" (BID), Volume 4.] Such comments, therefore, do not compel reconsideration under section 307.

Concerning the analysis of the "new boiler survey," EPA surveyed steam generating unit sales from 1981 to 1984 to determine why new steam generating units are installed, what percentage of recent sales were for replacement, how sales might be related to increased cost, and the impact of new units on overall SO_2 emissions. The survey was conducted to respond to CIBO comments that the great majority of new units replace existing units and that the NSPS would prompt owners to delay purchasing replacement units. CIBO suggested that EPA's analysis of the "new boiler survey" is faulty and argued that had EPA correctly analyzed the survey, the outcome of the rule would have been different.[2]

Again, this is not the case. The findings of the survey indicate that although replacement was the primary reason for many new units, a roughly equal number of units are installed for new applications. The survey also found that the decision to build most of these new application units was not sensitive to cost increases in the range expected to result from the new rules. Findings from the survey also indicated that many existing units would continue to be used alongside the replacement units.

In its petition, CIBO hypothesized that the answers received from the survey might have been different if the survey had asked whether the unit would be built if air pollution control equipment were required. However, CIBO provided no details to support this conjecture. Unsupported conjecture does not provide a basis for reconsideration under section 307. As discussed in greater detail in Section IV below, the amount, not the origin, of costs seems relevant to elasticity of sales as a function of costs. The replacement rate may affect the number of unit sales, but in the final analysis—and absent volume price decreases—the relationship between control costs and absolute emission reductions is more relevant to standard setting.

CIBO also argued that, apart from costs, reliability needs also deter new unit installation if pollution control systems are less reliable than production facilities. On August 19, 1988, it provided EPA with a "supplement" attaching letters attesting to the need for high rates of facility reliability. This argument does not provide a basis for reconsideration under section 307. The general point—the need for high steam generating unit reliability—was raised at the time of proposal and addressed during the comment period [See e.g., BID, Volume 4 (EPA-450/3-87-024)]. The specific argument that this need, like increased costs, could deter new installation could have been made at that time. Factored into the analysis was the cost of backup systems generally used by industry to ensure steam supply. Use of such backup systems should assure reliable operation and should not significantly affect installation rates. Even if backup systems did affect installation rates, the point remains that the number of new units and replacement units is less relevant to standard setting than the relationship between control costs and emissions.

CIBO argued that the "new boiler survey," properly analyzed, supported its claim that EPA overstated emission reductions. For reasons explained in Section IV below, CIBO's argument does not provide information of central relevance to the outcome of the rule compelling reconsideration under section 307. The reasonableness of the rule, considering costs, is not significantly affected by the total number of projected unit installations since smaller population projections would mean a corresponding reduction of control costs. Furthermore, CIBO simply renews a contention that was raised and discussed during the comment period. (See e.g., BID, Volume 4.)

CIBO also argued that a post-proposal memorandum, which was prepared for EPA and discussed the disposal of sodium-scrubbing waste, coupled with EPA's "reliance" on sodium-scrubbing, shows the "impracticability" of the rule—or, rather, that the rule renders "impracticable" the use of coal-fired steam generating units. The post-proposal memorandum notes, among other things, that several sodium scrubbers are located in areas where local rules might limit the availability of some scrubbing waste disposal options (Docket No. A-83-27, Docket Item IV-B-12).

The issue of scrubber waste disposal was raised and thoroughly discussed both prior to proposal and during the comment period. (See e.g., BID, Volume 4.) CIBO's comments on the post-proposal memorandum do not compel reconsideration under section 307. The possibility that some sources may be limited in their disposal options does not change the outcome of the rule.

CIBO also argued that post-proposal memoranda prepared for EPA do not show that fluidized bed combustion (FBC) and lime spray dry scrubbers are "demonstrated" technologies. (See e.g., Docket No. A-83-27, Docket Items IV-B-18 and IV-B-97.) CIBO's critique of the post-proposal memoranda does not compel reconsideration under section 307. The Agency's conclusion that FBC and lime spray dryers are "demonstrated" technologies was explained prior to proposal and again in response to public comments [See e.g., BID, Volume 4; 52 FR 47837; and "Summary of Regulatory Analysis" (EPA-450/3-86-005).] The EPA's conclusion in the final rule, as well as at proposal, was based on the judgment that test data and other factors indicate that high levels of reliability are achievable. The post-proposal memoranda, while providing additional support for this conclusion, were far from its sole support. Critiques of the memoranda, therefore, are not centrally relevant to the finding that these technologies are demonstrated for purposes of Section 111 of The CAA. The merit of CIBO's critiques is discussed in Section IV below.

[2] That EPA was going to conduct the "new boiler survey" was noted in the June 19, 1986, notice of proposed rulemaking (51 FR 22384). Notice of the availability of the study was sent to all commenters in April 1987, informing them that new analyses were being added to Docket A-83-27.

CIBO argued that EPA did not provide notice of the "extent" of its reliance on vendor guarantees with respect to the demonstrated status of lime spray dryers and that EPA improperly relied on a guarantee that was informal and unenforceable. This comment does not constitute centrally relevant new information compelling reconsideration under section 307. As CIBO's comment acknowledges, the possibility that EPA might refer to vendor guarantees was evident during the comment period. (See e.g., "Summary of Regulatory Analysis.") Moreover, as is discussed in Section IV below, EPA's determination that lime spray drying technology is demonstrated was based on engineering review of lime spray dryer designs, test data, and other information that indicate that this technology is demonstrated. The vendor guarantees were merely corroborative of this conclusion.

CIBO argued that the exemption for noncontinental areas from the percent reduction requirement should apply to all areas where natural gas is unavailable. The comment is essentially a moot point. The noncontinental exemption applies in practice only to units firing very low sulfur oil. The final standard, in fact, exempts all sources firing very low sulfur oil from the percent reduction requirement, no matter where they are located.

2. Zimmer Owners

The Zimmer owners argued that information provided in their petition shows that use of 130 ng SO_2/J (0.30 lb SO_2/million Btu) oil is not cost effective relative to using a higher sulfur content oil. This comment does not compel reconsideration under section 307. The original exemption at the time of proposal was based on a heat input limitation of 86 ng SO_2/J (0.20 lb SO_2/million Btu), and the exemption in the final rule was based on 130 ng SO_2/J (0.30 lb/million Btu). The Zimmer owners' concerns about the cost effectiveness of various low sulfur oils could have been raised during the comment period. The Zimmer owners' comment is discussed in more detail in Section IV below.

3. HECO

The final rule, unlike the proposal, exempted oil-fired units in noncontinental areas from the percent reduction requirement, but limited emissions to the equivalent of 130 ng SO_2/J (0.30 lb. SO_2/million Btu). HECO argued that no notice of the 0.30 requirement was given, that the emissions limit should be raised to 210 ng SO_2/J (0.50 lb SO_2/million Btu) on Oahu, and that no limit should be imposed elsewhere in Hawaii.

This argument does not compel reconsideration under section 307. It is true, as HECO claims, that the emission limit of 130 ng SO_2/J (0.30 lb SO_2/million Btu) was developed after (and as a result of) the comment period. The Agency had, however, established an 86 ng SO_2/J (0.20 lb SO_2/million Btu) limit as the basis for a percent reduction exemption. HECO's objections could have been raised during the comment period because its objections are based on the cost and/or current unavailability of very low sulfur oil, i.e., they apply to both the proposed emission limit and the final emission limit. Further, the standard does not require use of 130 ng SO_2/J (0.30 lb SO_2/million Btu) oil, but rather allows the owner to meet this emission limit by whatever means the owner chooses. HECO's comments are discussed in more detail in Section IV below.

4. API/NFPA

API and NFPA argued that new post-proposal materials and analyses showed that various backup strategies for maintaining compliance during periods of planned and unplanned outages (i.e., start-ups, shutdowns, and malfunctions) are not available.

This comment does not compel reconsideration under Section 307 because the information in the API/NFPA petition, including information about demand charges and premiums for noninterruptible supplies of natural gas, was addressed in response to comments or could have been presented during the public comment period. Furthermore, as discussed in Section IV below, even upon consideration of the information contained in the petition, EPA finds no basis for reconsideration of the rule.

II. Petitions Submitted Concerning the PM/NO_x Standards

A. Achievability of the PM/NO_x Standards

1. Achievability of NO_x Standards by Distillate Oil-Fired Electric Utility Auxiliary Steam Generating Units

Petitioner's Comment: The Zimmer owners commented that electric utility auxiliary steam generating units that fire distillate oil cannot consistently meet the NO_x standard of 43 ng NO_x/J (0.10 lb NO_x/million Btu) heat input.

Agency Response: Electric utility auxiliary steam generating units are large field-erected units. These units are characterized by low volumetric heat release rates, typically below 310,000 J/sec-m^3 (30,000 Btu/hour ft^3). Heat release rate is one of the major factors in determining the NO_x-generating potential of a unit firing distillate oil and the ability of control techniques to limit NO_x emissions. Data show that NO_x emissions increase as heat release rate increases, all other things being equal. Emission test data available from three distillate oil-fired steam generating units employing staged combustion demonstrate that NO_x emissions can be limited to 43 ng NO_x/J (0.10 lb NO_x/million Btu) or below through the use of this technique. (See Docket No. A-79-02, Docket Items II-I-224, II-A-9, and II-A-14.) One of the units used a staged combustion burner while the other units used staged combustion air. These steam generators are packaged units with volumetric heat release rates of 460,000 to 490,000 J/sec-m^3 (45,000 to 48,000 Btu/hour-ft^3), which are higher than those typical for electric utility auxiliary units.

Since the heat release rates for electric utility auxiliary units are substantially below those of the tested steam generating units, NO_x emissions can be limited to 43 ng NO_x/J (0.10 lb NO_x/million Btu) heat input or less through the use of staged combustion when firing distillate oil. Moreover, other NO_x limitation techniques, such as flue gas recirculation, are available which have been shown to be capable of limiting NO_x emissions to 43 ng NO_x/J (0.10 lb NO_x/million Btu) or less in distillate oil-fired steam generating units with heat release rates up to 640,000 J/sec-m^3 (62,000 Btu/hour-ft^3). (See Docket No. A-79-02, Docket Items II-I-224 and IV-B-23.) Accordingly, there is no basis for granting the request by the Zimmer owners for a higher NO_x limit.

2. Special Monitoring Problems Associated with Electric Utility Auxiliary Steam Generating Units

Petitioner's Comment: UARG contended that the monitoring requirements in the NO_x standards would be difficult, if not impossible, for very low capacity factor steam generating units to meet. Specifically, the petitioner claimed that facilities such as oil-fired utility auxiliary steam generating units would not be able to satisfy the initial performance test requirement to be completed within 180 days of initial start-up because a unit that operates only 2 or 3 days per month, for example, would take an entire year to satisfy these performance test requirements.

Similarly, the petitioner claimed that the 30-day rolling average compliance test for these same units would not produce meaningful data because it is unlikely that enough data would be

collected in 1 year to calculate even one 30-day average.

Agency's Response: The Agency does not agree with the petitioner's contention that the NO_x monitoring requirements cannot be met by very low capacity factor steam generating units. The initial performance test is based on emissions data collected during the first 30 operating days following unit start-up (operation of a unit for a single hour during a given day qualifies as an operating day). Up to 180 calendar days can be used to collect these 30 days of operating data. Many very low capacity factor units may be able to gather 30 days of data through collection of NO_x emissions data in conjunction with commercial acceptance testing of the unit and during normal operating days. If insufficient operating days occur during the first 180 calendar days, the owner can operate the unit and vent steam to collect the additional NO_x emissions data necessary. If collection of such data is considered infeasible for an individual unit, the owner can apply to the Administrator for relief under § 60.8(b) of the General Provisions of 40 CFR Part 60.

The petitioner misunderstands the mechanics of how 30-day rolling averages are calculated in contending that insufficient data would be collected in a year to calculate 30-day averages. A 30-day rolling average is calculated as the average of all daily average data collected during the previous 30 consecutive steam generating unit operating days. The first 30-day average is calculated after initial unit start-up and serves as the initial performance test. Thereafter, a new 30-day rolling-average is calculated at the end of each new steam generating unit operating day.

B. Interrelationship of PM/NO_x and SO_2 Standards

1. Effect of SO_2 Control Techniques on PM/NO_x

Petitioner's Comment: CIBO stated that EPA proposed a stringent (90 percent reduction) SO_2 standard after proposal of the PM/NO_x NSPS, but ignored economic and technical interrelationships between the proposed SO_2 standards and the promulgated PM/NO_x standards. According to the petitioner, all of these combustion products (PM, NO_x, and SO_2) are critically interrelated and, therefore, should not have been considered under two separate NSPS. The petitioner pointed out that implementation of control techniques to satisfy the SO_2 standards will affect the control techniques necessary to satisfy the PM/NO_x standards, both from a technical feasibility and a cost standpoint. The petitioner also stated that no opportunity was given for public comment on the technical or cost impact of the SO_2 standards on the PM/NO_x standards.

Agency Response: Although NSPS for PM/NO_x and SO_2 were developed in separate regulatory actions, potential technical or economic interrelationships were considered throughout the development of regulations for each pollutant and fuel type. For example, because PM and SO_2 emissions and control technologies for oil-fired units are closely interrelated, the PM and SO_2 standards for oil were considered in the same regulatory action. Relationships between the use of a fabric filter or electrostatic precipitator (ESP) to reduce PM emissions and a flue gas desulfurization (FGD) system to reduce SO_2 emissions from coal-fired steam generating units were also identified, but were found to be separable, and were therefore analyzed in separate regulatory actions. Possible interrelationships between NO_x and SO_2 control were also considered, but no significant interrelationships were identified.

Further, when evaluating alternative SO_2 standards for coal-fired units, the Agency assumed that the proposed PM and NO_x standards were already in effect and that new units were constructed and operated to comply with them. This approach ensured that even minor technical and cost interrelationships between the standards for PM, NO_x, and SO_2 were implicitly considered during the course of the SO_2 rulemaking. Accordingly, the petitioner's contention that the Agency did not consider the interrelationship between the PM/NO_x and SO_2 standards is incorrect.

Finally, during the comment period on the proposed SO_2 standards, the public could have commented on technical and economic interrelationships among the PM, NO_x, and SO_2 standards. However, no significant interrelationships were identified by any of the commenters. Furthermore, mere conjuncture is not a basis for granting a petition for reconsideration. Only one specific interrelationship of the standards was identified by the petitioners and, as is explained below, it does not impose unreasonable impacts.

2. Achievability of NO_x Standards by Pulverized Coal-Fired Units When Using Backup Fuel to Meet SO_2 Standards

Petitioners Comment: As a specific example to illustrate the PM/NO_x/SO_2 interrelationship, CIBO cited a field-erected pulverized coal (PC)-fired steam generating unit firing natural gas or oil as a backup fuel. The petitioner stated that firing backup fuels in PC units will become more frequent and prolonged than in the past because of FGD system reliability problems, fuel disruptions, and fuel price variations. According to the petitioner, all PC units are equipped with air preheaters, which typically deliver preheated air at 110 to 160 °C (400 to 600 °F) for combustion of both primary and backup fuels. Such high air temperatures, which increase the formation of thermal NO_x, restrict the ability of units with volumetric heat release rates below 720,000 J/sec-M^3 (70,000 Btu/hour-ft^3) to meet the 43 ng NO_x/J (0.10 lb NO_x/million Btu) heat input NSPS for natural gas for distillate oil combustion. Since using backup fuel is part of the basis for the SO_2 standards, the petitioner stated that this requirement must be considered in the NO_x standards and the necessary relief must be provided in the form of a higher NO_x emission rate for PC units firing natural gas or distillate oil with air preheat.

Agency Response: Coal-fired steam generating units inherently have larger furnace volumes than oil- and natural gas-fired units with equivalent steam generating capacities. Because of the lower heat release rates in these larger furnace volumes, conversion of atmospheric nitrogen to NO_x while firing backup fuels in a field-erected PC-fired steam generating unit is lower than in a smaller, higher heat release rate steam generating unit designed to fire natural gas or oil. To assure that proper combustion conditions are achieved to minimize NO_x formation, a number of NO_x reduction techniques are available. These techniques include reducing combustion air temperature by either total or partial bypass of the air preheater, and using flue gas recirculation, overfire air ports, and low NO_x burners to fire backup fuels. Data from units employing staged combustion burner (SCB) or staged combustion air technology indicate that these controls can meet the 43 ng NO_x/J (0.10 lb NO_x/million Btu) heat input limit when firing natural gas or oil in units with heat release rates below 720,000 J/sec-m^3 (70,000 Btu/hour-ft^3). In addition, one low NO_x burner manufacturer stated that NO_x emissions can be limited to 43 ng NO_x/J (0.10 lb NO_x/million Btu) heat input while firing natural gas if the unit heat release rate is less than 770,000 J/sec-m^3 (75,000 Btu/hour-ft^3). (See Docket No. A-79-02, Docket Item IV-E-14.)

Industrial field-erected units have heat release rates well below these levels. A survey of such units installed between 1982 and 1986 identified nine PC-fired units. (See Docket No. A-83-27, Docket Items IV-J-4, IV-J-5, IV-J-7, and IV-J-9, and IV-J-42.) The heat release rates for these units ranged from 140,000 to 245,000 J/sec-m^3 (13,500 to 23,700 Btu/hour-ft^3). Since these heat release rates are substantially below the upper limits of 720,000 to 770,000 J/sec-m^3 (70,000 to 75,000 Btu/hour-ft^3) identified above, NO_x emissions can be reduced to 43 ng NO_x/J (0.10 lb NO_x/million Btu) heat input or less through use of the above NO_x reduction techniques when firing natural gas or oil as a backup fuel. Accordingly, there is no basis for granting the CIBO request for a higher NO_x limit or convening a proceeding to reconsider the interrelationship between the PM/NO_x and SO_2 standards.

C. Projected Environmental and Economic Impacts

1. Overstatement of Impacts

Petitioner's Comment: EPA projected that 725 new steam generating units with heat input over 29 MW (100 million Btu) would be built in the 5-year period following proposal. CIBO stated that this number is too high (CIBO contended that 250 new units are more likely, of which 80 percent are replacement units) and, as a result, the projected economic, environmental, and energy impacts associated with the PM/NO_x standards are overstated. The petitioner cited the Agency's own "new boiler survey" to support its contention. The petitioner contended that the survey shows that the number of "new" steam generating units as opposed to "replacement" units was overestimated, that purchase of replacement units is discretionary, and that the impact of the standards will be to further reduce the number of replacement units during the period modeled, given the high cost of complying with the standards. Thus, CIBO argued that the projected emission reductions achieved by the standards are significantly overestimated.

Agency's Response: As explained in the response to comments in the SO_2 rulemaking (see e.g., 52 FR 47826), several factors suggest that 1984 estimates of steam generating unit population and total "new" emissions were high. These estimates of new steam generating units were based on U.S. Department of Energy projections made in the late 1970's. (See e.g., BID, Volume 4.) As the Agency explained, however, any change in the overall balance between the costs and benefits and, hence the reasonableness of the standard, depends on the relative change in both costs and benefits. If EPA has overestimated the number of new units subject to the standard, then *both* the costs as well as the emission reductions (i.e., benefits) of the standard decrease. EPA's conclusion as to the standard would remain valid even if CIBO's estimates, or lower ones, proved more accurate.

The total number of new steam generating units and the percentage of these units that are replacements was examined in the "new boiler survey." The survey results suggest that about half of all unit installations from 1981 to 1984 represented replacements of existing units. However, for four reasons, the fact that a significant number of new units are replacements for existing units does not support CIBO's claims that lower-than-projected emissions reduction compel reconsideration. First, replacement capacity may simply displace existing capacity in an accounting sense, but it represents *new* capacity under section 111 of the Clean Air Act. Therefore, the petitioner's exclusion of replacement capacity from its calculations of baseline emissions increases is not warranted. Second, the suggestion that replacement should not be counted because it is discretionary and might be deferred is unfounded. Deferring replacement is simply replacement displaced in time to a later date. Third, the "new boiler survey" results indicate that the decision to install new steam generating units is not significantly cost sensitive in the range of cost increases anticipated by the Agency. Fourth, with respect to projected post-NSPS emission levels, many of the replaced units are not retired but continue in service.

2. Legal Basis for and Economic Impacts of Controls on Electric Utility Auxiliary Steam Generating Units

Petitioner's Comment: In their petitions, UARG and the Zimmer owners argued that Subpart Db should not apply to auxiliary utility steam generating units that are used to assist in start-up and shutdown of the main steam generating unit because these units are not significant contributors, operate at very low capacity factors, use oil or natural gas, operate intermittently, and are located in rural areas. The petitioners also contended that any standards for PM/NO_x would result in excessive cost impacts on electric utility auxiliary steam generating units relative to units operated at higher capacity factors. According to the petitioners, the standards would also have minimal impact on reducing PM and NO_x emissions beyond those achieved by current unit designs. Therefore, the petitioners recommended that the final standards be amended to either (1) exempt utility auxiliary steam generating units from the standards; (2) adopt a capacity factor cut-off for the promulgated standards and establish different levels of control for units that operate at very low annual capacity factor levels, such as 10 percent or less; or (3) reduce the burden imposed by NO_x monitoring requirements on steam generating units that operate at very low annual capacity factors.[3]

Agency Response: As the Agency stated in its June 19, 1984, proposed rule (49 FR 25156), all steam generating units with a heat input capacity greater than 29 MW (100 million Btu/hour) (other than those units subject to Subpart Da) were included within the Subpart Db rule (51 FR 42794). The Agency included very low capacity factor units on the basis that the design of these units and control technologies for emission reductions are similar, irrespective of capacity factor. As was noted in the final rule, "there is no requirement that each subcategory of a listed category or each individual source within a listed category also be a significant contributor." (See 51 FR 42795; *see also* 51 FR 42772.) It was thereby determined that auxiliary utility steam generating units are subject to Subpart Db.

The Agency does not agree that the criteria set forth by UARG and the Zimmer owners provide a basis for EPA to subcategorize utility auxiliary steam generating units. No doubt there are multiple bases upon which Subpart Db steam generating units could be subcategorized. Criteria such as ownership and/or the existence of companion base load units (i.e., units owned by utilities, or units auxiliary to base load units) do not seem to be functionally useful. An exemption for rural settings is inconsistent with the concept of section 111, which contemplates national standards and does not distinguish among regions based on air quality achieved. Capacity factor, although related to the level of emissions, is unsuitable as a basis for exemption from all standards where emission control remains cost effective; as the final rule recognizes, however,

[3] The Zimmer owners also contended that section 111(f) bars EPA from determining that utility auxiliary steam generating units are within the category of units subject to Subpart Db and, simultaneously, in regulating such units, section 111(f) requires that EPA establish a list of major stationary source categories and establish deadlines for regulation. The Zimmer owners do not explain their interpretation of section 111(f). On its face, section 111(f) contains no such bar.

capacity factor is an appropriate criterion for exemption where emission control is not cost effective.

As discussed in a separate rulemaking notice published today elsewhere in the **Federal Register**, the Administrator, under his discretionary authority, is proposing to amend the NO_x performance testing and monitoring requirements for steam generating units that operate at very low annual capacity factors (less than 10 percent) and that fire natural gas, distillate oil, or low nitrogen residual oil (either alone or in combination). The proposed rule imposes less burdensome performance testing and monitoring requirements on large steam generating units and exempts small steam generating units from the NO_x standards.

The Agency also does not agree that auxiliary utility steam generating units should be exempted from the performance standards for PM and NO_x on the basis that minimal emission reductions will be achieved. Although most auxiliary utility units may be designed to fire oils with PM emission potentials of less than 43 ng/J (0.10 lb/million Btu) and may be equipped with low NO_x burners, the performance standards provide a "cap" to assure that these units are operated in a manner that minimizes emissions. Establishment of performance standards as a "cap" to limit future emissions is a valid exercise of regulatory authority.

D. "New Boiler Survey"

Consideration of New Information Gathered in the "New Boiler Survey."

Petitioner's Comments: CIBO stated that EPA recognized the importance of steam generating unit replacement when it announced that it had initiated a "new boiler survey" to gather information regarding the impact of the NSPS on new steam generating unit construction and refurbishment (51 FR 16586). The petitioner contended that many new steam generating units are replacements for existing units and, in most cases, these new units represent discretionary expenditures by unit owners. As a result, if the cost of a new unit is too high, the owner will continue to use the existing unit. Because existing units frequently have higher emission rates than new units, failure to install new units will result in higher emission levels and fewer reductions than claimed by the Agency. The petitioner contended that EPA should recalculate the net reduction in emissions from steam generating unit replacement in its analysis and modify the final rule to encourage economic replacement of higher emitting, existing units.

Agency Reponse: Two questions are relevant here: First, what is the impact of the PM/NO_x standards on the rate of steam generating unit installations; and second, what are the implications of the "new boiler survey" for the PM/NO_x rule. Regarding the first of these questions, the "new boiler survey" was conducted in response to public comments on the proposed SO_2 standards. It focused on collecting data about the reasons new units are installed, the extent to which new units may be replacements for existing units, and the impact of new units on overall SO_2 emisssions. The survey did not directly examine PM/NO_x emissions. However, based on the survey data and earlier analyses of the cost of PM and NO_x control techniques, the impact of the PM/NO_x standards on replacement of existing steam generating units is considered minimal because of the small cost of the PM/NO_x standards on new units.

As to the second question, EPA's analysis of the "new boiler survey" results confirms the need for PM/NO_x controls. It may well be true, as the petitioner contends, that PM and NO_x emission rates for individual new units will be lower, even absent an NSPS, than for existing units of equal size and fuel use patterns. However, the level of reductions from individual units that would occur in the absence of an NSPS is less than the emission reductions resulting from the promulgated standards.

The argument that NSPS-induced delays in steam generating unit replacement will result in higher aggregate emissions is not supported by analysis. (See Docket A-83-27, Docket Item IV-A-4.) Based on unit replacement data from the "new boiler survey" and the PM and NO_x emission levels expected from existing and NSPS-controlled new steam generating units, aggregate emissions from existing and new steam generating units at facilities covered by the survey will increase after installation of new units even with the NSPS. For PM, the aggregate increase was roughly 30 percent relative to the level occurring prior to new unit installation. For NO_x, the aggregate emissions almost doubled. This result—higher aggregate emission despite lower emission rates from individual units—is caused primarily by emission increases from new units installed for new applications that substantially exceed the emission reductions from facilities where replacements occurred. Adoption of less stringent emission control requirements for new units would result in even greater increases in aggregate PM and NO_x emissions. As a result, promulgation of an NSPS with stringent emission limits is essential if aggregate emissions of PM and NO_x are to be minimized.

E. IFCAM National Impacts Model

Validity of the Model

Petitioner's Comment: CIBO claimed that the Industrial Fuel Choice Analysis Model (IFCAM) EPA used to forecast industrial steam generating unit sales has serious shortcomings. The model is based on historical data from a period of chaotic energy prices and large cost differentials between high cost fuels (such as natural gas and fuel oil) and low cost fuels (such as coal and waste fuels). The petitioner stated that the previous behavior of steam generating unit owners in conserving energy and switching fuels would not be repeated today because of the large decline of natural gas and fuel oil prices relative to those for coal and waste fuels. According to the petitioner, the IFCAM model must be revalidated using the steam generating unit sales results contained in the "new boiler survey" and energy prices for the period in question, allowing for appropriate decision lead times. The petitioner stated that the IFCAM model should not be used for regulatory analyses until this revalidation has been accomplished. If the IFCAM projections cannot be validated, the petitioner stated that they must be disregarded and new data developed.

Agency Reponse: The petitioner appears to misunderstand the design and operation of IFCAM. IFCAM is simply a "least cost" economic choice model designed to aid in examining the impact of alternate regulatory standards on new industrial steam generating units. Key economic parameters (such as the estimated growth in national industrial energy demand and projected prices for coal, oil, and natural gas) are inputs to the model and reflect projected economic conditions in the future. For each alternate regulatory standard, IFCAM uses the projected fuel prices and total industrial energy demand to evaluate steam production costs for new industrial units spanning a range of sizes, capacity factors, and fuels, and then selects the steam generating unit and fuel combination with the lowest after-tax costs over the useful life of each unit. The results of these fuel choice selections for each new steam generating unit are then added together to estimate the total costs, emissions, and fuel use associated with the alternate regulatory standard.

Consequently, the impacts of alternate regulatory standards are projected by IFCAM based on the input values for projected fuel prices, projected industrial energy demand, and specified regulatory requirements. The results obtained from IFCAM, therefore, are not based on the "past," but are based on projections of the "future."

III. Petitions Submitted Concerning the SO_2 Standards

A. Legal Basis for Establishing the SO_2 Standards

1. Consistency of the SO_2 Standards with Congressional Intent

Petitioner's Comment: CIBO supplemented its petition for reconsideration with contentions that the SO_2 standard is inconsistent with Congressional intent in enacting the 1977 amendments to the CAA. The essence of CIBO's contentions is that Congress enacted the section 111 percent reduction requirement to ensure that new sources do not switch to natural gas to avoid the application of control technology. CIBO contends, however, that the percent reduction requirement included in the SO_2 standard will encourage new sources to switch from coal to natural gas. The result, therefore, is to circumvent the statute. (The Department of Commerce also submitted comments on this point.)

Agency Reponse: The petitioner's contentions that the SO_2 standard is inconsistent with Congressional intent are without merit. The petitioner misinterprets section 111. Followed to their logical conclusions, these contentions mean that the Agency should have either not adopted any percent reduction requirement at all, or adopted a percent reduction requirement that applied to all fuels (e.g., coal, oil, natural gas, wood, etc.).

An SO_2 standard for fossil fuel-fired stationary sources without any percent reduction requirement is inconsistent with the explicit language of Section 111 as it was amended by Congress [see CAA 111(a), H.R. Rep. No. 95-294 95th Cong., 1st Sess. 188 (1977) "Conference Report" reprinted in "Legislative History of the Clean Air Act Amendments of 1977", Volume 4, at 2655 "Legislative History"]. If the Agency had adopted an SO_2 standard including only a mass emission limit, sources could have avoided the application of any control technology simply by burning oil or low sulfur coal.

An SO_2 standard with a percent reduction requirement applied to all fuels, including fuels such as natural gas, very low sulfur oil, wood, etc., may also be inconsistent with the explicit language of section 111, which requires the Agency to consider costs. If the Agency had adopted an SO_2 standard applying the percent reduction requirement to all fuels, unreasonably high costs would have been imposed on a number of new sources firing fuels such as natural gas, very low sulfur oil, wood, etc.

EPA reads the percent reduction requirement in section 111 as tempered by the requirement that technology be the "best technological system of continuous emission reduction which (taking into consideration the cost * * *) * * * has been adequately demonstrated." Thus, a percent reduction requirement need not be applied to certain types or classes of sources if the impacts associated with imposing this requirement would be unreasonable. Consequently, the Agency made a thorough analysis of the potential impacts of imposing the percent reduction requirement on various types and classes of sources. Based on this analysis, the Agency included exemptions from the percent reduction requirement where the impacts of imposing this requirement would have been unreasonable. The final SO_2 standard, therefore, is reasonable and this approach represents a reasonable way to harmonize the twin requirements of Section 111 to include percent reduction requirements and to consider costs.

Finally, even in the absence of the SO_2 standard, economic factors unrelated to the standards, such as the relative price between coal, oil, and natural gas, are likely to have more impact on the choice of fuel for a new industrial-commercial-institutional steam generating unit than the SO_2 standard.

2. Impacts of the SO_2 Standard on the Natural Energy Policy

Petitioner's Comment: CIBO claimed that the SO_2 standard is inconsistent with national energy policy in that it fails to encourage the use of coal, threatens a balanced energy supply, and reduces the incentive for companies to develop clean coal technologies. (The Department of Energy and the Department of Commerce also submitted comments on this point.)

Agency Response: The petitioner's comments are a repetition of comments submitted to the Agency during the public comment period following proposal of the SO_2 standards. At worst, as discussed in the "Summary of Regulatory Analysis," the proposal notice (51 FR 22384), Volume 4 of the Background Information Document, and the promulgation notice (52 FR 47826), the SO_2 standard will have only a very small impact on the overall mix of fuels consumed to satisfy national energy demands. Thus, the standard will not cause a significant change in national energy supplies nor will it threaten national energy security.

To illustrate this fact, under the worst case scenario examined by the Agency, about 600 new coal-, oil- or gas-fired industrial-commercial-institutional steam generating units are projected to be sold over the 5-year period between 1986 and 1990. These new units will result in total fuel consumption of roughly 550 PJ/year (520 trillion Btu/year) in 1990. Even if all this energy consumption were satisfied by coal, it would represent less than 3 percent of total United States coal consumption in 1986. Similarly, if all this energy consumption were satisfied by oil or natural gas, it would represent less than 2 percent or 3 percent, respectively, of total oil or natural gas consumption in 1986.

Not all this increased energy consumption in new industrial-commercial-institutional steam generating units, of course, will be satisfied by a single fuel, such as natural gas or oil. Furthermore, the Agency's projections of sales of new steam generating units are quite likely to be overestimated, as the petitioner has pointed out. Consequently, the impact of the SO_2 standard on changes in the national energy mix of coal, oil, and natural gas will be even less significant than these figures might indicate.

The Agency acknowledges that some fuel switching to natural gas may occur as a result of the SO_2 standard. As discussed in Volume 4 of the Background Information Document and the promulgation notice (52 FR 47826), this fuel switching, however, will be small compared to the amount of fuel switching that is likely to occur as a result of the current low price of natural gas. The impact of the SO_2 standard on the difference in cost between firing coal or firing natural gas in a new steam generating unit is small compared to the impact of current natural gas prices. Even in the absence of the SO_2 standard, with current low natural gas prices few new steam generating units are likely to select coal over natural gas.

Finally, as also discussed in the proposal notice (51 FR 22384), Volume 4 of the Background Information Document, and the promulgation notice, (52 FR 47826), in developing the SO_2 standard the Agency recognized that the standard and, in particular, the requirement to achieve a 90 percent reduction in SO_2 emissions, could hinder

the development of some new clean coal technologies. The potential risk of failure that might be associated with using a new technology to achieve such a high percent reduction requirement could be sufficient in some cases to deter the use of that technology. Yet it is only through new technologies that better and less expensive means of controlling SO_2 emissions can be developed.

Although development of new technologies should be encouraged, it is not reasonable to permit the use of new technologies if use of these technologies would lead to SO_2 emissions grossly out of balance with what emissions would have been if a conventional technology had been used. Thus, to encourage the development of new technologies that show promise of achieving levels of performance comparable to those of existing technologies, but ensure that SO_2 emissions are not grossly out of balance with what they would have been if a conventional technology had been used, provisions were included in the SO_2 standard that require a 50 percent reduction in SO_2 emissions from new technologies and limit SO_2 emissions to 260 ng SO_2/J (0.6 lb SO_2/million Btu). This percent reduction requirement is low enough to substantially reduce the risk of failure associated with achieving it, and the 260 ng SO_2/J (0.6 lb SO_2 million Btu) emission limit ensures that SO_2 emissions from a source using a new technology will not be grossly out of balance with what SO_2 emissions would have been if a conventional technology had been used.

B. Projected Economic Impacts

1. Cost Effectiveness of a 130 ng SO_2/J (0.30 lb SO_2/million Btu) Heat Input Emission Limit on Electric Utility Auxiliary Steam Generating Units at the Zimmer Owners' Generating Station

Petitioner's Comment: The Zimmer owners stated that EPA did not consider the full costs associated with meeting a 130 ng SO_2/J (0.30 lb SO_2/million Btu) heat input emission limit for its two very low capacity factor auxiliary utility steam generating units. The petitioner stated that the exemption from the percent reduction requirement for oil-fired units with a maximum annual heat input capacity of 30 percent and less was meaningless when their very low capacity auxiliary units must also meet the 130 ng SO_2/J (0.30 lb SO_2/million Btu) heat input emission limit.

The petitioner contended that the full costs of meeting a 130 ng SO_2/J (0.30 lb SO_2/million Btu) heat input standard at its two auxiliary units are grossly disproportionate to the benefits achieved [i.e., Mg (tons) of SO_2 removed]. For these units, either very low sulfur oil must be burned in both the main unit and the auxiliary units or a separate oil handling system must be installed for the auxiliary units. According to the petitioner, the separate handling system would cost a total of $225,000/year, or $13,000/Mg ($11,800/ton) of SO_2 removed, whereas burning very low sulfur oil in both the main unit and auxiliary units would cost a total of $190,000/year, or $11,000/Mg ($10,000/ton) of SO_2 removed. As a result of these unreasonable cost impacts, the petitioner recommended that very low capacity factor auxiliary units be excluded altogether from regulation under Subpart Db standards.

Agency Response: The 130 ng SO_2/J (0.30 lb SO_2/million Btu) heat input emission limit for steam generating units exempt from the percent reduction requirement was established based on an assessment of the emissions and costs of very low sulfur oils. In establishing an NSPS, the Agency determines the best technology available, considering costs and other factors, for the category of sources affected by the standard. This approach does not mean that every source affected by the standards will incur the same costs of compliance. Some individual facilities subject to the standards may experience higher cost. In other words, in setting standards for new sources the Agency takes costs into account for the category of sources considered as a whole, not cost for every particular facility that might be affected.

Nevertheless, EPA reexamined the cost effectiveness of the promulgated SO_2 standard based on the Zimmer owners' specific situation and concluded that even in their situation the costs are reasonable.

Of the two compliance alternatives identified by the Zimmer owners, the lower cost alternative is to use very low sulfur oil in both the main steam generating unit [which is permitted to fire oil with an emission potential of 240 ng SO_2/J (0.55 lb SO_2/million Btu)] and the auxiliary units, which are subject to these standards. Based on the projected emission reductions from only the auxiliary units [estimated at 17 Mg/year (19 tons/year)], the petitioner estimated that the cost effectiveness of SO_2 reductions would be $11,000/Mg ($10,000/ton). However, it is inappropriate to exclude the emission benefits of using very low sulfur oil in the main units. When these emission reductions are included, the cost-effectiveness level is roughly $3,700/Mg ($3,400/ton) of SO_2, which is considered reasonable.

Further, these calculations are based on a fuel premium that the Zimmer owners believe may exist between 130 and 240 ng SO_2/J (0.30 and 0.55 lb SO_2/million Btu) oil of six cents per gallon. Based on a review of available data on fuel sulfur price premiums in the areas surrounding the Zimmer station, this premium appears overstated. In fact, this review identified little, if any, premium in the price between 130 and 240 ng SO_2/J (0.30 and 0.55 lb SO_2/million Btu) oils. As a result, the actual cost-effectiveness level could be considerably lower than the value calculated above.

2. Exemption for Noncontinental Areas

Petitioner's Comment: CIBO contended that the exemption of industrial steam generating units from the 90 percent SO_2 reduction requirement in noncontinental areas was arbitrary. According to the petitioner, the Agency provided this limited exemption due to the unavailability of natural gas in noncontinental areas. The petitioner argued that the distinction between facilities in continental and noncontinental areas is not supportable, considering that steam generating unit owners in some areas of the continental United States also have difficulties in obtaining natural gas.

Agency Response: The petitioner's contention is a moot point. Little or no coal is burned in steam generating units loaded in noncontinental areas. Thus, the exemption for noncontinental areas in the final rule applies in practice only to steam generating units burning very low sulfur oil. The final standard, however, also exempts all steam generating units firing very low sulfur oil from the percent reduction requirement no matter where they are located. In effect, therefore, the exemption sought by CIBO has already been granted in the existing rule. To extend this exemption for oil-fired units to coal-fired units in the continental United States, would present statutory difficulties. Congress plainly intended that the Agency utilize percentage reduction standards where appropriate given other statutory constraints, including the obligation to consider costs and other environmental impacts.

3. Failure to Analyze Economic Impacts on the Paper Industry

Petitioner's Comment: API/NFPA stated that, when compared to the seven other major steam-using industry groups

examined in the "Summary of Regulatory Analysis," the paper industry ranked first in industrial steam generating unit fossil fuel consumption. However, EPA performed economic impact analyses for only six of these industries, omitting an analysis of the paper industry. According to the petitioner, such an analysis of the paper industry would have revealed important information about the impact of the standard on the paper industry.

Agency Response: The economic impacts analysis of NSPS for industrial steam generating units was conducted in two phases. The first phase focused on major steam-using industries. Using aggregate economic criteria to characterize each industry selected for analysis, this phase of the analysis examined the potential impact of NSPS on industry average steam costs and product prices, and the ability of the industry to pass increased costs forward to the consumer or to absorb increased costs due to high profitability.

The second phase of the analysis focused on selected industries considered likely to experience the most severe economic impacts. Industries were selected for this phase of the analysis based on several crtieria: (1) Results from the first phase of the analysis indicated further analysis was appropriate; (2) manufacturing operations within an industry were considered unusually steam-intensive; or (3) the steam generating unit capacity within an industry was characterized by unusually low utilization factors. Using model plants and model firms representative of those found within each industry selected for analysis, this phase of the analysis examined the potential impacts of NSPS on product prices and profitability at the plant level and capital availability at the firm level.

The pulp and paper industry was one of the industries examined in the first phase of this analysis. The results, however, indicated that the potential impacts of NSPS on this industry were small and that further analysis of this industry was not warranted in the second phase of this analysis. Although a major steam consuming industry, most of the steam used in the pulp and paper industry for pulping, bleaching, and paper making is generated by burning fuels, such as black liquor and wood, which are not subject to the SO_2 standards. Combustion of oil and coal in the pulp and paper industry may contribute less than one-third of the total steam requirements for this industry. Therefore, the potential impact of the NSPS on steam costs and product prices is small.

In addition, the first phase of the analysis also indicated that the pulp and paper industry was quite profitable. Pulp, paper, and board were produced at record levels in 1984, 1985, and 1986. The rates of after-tax profit on stockholders equity, the rates of after-tax profit on total assets, and the after-tax profits per dollar of sales were near or exceeded the average for all manufacturing plants in 1984, 1985, and 1986.

As a result, the pulp and paper industry was not considered one of those industries likely to experience the most severe economic impacts and, therefore, this industry was not examined in the second phase of the analysis. In any case, the petitioner gave no indication of how such an analysis would change the outcome of the standard. Consequently, the Agency finds no basis for reconsidering the standards.

4. Inadequate Analysis of the Economic Impact of Start-Up, Shutdown, and Malfunction Provisions

Petitioner's Comment: API/NFPS also contended that start-up, shutdown, and malfunction provisions are needed for the standards because methods of compliance with the standards during these periods are not always available or are too expensive for many new paper industry facilities. The petitioner contended that EPA had abandoned its earlier position that emissions during periods of start-up, shutdown, or malfunction would be minimized by relying on spare capacity. The petitioner added that the Agency now relies on the ability of units to switch to very low sulfur oil or natural gas during such periods.

The petitioner stated that many paper mills cannot obtain natural gas and that 0.3 weight percent sulfur oil is not readily available in many areas of the country, particularly in noncoastal areas. The petitioner contended that the lack of natural gas in the noncontinental United States was specifically recognized in the regulations by providing an exemption from the percent reduction requirement for facilities in these locations, but that the regulations discriminate for no valid reason against continental facilities that cannot obtain gas or very low sulfur fuel.

According to the petitioner, many paper mills with access to natural gas would also incur costs for backup supplies of natural gas in excess of EPA assumptions because the gas costs that were assumed when developing the regulations did not take into account demand charges and premium prices for firm gas supplies. Many paper mills would also incur excessive costs for backup supplies of very low sulfur fuel oil. The petitioner estimated that the cost effectiveness of SO_2 removal when using noninterruptible natural gas or very low sulfur oil as a malfunction backup fuel can be as high as $17,300/Mg ($15,700/ton), a ratio almost ten times more than estimated when developing the regulations.

Agency Response: The decision to limit SO_2 emissions during periods of start-up, shutdown, and malfunction was based on the availability of several cost-effective alternatives that an affected facility can use during these periods. Contrary to the petitioner's assertion, using spare FGD capacity was not abandoned as a backup alternative and is the most economically attractive option in many situations. It is true that natural gas is not available everywhere. Similarly, very low sulfur residual oil may be difficult to obtain in noncoastal locations, although very low sulfur distillate oil is generally available throughout the United States. If neither of these fuels is available at a specific location, alternatives such as liquid petroleum gas (LPG) or spare FGD modules could be considered. Each alternative need not be available at every potential location of a new facility.

The costs of spare FGD capacity, natural gas, and very low sulfur oil were analyzed prior to promulgation of the standards. These costs were reexamined based on the petitioner's comments. In addition, use of LPG was also examined. When demand charges cited by the petitioner of $6.60 to $11.40/trillion J/day/month ($7 to $12/million Btu/day/month) are assumed for noninterruptible natural gas, the cost effectiveness of this option ranges from $3,800 to $11,500/Mg ($3,500 and $10,500/ton). The cost effectiveness of all of the other options, however, such as natural gas (which does not carry such high demand charges), very low sulfur oil, LPG, or spare FGD capacity, remains in the range of $550 to $4,400/Mg ($500 to $4,000/ton) of SO_2 removed and is considered reasonable.

In addition, most steam using plants operate several steam generating units at less than full capacity so that if one unit malfunctions, the load can be switched from one unit to another. According to data collected in the "new boiler survey," over 90 percent (i.e., 85 out of 92) of the new coal- or oil-fired units sold between 1981 and 1984 were installed at plants with multiple steam generating units. Because of the availability of backup steam generating capacity, most plants should be able to

shift steam production to another unit during periods of FGD malfunction.

In view of this variety of start-up, shutdown, and malfunction compliance options, individual plants will be able to economically control SO_2 emissions during these periods.

5. Legal Requirement for Consideration of Start-up, Shutdown, and Malfunction Costs

Petitioner's Comment: API/NFPA further contended that the courts require consideration of start-up, shutdown, and malfunction costs, citing *National Lime Association v. EPA*, 627 F.2d 416 (DC Circuit 1980) (referred to hereinafter as *National Lime*). According to the petitioner, the costs of complying with the standards during periods of start-up, shutdown, and malfunction are unreasonably high and could be avoided with a provision for a temporary variance during start-up, shutdown, and malfunction conditions.

Agency Response: National Lime does not require special start-up, shutdown, or malfunction provisions. Rather than specifying a particular requirement or type of analysis to be undertaken, the court in *National Lime* required only that consideration be given to the achievability of the standards under the anticipated range of operating variables. The petitioner correctly pointed out that analysis of the achievability of standards under the likely range of conditions should include an assessment of the cost of compliance associated with start-up, shutdown, and malfunction of FGD equipment. As discussed above, the costs of several different start-up, shutdown, and malfunction alternatives were analyzed. The results of this analysis indicate that the impacts associated with limiting emissions during start-up, shutdown, and malfunction are reasonable. Thus, it is clear that the Agency's analysis in adopting the standards is consistent with *National Lime*.

6. Availability of 130 ng SO_2/J (0.30 lb SO_2/million Btu) Oil in Hawaii [4]

Petitioner's Comment: HECO stated that the unique fuel supply and electric generation situation in Hawaii was not considered in establishing the 130 ng SO_2/J (0.30 lb SO_2/million Btu) emission limit. HECO contended that EPA should broaden the exemption to allow sources on Oahu to burn oil with a sulfur content of 0.5 weight percent or less, which HECO currently is required by local regulations to fire on Oahu.

The two refineries located on the island of Oahu purchase crude oils with low sulfur contents that, when blended, produce low sulfur residual oil with 0.5 weight percent sulfur or less. These refineries cannot supply all of HECO's needs, however, and approximately 3 million barrels of low sulfur residual oil are imported by HECO from the West Coast of the United States, Singapore, and other worldwide sources.

Meeting a sulfur specification of 0.5 weight percent permits HECO and the two refineries on Oahu to keep costs down and allows HECO to purchase low sulfur residual oil that is competitive with low sulfur residual oil in the continental United States. Having to purchase low sulfur residual oil with a sulfur content of less than 0.3 weight percent would increase HECO's costs. Besides the premium for this oil, there would be additional costs for segregated storage, and the benefits would not be worth the costs. As a result, the promulgated standards would effectively preclude new Subpart Db steam generating units on Oahu.

Agency Response: HECO argues, in effect, that the exemption from the 90 percent reduction requirement included in the final standard for steam, generating units firing very low sulfur oil should be increased from 130 ng SO_2/J (0.30 lb SO_2/million Btu) to 240 ng SO_2/J (0.50 lb/million Btu) since firing oil containing less than 130 ng SO_2/J (0.30 lb SO_2/million Btu) will increase HECO's costs. The mere fact that complying with this exemption from the percent reduction requirement will itself result in some increase in costs, if HECO decides to take advantage of the exemption, is not a sufficient basis for reconsidering the exemption. This exemption was not included in the standard to provide a convenient means for sources to avoid the percent reduction requirement or for sources to avoid experiencing any increase in costs in complying with the standard.

The exemption from the percent reduction requirement included in the standard for steam generating units firing oils of less than 130 ng SO_2/J (0.30 lb SO_2/million Btu) was based on a broad weighing of the relative costs and benefits of percent reduction requirements compared to firing oils of various sulfur contents. The costs of complying with the standard will vary somewhat from location to location, and at any specific location will depend on factors, such as local fuel prices, which are unique to that location. Not every steam generating unit, therefore, will find it advantageous to comply with the standard in exactly the same way. Some units may find it advantageous to comply with the standard by meeting the percent reduction requirement, others may find it advantageous to comply with the standard by firing very low sulfur oils. In short, not every steam generating unit subject to the standard will experience the same costs, nor is there any requirement in section 111 of the CAA that the Agency tailor the standard in such a way that no source will experience higher costs than any other source.

In the original rulemaking, the Agency examined a broad range of costs associated with the standard. (See e.g., "Summary of Regulatory Analysis.") HECO's contention that it will experience increased costs, or for that matter even that it may experience higher than average costs, in complying with the standard (or exemptions from the standard) would not have changed the outcome of the rule and, therefore, does not compel reconsideration.

Despite this finding, however, the Agency is unaware of why any HECO facility would be unable to take advantage of the exemption from the percent reduction requirement for steam generating units firing oils of less than 130 ng SO_2/J (0.30 lb SO_2/million Btu) if it chose to, nor does HECO suggest otherwise.

First, Hawaii's access to very low sulfur oil may well be equal to or superior to that of many areas of the continental United States, with its access to waterborne shipments of very low sulfur fuel oils from Indonesia and California, two of the largest markets of very low sulfur residual oil in the world.

Second, available data from the U.S. Department of Energy (DOE) for the years 1985 and 1986 (Docket No. A-83-27, Docket Items IV-I-3, IV-I-5, IV-I-6 and IV-I-7) indicate that about 10 to 20 percent of the residual oil used by HECO in 1985 and 1986 was 0.3 weight percent sulfur (or less) with the balance being between 0.3 and 0.5 weight

[4] Following the submittal of its Petition for Reconsideration in March, HECO offered to provide additional information concerning oil shipments and oil consumption on the Hawaiian Islands to support its contention that oil containing less than 0.3 weight percent sulfur was unavailable in Hawaii. No such data were forthcoming until December 19, 1988, some 9 months after submittal of the Petition for Reconsideration. The data covered the 1984-1987 time period, and much of this information could have been submitted during the comment period following proposal of the rule in June 1986, and certainly the information could have been submitted with the Petition for Reconsideration. HECO never advised the Agency that it was having difficulty obtaining the data or that it actually intended to supplement its petition. The Agency has no obligation to delay action on the Petitions for Reconsideration pending submittal, however belated, of information from petitioners or others. Nevertheless, the responses set forth below do address information presented in HECO's December 19, 1988, submittal.

percent sulfur. Additional data indicate a significant percentage of the residual oil imported into Hawaii (i.e., from outside the United States) was less than 0.3 weight percent sulfur: 7 percent in 1985; 15 percent in 1986; and 85 percent in 1987.

Furthermore, as HECO points out in its supplement, it currently imports oil from the West Coast of the United States and Singapore. Based on review of DOE data for 1987 (Docket A-83-27, Docket Item VI-B-9), supplies of residual oil containing less than 0.3 weight percent sulfur are currently available in California. These residual oils are refined from Indonesian and Australian crude oils and could be shipped to Hawaii. Handling requirements for these 0.3 weight percent sulfur residual oils are similar to those for higher sulfur content residual oils.

This indicates that residual oil with less than 0.3 weight percent sulfur is available in Hawaii, has been used by HECO in the past, and is available for import to Hawaii.

Third, the possible need for new handling facilities does not distinguish HECO from other steam generating unit owners and operators. In Hawaii, as elsewhere in the United States, depending on the type of oil purchased (a matter under the owner or operator's control), the use of very low sulfur oil may require installation of dedicated oil handling and storage facilities alongside of, or in place of, facilities handling higher sulfur content oil.

Finally, HECO claims that the increase in costs associated with complying with the exemption from the percent reduction requirement might result in "precluding" the use of new steam generating units on Oahu. HECO, however, does not explain its reasoning for this claim. HECO may mean, as it suggests with respect to the outer islands, that sources may construct diesel engines rather than steam generating units. This decision is for the source operator to make. The possibility that sources may construct diesel engines rather than steam generating units is not, however, a basis for modifying the standard.

For all of these reasons, an increase in the sulfur content of the oil exempted from the percent reduction requirement is not warranted for Hawaii.

7. Need for New Oil Transportation System in Hawaii

Petitioner's Comment: HECO also stated that, in order for neighboring islands (Maui, Kauai, Molokai, Lanai, and Hawaii) to use very low sulfur residual fuel oil a new inter-island transportation system (including vessels and delivery, receiving, and storage capacity) would have to be developed. Currently, all of the oil fired on these islands is imported in barges or tankers. Steam generating units on the neighboring islands fire oil with a sulfur content of 2 weight percent or less, which does not require a heated storage or distribution system. Importing waxy, very low sulfur residual oil would require heated barges for inter-island transport and a heated storage and distribution system on the islands. Coast Guard regulations prohibit hearing of the barges used for inter-island transport, and constructing a heated storage and distribution system would be uneconomical. HECO contended, therefore, that the Agency should exempt the Hawaiian outer islands from the SO_2 standards all together or permit the use of medium sulfur (2 weight percent) oil.

Agency Response: The nature of the inter-island transportation system in Hawaii does not warrant a special exemption for the outer islands. Residual oil capable of meeting an SO_2 emission limit of 130 ng SO_2/J (0.30 lb SO_2/million Btu) could be obtained by HECO, as discussed above. Based on information received from the Hawaiian Department of Energy (Docket No. A-83-27, Docket Item VI-E-9), the current method for transporting residual oil between the neighboring islands of Hawaii is by barge. This same system could be used to transport very low sulfur oil among the islands if slight modifications were made. These modifications could include cleaning some of the barges, dedicating them to the transport of very low sulfur oil, and equipping new steam generating units with new or converted storage tanks dedicated to the storage of very low sulfur oil.

Barge transport of fuel oil, far from being unique to Hawaii, is common practice throughout the continental United States. The Coast Guard does not prohibit the heating of barges transporting oil; it does have specific barge and heating system design requirements to ensure that oil is safely shipped (Docket A-83-27, Docket Item IV-E-10).

Depending on the type of oil purchased, a matter entirely under HECO's control, use of very low sulfur residual oil may require construction of a heated storage and distribution system. The need for this type of system, however, would be no different for a new steam generating unit located in Hawaii than for a similar unit located in the continental United States.

Therefore, an exemption from the standard for steam generating units located on the outer islands or an increase from 130 ng SO_2/J (0.30 lb SO_2/million Btu) to 867 ng SO_2/J (2.0 lb SO_2/million Btu) in the sulfur content of the oil exempted from the percent reduction requirement for the outer islands based on the need to make changes to the existing inter-island transport system or the cost of constructing a heated storage and distribution system is unwarranted.

8. Increased Use of Large Steam Generating Units or Gas Turbine Generators in Hawaii

Petitioner's Comment: HECO further stated that if it is required to comply with the 130 ng SO_2/J (0.30 lb SO_2/million Btu) SO_2 limitation, it would install gas turbine generators or electric utility steam generating units with heat inputs greater than 73 MW (250 million Btu/hour) rather than Subpart Db units. According to the petitioner, such large utility steam generating units and gas turbine generators could comply with Subparts Da or GG by using the 0.5 weight percent sulfur residual oil available on Oahu.

Agency Response: Subpart Db applies to steam generating units with a heat input capacity greater than 29 MW (100 million Btu/hour), except for electric utility steam generating units covered by Subpart Da. Indeed, the petitioner could install electric utility steam generating units in excess of 73 MW (250 million Btu/hour) heat input or a gas turbine generator and be subject to Subpart Da or GG, respectively, rather than Subpart Db. Large electric utility steam generating units or gas turbine generators can comply with the SO_2 requirements of Subparts Da or GG by firing 0.5 weight percent sulfur oil.

9. Economic Impacts of Firing Low Sulfur Oil in the Hawaiian Outer Islands

Petitioner's Comment: HECO noted that the cost differential between distillate oil and residual oil makes the use of distillate oil in steam generating units impracticable on the outer islands compared to diesel engines. The result, according to HECO, is that no one will build steam generating units; rather, they will burn distillate oil in more efficient diesel engines.

Agency Response: The SO_2 standards merely limit the sulfur content of oil that may be fired without meeting the 90 percent reduction requirement. The standards do not require new steam generating units taking advantage of this exemption to fire distillate oil, but permit new steam generating units to fire any type of oil. That HECO might

find it more economical to make use of diesel engines to produce electricity does not make the standard unreasonable. As stated earlier, the Agency believes that residual oil containing less than 130 ng SO_2/J (0.30 lb SO_2/million Btu) is available and can be supplied to steam generating units in Hawaii. HECO, however, always has the option of using distillate oil, residual oil, or even crude oil, or of switching between these fuels, based on its own assessment of fuel costs, supply uncertainties, and other factors. Furthermore, if transportation costs or use of very low sulfur content oil in the Hawaiian Islands becomes too expensive, HECO may wish to consider partial scrubbing of higher sulfur content oil to achieve the 130 ng/J (0.30 lb/SO_2 million Btu) emission limit.

B. Post-Proposal Developments

1. New Docket Material

Petitioner's Comment: CIBO contended that EPA introduced new material into the docket and conducted new analyses of existing data after the close of the public comment period, and that the public was not given sufficient opportunity to comment on this new material.

Agency Response: In the proposed SO_2 rulemaking of June 19, 1986, EPA stated that the energy price scenarios would be updated between proposal and promulgation to determine whether the costs, emission reductions, or cost effectiveness of the rule would be altered significantly, and, when completed, this information would be added to the docket. (See 51 FR 22387.)

On April 27, 1987, and again on October 30, 1987, a notice of document availability was sent to parties who commented on the June 19, 1986, proposed rulemaking, informing them that new materials and analyses were being added to the docket. These notices included a listing of more than two dozen new reports related to the rulemaking, which can be found in Docket No. A-83-27. Copies of four of the reports, including the results of the "new boiler survey," were attached to the April notice and six were attached to the October notice.

None of the petitioners commented on these new materials nor did they submit any additional information. Further, the new analyses showed no significant differences from the analyses that led to the development of the proposed standard and reaffirmed the reasonableness of the final standard.

2. Analysis of the "New Boiler Survey"

Petitioner's Comment: CIBO objected to a question in the "new boiler survey" which asked, "Would your decision to build a new boiler change if projected costs to produce steam increased by: 10, 20, 30, or 50 percent?" The petitioner contended that this question was misleading because it failed to reveal the source of the increased cost of meeting the 90 percent SO_2 emission reduction requirement. The petitioner also contended that the question failed to address costs, other than incremental steam cost, that would affect project viability. The petitioner suggested that the question be rephrased to ask, "Would your decision to install a coal- or oil-fired boiler change if such boiler were subject to a requirement (1) that 90 percent of potential SO_2 emissions be removed on a continuous 30-day average basis (including start-up and shutdown periods), and (2) that the installation of low sulfur fuel-firing capability might need to be installed for periods of FGD system malfunction?"

Agency Response: The purpose of the "new boiler survey" was to determine to what extent new steam generating units may be replacements for existing units and what impact this may have on overall SO_2 emissions. Thus, the survey focused on the reasons motivating the installation of new units, the disposition of existing units that may be replaced by new units, and the overall impact of the installation of new units on SO_2 emissions. The specific question on costs was included in the survey to gauge how sensitive decisions to install new units, including those units that may replace existing units, may be to potential increases in costs. The petitioner hypothesized that the answers might have been different if EPA had formulated its question to specify that increased costs resulted from pollution control. In determining the cost of steam, prudent business practices would be to include all the costs associated with steam production, including any costs associated with pollution control and steam supply reliability. It is the magnitude, not the origin, of costs that is relevant to the elasticity of sales as a function of costs. No details or data were provided to support CIBO's conjecture. Unsupported conjecture is not an adequate basis for reconsidering a rule.

3. Reevaluation of SO_2 Emission Reductions

Petitioner's Comment: CIBO also contended that EPA failed to reevaluate SO_2 emission reductions in light of the data received from the "new boiler survey" conducted after proposal of the standards. Specifically, the petitioner contended that the SO_2 emission rates used by EPA were too high and, as a result, SO_2 emission reductions were overestimated. The petitioner also contended that the overall emission rate gleaned from the survey demonstrates that a 1,100 ng SO_2/J (2.5 lb SO_2/million Btu) heat input baseline for new coal-fired steam generating units is unjustifiably high. The petitioner also contended that the survey demonstrates that SO_2 emission rates for oil-fired units were overestimated. The petitioner stated that without an accurate estimate of emission reduction, EPA cannot fulfill its statutory obligation under the CAA to accurately determine the cost of achieving the emission reductions that any particular standard will impose.

Agency Response: The Agency did analyze the impacts of the SO_2 standards using SO_2 emission rates from the "new boiler survey." In fact, for every analysis of national impacts performed by EPA, both prior to and after proposal of the standards, the Agency included regulatory altenratives that were essentially the same as the emission rate indicated by the survey to represent baseline levels. Because the Agency analyzes the incremental impacts of each regulatory alternative over the next less stringent alternative, the designation of a particular emission level as "baseline" rather than a "regulatory alternative" has little practice effect. The incremental differences will be the same in either case.

Each of the Agency's analyses included emission levels lower than 1,100 ng SO_2/J (2.5 lb SO_2/million Btu) for coal-fired units and 1,300 ng SO_2/J (3.0 lb SO_2/million Btu) for oil-fired units. For example, each analysis included an alternative based on an emission level of 520 ng SO_2 /J (1.2 lb SO_2/million Btu) and 340 ng SO_2/J (0.8 lb SO_2/million Btu) for coal- and oil-fired units, respectively. These emission levels are essentially the same as those the petitioner believes can be gleaned from the survey as representative of baseline emission levels.

In each analysis, the impacts of the regulatory alternative eventually promulgated as the SO_2 standards were analyzed relative to less stringent alternatives, including an emission level essentially comparable to the "revised baseline" level proposed by the petitioner. In each instance, the impacts of the promulgated standards were reasonable compared to this "revised baseline" level. Consequently, the Agency did analyze the impacts of the

standards in light of the results of the survey and found those impacts to be reasonable.

4. Information on Impacts of Waste Disposal

Petitioner's Comment: CIBO argued that post-proposal information showed that significant waste disposal problems would be created by the SO_2 standards. It also argued that methods used in some areas for disposing of sodium scrubber waste (i.e., deep well injection, use of lined disposal sites) are not cost effective, making the use of coal-fired steam generating units impracticable.

Agency Response: Steam generating units generally do not operate in isolation from other industrial processes, but are most often part of a larger industrial manufacturing plant that itself often produces substantial quantities of wastes requiring disposal. In addition, coal-fired steam generating units generate fly ash as well as liquid feedwater and steam system "blow-down" wastes, which also require disposal. Thus, use of SO_2 control systems to reduce SO_2 emissions from steam generating units may increase the volume of wastes to be disposed of, but generally does not create a new problem (i.e., a need to dispose of wastes where no such need existed before).

In areas where disposal of waste streams from sodium FGD or any other FGD system is considered by the owner or operator of a new steam generating unit covered by the NSPS to be too costly, the owner or operator could select an alternative approach to comply with the NSPS. As discussed throughout volume 4 of the "Background Information Document," the "SO_2 Control Technology Updates Report," and the "Summary of Regulatory Analysis," the SO_2 standards are based on a wide variety of techniques for controlling or reducing SO_2 emissions. The types of waste produced by FGD systems are quite different. As a result, a steam generating unit owner can select the FGD system best suited to local waste disposal requirements. Sodium FGD systems, for example, produce a liquid waste requiring disposal. Lime spray drying systems and FBC systems, on the other hand, produce a dry waste product. The cost impacts associated with each of these SO_2 control technologies, including the costs of waste disposal, are considered reasonable. Thus, one can minimize problems associated with increased waste disposal by appropriate selection of the SO_2 control system. The NSPS does not create an insurmountable waste disposal problem nor does it make the use of coal-fired steam generating units impractical. Finally, even though not a basis of the standard, if the steam generating unit owner or operator views the cost of these control techniques as excessive, switching to an alternate fuel, such as natural gas or very low sulfur oil, which imposes no additional waste disposal requirements, is an option.

5. Ability of FBC and FGD Systems to Achieve 90 Percent SO_2 Reduction

Petitioner's Comment: CIBO questioned the ability of FBC units to achieve 90 percent SO_2 reduction, especially those units experiencing large load swings. In addition, the petitioner stated that new information on spray dryer FGD systems does not support the ability of this technology to meet the 90 percent SO_2 reduction requirements. The petitioner claimed that EPA relied on switching to natural gas, and that such reliance violated EPA's duty to promulgate a standard that is achievable for coal- and oil-fired units.

Agency Response: As discussed in Volume 4 of the "Background Information Document," sufficient short-term performance test data exist to demonstrate that FBC technology is capable of achieving 90 percent SO_2 removal. Short-term data presented in the "Summary of Regulatory Analysis" show that several FBC units achieved 90 percent or greater SO_2 control during the test periods. Longer term data (30 days or more) also demonstrate that FBC units care capable of achieving greater than 90 percent SO_2 removal at high reliability levels. A 30-day test on a bubbling bed FBC unit burning high sulfur coal showed SO_2 removal efficiencies averaging 93.5 percent. A 30-day test conducted at another site showed an average SO_2 removal of 90 percent with greater than 99 percent reliability. During a 67-day period at this site, the FBC unit had a reliability of 97 percent. In addition, vendors have consistently stated that FBC units can be designed to achieve 90 percent SO_2 removal at high reliability levels. Based on these data, EPA believes that FBC has demonstrated the ability to meet the 90 percent SO_2 reduction requirement in the promulgated standards.

In response to the petitioner's comment regarding the ability of FBC units to respond to load swings, FBC technology is characterized by the large thermal mass of the bed, which in turn limits the ability of FBC units to adjust quickly to large variations in steam demand. This is a characteristic of FBC technology that is unrelated to SO_2 removal. As a result, the owner of a facility with rapidly changing steam demands is likely to select a conventional steam generating unit and FGD system, rather than an FBC, due to this inherent characteristic of FBC technology, which limits its ability to respond to large load swings.

The percent reduction and reliability of lime spray drying have also been demonstrated, as discussed in Volume 4 of the "Background Information Document" and as documented in the "Summary of Regulatory Analysis" and the "SO_2 Control Technology Update Report." Although few long-term (30 day and longer) data are available to demonstrate high SO_2 removal levels, short-term tests indicate that lime spray drying systems are capable of achieving percent reduction levels in excess of 90 percent. Although most lime spray dryers today are operated at roughly 70 percent reduction to comply with the lower percent reduction requirements in Subpart Da and in State permits, there is no reason to believe lime spray dryers cannot achieve 90 percent SO_2 reduction while maintaining a high degree of reliability. In fact, those periods during which high removal levels have been achieved in percent reduction tests indicate that lime spray drying systems are capable of achieving high percent reduction levels with high reliability levels. In addition, as with FBC technology, a vendor has also stated that lime spray dryer FGD systems can be designed to achieve 90 percent SO_2 removal at high reliability levels (Docket No. A-83-27, Docket Item VI-D-5). For these reasons, EPA believes that lime spray drying has demonstrated the ability to meet the 90 percent SO_2 reduction requirement in the promulgated standards. (See 52 FR 47837.)

In this connection, EPA stated in the promulgation preamble that one vendor's guarantee that 95 percent reliability was achievable in industrial applications was "consistent" with the results of 2 years operation of a lime spray drying system on a 132 MW (450 million Btu/hour) heat input coal-fired steam generating unit. (See 52 FR 47837; see also Docket A-83-27, Docket Item IV-B-9.) This statement remains true. The distinctions noted by the petitioner between this application and industrial applications regarding removal rates and load levels do not invalidate the comparison. The lower removal rate does not mean that EPA is incorrect in judging that higher removal rates can be achieved in industrial applications. Likewise, differences in loads do not mean that EPA's judgment is mistaken that load changes can be managed. The Agency's use of the comparison was fair. The example was not used as direct

proof of reliability. It served as a useful, but not necessary, illustration that the vendor guarantee in question was realistic. Moreover, the Administrator's determination that the standard was reasonable was not based on the assumption that fuel switching would occur.

6. Use of Vendor Statements to Support 90 Percent SO_2 Reduction

Petitioner's Comment: CIBO stated that informal vendor statements had been used to support that assertion that lime spray dryers can achieve a 90 percent SO_2 reduction. The petitioner asserted that a vendor guarantee does not reflect "adequately demonstrated" performance because the standard "must be based on cost-effective technologies that can be successfully and reliably used in operating installations." The petitioner also stated that EPA did not provide notice of how much EPA relied on vendor guarantees in finding that lime spray dryers are "demonstrated."

Agency Response: Data, analysis, and engineering judgment were used to establish the 90 percent SO_2 reduction standard. The vendor guarantee was used merely to confirm the regulatory decision and not as the sole basis for the standard. The term "adequately demonstrated" does not mean "successfully and reliably used in operating installations." An "achievable" standard need not be already routinely achieved in the industry. [See *National Lime Association v. EPA*, 627 F.2d 416 (1980); *Sierra Club v. Costle*, 657 F.2d 298 (1981); and *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (1973).] Rather, to be achievable, the standard must be achievable under most adverse conditions that can reasonably be expected to occur. (See *National Lime, supra.*)

The vendor in question is a leading spray dryer FGD manufacturer, having installed over 50 percent of the existing units, and is a reliable and authoritative source of information on dry FGD systems. The vendor's statements were only used to support the data and engineering judgment that served as the basis of the standards. CIBO's criticisms of such guarantees are not "centrally relevant" to the outcome of rule. In fact, EPA's determination that the lime spray technology was "demonstrated" was based, in the proposal as in the final rule, on the data in the record and its judgment that high levels of performance and reliability were achievable. The Agency noted the availability of performance guarantees at the time of proposal only as additional support for, but not the basis of, its position. (See e.g., BID, Volume 4.)

IV. Summary

The issues raised in each petition and discussed in this notice were carefully considered; however, only the issue concerning cost impacts of the NO_x standard on very low capacity factor steam generating units provides a basis for revising the promulgated standards. A proposal to do so will be made in a separate notice. The other issues raised by petitioners do not require or justify reconsideration of the promulgated PM, SO_x, or NO_2 standards under Section 307.

Date: January 6, 1989.

Lee M. Thomas,

Administrator.

[FR Doc. 89-701 Filed 1-12-89; 8:45 am]

BILLING CODE 6560-50-M

federal register

Friday
January 13, 1989

Part VI

Department of the Interior

Minerals Management Service

Norton Basin Lease Sale 120; Request for Interest; Notice

4310-MR

UNITED STATES
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Norton Basin Lease Sale 120
Request for Interest

Purpose

Proposed Sale 120--Norton Basin is being reviewed by the Secretary of the Interior to determine whether the Outer Continental Shelf (OCS) presale process should be initiated for this sale. The oil and gas industry is asked to assist in this process by providing up-to-date information on its interest in leasing and exploring in the Norton Basin Planning Area.

The responses will assist the Secretary of the Interior in determining if the presale process for the proposal should be started, delayed, or deferred for consideration in a future 5-year schedule. This approach is designed to add flexibility to the program by providing for the reasonable possibility that changes in geologic data and economic or other conditions could create bidding interest in areas which may now appear unattractive. For example, a substantial oil price increase (such as might result from an oil supply disruption), if anticipated to be relatively long term, could make an area presently unattractive to potential bidders into one which could be of interest. Other information of interest would include new geophysical data, new geologic data, new interpretations of existing data, and new estimates of costs of production. By requesting information and acting on it prior to the issuance of the Call for Information and Nominations, the risk of inappropriate expenditures for such sales would be reduced.

If the Request for Interest (RFI) indicates sufficient interest to warrant proceeding with the sale, these prelease steps will follow: Call for Information and Nominations and Notice of Intent to Prepare an Environmental Impact Statement (EIS), Area Identification, draft EIS, Public Hearings, final EIS, proposed Notice of Sale, Governor's Comments, and final Notice of Sale. For Alaska sales, the entire process takes approximately 28 months.

Description of the Area

The Norton Basin Planning Area is located offshore the western coast of the State of Alaska in the Northern Bering Sea and includes approximately 4,700 blocks covering about 25 million acres.

Large portions of the area were requested for deferral by the State of Alaska and the signatories to the Institute for Resource Management (IRM) Bering Sea Proposal. A portion of the area requested for deferral has been deferred pursuant to the 5-year program. This is shown as a subarea deferral on the map which appears at the end of this document. Areas requested by the State and the IRM that were not adopted for deferral at this time have been highlighted for special presale consideration. Highlighting subareas for special presale consideration means special mention of such subareas in the Call for Information and Nominations and consideration of them as potential deferral alternatives in the EIS scoping process. This is consistent with the commitment made in the 5-year program.

The total area open for comment at this time consists of approximately 2,300 blocks (approximately 13 million acres) and is outlined on the attached map.

Previous Sale-Related Activities

The first Federal offshore oil and gas lease sale in this area, OCS Oil and Gas Lease Sale 57, was held on March 15, 1983. Of 418 blocks (about 2.3 million acres) offered, 64 blocks received bids, and bids on 59 blocks were accepted. As a result of that sale, over $317.8 million in bonuses were collected. All 59 leases were issued for a primary term of 10 years. Forty-six leases have been relinquished as of November 1988.

An RFI for Sale 120 was published on April 30, 1987, at 52 FR 15932. On October 8, 1987, the Department of the Interior announced the decision to delay action on this lease sale. This decision was made after analyzing comments submitted by 11 companies in response to the RFI.

Two Deep Stratigraphic Test wells have been drilled in this area. In addition, six exploratory wells were drilled without encountering commercial discoveries of oil and gas. All six wells have been plugged and abandoned.

Instructions on Request for Interest

Information regarding leasing and exploring in the Norton Basin Planning Area may be provided by mail, telephone, or, alternatively, an informal meeting with the Regional Director or designated representative. General or detailed information may be submitted. We request that you provide information on the following:

(1) Are you interested in the area at this time?

(2) Would your level of interest in this area change if oil and gas prices increase?

(3) What general or detailed information can you provide regarding whether we should proceed in this planning area with the OCS presale process; delay the presale process for 1 year or more; or defer the sale for consideration in a future 5-year schedule?

(4) Is your company spending money on any oil and gas activities in this area or are expenditures anticipated on activities such as geologic and geophysical work, etc.?

(5) What comments and suggestions can you provide on your choice of minimum bid level, alternative bidding systems, and other procedures which may lead to the enhanced understanding of the oil and gas resources of the Norton Basin Planning Area?

In order to be included in the review process, information must be submitted no later than 45 days following publication of this document in the Federal Register. Receipt of the information will be facilitated if the envelope is marked "Request for Interest on Proposed Lease Sale 120, Norton Basin." The telephone number and name of a person to contact in the respondent's organization for additional information should also be enclosed.

Letters should be mailed or hand delivered to the Regional Supervisor for Leasing and Environment, Minerals Management Service, Alaska OCS Region, 949 East 36th Avenue, Room 110, Anchorage, Alaska 99508-4302. Telephone responses may be made to Mr. Tom Warren at (907) 261-4691 or to Mr. Dave Bornholdt at (202) 343-5121. A copy of the response should be sent to the Chief, Offshore Leasing Management Division, Department of the Interior, Minerals Management Service, Room 4230 (Mail Stop 645), Washington, D.C. 20240. Hand deliveries to the headquarters office may be made at 18th and C Streets, N.W., Room 2523, Washington, D.C.

T Gernhofer

Director, Minerals Management Service

Thomas Gernhofer

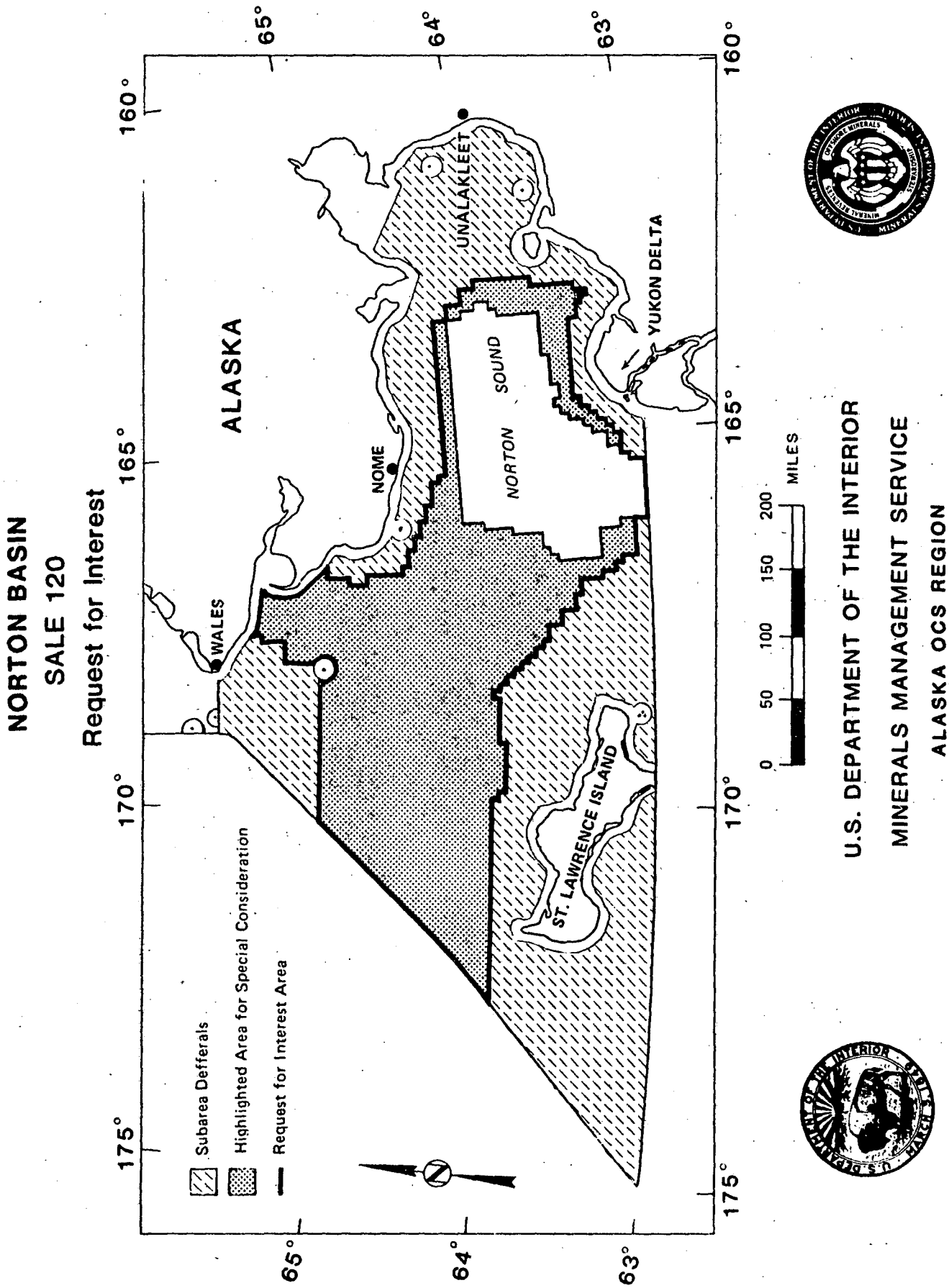
Approved:

James E Cason

Assistant Secretary - Land and Minerals Management

Date 1/9/89

James E. Cason



[FR Doc. 88-772 Filed 1-12-88; 8:45 am]

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federal register

Friday
January 13, 1989

Part VII

Department of the Interior

Minerals Management Service

Chukchi Sea; Lease Sale 126; Call for Information and Nominations; Intent to Prepare an Environmental Impact Statement; Notice

UNITED STATES
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Chukchi Sea
Lease Sale 126

Call for Information and Nominations
and
Notice of Intent to Prepare an Environmental Impact Statement

CALL FOR INFORMATION AND NOMINATIONS

Purpose of Call

The purpose of the Call for Information and Nominations (Call) is to gather information for Outer Continental Shelf (OCS) Lease Sale 126. This sale, located in the Chukchi Sea Planning Area, is tentatively scheduled for May 1991. Information and nominations on oil and gas leasing, exploration, and development and production within the Chukchi Sea are sought from all interested parties. This initial information-gathering step is important for ensuring that all interests and concerns are communicated to the Department of the Interior (DOI) for future decisions in the leasing process pursuant to the OCS Lands Act, as amended (43 U.S.C. 1331 *et seq.*), and regulations at 30 CFR 256. This Call does not indicate a preliminary decision to lease in the area described below.

Description of Area

The area of Call is located offshore the State of Alaska in the Chukchi Sea and the Arctic Ocean. The area available for nominations and comments consists of approximately 5,450 whole and partial blocks (about 29.5 million acres) as outlined on the map which appears at the end of this Call. The map includes an outline of the Minerals Management Service's (MMS's) interpretation of the area of hydrocarbon potential. Respondents may nominate and are asked to comment on any acreage within the entire Call area. A larger scale map of the Chukchi Sea Planning Area (hereinafter referred to as the Call Map) showing boundaries of the Call area on a block-by-block basis and a complete list of Official Protraction Diagrams (OPD's) are available from the Records Manager, Alaska OCS Region, Minerals Management Service, 949 East 36th Avenue, Room 502, Anchorage, Alaska 99508-4302, telephone (907) 261-4621. The OPD's may be purchased from the Records Manager for $2.00 each.

Instructions on Call

Respondents are requested to nominate blocks within the Call area that they would like included in OCS Lease Sale 126. Nominations must be depicted on the larger scale Call map by outlining the area(s) of interest along block lines. Respondents may also submit a list of whole and partial blocks nominated (by OPD designations) to facilitate correct interpretation of their nominations on the Call map. Although the identities of those submitting nominations become a matter of public record, the individual nominations are proprietary information.

Respondents should also rank areas nominated according to priority of their interest (e.g., priority 1 (high), 2 (medium), or 3 (low)). Areas nominated that do not indicate priorities will be considered priority 3. Respondents are encouraged to be specific in indicating areas or blocks by priority, because blanket priorities on large areas are not useful in the analysis of industry interest.

The telephone number and name of a person to contact in the respondent's organization for additional information should be included in the response.

Comments are sought from all interested parties about particular geologic, environmental, biological, archaeological, or socioeconomic conditions, conflicts, or other information that might bear upon potential leasing and development in the Call area. Comments also are sought on potential conflicts that may result from the proposed sale and future OCS oil and gas activities with approved local coastal management plans (CMP's). If possible, these comments should identify specific CMP policies of concern, the nature of the conflicts foreseen, and steps that MMS could take to avoid or mitigate the potential conflicts. Comments may be in terms of either broad areas or restricted to particular blocks of concern. Those submitting comments are requested to list block numbers or outline the subject area on the large-scale Call map.

Nominations and comments must be received no later than 45 days following publication of this document in the Federal Register in envelopes labeled "Nominations for Proposed Chukchi Sea Lease Sale 126," or "Comments on the Call for Information and Nominations for Proposed Chukchi Sea Lease Sale 126," as appropriate. The original Call map with indications of interest and/or comments must be submitted to the Regional Supervisor, Leasing and Environment, Alaska OCS Region, at the address stated under Description of Area. Copies of the Call map showing indications of interest and any comments are to be sent to the Chief, Offshore Leasing Management Division, Department of the Interior, Minerals Management Service, Room 4230, 18th and C Streets, NW, Washington, D.C. 20240.

Use of Information from Call

Information submitted in response to this Call will be used for several purposes. First, responses will be used to focus the analysis in the remainder of the sale process on areas of hydrocarbon potential for oil and gas development. Second, comments on possible environmental effects and potential use conflicts will be used in the analysis of environmental conditions in and near the Call area. This information will be used to make a preliminary determination of potential advantages and disadvantages of oil and gas exploration and development to the Region and the Nation. A third purpose for this Call is to use the comments to initiate the scoping process for the EIS and analyze alternatives to the proposed action. The Notice of Intent to Prepare an EIS, including a description of the scoping process, is located later in this document. Fourth, comments may be used in developing lease terms and conditions to ensure safe offshore operations. Fifth, comments may be used to evaluate potential conflicts between the Coastal Management Program and offshore oil and gas activities.

Existing Information

An extensive environmental as well as socioeconomic studies program has been under way in this area since 1975. The emphasis, including continuing studies, has been on geologic mapping, environmental characterization of biologically sensitive habitats, endangered whales and marine mammals, physical oceanography, ocean-circulation modeling, and ecological effects of oil and gas activities. A complete listing of available study reports and information for ordering copies may be obtained from the Records Manager, Alaska OCS Region, at the address stated under Description of Area. The reports may also be ordered directly from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161 or by telephone at (703) 487-4650.

In addition, a program status report for continuing studies in this area may be obtained from the Chief, Environmental Studies Section, Alaska OCS Region, at the address stated under Description of Area or by telephone at (907) 261-4620. Summary Reports and Indices and technical and geologic reports are available for review at the MMS Alaska OCS Region (see address under Description of Area). Copies of the Alaska OCS Regional Summary Reports may also be obtained from the OCS Information Program, Office of Offshore Information and Publications, Minerals Management Service, 1951 Kidwell Drive, Suite 601, Vienna, Virginia 22180 or by calling (703) 285-2283.

Tentative Schedule

Final delineation of the area for possible leasing will be made at a later date in compliance with applicable laws including all requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the OCS Lands Act, as amended, and with established departmental procedures.

Tentative milestones that will precede this sale, proposed for May 1991, are:

Milestones	Dates
Comments Due on the Call	February 1989
Scoping Comments Due	February 1989
Area Identification	April 1989
Draft EIS Published	May 1990
Hearings on Draft EIS Held	June 1990
Final EIS Published	November 1990
Availability of Proposed Notice of Sale Published	December 1990
Governor's Comments Due on Proposed Notice	February 1991
Final Notice of Sale Published	April 1991
Sale	May 1991

NOTICE OF INTENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

Purpose of Notice of Intent

Pursuant to the regulations (40 CFR 1501.7) implementing the procedural provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), as amended, MMS is announcing its intent to prepare an EIS regarding the oil and gas leasing proposal known as Sale 126 in the Chukchi Sea off Alaska. The Notice of Intent also serves to announce the scoping process that will be followed for this EIS. Throughout the scoping process, Federal, State, and local governments and other interested parties aid MMS in determining the significant issues and alternatives to be analyzed in the EIS.

The EIS analysis will focus on the potential environmental effects of leasing, exploration, and development of the blocks

included in the area defined in the Area Identification procedure as the proposed area of the Federal action. Alternatives to the proposal that may be considered are to delay the sale, cancel the sale, or modify the sale.

Instructions on Notice of Intent

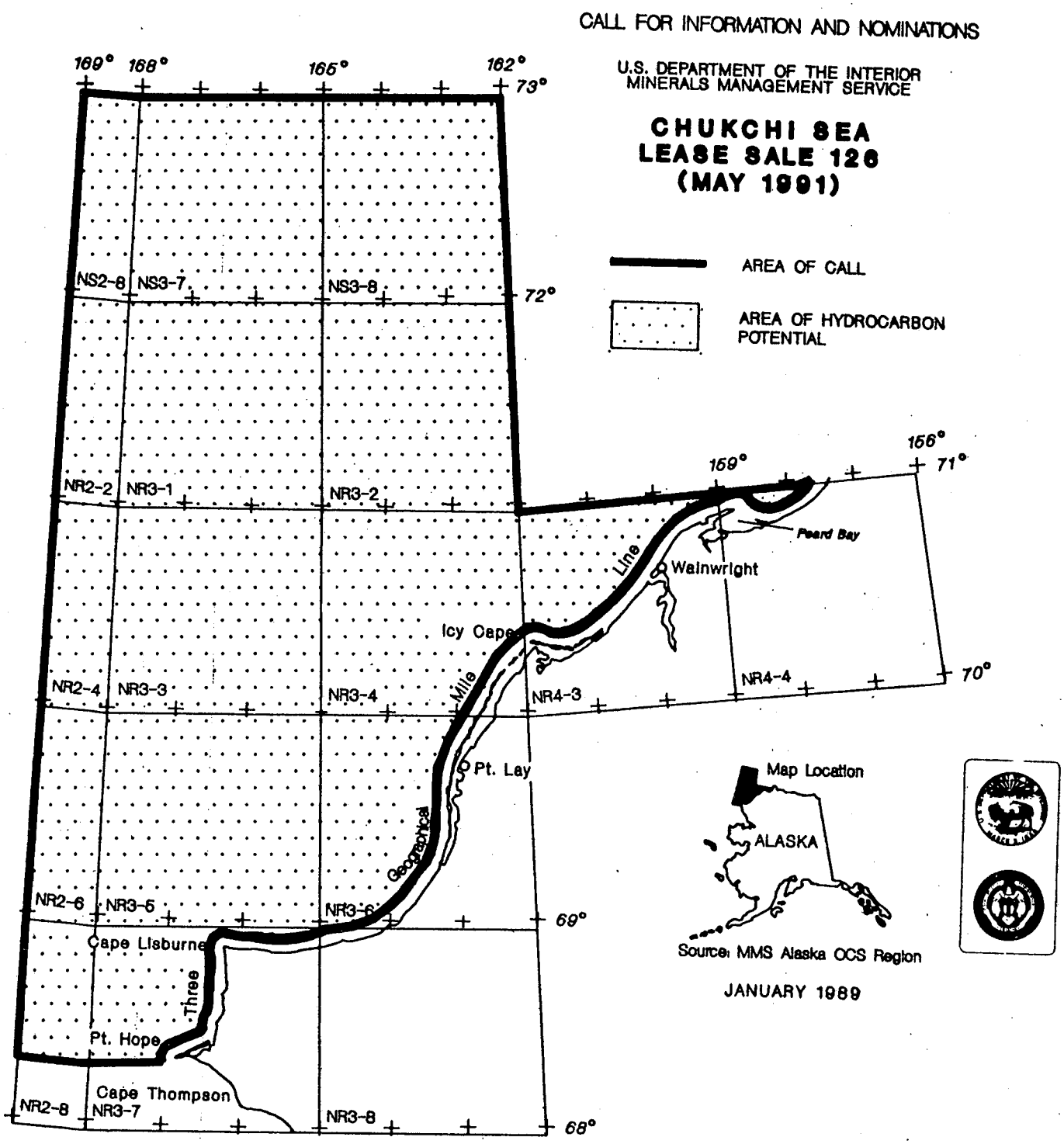
Federal, State, and local governments and other interested parties are requested to send their written comments on the scope of the EIS, significant issues that should be addressed, and alternatives that should be considered to the Regional Supervisor, Leasing and Environment, Alaska OCS Region, at the address stated under Description of Area above. Comments should be enclosed in an envelope labeled "Comments on the Notice of Intent to Prepare an EIS on the proposed Chukchi Sea Lease Sale 126." Comments are due no later than 45 days from publication of this Notice.

Director, Minerals Management Service
Robert E. Kallman

Approved:

Acting
Assistant Secretary - Land and Minerals Management
James E. Cason

1/9/89
Date



[FR Doc. 89-771 Filed 1-12-89; 8:45 am]

BILLING CODE 4310-MR-C

federal register

Friday
January 13, 1989

Part VIII

Department of Education

Office of Special Education and Rehabilitative Services

34 CFR Part 301

Preschool Grants for Handicapped Children Program; Final Regulations

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services

34 CFR Part 301

Preschool Grants for Handicapped Children Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues regulations implementing the Preschool Grants for Handicapped Children program (Preschool Grants). This program is authorized under section 619 of Part B of the Education of the Handicapped Act (EHA), as amended by Pub. L. 99-457, the Education of the Handicapped Act Amendments of 1986. These final regulations establish the requirements for implementing this new formula grant program to provide Federal financial assistance to States for serving children with handicaps aged three through five years.

EFFECTIVE DATE: These 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: Ms. Nancy Treusch, Division of Educational Services, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 4615—MES 2732), Washington, DC 20202; Telephone: (202) 732-1097.

SUPPLEMENTARY INFORMATION: Public Law 99-457, enacted on October 8, 1986, revised section 619 of Part B of the EHA by replacing the Incentive Grants program with a new Preschool Grants for Handicapped Children program (Preschool Grants). The purpose of the Preschool Grants program is to provide additional Federal financial assistance to States for providing special education and related services to children with handicaps aged three through five years. The Preschool Grants regulations establish the administrative procedures for applying for and distributing Preschool Grant funds. They are not intended to repeat the substantive rights and protections of three through five-year-old children with handicaps which are established under Part B of the EHA and its implementing regulations at 34 CFR Part 300. These rights and protections include the right to a free appropriate public education, placement in the least restrictive environment, and the availability of due process procedures.

Beginning in fiscal year (FY) 1988, States are required to use at least seventy-five percent of their Preschool Grants funds for making subgrants to local educational agencies (LEAs) and intermediate educational units (IEUs). States may use not more than twenty percent of their grant funds for planning and developing a statewide comprehensive delivery system for special educational services to children with handicaps aged birth through five years and for providing direct and support services to children with handicaps aged three through five years. These funds may be used to continue the planning begun under the Early Childhood State Plan grants which were previously authorized under section 623(b) of the EHA and eliminated by Pub. L. 99-457. States may use not more than five percent of the total grant award for the cost of administering the grant.

A new provision in the statute requires that States make a free appropriate public education available to all children with handicaps aged three through five years by FY 1991 in order to continue to be eligible for funding under the Preschool Grants program. Eligibility for EHA-Part B funds for children with handicaps aged three through five years, funding under Parts C through G of the EHA for projects relating exclusively to children with handicaps aged three through five years, and funding for children with handicaps aged three through five years served under Pub. L. 100-297 (which reauthorized the Chapter 1 State Operated or Supported Program for Handicapped Children) is contingent upon eligibility for a Preschool Grant. These statutory eligibility restrictions will become effective in FY 1991. Currently, all States are eligible for funding under the Preschool Grants program.

For FY 1987 through FY 1989 a Preschool Grant award is the total of two amounts. The first amount, the basic grant, is based on the previous year's December 1 EHA-Part B count (reported to the Secretary on a non-categorical basis) of three- through five-year-old children with handicaps receiving special education and related services. The basic amount was $300 per child in FY 1987, $400 per child in FY 1988, and will be up to $500 per child in FY 1989.

The second amount, the bonus, is based upon the net estimated increase in the number of three- through five-year-old children with handicaps expected to be served under the EHA-Part B on December 1 of the current calendar year. A bonus payment of up to $3800 for each additional child is paid when: (1) there is an estimated increase in the total number of three- through five-year-old children with handicaps served (i.e., those served under both the EHA-Part B and the Chapter 1 State Operated or Supported Program for Handicapped Children) from the previous child count, and (2) there is an estimated increase from the previous year's EHA-Part B count in the number of three- through five-year-old children served under the EHA-Part B. Therefore, in order to determine the net estimated increase in three- through five-year-old children served, a State must estimate the next year's Chapter 1 State Operated or Supported Program for Handicapped Children three- through five-year-old child count as well as the next year's EHA-Part B three- through five-year-old child count.

Downward or upward adjustments are made in the subsequent year's grant if the actual child count differs from the estimate. Bonus payments apply only for fiscal years 1987, 1988, and 1989. For fiscal year 1990 and thereafter, States receive up to $1000 per child for the three- through five-year-olds counted in the previous year's December 1 EHA-Part B child count.

Section 3501 of the Hawkins-Stafford Act amended Part E of the General Education Provisions Act (GEPA) to provide for new enforcement procedures. The amended Part E requires the Secretary to establish an Office of Administrative Law Judges (OALJ) to replace the existing Educational Appeal Board and sets out new hearing procedures. 20 U.S.C. 1234-1234i. As a result, appeals from cost disallowance decisions received by a State educational agency (SEA) on or after October 25, 1988 will be heard by the OALJ. The Educational Appeal Board will continue to hear appeals from determinations received by an SEA before October 25.

On November 18, 1987, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the **Federal Register** (52 FR 44346). No major changes have been made to the proposed regulations. A technical change has been made to § 301.4 due to the publication (FR 8033-8103, March 11, 1988) of the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (to be codified at 34 CFR Part 80). Effective October 1, 1988, Part 80 supersedes Part 74 with respect to State and local governments. Section 301.12 has been deleted because this

information is already included in the application package. A new § 301.12 has been added describing the sanctions if a State does not meet the statutory timeline for making a free appropriate public education available to all children with handicaps aged three through five years.

Analysis of Comments and Changes

In response to the Secretary's invitation to comment, five hundred and five (505) parties submitted comments on the proposed regulations. An analysis of the comments and of changes in the regulations since publication of the NPRM follows.

Major issues that address topics covered in the Part B regulations are grouped according to subject. Other substantive issues are discussed under the section of the Preschool Grants regulations to which they pertain. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Many of the public comments pertained to the substantive rights of three- through five-year-old children with handicaps which are in the regulations implementing Part B of the EHA (34 CFR Part 300). Comments which addressed the proposed addition to the comment on the least restrictive environment (LRE) contained in the NPRM under the EHA–Part B (FR 8390, March 14, 1988) will be considered in the development of the final Part B regulations at 34 CFR Part 300. No changes have been made to the Preschool Grants regulations based on comments regarding issues covered by the regulations at 34 CFR Part 300. However, the Secretary has briefly responded to the comments that have a significant impact on the three- through five-year-old population by cross-referencing the pertinent EHA–Part B regulations. A discussion of these topics follows:

1. Least Restrictive Environment (LRE)

Comment: Some commenters wanted specific language stating that special education and related services must, to the maximum extent appropriate, be provided to preschool children with handicaps in the LRE. Other commenters wanted clarifiction of the definition of "least restrictive environment" as it applies to preschool children, especially if a State does not provide preschool programs for non-handicapped children.

Discussion: The existing requirements on LRE at 34 CFR 300.550–300.556 apply to preschool children with handicaps. The NPRM to amend 34 CFR Part 300 proposes an addition to the comment following § 300.552, which sets forth the general requirements for placement in the least restrictive environment. The proposed addition to the comment provides examples of how a public agency serving preschool children with handicaps may meet the LRE requirements if it does not provide education to non-handicapped children who are aged three, four, or five years.

Changes: None.

2. Parent Counseling and Training

Comment: Some commenters wanted the Preschool Grants regulations to contain requirements that the individualized education program (IEP) include instruction for parents so that they can be active and knowledgeable in assisting in their child's progress and "involvement of parents and family" to ensure that the family involvement provided for under the Early Intervention for Infants and Toddlers with Handicaps program (Early Intervention program) will be continued in preschool programs.

Discussion: "Parent counseling and training" is defined at 34 CFR 300.13(b)(6) as a related service and may be included at any time in an IEP if it is determined to be needed to assist a child in benefitting from special education. The regulations implementing Part B also emphasize the role of parents at an IEP meeting. See Question 26 in Appendix C to 34 CFR Part 300. Finally, the regulations at 34 CFR 300.370(b)(2) include "parent training activities" under the definition of "support services" for which a State educational agency (SEA) may use its EHA-Part B allocation.

The Secretary has consistently supported parental involvement in all educational programs. This includes supporting the important role of parents as active participants in the development and implementation of their child's educational program. States are encouraged to increase efforts to include parents in developing and providing special education and related services to their preschool child with handicaps.

Changes: None.

3. Case Management Services

Comment: Some commenters argued that case management services that are required under the Early Intervention program, should be required under the Preschool Grants program.

Discussion: Part H of the EHA specifically identifies case management services as one of the early intervention services to be provided. Under the Early Intervention program, the case manager is responsible for the implementation of the Individualized Family Service Plan (IFSP) and coordination with other agencies. Under Part B of the EHA, the public agency responsible for the education of a child with a handicapping condition must ensure that all the services listed in the child's IEP are provided. (See 34 CFR 300.341 and questions 45 and 46 in Appendix C to 34 CFR Part 300)

Changes: None.

4. Comprehensive System of Personnel Development (CSPD)

Comment: Many commenters wanted the regulations implementing the CSPD to include training for both professionals and paraprofessionals who work with preschool children with handicaps.

Discussion: Section 613(a)(3) of the EHA and the EHA-Part B regulations implementing the Comprehensive System of Personnel Development at 34 CFR 300.380–300.387 already allow a State to include in the CSPD professionals and paraprofessionals who work with preschool children with handicaps.

Changes: None

5. Applicability of 34 CFR 300.300(b)(3)

Comment: Many commenters wanted guidance on the applicability of 34 CFR 300.300(b)(3) to the Preschool Grants program. Section 300.300(b)(3) requires a State to serve all three- through five-year-old children with a particular handicapping condition once 50% of those children are served. Commenters believed that this requirement conflicts with the phasing-in of the new provision in Section 619 of a free appropriate public education to all three-through five-year-old children with handicaps by fiscal year 1991.

Discussion: Section 110 of the Handicapped Programs Technical Amendments Act of 1988 (Pub. L. 100–630, enacted on November 7, 1988) exempts States from complying with 34 CFR 300.300(b)(3), with respect to children aged three through five years, during the phase-in period of the Preschool Grants program.

Changes: None

6. Transition

Comment: Many commenters were concerned about the transition of children from the Early Intervention program to the Preschool Grants program. Some commenters recommended that, to ensure a smooth transition, these children should continue to be served under an individualized family service plan (IFSP)

rather than under an individualized education program (IEP). Some commenters recommended that, to prevent lapses in services for these children, language should be added to the Preschool Grants regulations requiring coordination between the Early Intervention program and the Preschool Grants program.

Discussion: The State educational agency has a variety of options for developing and implementing procedures that will ensure continuity during a child's transition from services under the Early Intervention program to services under the Preschool Grants program and the EHA-Part B. Section 619(c) of the statute allows the SEA to use up to 20% of its Preschool Grant (State set-aside) for planning and developing a comprehensive statewide service delivery system for children from birth through age five years. These funds may be used to develop a system for planning and coordinating transition services when a child moves from the Early Intervention program to the Preschool Grant program. The SEA may also use funds from the set-aside portion of the EHA-Part B State grant to provide transition services. Finally, Part H funds may be used to support transition services, as will be indicated in the final regulations implementing the Early Intervention program.

Although IFSPs and IEPs must be developed and implemented according to the requirements applicable to the respective programs, nothing in Part B, section 619, or Part H of the statute prevents IEPs from containing the same elements as IFSPs. In fact, section 677(d) of the EHA-Part H requires that the IFSP contains steps to be taken to support the transition of the handicapped toddler to services provided under the EHA-Part B, to the extent such services are considered appropriate. States may include in their procedures for transition methods by which the IFSP can be used as a basis for the development of the IEP.

Since no one agency has the funding sources to provide all the necessary services, States may use their interagency agreements to clarify transition options and develop appropriate procedures and activities. With proper planning, the interagency agreements between the SEA and other agencies providing services to handicapped infants and toddlers should contain enough flexibility so that lapses in delivery of services will not occur.

Changes: None.

The following is an analysis of comments pertaining to specific regulatory sections of the Preschool Grants regulations.

Subpart A—General

Section 301.1

Comment: Commenters wanted the language in paragraphs (a) and (c) revised to clarify that SEAs may make subgrants to LEAs and IEUs to provide special education and related services and that the SEA may provide direct and support services.

Discussion: Section 301.1 describes the general purpose of the Preschool Grants program. The specific provisions that the commenters wanted included are set forth in § 301.3 and § 301.30. These sections implement the statutory requirement that beginning in fiscal year 1988, the SEA must allocate at least 75% of the Preschool Grant award for subgrants to LEAs and IEUs for their use in providing special education and related services to preschool children with handicaps. The SEA may use not more than 20% of the Preschool Grant award to plan and develop a statewide comprehensive service delivery system for children with handicaps from birth through five years and to provide direct and support services to preschool children with handicaps.

Changes: None.

Section 301.2

Comment: Commenters wanted "local educational agency (LEA) or intermediate educational unit (IEU)" in paragraph (b) changed to "LEAs and IEUs."

Discussion: This change will clarify that both LEAs and IEUs are eligible subgrantees.

Changes: "Any" is deleted and "or" is changed to "and."

Comment: Many commenters wanted private schools and other State agencies to be eligible subgrantees. There was concern that funding only LEAs and IEUs would disrupt the current service delivery system in many States.

Discussion: Section 619(c) of the statute authorizes subgrants only to LEAs and IEUs. However, nothing in the statute prohibits LEAs, IEUs, and the SEA, if the SEA provides direct or support services, from contracting with private schools and other State agencies for the delivery of services.

Changes: None.

Section 301.3

Comment: Commenters wanted services under this program to be available to children with handicaps from birth through age five years.

Discussion: Services under this program are not authorized for children with handicaps from birth through age two years, although they were authorized under the former Preschool Incentive Grant program. Under the EHA Amendments of 1986, direct services under the Preschool Grants program are provided only to children with handicaps aged three through five years.

Changes: None.

Section 301.4

Comment: Some commenters wanted all documents and regulations applicable to this program included in this regulation rather than cited separately.

Discussion: Because so many parts of the Education Department General Administrative Regulations (EDGAR) and other regulations apply to this program, the Department does not consider it feasible to compile all of the regulations into one document. A compilation would be overly cumbersome and would duplicate existing regulations.

Changes: None.

Section 301.5

Comment: Some commenters wanted "and their families" and "early intervention services," added to the definition of "comprehensive service delivery system" (CSDS) to clarify that the States could plan for these types of services under the CSDS.

Discussion: The definition of CSDS already gives States the authority to plan for providing special education and related services to handicapped children from birth through age five. This includes planning appropriate services for handicapped infants and toddlers, including involvement of their families.

Changes: None.

Comment: Some commenters wanted the term "excess appropriation" changed because it can be confused with "excess cost."

Discussion: "Excess appropriation" is the statutory term. Its definition makes it clear that the term does not mean "excess cost."

Changes: None.

Comment: Commenters wanted the word "years" added to the definition of "Preschool."

Discussion: This suggestion clarifies that "age" refers to years.

Changes: The definition of "Preschool" is amended by adding "years" after "three through five."

Subpart B—How Does a State Apply for a Grant?

Section 301.10

Comment: Several commenters wanted to know what must be included in the EHA–Part B State plan to demonstrate the availability of a free appropriate public education to all children with handicaps aged three through five years.

Discussion: In order to be eligible for a Preschool Grant in FY 1991, the State must include in its State plan policies and procedures that ensure the availability of a free appropriate public education to all children with handicaps aged three through five years. See section 619(b)(1). A State must verify the policies and procedures with copies of State statutes, regulations, court orders, or other legal documents on which the policies and procedures are based.

Changes: None.

Section 301.11

Comment: Several commenters wanted the Tydings Amendment included in this section of regulations. The Tydings Amendment provides states and subgrantees one additional fiscal year beyond the fiscal year for which a grant was made for obligating funds from that fiscal year. Because appropriations become available on July 1 each year for this program, State and local recipients have 27 months from that date to obligate the funds.

Discussion: The Tydings Amendment, Section 412(b) of the General Education Provisions Act applies to the Preschool Grants program. 34 CFR 76.705 of the Education Department General Administrative Regulations (EDGAR) implements the statutory provision. Under Pub. L. 100–630, if a State's FY 1988 allotment was adjusted downward due to overpayment of bonus funds in FY 1987, the FY 1987 funds remain available for obligation by the State and LEAs and IEUs for an additional 12 months. If a State's FY 1989 allotment is adjusted downward due to an overpayment of bonus funds in FY 1988, the FY 1988 funds will remain available for obligation by the State and LEAs and IEUs for an additional 12 months. States that do not receive a downward adjustment to their FY 1988 or FY 1989 allotment will not be affected by this provision in Pub. L. 100–630.

Changes: None.

Section 301.12

Comment: Several commenters wanted clarification that nonparticipation under section 619 will not affect receiving Part B funds for children and youth with handicaps aged 6 through 21 years. Also, several commenters wanted to know what funds will be affected if a State does not make a free appropriate public education available to all preschool children with handicaps by the timeline established in the statute.

Discussion: EHA–Part B funds for six through twenty-one year-old children with handicaps will not be affected if a State does not make a free appropriate public education available to all three-through five-year-old children with handicaps by 1991.

Sections 609 and 611(a)(1) of the EHA describe the funds that are affected by a State not making a free appropriate public education available to all preschool children with handicaps by 1991.

Changes: A new § 301.12, "What are the sanctions if a State does not meet the statutory timelines for making a free appropriate public education available to preschool children with handicaps?" has been added.

Subpart C—How Does the Secretary Make a Grant to a State?

Section 301.20

Comment: Some commenters asked that States be allowed to use "other available data," in addition to data obtained from LEAs and IEUs, as a basis for the estimate of the increase in the number of children with handicaps aged three through five years who will be receiving special education and related services on December 1 of the next fiscal year.

Discussion: Each State submitting an estimated count must attach a copy of the procedures the State used to make an estimation. Using other data in addition to data from LEAs and IEUs is permissible under the statute and, as the commenters suggested, may assist States in acquiring the information needed for the most accurate estimate possible.

Changes: The Secretary has added "and other available data" to § 301.20(c).

Comment: Some commenters felt that bonus payments only for newly served preschool children with handicaps is unfair to States that have already established preschool programs.

Discussion: The principal purpose of the bonus provision is to provide a financial incentive to States that were not previously serving the preschool handicapped to enourage them to do so. States with mandates already in effect can receive bonus funds for previously unserved children with handicaps, including those who will turn three years old and receive special education and related services by December 1, of the next school year.

Changes: None.

Comment: Many commenters asked which children may be considered "newly served" for purposes of the estimated count and whether children served under the Chapter 1 State Operated or Supported Program for Handicapped Children could be included in the estimate as new children to be served under Part B.

Discussion: "Newly served" children are those who have never received special education and related services. Children previously served under the Chapter 1 State Operated or Supported Program for Handicapped Children have received special education and related services, and are, therefore, not "newly served" children for purposes of making an estimation. The purpose of the bonus payments was not to transfer children from another federal program to Part B in order to generate bonus funds. The intent was to encourage states to locate and serve children who had never received special education and related services.

Changes: None.

Comment: Some commenters wanted the estimated count to pertain to the estimated increase in the number of preschool children with handicaps receiving a "free and *most* appropriate education." (emphasis added)

Discussion: The statute provides that the estimated count consist of children with handicaps aged three through five years who will be receiving special education and related services. This is the standard used in the regulations.

Changes: None.

Section 301.21

Comment: Some commenters requested clarification of the language to show that the Chapter 1 State Operated or Supported Program for Handicapped Children (34 CFR Part 302) count, as well as the EHA–B (34 CFR Part 300) count, will be used to verify the accuracy of an estimated count.

Discussion: In making adjustments to a State's grant, both of these counts are used to verify the accuracy of the estimated count.

Changes: Section § 301.21 is amended to include the Chapter 1 State Operated or Supported Program for Handicapped Children count in verifying the accuracy of an estimated count.

Subpart D—How Does a State Distribute the Grant Money?

Section 301.30

Comment: Some commenters suggested that § 301.30(d), which allows the SEA to provide services if an LEA or IEU is unable or unwilling to provide services, may cause LEAs and IEUs not to provide services, and should be deleted.

Discussion: Section 614(d) of the EHA allows States, under certain limited circumstances, to retain funds that would normally flow to an LEA or IEU. Funds can be retained if the LEA or IEU (1) is unable or unwilling to maintain programs of free appropriate public education; (2) is unable or unwilling to be consolidated with other LEAs in order to establish and maintain the programs; or (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of these children.

The Department has no authority to eliminate this provision which applies to all programs authorized under the EHA-Part B, including the Preschool Grants program in section 619.

Changes: None.

Section 301.31

Comment: Some commenters wanted States to have the discretion to combine basic and bonus funds before calculating subgrants rather than separately calculating basic and bonus amounts for subgrants.

Discussion: Section 619(a) and (c)(3) of the statute require that both at the federal and State level two calculations, basic and bonus, be made. Each must be calculated on a pro rata basis. The subgrant may be issued on a grant award document showing the award as a total amount that does not break out the basic and bonus amounts.

Changes: None.

Comment: None.

Discussion: The Secretary has made a minor change to § 301.31 to clarify how a State determines the amount to which an LEA or IEU that is entitled to a subgrant will receive upon submitting an approval application to the SEA. The change conforms the language of § 301.31 to the language of the statute.

Changes: The regulation is amended by deleting the last phrase in § 301.31 (a) and (b), "in all LEAs and IEUs that apply to the SEA for Preschool Grant funds," and replacing it with "in all LEAs and IEUs that are entitled to Preschool Grants funds."

Section 301.32

Comment: Some commenters wanted this section to provide that SEAs may use the 20% State set-aside portion of the Preschool Grant to adjust bonus allocations awarded to LEAs and IEUs so that LEAs and IEUs that did have an increase in the number of preschool children with handicaps will not be penalized because there was no statewide growth.

Discussion: The SEA already has the authority to use the 20% set-aside portion of its grant under this program and under their EHA-Part B grant to assist LEAs and IEUs who would otherwise not receive as large a subgrant as anticipated.

Change: None.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

List of Subjects in 34 CFR Part 301

Education, Education of the handicapped, Grant programs—education, Reporting and recordkeeping requirements.

Dated: November 14, 1988.

Lauro F. Cavazos,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.173 Preschool Grants for Handicapped Children)

The Secretary amends Title 34, Chapter III of the Code of Federal Regulations by revising Part 301 to read as follows:

PART 301—PRESCHOOL GRANTS FOR HANDICAPPED CHILDREN

Subpart A—General

Sec.
301.1 What is the Preschool Grants for Handicapped Children Program?
301.2 What is eligible for an award?
301.3 What kinds of activities may be assisted?
301.4 What regulations apply?
301.5 What definitions apply?

Subpart B—How Does a State Apply for a Grant?

301.10 How does a State become eligible to receive a grant?
301.11 When does a State apply for a grant?
301.12 What are the sanctions if a State does not meet the statutory timeline for making a free appropriate public education available to all preschool children with handicaps?

Subpart C—How Does the Secretary Make a Grant to a State?

301.20 What requirements apply to estimating the number of handicapped children who will be served in order to receive funds from an excess appropriation?
301.21 How are adjustments made if a State overestimates or underestimates the increase in preschool handicapped children served?

Subpart D—How does a State Make a Subgrant to an Applicant?

301.30 How does a State distribute the grant money?
301.31 What is the amount of a subgrant to a local educational agency?
301.32 How are adjustments made to a local educational agency's subgrant?

Authority: 20 U.S.C. 1419, unless otherwise noted.

Subpart A—General

§ 301.1 What is the Preschool Grants for Handicapped Children Program?

The Preschool Grants for Handicapped Children program (Preschool Grants program) provides grants to States to assist them in—

(a) Providing special education and related services to handicapped children aged three through five years;

(b) Planning and developing a statewide comprehensive delivery system for handicapped children from birth through age five years; and

(c) Providing direct and support services to handicapped children aged three through five years.

(Authority: 20 U.S.C. 1419)

§ 301.2 Who is eligible for an award?

(a) The Secretary makes a grant to each State that submits an application that meets the requirements of this part.

(b) A State may make a subgrant to any local educational agency (LEA) and intermediate educational unit (IEU) that submits an approvable application to the State educational agency (SEA).

(Authority: 20 U.S.C. 1419)

§ 301.3 What kinds of activities may be assisted?

Under the Preschool Grants program, the Secretary makes a grant to a State to conduct the following activities:

(a) Provide subgrants to LEAs and IEUs to assist them in providing special education and related services to handicapped children aged three through five years.

(b) Plan and develop a statewide comprehensive service delivery system for handicapped children from birth through age five years.

(c) Provide direct and support services from the SEA to handicapped children aged three through five years.

(Authority: 20 U.S.C. 1419)

§ 301.4 What regulations apply?

The following regulations apply to the Preschool Grants program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 76 (State-Administered Programs), Part 77 (Definitions that Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement).)

(b) The regulations in this Part 301.

(c) The regulations in 34 CFR Part 300.

(Authority: 20 U.S.C. 1419)

§ 301.5 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in the Act:

Intermediate educational unit
Local educational agency
State
State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
EDGAR
Fiscal year
Grant period
Secretary
Subgrant

(c) *Other definitions.* The following definitions also apply to this part:

"Act" means the Education of the Handicapped Act, as amended.

"Comprehensive service delivery system" means a State's plans and procedures, including goals and objectives, for identifying all handicapped children from birth through age five years and providing special education and related services to those children in accordance with State law, policy, or practice.

"Excess appropriation" means that portion of each appropriation for fiscal years 1987, 1988, and 1989 remaining after the maximum amount of funds for each child counted has been awarded to States based on the most recent child count of children with handicaps aged three through five years receiving special education and related services.

"Part B child count" means the child count required by section 611(a)(3) of the Act.

"Preschool" means the age range of three through five years.

(Authority: 20 U.S.C. 1402, 1419)

Subpart B—How Does a State Apply for a Grant?

§ 301.10 How does a State become eligible to receive a grant?

(a) For fiscal years 1988, 1989, and 1990 a State is eligible to receive a grant if—

(1) The Secretary approves its State plan under 34 CFR Part 300;

(2) The State provides special education and related services to any handicapped children aged three through five years; and

(3) The State submits an application to the Secretary that meets the requirements of this part.

(b) Beginning in fiscal year 1991, a State is eligible to receive a grant if—

(1) The Secretary approves its State plan under 34 CFR Part 300;

(2) The State has policies and procedures in its State plan under 34 CFR Part 300 that assure the provision of a free appropriate public education to all handicapped children aged three through five years in accordance with the requirements in 34 CFR Part 300; and

(3) The State submits an application to the Secretary that meets the requirements in this part.

(Authority: 20 U.S.C. 1419 (a), (b))

§ 301.11 When does a State apply for a grant?

(a) A State shall submit a Preschool Grants application effective for fiscal years 1988 and 1989.

(b) The State shall extend its FYs 1988–1989 application through FY 1990.

(c) For FY 1991 a State shall submit a one, two, or three year application. Thereafter the State shall submit its Preschool Grants application with the three-year State plan under 34 CFR Part 300.

(Authority: 20 U.S.C. 1419 (a)(3), (b)(4))

§ 301.12 What are the sanctions if a State does not meet the statutory timeline for making a free appropriate public education available to all preschool children with handicaps?

If a State does not meet the requirements in section 619(b)(1) of the Act—

(a) The State is not eligible for a Preschool Grant;

(b) The State is not eligible for funds under 34 CFR Part 300 for handicapped children aged three through five years;

(c) No State, LEA, IEU, or other public institution or agency is eligible for a grant under Parts C through G of the Act if the grant relates exclusively to programs, projects, and activities pertaining to handicapped children aged three through five years; and

(d) The State is not eligible for funds for three through five-year-old children served under 34 CFR Part 302.

(Authority: 20 U.S.C. 1408; 1411(a)(1)(A); 1419(a)(b))

Subpart C—How Does the Secretary Make a Grant to a State?

§ 301.20 What requirements apply to estimating the number of handicapped children who will be served in order to receive funds from an excess appropriation?

(a) In order to receive funds from an excess appropriation based on an estimated increase in the number of handicapped children aged three through five years who will be receiving special education and related services under Part B of the Act on December 1 of the year following the most recent Part B child count, a State must—

(1) Have an increase in the total number of handicapped children aged three through five years served under both 34 CFR Parts 300 and 302 from the previous year; and

(2) Have an increase from the previous year in the total number of handicapped children aged three through five years served under 34 CFR Part 300.

(b) Each State shall develop and implement procedures to estimate accurately the increase in the number of handicapped children aged three through five years who will be receiving special education and related services under 34 CFR Parts 300 and 302 by the count dates for these programs for the next fiscal year.

(c) The procedures for making an estimation in paragraph (b) of this section must be based upon estimates from LEAs and IEUs, and other available data, of the number of additional handicapped children aged three through five years that LEAs and IEUs expect to be serving under 34 CFR Parts 300 and 302 on December 1 of the year following the most recent Part B child count.

(d) The State shall provide the estimates on forms provided by the Secretary no later than February 1 of the year in which the Secretary requires estimates.

(e) The State shall attach a copy of the procedures used to make the estimates under paragraph (c) of this section to the estimated count form.

(Authority: 20 U.S.C. 1419(a))

(Approved by the Office of Management and Budget under control number 1820-0552)

§ 301.21 How are adjustments made if a State overestimates or underestimates the increase in preschool handicapped children served?

If the actual number of additional handicapped children aged three through five years counted as served on December 1 of the following year under 34 CFR Parts 300 and 302 differs from the estimate submitted by a State in fiscal year 1987, 1988, or 1989, the Secretary increases or decreases the State's grant for the next fiscal year based upon the difference in the number of additional handicapped children who were estimated to be served and the number actually served under 34 CFR Part 300.

(Authority: 20 U.S.C. 1419(a)(2))

Subpart D—How Does a State Make a Subgrant to an Applicant?

§ 301.30 How does a State distribute the grant money?

(a) A State shall distribute at least 75 percent of its grant to LEAs and IEUs to be used to provide additional education and related services to handicapped children aged three through five years.

(b) A State may use not more than 20 percent of the grant for—

(1) The planning and development of a statewide comprehensive service delivery system for handicapped children from birth through age five years; and

(2) The provision of direct and support services for handicapped children aged three through five years.

(c) A State may use not more than five percent of the grant for the costs of administering the grant.

(d) If a State provides services to preschool handicapped children because some or all LEAs and IEUs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs and IEUs to provide special education and related services to handicapped children aged three through five years residing in the area served by those LEAs and IEUs.

(Authority: 20 U.S.C. 1414(d), 1419(c)(2))

§ 301.31 What is the amount of a subgrant to a local educational agency?

From the amount of funds available to LEAs and IEUs in the State, each LEA and IEU is entitled to the sum of—

(a) An amount that bears the same ratio to the maximum amount awarded to the State based on the previous child count as the number of handicapped children aged three through five years in that agency who were receiving special education and related services on the most recent Part B child count bears to the aggregate number of handicapped children aged three through five years receiving special education and related services on the most recent Part B child count in all LEAs and IEUs that are entitled to Preschool Grants funds; and

(b) An amount that bears the same ratio to the State's excess appropriation, if any, as the LEA's or IEU's estimated count of additional handicapped children aged three through five years who will be receiving special education and related services on the next Part B child count bears to the aggregate number of additional handicapped children aged three through five years who will be receiving special education and related services by the next Part B child count in all LEAs and IEUs that are entitled to Preschool Grant funds.

(Authority: 20 U.S.C. 1419(c)(3))

§ 301.32 How are adjustments made to a local educational agency's subgrant?

If the actual number of additional handicapped children aged three through five years served under 34 CFR Part 300 in fiscal year 1987, 1988, or 1989 differs from the estimate submitted by an LEA or IEU for that fiscal year, the State shall increase or decrease the LEA's or IEU's grant in the next fiscal year based upon the number of preschool handicapped children who were actually served.

(Authority: 20 U.S.C. 1419(c)(3) (A), (B))

[FR Doc. 89-905 Filed 1-11-89; 8:45 am]

BILLING CODE 4000-01-M

federal register

Friday
January 13, 1989

Part IX

Office of Management and Budget

Budget Rescissions and Deferrals; Notice

OFFICE OF MANAGEMENT AND BUDGET

Budget Rescissions and Deferrals

To the Congress of the United States:

In accordance with the Impoundment Control Act of 1974, I herewith report six new rescission proposals totaling $143,096,000.

The rescissions affect programs in the Departments of Housing and Urban Development, Interior, Justice, and Labor.

The details of these rescission proposals are contained in the attached report.

Ronald Reagan,

The White House,

January 9, 1989.

BILLING CODE 3110-01-M

1

CONTENTS OF SPECIAL MESSAGE
(in thousands of dollars)

RESCISSION NO.	ITEM	BUDGET AUTHORITY
	Department of Housing and Urban Development:	
	Housing Programs:	
R89-1	Subsidized housing programs.....	20,000
	Community Planning and Development:	
R89-2	Urban development action grants.....	51,651
	Department of the Interior:	
	Fish and Wildlife Service:	
R89-3	Land acquisition.....	30,000
	National Park Service:	
R89-4	Land acquisition and State assistance	35,000
	Department of Justice:	
	Office of Justice Programs:	
R89-5	Justice assistance.....	5,000
	Department of Labor:	
	Employment Standards Administration:	
R89-6	Black lung disability trust fund....	1,445
	Total, rescissions.....	143,096

SUMMARY OF SPECIAL MESSAGES
FOR FY 1989
(in thousands of dollars)

	RESCISSIONS	DEFERRALS
Third special message:		
New items.....	143,096	---
Revisions to previous special messages..	---	---
Effects of second special message.....	143,096	---
Amounts from previous special messages that are changed by this message (changes noted above).....	---	---
Subtotal, rescissions and deferrals.....	143,096	---
Amounts from previous special messages that are not changed by this message....	---	8,942,531
Total amount proposed to date in all special messages.....	143,096	8,942,531

3

Rescission Proposal No: R89-1

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Housing and Urban Development	New budget authority..... $7,180,265,000 (P.L. 100-404)
Bureau: Housing Programs	Other budgetary resources.. $ 451,043,000
Appropriation title and symbol: Subsidized housing programs 86X0164	Total budgetary resources.. $7,631,308,000
	Amount proposed for rescission..... $ 20,000,000
OMB identification code: 86-0164-0-1-999	Legal authority (in addition to sec. 1012): [ ] Antideficiency Act [ ] Other _____
Grant program: [X] Yes [ ] No	
Type of account or fund: [ ] Annual [ ] Multiple-year _____ (expiration date) [X] No-Year	Type of budget authority: [X] Appropriation [ ] Contract authority [ ] Other _____

Justification: This account funds subsidized housing programs such as Section 8 housing programs (including housing vouchers), and public and Indian housing development. The Nehemiah Housing Opportunity Grants program is also funded under this account, receiving an appropriation of $20 million in FY 1989. Under the Nehemiah program, non-profit organizations are given grants to provide loans up to $15,000 at no interest to moderate income households (up to 115 percent of median income) to rehabilitate or purchase housing. A rescission of $20 million is proposed because the Nehemiah program would not help very-low-income households (those households with incomes below 50 percent of median income) and would require residents to live in specified areas. Instead, the Administration supports the expansion of the housing voucher program from 47,000 HUD incremental units in FY 1989 to 120,000 in FY 1990 (including 20,000 in FmHA). The housing voucher program directs Federal subsidies to the most needy while improving tenant mobility and choice.

Estimated Program Effect: A lower priority program activity would be terminated.

4

R89-1

Outlay Effect (in thousands of dollars):

1989 Outlay Estimate		Outlay Savings					
Without Rescission	With Rescission	1989	1990	1991	1992	1993	1994
12,565,347	12,565,347	...	6,875	9,375	3,750	...	...

5

R89-1

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Housing Programs

Annual Contributions for Assisted Housing

(including rescission)

Of the funds included under this head in Public Law 100-404, $20,000,000 for the Nehemiah Housing Opportunity Grants program are rescinded: Provided, That the following language is repealed : ", and $20,000,000 shall be for assistance under the Nehemiah housing opportunity program pursuant to section 612 of the Housing and Community Development Act of 1987 (Public Law 100-242) and the immediately aforementioned $20,000,000 shall not become available for obligation until July 1, 1989, and pursuant to section 202(b) of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, this action is a necessary (but secondary) result of a significant policy change".

6

Rescission Proposal No: R89-2

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Housing and Urban Development	**New budget authority**..... $_____ (P.L.)
Bureau: Community Planning and Development	**Other budgetary resources**.. $ 100,988,000
Appropriation title and symbol: Urban development action grants 866/90170 867/00170 868/10170	**Total budgetary resources**.. $ 100,988,000
	Amount proposed for rescission..... $ 51,651,000
OMB identification code: 86-0170-0-1-451	**Legal authority** (in addition to sec. 1012): [ ] Antideficiency Act [ ] Other _____
Grant program: [X] Yes [ ] No	
Type of account or fund: [ ] Annual Sept. 30, 1989 [X] Multiple-year Sept. 30, 1990 Sept. 30, 1991 (expiration date) [ ] No-Year	**Type of budget authority:** [X] Appropriation [ ] Contract authority [ ] Other _____

Justification: This appropriation provides grants to cities and urban counties to stimulate economic development activity. However, the Administration believes that these grants redistribute economic activity rather than creating it and distort local economic investment decisions. No new funds were provided for this activity in FY 1989 appropriations. Building on the decisions implicit in these enacted levels, a rescission of recoveries and recaptures of prior year obligations and repeal of program authorization are proposed. Other more preferable Federal programs, such as the Community Development Block Grant (CDBG) program remain available for local economic development activities.

Estimated Program Effect: A lower priority program would be terminated.

Outlay Effect (in thousands of dollars):

1989 Outlay Estimate		Outlay Savings					
Without Rescission	With Rescission	1989	1990	1991	1992	1993	1994
310,000	310,000	...	12,500	12,500	13,325	13,326	...

7

R89-2

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Community Planning and Development

Urban development action grants

From funds available under this head in fiscal year 1989 through recaptures or recoveries of prior year obligations, not to exceed $49,337,000 may be obligated during fiscal year 1989, and the remaining balances are rescinded.

8

Rescission Proposal No: R89-3

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Interior	New budget authority..... $ 74,759,000 (P.L. 100-446)
Bureau: Fish and Wildlife Service	Other budgetary resources.. $ 7,579,000
Appropriation title and symbol: Land acquisition 14X5020	Total budgetary resources.. $ 82,338,000
	Amount proposed for rescission..... $ 30,000,000
OMB identification code: 14-5020-0-2-303	Legal authority (in addition to sec. 1012): [ ] Antideficiency Act [ ] Other _____
Grant program: [ ] Yes [X] No	
Type of account or fund: [ ] Annual [ ] Multiple-year _____ (expiration date) [X] No-Year	Type of budget authority: [X] Appropriation [ ] Contract authority [ ] Other _____

Justification: This appropriation funds land acquisition by the Fish and Wildlife Service. Federal land purchases may be postponed in times of budget stringency, without adverse effect on jobs, the national economy, or vital national needs. The Federal Government already owns more than 760 million acres of land, or more than one-third of all land in the United States. Also, recent data show that recreational use of Federal lands (measured in visitor-days) has declined from its 1976 peak. A rescission of $30 million is proposed, reflecting the postponement of non-essential Federal land acquisition to help offset expected costs of adding land to Manassas National Battlefield Park (VA) pursuant to P.L. 100-647.

Estimated Program Effect: Lower priority Federal land acquisition would be postponed or cancelled.

9

R89-3

Outlay Effect (in thousands of dollars):

1989 Outlay Estimate		Outlay Savings					
Without Rescission	With Rescission	1989	1990	1991	1992	1993	1994
62,217	48,717	13,500	13,500	3,000	...	...	...

10

R89-3

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Land acquisition

Of the funds made available under this head in Public Law 100-446, $30,000,000 are rescinded.

11

Rescission Proposal No: R89-4

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Interior	**New budget authority.....** $ 91,245,000 (P.L. 100-446)
Bureau: National Park Service	**Other budgetary resources..** $ 19,653,000
Appropriation title and symbol: Land acquisition and State assistance 14X5035	**Total budgetary resources..** $ 110,898,000
	Amount proposed for rescission..... $ 35,000,000
OMB identification code: 14-5035-0-2-303	**Legal authority** (in addition to sec. 1012): [ ] Antideficiency Act
Grant program: [ ] Yes [X] No	[ ] Other _____
Type of account or fund:	**Type of budget authority:**
[ ] Annual	[X] Appropriation
[ ] Multiple-year _____ (expiration date)	[ ] Contract authority
[X] No-Year	[ ] Other _____

Justification: This appropriation funds land acquisition by the National Park Service and grants to States for recreation development purposes. Federal land purchases may be postponed in times of budget stringency, without adverse effect on jobs, the national economy, or vital national needs. The Federal Government already owns more than 760 million acres of land, or more than one-third of all land in the United States. Also, recent data show that recreational use of Federal lands (measured in visitor-days) has declined from its 1976 peak. A rescission of $35 million is proposed, reflecting the postponement of non-essential Federal land acquisition to help offset expected costs of adding land to Manassas National Battlefield Park (VA) pursuant to P.L. 100-647.

Estimated Program Effect: Lower priority Federal land acquisition would be postponed or cancelled.

12

R89-4

Outlay Effect (in thousands of dollars):

1989 Outlay Estimate		Outlay Savings					
Without Rescission	With Rescission	1989	1990	1991	1992	1993	1994
120,296	108,046	12,250	10,500	7,000	5,250	...	...

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R89-4

DEPARTMENT OF THE INTERIOR

National Park Service

Land acquisition and State assistance

Of the funds made available under this head in Public Law 100-446, $35,000,000 are rescinded.

14

Rescission Proposal No: R89-5

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Justice	New budget authority..... $ 319,075,000 (P.L. 100-459)
Bureau: Office of Justice Programs	Other budgetary resources.. $ 21,184,000
Appropriation title and symbol: Justice assistance 1590401	Total budgetary resources.. $ 340,259,000
	Amount proposed for rescission..... $ 5,000,000
OMB identification code: 15-0401-0-1-754	Legal authority (in addition to sec. 1012): [ ] Antideficiency Act [ ] Other _____
Grant program: [X] Yes [ ] No	
Type of account or fund: [X] Annual [ ] Multiple-year _____ (expiration date) [ ] No-Year	Type of budget authority: [X] Appropriation [ ] Contract authority [ ] Other _____

Justification: This appropriation funds the Office of Justice Programs, including grants to States for expenses incurred for the incarceration of Mariel Cubans in State facilities following their conviction of a felony committed after having been paroled into the United States by the Attorney General. There is no precedent for the Federal Government to reimburse States for the costs of incarcerating individuals convicted of State crimes. Further it is not appropriate that taxpayers throughout the United States should share the costs of reimbursing States for a program that benefits only sixteen States. This proposed rescission (coupled with supplemental proposals included with the FY 1990 Budget) will allow the funding of other higher priority Department of Justice programs.

Estimated Program Effect: Grants will not be awarded to those States having incarcerated Mariel Cubans in State facilities.

15

R89-5

Outlay Effect (in thousands of dollars):

1989 Outlay Estimate		Outlay Savings					
Without Rescission	With Rescission	1989	1990	1991	1992	1993	1994
279,369	274,369	5,000	...	...	...	...	...

16

R89-5

DEPARTMENT OF JUSTICE

Office of Justice Programs

Justice assistance

Of the funds made available under this head in Public Law 100-459, $5,000,000 are rescinded from funds available for grants to states for their expenses of incarcerating Mariel Cubans: Provided, That the last paragraph under this head is repealed.

17

Rescission Proposal No: R89-6

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Labor	**New budget authority.....** $ 690,825,000 (P.L. 95-227 & 100-436)
Bureau: Employment Standards Administration	**Other budgetary resources..** $ 13,170,000
Appropriation title and symbol: Black lung disability trust fund 209/08144	**Total budgetary resources..** $ 703,995,000
	Amount proposed for rescission..... $ 1,445,000
OMB identification code: 20-8144-0-7-601	**Legal authority** (in addition to sec. 1012): [ ] Antideficiency Act [ ] Other _____
Grant program: [ ] Yes [X] No	
Type of account or fund: [ ] Annual [X] Multiple-year Sept. 30, 1990 (expiration date) [ ] No-Year	**Type of budget authority:** [X] Appropriation [ ] Contract authority [ ] Other _____

Justification: This appropriation finances payment of black lung benefits and the administration of the Black Lung Disability Trust Fund. A rescission is proposed to reduce the amount of funding available for transfer to Departmental Management. This proposal reflects the elimination of the Black Lung case backlog in the Office of Administrative Law Judges in FY 1989. This rescission proposal, accompanied by a general fund FY 1989 supplemental appropriation of the same amount in the FY 1990 Budget, will provide funds to permit the transfer of Administrative Law Judges from Black Lung caseload, where they are no longer needed, to the Longshore and Harbor Workers' area, where backlogs are increasing rapidly.

Estimated Program Effect: None

Outlay Effect (in thousands of dollars):

1989 Outlay Estimate		Outlay Savings					
Without Rescission	With Rescission	1989	1990	1991	1992	1993	1994
683,077	681,632	1,445	...	...	...	...	...

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R89-6

DEPARTMENT OF LABOR

Employment Standards Administration

Black lung disability trust fund

(including transfer of funds)

Of the funds made available for transfer to Departmental Management, Salaries and Expenses, under this head in Public Law 100-436, $1,445,000 are rescinded.

[FR Doc. 89-921 Filed 1-12-89; 8:45 am]
BILLING CODE 3110-01-C

federal register

Friday
January 13, 1989

Part X

Office of Management and Budget

Cumulative Report on Rescissions and Deferrals; Notice

OFFICE OF MANAGEMENT AND BUDGET

Cumulative Report on Rescissions and Deferrals

January 1, 1989.

This report is submitted in fulfillment of the requirements of section 1014(e) of the Impoundment Control Act of 1974 (Pub. L. 93–344). Section 1014(e) provides for a monthly report listing all budget authority for this fiscal year for which, as of the first day of the month, a special message has been transmitted to the Congress.

This report gives the status as of January 1, 1989 of 14 deferrals contained in the first two special messages of FY 1989. There have been no rescissions proposed. These messages were transmitted to the Congress on September 30, and November 29, 1988.

Rescissions (Table A and Attachment A)

As of January 1, 1989, there were no rescission proposals pending before the Congress.

Deferrals (Table B and Attachment B)

As of January 1, 1989, $7,811.5 million in budget authority was being deferred from obligation. Attachment B shows the history and status of each deferral reported during FY 1989.

Information from Special Messages

The special messages containing information on the deferrals covered by this cumulative report are printed in the Federal Registers as listed below:

Vol. 53, FR p. 39879, Wednesday, October 12, 1988

Vol. 53, FR p. 49530, Wednesday, December 7, 1988

Joseph R. Wright, Jr.,

Director.

BILLING CODE 3110-01-M

TABLE A

STATUS OF 1989 RESCISSIONS

	Amount (In millions of dollars)
Rescissions proposed by the President.....	0
Accepted by the Congress.....	0
Rejected by the Congress.....	0
Pending before the Congress.....	0

****

TABLE B

STATUS OF 1989 DEFERRALS

	Amount (In millions of dollars)
Deferrals proposed by the President.....	8,942.5
Routine Executive releases through January 1, 1989 (OMB/Agency releases of $1,137.1 million and cumulative adjustments of $6.0)	-1,131.1
Overturned by the Congress.....	0
Currently before the Congress.....	7,811.5

Attachments

Attachment A - Status of Rescissions - Fiscal Year 1989

As of January 1, 1989 Amounts in Thousands of Dollars Agency/Bureau/Account	Rescission Number	Amount Previously Considered by Congress	Amount Currently before Congress	Date of Message	Amount Rescinded	Amount Made Available	Date Made Available	Congressional Action
NONE								

Attachment B - Status of Deferrals - Fiscal Year 1989

As of January 1, 1989 Amounts in Thousands of Dollars Agency/Bureau/Account	Deferral Number	Amount Transmitted Original Request	Amount Transmitted Subsequent Change (+)	Date of Message	Cumulative OMB/Agency Releases (-)	Congressionally Required Releases (-)	Congressional Action	Cumulative Adjustments (+)	Amount Deferred as of 1-1-89
FUNDS APPROPRIATED TO THE PRESIDENT									
International Security Assistance									
Foreign military sales credit	D89-11	4,122,750		11-29-88	300,000				3,822,750
Economic support fund	D89-01	592,760		09-30-88					
	D89-01A		2,054,000	11-29-88	779,860				1,866,900
Military assistance	D89-12	457,000		11-29-88	9,000				448,000
International military education and training	D89-13	37,400		11-29-88	37,400				0
Agency for International Development									
International disaster assistance	D89-14	18,125		11-29-88	4,796				13,329
Special Assistance for Central America									
Promotion of stability and security in Central America	D89-2	1,000		09-30-88					1,000
DEPARTMENT OF AGRICULTURE									
Forest Service									
Expenses, brush disposal	D89-3	144,649		09-30-88					144,649
Cooperative work	D89-4	335,263		09-30-88					335,263
DEPARTMENT OF DEFENSE - CIVIL									
Wildlife Conservation, Military Reservations									
Wildlife conservation, Defense	D89-5	1,212		09-30-88					1,212
DEPARTMENT OF ENERGY									
Power Marketing Administration									
Southwestern Power Administration, Operation and maintenance	D89-6	2,800		09-30-88					2,800

Attachment B - Status of Deferrals - Fiscal Year 1989

As of January 1, 1989 Amounts in Thousands of Dollars Agency/Bureau/Account	Deferral Number	Amount Transmitted Original Request	Amount Transmitted Subsequent Change (+)	Date of Message	Cumulative OMB/Agency Releases (-)	Congressionally Required Releases (-)	Congressional Action	Cumulative Adjustments (+)	Amount Deferred as of 1-1-89
DEPARTMENT OF HEALTH AND HUMAN SERVICES									
Social Security Administration									
Limitation on administrative expenses (construction).....	D89-7	6,745		09-30-88					6,745
DEPARTMENT OF JUSTICE									
Office of Justice Programs									
Crime victims fund.....	D89-8	90,000		09-30-88					90,000
DEPARTMENT OF STATE									
Bureau for Refugee Programs									
United States emergency refugee and migration assistance fund, executive.....	D89-9	26,135		09-30-88					
	D89-9A		27,000	11-29-88	6,001			6,001	53,135
DEPARTMENT OF TRANSPORTATION									
Federal Aviation Administration									
Facilities and equipment (Airport and airway trust fund).....	D89-10	823,608		09-30-88					
	D89-10A		202,084	11-29-88					1,025,692
TOTAL, DEFERRALS.....		6,659,446	2,283,084		1,137,056	0		6,001	7,811,475

[FR Doc. 89-922 Filed 1-12-89; 8:45 am]

BILLING CODE 3110-01-C

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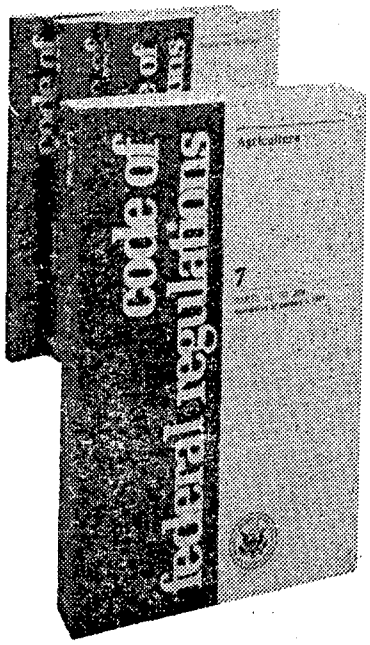

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